ISSUES VAT AUDIT – BUILDERS & DEVELOPERS – CA DILIP PHADKE

No. Build-Devep/Adm.Relief.06-10/Adm-8 Mumbai, Date: 26.09.2012
(Trade Cir. 18T of 2012)

Sub: Certain clarifications regarding Annexures to be submitted by Developers.

Sir/Madam/Gentleman,

BACKGROUND:

Trade Circular 14T of 2012 was issued on 06 August, 2012 to guide developers for obtaining registration, grant of administrative relief for unregistered period, and filing of return for period starting from 20/06/2006.

As per the earlier Circular instructions, the developer has to apply for registration and apply for administrative relief alongwith proof of filing of returns and payment of tax for unregistered period.

Now it is further stated that the developer who submits his returns or as the case may be, revised returns for unregistered or registered period, the developer shall submit year wise annexure showing the working of his tax liability.

This yearwise annexure will be for all the return periods ending up to 31-10-2012 and will be in addition to returns to be filed by the dealers.

The format of annexure is made available on website of the Maharashtra Sales Tax Department www.mahavat.gov.in under download

banner. The filled yearwise annexure is to be attached with e-mail and to be sent on builderscell@gmail.com e-mail id.

Needless to mention that the developers should first upload all their returns along with tax and then submit his annexures to builderscell@gmail.com

It is further clarified that, the Frequently Asked Questions [FAQs] regarding the tax liability and other issues displayed on website www.mahavat.gov.in under the banner of "what's new" displays the following options provided under Maharashtra Value Added Tax Act, 2002 to enable the dealers to discharge his tax liability by selecting/ adopting any one of the options mentioned there-under:-

From 20.06.2006 to 31.03.2010

1. **Composition Scheme U/s 42 (3)** - Under this scheme developer has to pay 5% tax on the agreement value. Land deduction is not available. Input tax credit is available subject to the reduction of 4 per cent.
2. **Actual Expense Method U/r 58-** Under rule 58, the deduction of Labour & service charges is available on actual basis. Land deduction is also available. Set-off will be calculated subject to the conditions u/r 53 and 54.
3. **Standard Deduction Method U/r 58-** Under rule 58, the deduction of land cost will be allowed. Thereafter, 30% standard deduction from remaining amount will be available as per proviso to sub-rule 1. Set-off will be calculated subject to the conditions u/r 53 and 54.

After 01.04.2010

The developers can opt for fourth option for any agreement registered after 1st April 2010. Under this option u/s 42 (3A), developer has to pay 1% tax on total agreement value. No land deduction and input tax credit is available.

By selecting one of the option, the developer shall discharge his tax liability accordingly.

Some queries have been received regarding liability to be worked out on cost plus basis, i.e. cost of material and profit as per balance sheet. It is now clarified that no method apart from those statutorily prescribed and mentioned above in the rules will be admissible.

If any short payment is made by the developer by choosing other than abovementioned four options, the balance tax shall be recovered according to the provisions of law. In case of difficulties, the dealers are requested to approach the concerned Help Desk Officer.

This clarification cannot be made use of for legal interpretation of provisions of law, as it is clarificatory in nature. If any member of the trade has any doubt, he may refer the matter to this office for further clarification.

You are requested to bring the contents of this clarification to the notice of all the members of your association.

(S. P. Kadu-Patil)
Commissioner of Sales Tax,
Maharashtra State, Mumbai.

No. Build-Devep/ADM Relief 06-10/ADM-8 **Mumbai, Dt.** 25-09-2012

Trade Cir. No. 17T of 2012

Sub : Extension of dates for Grant of Registration, ADM relief and payment of taxes etc.

Ref. : Trade Circular bearing No. 14T 2012 dated 6th August 2012.

Gentlemen/Sir/Madam,

You are well aware that Hon'ble Bombay High Court in case Maharashtra Chamber of Housing Industry ("MCHI") has delivered a judgment and confirmed the levy of the tax in respect of sale of under construction flats etc. Thereafter, this office issued a Trade Circular cited at Ref. above and issued instructions with regards to registration, administrative relief and payment of tax by Builders and Developers.

2. The Promoters and Builders Association as well as MCHI have filed the Special Leave Petitions before Hon'ble Supreme Court of India. The matter came for hearing before the Hon'ble Apex court on 28th August 2012. The apex court passed an interim order on 28/08/2012.

3. To give effect to the interim order passed by Hon'ble Apex Court, the instructions contained in clause (l) and (m) of the Trade Circular 14T of 2012 dated 6th August 2012 stands modified as under:-

(a) The developers who have not obtained the registration under MVAT Act, 2002 shall obtain the same on or before 15th October 2012.

(b) The time for filing of return and payment of tax stands extended up to 31st October 2012.

As per the directions of Hon'ble Supreme Court of India, "In case the concerned developers pay tax under the Maharashtra Value Added Tax Act, 2002 (for short "2002 Act") as amended vide Section 2(24) w.e.f. June20, 2006 on or before October 31, 2012, the coercive process for recovery of tax, interest or penalty shall remain stayed. This shall however not preclude the assessing officer to complete the assessment.

The above payment of tax by the concerned developers shall be subject to the final decision in the matter before this court."

(c) The payment of the tax as aforesaid shall be subject to the final outcome of the aforesaid petition.

(d) The developers fulfilling above two conditions will become eligible for grant of administrative relief provided the application is made on or before 31st October 2012.

4. If any member of the trade has any doubt, he may refer the matter to this office for further clarification or may contact to the Help Desk officers mentioned in Trade Circular No. 14T of 2012.

5. You are requested to bring contents of this circular to the notice of the members of your association.

No. Build-Devep/Adm.Relief.06-10/Adm-8 Mumbai, Date: 06-08-2012
(Trade Cir. 14T of 2012)

SUB: Grant of Registration and Administrative Relief to Developers.

Sir/Madam/Gentleman,

BACKGROUND:

1. The Hon. Bombay High court has delivered judgement in case of Maharashtra Chamber of Housing Industry (MCHI) vs. State of Maharashtra in respect of the writ petition no. 2022 of 2007. The constitutional validity of the amendment to section 2(24) of the Maharashtra value added tax Act, 2002, Notification dated 9-7-2010 notifying a composition scheme for Builders, Developers was upheld. The Promoters and Builders Association has filed special leave petition No. 17738 and 17709 of 2012 before the Hon' Supreme Court of India. Hon' Apex Court admitted the petition but no stay is granted to the judgement of Hon Bombay High Court.

As a result, the developers are liable to pay tax under Maharashtra Value Added Tax Act, 2002 with effect from 20th June, 2006.

2. Considering the above position, it is expected that large number of developers will come forward to obtain the registration under Maharashtra Value Added Tax Act, 2002. In order to facilitate obtaining registration, grant of administrative relief for unregistered period, and filing of return for period starting from

20/06/2006 for these dealers, following measures are being taken by the Sales Tax Department.

a) At every division, a dedicated officer of registration branch will be assigned with the job of granting registration to developers. Display board of such facility will be placed at the conspicuous location in office premises.
b) No pre-registration visit will be conducted to the place of business of developers.
c) At present, after uploading of registration application, the system generated appointment date is communicated to the dealer. However in case of developers, a dedicated registration officer will attend to such dealers on next day of uploading the registration application, irrespective of the appointment date given by system.
d) Registration number should be granted to such dealers on the same date on priority, subject to the developers submitting the necessary documents.
e) As per the earlier Circular instructions, if there is a delay in obtaining certificate of registration beyond a period 5 years, then this delay is treated as an attempt to evade the tax and such dealers are not considered for grant of administrative relief. However for developers, the delay beyond a period of 5 years in obtaining registration will not be treated as an attempt to evade tax and these dealers will be granted administrative relief if they apply for registration before 16/08/2012.
f) If the developer applies for registration on or before 16/08/2012 and applies for administrative relief on or before 31/08/2012 alongwith proof of filing of returns and payment of tax for unregistered period, then the compounding fee for all unregistered period shall be levied at Rs. 5000 only.

However, if any developer fails to apply for registration and administrative relief before above-mentioned date then the compounding fee will be levied as per office order No. IMC10.07/Adm Relief/URD/Adm-4/B-1020 Mumbai Dated 18 April, 2007, which will be as below:-

"For dealers who have not obtained Registration Certificate immediately after they became liable for registration but obtain a Registration Certificate under the MVAT Act after remaining unregistered for some time.

The compounding fee should not desirably less than,
Rs. 5000 plus 0.5% of the gross sales tax liability, arising during unregistered period, for each month of delay in obtaining the Registration under the relevant Act."

g) Once the developer submits his application for administrative relief along with compounding fee and pays taxes with returns for unregistered period, the concerned Joint Commissioner shall pass the order granting administrative relief within two days. There will be no need to give hearing to the dealer.

h) Considering the expected workload, more Joint Commissioners are entrusted with the powers of grant of administrative relief in Mumbai and Pune.

i) The registration officer while granting the registration to these dealers should set the periodicity of their returns as quarterly.

j) Being a works contractor, the dealers should file their returns in form no. 233.

k) Needless to mention that the developers should upload all their returns along with tax, interest and late fee.

l) The developers who have still not obtained registration shall obtain registration on or before 16th August, 2012. In such cases penalty under sub-section (2A) of section 29 of MVAT Act will not be attracted.

m) Those developers who had obtained registration and paid taxes for period after 01-04-2010 should apply for administrative relief for previous period and file returns for previous periods on or before 31st August, 2012.

n) The department will initiate penal actions against developers who will not obtained registration and file the returns within above time.

o) If the Audit Report u/s 61 in Form No. 704 for all the periods up to 2011-12 are filed on or before 30th November, 2012, then the penalty u/s 61 (2) will not be levied.

3. To facilitate these dealers and to resolve their queries, dedicated help desks have been opened at following offices of the Sales Tax Department, viz, Mumbai,

MCHI JUDGEMENT

April 10, 2012.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD,J.)

The nature of the challenge

2. In this batch of petitions under Article 226 of the Constitution there is a challenge to the constitutional validity of Section 2(24) of the Maharashtra Value Added Tax Act, 2002 as amended initially by Maharashtra Act XXXII of 2006 and thereafter by Maharashtra Act XXV of 2007 on the ground that the amendments transgress the limitations contained in Article 366(29A)(b) of the Constitution. The challenge of the petitioners is that by amending the provisions of Section 2(24) the State Legislature has brought within the ambit and purview of the expression "sale", an agreement for the building and construction of immovable property which is not a works contract. Consequently, the legislative competence of the State Legislature is questioned on the ground that the Legislature by and as a result of the amendment has sought to impose a tax on a transaction which does not involve a sale of goods within the meaning of Entry 54 of the State List to the Seventh Schedule to the Constitution and has hence transgressed the limitations on its legislative power under Article 246(3) of the Constitution.

There is also a challenge in consequence to the provisions of Rule 58(1A) of the Maharashtra Value Added Tax Rules, 2005 which were introduced by a State Notification dated 1 June 2009.

The batch of petitions also involves a challenge to a Circular dated 7 February 2007 issued by the State Government purporting to clarify the scope of the amendment.

The petitioners also seek to question a Notification dated 9 July 2010 issued by the State Government under the Act notifying a composition scheme and the legitimacy of certain notices which have been issued by the State Tax Authorities.

Maharashtra Value Added Tax Act, 2002 and the Rules

The Maharashtra Value Added Tax Act, 2002, as it was originally enacted, defined the expression "sale" in Clause (24) of Section 2 as follows:

"(24) "Sale" means -- here court has given definition as it stands from time to time.

Rule 58(1) of the Rules framed under the Maharashtra Value Added Tax Act, 2002 provides that – here court has given provisions of rule 58(1) Table & (1A)

On 7 February 2007 a Trade Circular was issued by the Commissioner of Sales Tax following the decision of the Supreme Court in the case of **M/s. K. Raheja Development Corporation1.** The Circular adverts to the judgment of the Supreme Court and clarifies that any transfer of property after 20 June 2006 irrespective of whether an agreement was signed prior to that date would be governed by the amended

definition of “sale” under Section 2(24) of the Act. The circular clarifies that tri partite agreements between land owners, developers and prospective buyers would also be covered by the amendment. The Trade Circular also contains a clarification that an earlier determination made by the Commissioner of Sales Tax on 28 June 2004, which was prior to the amendment to Section 2(24) would not govern subsisting contracts in view of the amended provisions. Finally the Circular draws attention to the decision of the Supreme Court in **K.Raheja** (Supra) that if the agreement is entered into after the flat or unit is already constructed, then there would be no works contract, but so long as an agreement is entered into before the construction is complete, it would constitute a works contract. Finally, the Circular states that it is only clarificatory in nature and cannot be used as such for interpretation of the provisions of law.

On 9 July 2010 the Government of Maharashtra provided for a scheme of composition under Section 42(3A). The composition scheme applies to registered dealers who undertake the construction of flats, dwellings, buildings or premises and transfer them in pursuance of an agreement along with land or interest underlying the land. The composition amount is prescribed at one percent 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. The composition scheme is subject to certain conditions.

Submissions of the Petitioners**:**

The following submissions have been urged before the Court on behalf of the Petitioners:

1. Forty Sixth Amendment to the Constitution which led to the insertion of Article 366(29A) was to overcome the judgments of the Supreme Court, inter alia in **State of Madras Vs. Gannon Dunkerley & Co.**

2. In order to attract the application of Article 366(29A)(b) in relation to a works contract the following conditions must be fulfilled:

(i) There has to be a transfer of property in goods;

(ii) The expression “goods” is as defined in Article 366(12); and

(iii) Such transfer has to be in the execution of a works contract.

3. As a result of the Forty Sixth Amendment an indivisible works contract is by legal fiction made divisible into a contract for supply of materials and a contract for supply of labour and services. In other words the State Legislature cannot locate a sale of immovable property and then attempt to trace out what are the goods involved in the execution of the contract;

4. The amendment to Section 2(24) is beyond the Legislative competence of the State Legislature. What the State Legislature has attempted to do by the amendment and by the insertion of Rule 58(1A) is to split a contract for the sale of immovable properties into three parts:

(i) a contract for supply of goods and materials; (ii) a contract for supply of labour and services; and (iii) the cost of the immovable property. A contract for the sale of immovable property does not fall within

any of the sub-clauses of Article 366(29A) and consequently it is not open to the State Legislature to expand the ambit of the deeming fiction that is created by the Forty Sixth Amendment;

5. A works contract involves only two elements viz. (i) the transfer of property in goods; and (ii) supply of labour and services. If a third element is involved in the contract viz. the sale of immovable property it does not constitute a works contract and hence to such a contract, the legal fiction which is created by Article 366(29A) would not apply. Those agreements to be taxes by amendment are agreements for the sale of immovable property;

6. A contract which is governed by the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (**MOFA**) cannot be regarded as a works contract. Such a contract is an agreement for the purchase of immovable property in its complete sense. An agreement which is governed by the MOFA is an agreement simplictor for transfer of immovable property. The right of the purchaser of a flat is to ensure that the construction is carried out in accordance with the contract and that the land and building is conveyed by the developer to the co-operative society. Such a transaction is only one for the transfer of a flat and does not constitute a works contract. An agreement under the MOFA does not confer any title to or interest in the purchaser of the flat until a conveyance is executed under Section 11 by the promoter in favour of the cooperative society.

Submissions by Advocate General

8. On the other hand, the learned advocate general appearing on behalf of the State Government submitted that:

(a) The provisions of Section 2(24) which defines the expression “sale” fall within the compass of Article 366(29A);

(b) A works contract is a contract to execute works and encompasses a wide range of contracts. The expression works contract is not restricted to building contracts having only two elements viz. the sale of material and goods and the supply of labour and services;

(c) The well settled connotation of the expression works contract is that a building contract may also involve in certain situations a sale of land;

(d) An unduly restrictive or contrived meaning should not be given to the provisions of Article 366(29A) otherwise the object underlying the Constitutional amendment would be defeated;

(e) The purpose underlying the enactment of the deeming fiction in Article 366(29A) was to override the limited definition of the expression sale in the Sale of Goods Act, 1930 and to isolate the sale of goods element involved, inter alia, in a contract which is a works contract;

(f) A works contract is one where there is a contract to do work and it does not cease to be such merely because any other obligation exists.

2. In an agreement which is governed by the MOFA, a conveyance of the interest in the flat or at any rate an interest therein is created at the stage of the execution of an agreement under Section 4. The doctrine of accretion is always subject to a contract to the contrary. The provisions of the MOFA contain a statutory stipulation to the contrary where the accretion to the property ensures to the benefit of the flat purchaser; and

3. The Trade Circular and the amendment to Rule 58(1A) are only clarificatory in nature.

The rival submissions now fall for consideration

The judgment in **Gannon Dunkerley**, therefore, emphasized that where a building contract is one and indivisible, no sale of goods as such would be involved which could be the subject matter of a tax on the sale of goods. However, the Court clarified that if the parties entered into distinct and separate contracts, one for the transfer of materials for money consideration and the other for the payment of remuneration for services and for the work done, there would in such a case be really two agreements. In such a situation it was open to the State to separate the agreement for sale from the agreement to do work and render service and to impose tax on the sale of goods and materials.

The Report of the Law Commission and the Forty Sixth Amendment

“sale” was usually regarded as including works contracts which would fall within the power of the States to levy a tax under Entry 54 of the State List. Taxes on that basis were being levied and recovered.

The Law Commission recommended that Entry 54 of the State List may be amended; or a fresh entry may be inserted in the State List.

Alternately it was suggested that a wide definition of the expression “sale” may be introduced in Article 366 so as to include works contracts.

12. Following the Report of the Law Commission the Forty Sixth Amendment to the Constitution was introduced. As a result of the Forty Sixth Amendment, Article 366(29A) was inserted into the Constitution.

Clause (29A) as inserted reads as follows:

(29A) "tax on the sale or purchase of goods" includes--

(a) xxxx

(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;

The validity of the Forty Sixth Amendment: Builders’ Association

S.C. noted that as a result of the judgment in **Gannon Dunkerley** where a contract was entered into in two parts viz. a part for the sale of goods and materials and another for supply of labour and services, sales tax was leviable on goods which were agreed to be sold under the first part. But no sales tax could

be leviable where the contract in question was an indivisible works contract. After the Forty Sixth Amendment a works contract which was an indivisible contract is, by legal fiction, a contract which is divisible, one for sale of goods and another for supply of labour and services. Prior to the Forty Sixth Amendment the Revenue could not have contended that when the goods and materials were supplied under distinct and separate contracts, an assessment of sales tax could be made ignoring Article 286.

Gannon Dunkerley II

The effect of the Forty Sixth Amendment fell for consideration by a Constitution Bench of the Supreme Court in **Gannon Dunkerley Vs. State of Rajasthan4.** The Supreme Court held that as a result of the Forty Sixth Amendment a contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for the sale of goods and another for the supply of labour and services. As a result, a contract which is single and indivisible has been brought on par with a contract containing two separate agreements. If the legal fiction in Article 366(29A)(b) has to be carried to its logical end, it would follow that even in the case of a single and indivisible contract there is a deemed sale of goods involved in the execution of the works contract.

Such a deemed sale, according to the Supreme Court, has all the incidents of a sale of goods involved in the execution of the works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services.

In the decision in **Gannon Dunkerley** (Supra) where the Forty Sixth Amendment was construed, the Supreme Court accepted that in order to determine the value of goods involved in the execution of works contracts, it would be open to the States to adopt a convenient mode for such determination by taking the value of a works contract as a whole and to deduct there from the cost of labour and services rendered by the contractor during the course of the execution of the works contract. The Supreme Court indicated that a deduction would have to be made from the value of the entire works contract of charges towards labour and services which would cover the following:

The Supreme Court has also emphasised that there could be cases where a contractor has not maintained proper accounts or the accounts are not found to be worthy of credence by the assessing authority. The Supreme Court held that in such cases it would be permissible for state legislation to prescribe a formula for determining charges for labour and services by fixing a particular percentage of the value of the works contract and to allow a deduction of the amount which is determined from the value of the works contract for the purpose of determining the value of the goods involved in its execution. However, the amount deductible under the formula towards charges of labour and services should not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract.

BSNL

In judgment of **Bharat Sanchar Nigam Ltd. Vs. Union of India,** the Supreme Court, pronounced that the after the enactment of the Forty Sixth Amendment, the sale element of those contracts which are

governed by any of the six sub-clauses of Clause (29A) of Article 366 is made severable and that it is by a fiction of law isolated and subjected to sales tax by the State Governments under Entry 54 of List II.

The content of a works contract

The petitioners submitted that If a transfer of immovable property takes place, the contract would in this submission involve a third element and would cease to be a works contract.

Now, in order to consider the tenability of the submission, it would be necessary to have regard to the decided cases on the subject.

Many of them shed light on the genesis of the distinction between a contract for work and services and a contract for the sale of goods. Court considered

Commissioner of Sales Tax Vs. Purshottam Premji 1970 (2) SCC 287

Ram Singh & Sons Engineering Works Vs. Commissioner of Sales Tax(1979) 1 SCC 487

Commissioner of Sales Tax, Madhya Pradesh v. Purshottam Premji

Radha Raman v. State of U.P 10. AIR 1953 Allahabad High Court

Supreme Court in **Kartar Singh Bhadana Vs. Hari Singh Nalwa** (2001) 4 SCC 661

The subsequent judgment of the Constitution Bench of the Supreme Court in **Builders' Association of India** (Supra) adverts to the infinite variety of the manifestation of works contracts. Ordinarily unless there is a contract to the contrary, in the case of a works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed when the goods or materials used are incorporated in the building. Hence, even the principle of accretion, which ordinarily applies, is subject to a contract to the contrary. The ambit of the expression "works contract" cannot be restricted to a particular category of works contracts.

"...We, however, make it clear that the cases argued before and considered by us relate to one specie of the generic concept of 'works-contracts'. The case-book is full of the illustrations of the infinite variety of the manifestation of 'works-contracts'. Whatever might be the situational differences of individual cases, the constitutional limitations on the taxing-power of the State as are applicable to 'works-contracts' represented by "Building-Contracts" in the context of the expanded concept of "tax on the sale or purchase of goods" as constitutionally defined under Article 366(29-A), would equally apply to other species of 'works contracts' with the requisite situational modifications."

Hindustan Shipyard Ltd. Vs. State of A.P. . (2000) 6 SCC 579**8** the Supreme Court noted that there may be three categories of contracts:

(i) The contract may be for work to be done for remuneration and for supply of materials used in the execution of the work for a price; (This contract is a composite contract consisting of two contracts one for the sale of goods and the other is for work and labour.)

(ii) It may be a contract for work in which the use of the materials is accessory or incidental to the execution of the work; (This is a contract for work and labour not involving sale of goods.) and

(iii) It may be a contract for supply of goods where some work is required to be done as incidental to the sale. (This is a contract for sale where the goods are sold as chattels and the work done is merely incidental to the sale)

.**Hudson's Building and Engineering Contracts**

Is indicative of the fact that in a typical case work will be carried out upon the land of the employer or building owner though in some special cases an obligation to build may arise by contract where this is not so.

Therefore, as a matter of first principle, it cannot be postulated that a contract would cease to be a works contract if any more than only two elements are involved in its execution viz.

(i) a supply of goods and materials; and (ii) performance of labour and services.

In the modern context and having regard to the complexity of work, it would be simplistic to reduce the connotation of works contracts to contracts only involving the aforesaid two elements.

MOFA

Now it would be necessary to consider the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (the **MOFA**).

The Act is, "An Act to regulate in the State of Maharashtra, the promotion of the construction of the sale and management, and the transfer of flats on ownership basis." The Act was enacted upon the report of an Expert Committee constituted by the State Government.

Section 2(a-1) defines the expression "flat" as follows:

"(a-1) "Flat" means a separate and self contained set of premises used or intended to be used for residence, or office, or show-room or shop or godown or for carrying on any industry or business (and includes a garage), the premises forming part of a building and includes an apartment."

Section 2 (C) defines the expression "promoter" thus:

""promoter" means a person and includes a partnership firm or a body or association of persons, whether registered or not who constructs or causes to be constructed a block or building of flats or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both."

Then court discussed provisions of

Section 3: liabilities on promoters.

Section 4: the promoter must enter in to agreement which should have approved plan, specifications, carpet area, price of flat including common areas, and the date of possession. The common areas would remain property of promoter until the land and building is transferred to a co-operative society.

Section 7: after the agreement is entered into, the promoter is precluded from making any alterations in the structures without the previous consent of the persons who have agreed to take flats in the building.

Section 9: After agreement a promoter is prohibited from creating any mortgage or charge in the flat or in the land without the previous consent and if created , shall not affect the right and interest of such persons.

Section 11a: promoter shall complete his title and to convey to either as a co-operative society or as a company or association, his right, title and interest in the land and building.

Section 12: every person who has executed an agreement to take a flat is required to pay at the proper time and place the price and his proportionate share of the municipal taxes, water and electricity charges, ground rent and other public charges in accordance with his agreement with the promoter.

Decisions of this Court have adverted to the special nature of the obligations which are cast upon the promoter under the MOFA. Some of them are as follows:

Vrindavan (Borivali) co-operative Housing Society Ltd. Vs. Karmarkar Brothers1983(2) Bom.C.R. 267,

A learned Single Judge of this Court noted that an agreement under the MOFA is not an ordinary agreement like a contract of sale because it is required to be executed in conformity with the provisions of Section 4 and has to be registered. The agreement involves a statutory compulsion to provide certain terms. and a suit seeking enforcement of those obligations could not be regarded as an ordinary suit for specific performance of a contract of sale.

This Court in **Maria Philomina Pereira Vs. Rodrigues Construction** AIR 1991 Bombay 27

Under the Ownership Flats Act, if the promoter does not comply with these obligations, there are other serious consequences to follow, including a prosecution. Ordinarily such considerations would not arise when a simple contract entered into between two individuals is broken. Therefore, it must necessarily be held that whenever a builder enters into an agreement with any flat purchaser, containing provisions which are to be incorporated as provided under the said Act, all such agreements must necessarily be held to be special agreements which can be enforced by filing suits

In the judgment in **Jayantilal Investments Vs. Madhuvihar Coop. Housing Society**(2007) 9 SCC 220 ,

The Supreme Court has noted that the State Legislature has sought to regulate the activities of promoters in Sections 3 and 4 which are statutory and mandatory by the Legislature.The promoter is not only obliged statutorily to give particulars of land, amenities and facilities among other things, but he is obliged to make a full and true disclosure of the development potential of the plot which is the subject matter of the agreement. The Supreme Court noted that at the time of execution of the agreement with the flat taker, the promoter is obliged statutorily to place the entire project / scheme. This obligation

remains unfettered because the concept of developability has to be harmoniously read with the concept of registration of society and conveyance of title. Once the entire project is placed before the flat takers at the time of the agreement, and then the promoter is not required to obtain prior consent of the flat takers as long as the builder puts up additional construction in accordance with the lay out plan, building rules and Development Control Regulations etc."

In **The State of Maharashtra Vs. Mahavir Lalchand Rathod** 1992(2)Bom.C.R.1

The Division Bench dealt with a batch of petitions where agreements for sale were executed in terms of Section 4 of the MOFA. These agreements were impounded by the registering authority and the issue which was raised before the Division Bench was whether they were liable to stamp duty under the Act. The Division Bench, after adverting to the terms of the agreement and to Section 2(g), came to the conclusion that though the agreements were described as agreements to sell, they were in effect and for all purposes conveyances falling under Section 2(g) in as much as the right, title and interest in the flat would stand transferred in favour of the purchaser on the payment of installments. The Division Bench noted that there is no clause in the agreement which required the developer to execute any other deed of conveyance at a later stage. The Division Bench held that it was difficult to accept that the agreement was a mere agreement to sell and that it did not create any right, title and interest in favour of the flat purchaser. The document, the Division Bench held, would be liable to the payment of stamp duty under Article 25 on the ground that it is a conveyance and whether or not possession was given on that date was not a relevant and decisive factor.

The view taken by the Division Bench was affirmed by the Supreme Court in appeal in **Veena Hasmukh Jain Vs.State of Maharashtra** (1999) 5 SCC 725.

In enacting the provisions of the MOFA, the State Legislature was constrained to intervene, in order to protect purchasers from the abuses and malpractices which had arisen in the course of the promotion of and in the construction, sale, management and transfer of flats on ownership basis. The State legislature has imposed norms of disclosure upon promoters. The Act imposes statutory obligations. The manner in which payments are to be made is structured by the Legislature. As a result of the statutory provisions, an agreement which is governed by the MOFA is not an agreement simplicitor involving an ordinary contract under which a flat purchaser has agreed to take a flat from a developer but is a contract which is impressed with statutory rights and obligations. The Act imposes restrictions upon a developer in carrying out alterations or additions once plans are disclosed, without the consent of the flat purchaser. Once an agreement for sale is executed, the promoter is restrained from creating a mortgage or charge upon the flat or in the land, without the consent of the purchaser. The Act contains a specific stipulation that if a mortgage or charge is created without consent of purchasers, it shall not affect the right and interest of such persons. There is hence a statutory recognition of the right and interest created in favour of the purchaser upon the execution of a MOFA agreement.

Having regard to this statutory scheme, it is not possible to accept the submission that a contract involving an agreement to sell a flat within the purview of the MOFA is an agreement for sale of immovable property simplicitor. The agreement is impressed with obligations which are cast upon the promoter by the legislature and with the rights which the law confers upon flat purchasers. It is in that

background that the Division Bench, though in the context of the provisions of the Stamp Act, recognised that an interest is created in favour of a flat purchaser by execution of the agreement.

The agreement is impressed with a statutory character and flavor as held by the Supreme Court in **Jayantilal Investments.** Agreements governed and regulated by the MOFA are not agreements to sell simplicitor, as construed in common law. The legislature has intervened to impose statutory obligations upon promoters; obligations of a nature and kind that are not traceable to the ordinary law of contract. Correspondingly, the rights which are conferred upon flat purchasers transcend those which prior to the enactment of the legislation would have been available under ordinary contractual conditions. The legislation now defines the content of the contract, by mandating the form of the contract and the stipulations which it must contain. The legislature has created rights in purchasers and imposed obligations upon promoters.

The Act regulates promotion and construction. The work which the promoter carries on is regulated to protect the interests of the purchasers. Every stage, including the disclosure of plans and specifications, the execution of work in accordance with the plans and specifications disclosed, the creation of charges in or upon the flat agreed to be sold and the land, and the eventual transfer of title to a co-operative society is governed by statutory obligations.

The foundation of the submission of the Petitioners is based on the provisions of the MOFA. Those provisions have been analysed earlier.

But it is necessary to note here that the MOFA is not the only regulatory enactment governing the promotion, sale and transfer of flats in the State.

The Maharashtra Apartment Ownership Act, 1970 was enacted to provide for the “ownership of an individual ownership apartment in a building and to make such apartment heritable and transferable property.” Section 2 provides that the Act applies only to property, the sole owner or all of the owners of which submit it to the provisions of the Act by executing and registering a declaration as provided in the Act. Section 4 stipulates that every apartment together with its undivided interest in the common areas and facilities appurtenant to the apartment shall for all purposes constitute heritable and transferable immovable property within the meaning of any law for the time being in force. Section 6 stipulates that each apartment owner shall be entitled to an undivided interest in the common areas and facilities in a percentage expressed in the declaration.

Sub-section (2) of Section 6 provides that the percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all of the apartment owners expressed in an amended declaration. Section 9 stipulates that once a declaration has been made, as provided in the Act, no encumbrance of any nature shall thereafter arise or be effective against the property. An encumbrance can be created only against each apartment and the percentage of undivided interest in the common areas and facilities appurtenant thereto. Under the second proviso to sub-section (1) of Section 9, it has been provided that no labour performed or material furnished with the consent or at the request of an apartment owner or his agent or his contractor or sub-contractor shall be the basis for

a charge or any encumbrance under the provisions of the Transfer of Property Act, 1882, against the apartment or any other property of any other apartment owner not expressly consenting to it. Section 11 provides for the contents of a declaration. A declaration is inter alia required to contain the description of the building, the number of storeys and basements, the number of apartments and the principal materials of which it is or is to be constructed. The words "is to be constructed" are indicative of the fact that a declaration is contemplated even before the construction is complete. An interest in the flat and in the common areas and facilities arises under the law even at that stage. The declaration is also to provide for the value of the property and of each apartment and percentage of undivided interest in the common areas and facilities. Section 12 provides for contents of a Deed of Apartment. **The provisions of the Apartment Ownership Act, 1970 hence recognize an interest of the purchaser of an apartment, not only in respect of the apartment which forms the subject matter of the purchase, but an undivided interest, described as a percentage in the common areas and facilities.**

It is not contingent upon any other statutory regulation of apartments under cognate legislation in the State of Maharashtra. We have, however, considered the effect of the provisions of the MOFA since they were pressed in aid on behalf of the Petitioners.

The constitutional validity of the provisions of the MVAT Act, 2002, (as amended,)

The constitutionality of the MVAT Act, 2002 must be determined by interpreting the statutory provisions of that Act as they stand. Having considered the issue of constitutional validity, the Petitioners have been unable to displace the presumption of constitutionality that must ordinarily apply to all legislation.

We find ourselves unable to accept the submission which has been urged on behalf of the petitioners that the Legislature, in the provisions of Section 2(24) as amended, has transgressed the limitations on its legislative power by bringing what were not in their substance works contracts within the field of the amended definition. The submission which has been urged on behalf of the petitioners proceeds on the foundation that a works contract is a contract for the purpose of work which involves only two elements viz. a supply of goods and material and a supply of labour and services. Works contracts have numerous variations and it is not possible to accept the contention either as a matter of first principle or as a matter of interpretation that a contract for work in the course of which title is transferred to the flat purchaser would cease to be a works contract. As the Supreme Court noted in its judgment in **Builders' Association**, the doctrine of accretion is itself subject to a contract to the contrary. The provisions of the MOFA, enacted in the State of Maharashtra, evince a legislative intent to protect the interest of flat purchasers by creating an interest in the property which is agreed to be acquired, in terms of the statutory provisions.

The effect of the amendment to Section 2(24) is to clarify the legislative intent that a transfer of property in goods involved in the execution of works contract including an agreement for building and construction of immovable property would fall within the description of a sale of goods within the meaning of the provision. Under Article 366(29A), the Constitution provides the constitutional content of the expression "tax on the sale or purchase of goods" in terms of an inclusive definition. The expanded content of that expression now provides the constitutional ambit of the legislative entry, Entry 54 of List II, which deals with taxes on the sale or purchase of goods, other than newspapers. All

the instances of taxes which fall within clauses a to f of Article 366 (29A) fall within the ambit of Entry 54. State legislation which meets the description of Article 366 (29A) is hence legislation which would fall within Entry 54 of List II. In order to meet the description contained in clause b, State legislation must provide for 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. Such a transfer shall be deemed to be a sale by a person making the transfer and a purchase of those goods by the person to whom the transfer is made. The amendment made by the State Legislature does not transgress the limitations which have been imposed by Article 366(29A)(b) of the Constitution.

The amended definition of the expression sale in clause b(ii) of the Explanation to Section 2(24) brings within the ambit of that expression transactions of that nature which are referrable to Article 366(29A)(b). The transactions which the legislature had in mind involve works contracts. What the state legislatures can tax under the expanded definition contained in clause b of Article 366(29A) must meet the governing requirements of that clause. There must be a transfer of property in goods involved in the execution of a works contract. The relevant clause in Section 2(24) is valid because it does not transgress the boundaries set out in Article 366(29A). Indeed, after the 46th Amendment, State legislation must confine itself to the limits set out even in the expanded concept of what constitutes a sale or purchase of goods in Article 366(29A). State legislation cannot expand the ambit of what constitutes a tax on the sale or purchase of goods beyond the constitutional frontiers. In order that Section 2(24) remains within constitutional boundaries, in the context of works contracts, it must be read to cover those cases which fall within the expanded definition as elaborated after the 46th Amendment. Whether there is a works contract in a given case is for assessing authorities to determine. As noted earlier, it is not possible to provide a comprehensive or all encompassing list of what contracts constitute works contracts. Section 2(24) properly construed, even after its amendment, reaches out to those cases which fall within the ambit of Article 366(29A). Explanation b(ii) to Section 2(24) in other words covers those transactions where there is a transfer of property in goods, whether as goods or in any other form, involved in the execution of a works contract. Once those parameters are met, the amended definition in the State legislation in the present case provides a clarification or clarificatory instances. When constitutional norms govern state legislation such as those provided in Article 366(29A) in this case, the legislation must be construed in the context of those norms which it cannot transgress. The law is valid because it does not breach those boundaries. There is no breach of constitutional boundaries.

The challenge to Rule 58(1A), may now be considered.

The Rule has provided that in the case of construction contracts where the immovable property, land or as the case may be, interest therein is to be conveyed and the property involved in the execution of the construction contract is also transferred, it is the latter component which is brought to tax. The value of the goods at the time of transfer is to be calculated after making the deductions which are specified under sub-rule (1). The judgment in the second **Gannon Dunkerley** specifies the nature of such deductions which can be made from the entire value of the works contracts. This was permitted to the States as a convenient mode for determining the value of the goods in the execution of the works contract.

Similarly, the cost of the land is required to be excluded from the total agreement value. Sub-rule (1A) stipulates that the cost shall be determined in accordance with the guidelines appended to the Annual Statement of Rates prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995 as applicable on 1 January of the year in which the agreement to sell the property is registered. The Proviso stipulates that deduction towards the cost of land under the sub-rule shall not exceed 70% of the agreement value. The petitioners have not brought on the record any material to indicate that the proviso to sub-rule (1A) of Rule 58 is arbitrary. Rule 58(1A) provides for the measure of the tax. The measure of the tax, as held by the Supreme Court in its decision in **Union of India Vs. Bombay Tyre International Ltd.** (1984) 1 SCC 467 must be distinguished from the charge of tax and the incidence of tax. The Legislature was acting within the field of its legislative powers in devising a measure for the tax by excluding the cost of the land.

In so far as the Trade Circular dated 7 February 2007 is concerned,

The Commissioner of Sales Tax has only adverted to the decision of the Supreme Court in **K. Raheja Development Corporation** (Supra). The Circular, however, clarifies by way of abundant caution, that it cannot be used for legal interpretation and was only intended as a clarificatory guide. A trade circular is only meant for the guidance of the trade. A circular cannot override a legislative provision or an exercise in the nature of subordinate legislation. The constitutional validity of a legislative provision or of subordinate legislation cannot be determined by a circular. In its decision in the case of **K. Raheja Development Corporation Vs. State of Karnataka**(2005) 5 SCC 162, the Supreme Court dealt with the provisions of the Karnataka Sales Tax Act, 1957. The constitutional validity of the provision was not in issue. Section 2(1)(v-i) defined a works contract to include any agreement for carrying out for cash, deferred payment or other valuable consideration, inter alia, the building and construction of immovable property. The Supreme Court in the course of its judgment adverted to the wide definition of the expression. In paragraph 20 of the judgment, the Supreme Court held as follows:

“Thus the Appellants are undertaking to build as developers for the prospective purchaser. Such construction/development is to be on payment of a price in various installments set out in the Agreement. As the Appellants are not the owners they claim a "lien" on the property. Of course, under clause 7 they have right to terminate the Agreement and to dispose of the unit if a breach is committed by the purchaser. However, merely having such a clause does not mean that the agreement ceases to be a works contract within the meaning of the term in the said Act. All that this means is that if there is a termination and that particular unit is not resold but retained by the appellants, there would be no works contract to that extent. But so long as there is no termination the construction is for and on behalf of purchaser. Therefore, it remains a works contract within the meaning of the term as defined under the said Act. It must be clarified that if the agreement is entered into after the flat or 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.”

The attention of the Court has been drawn to the fact that the decision in **K.Raheja** has now been placed for consideration before a larger Bench. The judgment in **K.Raheja** did not involve a challenge to the Constitutional validity of the provisions of the Karnataka Act and the proceedings before the Supreme

Court arose from the proceedings for assessment. We have independently considered the constitutional challenge to the provisions of Section 2(24) of the Maharashtra Value Added Tax Act and the Rules and hold it to be lacking in substance.

As regards the challenge to the Notification dated 9 July 2010,

It may be noted that the Notification which has been issued in exercise of power conferred by Section 42(3A) provides for a composition scheme. A composition scheme is made available at the option of the registered dealer. There is no compulsion or obligation upon a registered dealer to settle. The Court may in an extreme instance interfere in the exercise of its powers of judicial review only where the terms of a composition scheme are ex facie arbitrary and extraneous so as to be violative of Article 14. That has not been established before the Court in this case.

There is no merit in the challenge to the Constitutional validity of the composition scheme.

As regards the plurality of deemed sales.

The submission as regards plurality of deemed sales is based on the decision of the Supreme Court in **State of A.P. Vs. Larsen & Toubro Ltd.** (2008) 9 SCC 191 In that case, the issue before the Supreme Court was whether a turnover of Rs.111.53 crores of the sub contractors was liable to be added to the turnover of L. & T. The Supreme Court noted that once the work is assigned by L. & T. to its sub contractor, the former would cease to execute the works contract in the sense contemplated by Article 366(29A)(b) because the property would pass on accretion and there was no property in the goods with the contractor which was capable of re-transfer whether as goods or in some other form. In that context the Supreme Court held that if the submission of the Revenue were to be accepted, that would result in a plurality of deemed sales which would be contrary to Article 366(29-A)(b) of the Constitution and may also result in double taxation. In the present case, in the State of Maharashtra, the Legislature has specifically incorporated the provisions of Section 45(4) in the MVAT Act, 2002. The effect of Section 45(4) is to preclude the possibility of a double taxation of the kind that the Supreme Court noted would arise in that case. Consequently, in view of the specific statutory provision contained in Section 45(4), no issue of plurality of deemed sales would arise.

The definition of the expression “works contract” in Section 2(ja) of the Central Sales Tax Act, 1956, which has been introduced by Act 18 of 2005 with effect from 13 May 2005 is only for the purposes of that Act. The State law in the present case does not infringe the provisions of clauses a and b of Article 286(3), for the aforesaid reason.

The notices which were issued by the State Sales Tax authorities

The notices calling for disclosure of information fell within the purview of Sections 64 and 66 of the MVAT Act.

For the aforesaid reasons, we are of the view that there is no merit in the challenges addressed in this batch of petitions. No other submission has been urged. The Rule is discharged. The Petitions are dismissed. There shall be no order as to costs.

42. The Notices of Motion do not survive and stand disposed of.

(DR.D.Y. CHANDRACHUD,J.) (R.D.DHANUKA, J

From the above judgment it is clear that court has mainly given following decisions

1) The amendment of sec. 2(24) is not ultra virus or unconstitutional.
2) The rule 58(1) & (1A) providing for deduction of land and other deductions are not arbitrary.
3) The composition of 1% u/s 43(3A) is additional method for payment of taxes and is not compulsory.
4) The circulars are only for guidance and cannot go against law and can't be used for legal interpretation having legal binding.
5) Whether there is a works contract in a given case is for assessing authorities to determine. As noted earlier, it is not possible to provide a comprehensive or all encompassing list of what contracts constitute works contracts.
6) MOFA gives legal rights to the flat purchaser to get the possession of flat his interest is protected and there are liabilities cast upon promoter and hence he has right in land to enter in to a contract for construction of flat.

From the above it is clear that the judgment no where states that the builders are liable to pay the tax as per the agreements entered in to by them.

Regarding stand taken by honorable high court I would like to state that the purpose of MOFA is to protect the interest of the flat purchaser from the wrongs done by promoter. The judgments which are cited by the hon. Court are decided under MOFA. The basic purpose of MOFA & VAT is different, therefore they not be considered while taking decision under VAT.

If a flat purchaser goes to builder for purchasing the flat whether he has right title in land because of which he can employ the builder as a contractor. The flat purchaser gets the rights only after the agreement is entered in to and registered. There is no contractor and contractee relationship before the agreement is signed. He can not give any directions regarding size, specification of material to be used, and the amenities which he wants. The land remains the property of the promoter till society is formed and conveyance is made.

<u>METHODS OF CALCULATIONS:</u>

According to me even if the trade circular 18 T states that there are only three methods for calculations of amount of taxable sale, the said circular is not binding and if there are other methods to calculate the taxable amount they are to be considered by the assessing officer.

According to me rule 58 cannot allow various deductions to builders without legal hassles, because this rule is for contractors and not for builders. It does not take in to consideration various deductions for

builder like T.D.R. cost, Construction cost for flats in case of redevelopment. Similarly the deductions under the rule are per contract and the flat construction if one contract the deductions and tax can be calculated only after contract is completed. There cannot be tax on completed portion of building at the time of entering in to contract and corresponding set off will be reduced at each step.

Because of this I suggest two more methods whcich will help calculation of taxable amount and tax thereon.

1) **Cost plus profit method**: As per sec. 2(24) tax is to be paid on the material in which property is transferred under provisions of a contract. In case of a builder the property is transferred only material, which is used in building construction and providing amenities and facilities. Therefore if gross profit is added to material consumed the taxable amount and tax rate as well as tax can be calculated easily. Similarly there will not be any difficulty. The Supreme Court in the case of Gannon & Dunkerley has held that position of contractor and trader is same for finding out the profit and tax amount. If normal profit on building material is 15% by a trader it can be presumed that contractor will also earn the same margin.

   Following cases under B.S.T Act hold that the sale price can be worked out by adding gross profit to the purchase value can be relied upon.

   PratapSingh & sons (S.A.707 /708 of 1968 decided on 31/12/1974)

   Berar oil Industries (35 S.T.C. 474 Bombay High Court decided on 10/01/1975)

   Hind engineering & Machinery (S.A.No. 1478 of 1997 decided on 6/7/2002)

2) **USE OF READY RECONER FIGURES:**

   Value of land as per ready reckoner (R/R) is difficult to calculate as sq. mts. Of land in each flat cannot be calculated because of the rules regarding open spaces, reservations differ from project to project. In such cases we can use the R/R rate for calculation of tax payable.Deduct the construction cost as per R/R (Rs. 17,500/- & Rs. 11,000/- per sq. mtr. in B.M.C. & P.M.C. resp.) from built up area rate per sq. mtr. as per R/R.

   For Example, the R/R rate for built up area is Rs. 35000 per sq. mtr. For 2012 and actual consideration in the agreement for flat is Rs. 40000 per sq. mtr. The cost of land will be Rs. 35000 minus Rs.11000= Rs.24000 per sq mtr. Which will be deducted from agreement value of Rs.40000 leaving the balance sale price for MVAT at Rs. 16000 per sq mtr .The other deductions as per rule 58(1) for labour, services design fees and proportionate as establishment cost and profit margin etc. thereon can be claimed or 30% under standard deduction i.e. minimum Rs.4800 per sq mtr and leaving the taxable sales price at Rs.11200 per sq mtr. Assuming the weighted average tax rate based on rate of tax and value of each item of purchase is 8% (50% of purchases are for 4% rate items and 48% of purchases are for 12.5% item rate and 2% are 0%

rate) then the tax payable will be Rs.896. The set off/input tax credit will be further allowed. Assuming the tax separately on invoices from RD excluding OMS and URD is 60% of the purchases then the set off will be Rs.537 leaving the tax payable at Rs. 359 per sq mtr which is 0.9% of the sale value of flat.

This method of determining the cost of land finds support from the assumption that the flat sale agreement is a composite contract for sale of rights in land & construction on such land. The land rights are transferred at the time of execution of agreement for flat and construction is going on even after the date of agreement that is the date of transfer of land rights till the possession is handed over or till the building completed. The R/R for stamp duty valuation stipulates that in case the constructed area is to be given to the land owner then the value for the purpose of stamp duty for such constructed area is to be calculated at the stipulated rate (which 11000 per sq mtr for 2012.) Considering the market value of land prevailing at present, it is evident that the value of land in the market is the major portion of cost of flat and the selling price of the flat increases with the value of land increase. The rate at which land is sold is normally the rate at which the flats are sold in that area less the cost of construction to apply while determining the cost of land, overheads and reasonable profits. Therefore this method is the most practical method to apply while determining the cost of land. More so the rule 58(1A) Stipulates the use of R/R for valuation but does not specify which rate to be taken.

There are three rates given: one for land, second for built up area and the third for the cost of construction for built up area to be constructed and given to the landowner. The agreement for sale has built up area of flat and does not have land area. Land area comprised in the flat cannot be determined reliably. Therefore the cost of land as per R/R should be arrived at by deducting the construction cost for built up area to be given to the landowner as per R/R from the value of built up area stipulated in the R/R for the area in which the flat is located.

The other alternative source of determining the taxable value of works contract value included in the flat sale consideration is the RCC construction rate given in the R/R for stamp duty purposes. The construction rate can be most reliably taken as the value of works contract. For Example –During the year 2012 the R/R value of RCC construction for Pune Urban area is Rs.11500 per sq. mtr. Tax at average rate of say 8% will Rs.880 (2.2% of Rs.40000 per sq. mtr agreement value in above example) less set off of say 60% of purchases being RD purchases on which tax is paid separately, leaving the tax payable at Rs.352 which is 0.88% of agreement value.

(24) **"Sale"** means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation.— For the purposes of this clause,-

(a) XXXXXX

(b)(i) XXXXXXX

(ii) The transfer of property in goods (whether as goods or in some other form) involved in the execution of a 13[14[works contract including], an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, --------- improvement, modification, repair or commissioning of any movable or immovable property;]

(25) "**Sale price**" means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the seller in respect of the goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation, when such cost is separately charged.

Explanation I.— xxxxxx

Explanation II.—xxxxxx

Explanation III.— Sale price shall include the amount received by the seller by way of deposit, whether refundable or not, which has been received whether by way of a separate agreement or not, in connection with or incidental or ancillary to, the said sale of goods;

Sec. 61. Accounts to be audited in certain cases:-

(1) Every dealer liable to pay tax shall,-

(a) if his turnover of sales or, as the case may be, of purchases exceeds rupees sixty lakh in any year,

(b) Liquor dealers

(c) Holder of Entitlement Certificate

get his accounts in respect of such year audited by an Accountant within the prescribed period from the end of that year and furnish within that period the [complete report of such audit] in the prescribed form duly signed and verified by

such accountant and setting forth such particulars and certificates as may be prescribed.

[Explanation-I.- For the purposes of this section, Accountant means a Chartered Accountant within the meaning of the Chartered [6][Accountants Act, 1949 or a Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959 (23 of 1959)].

Explanation-II.- For the purposes of this section, an audit report shall be deemed to be the complete audit report only if all the items, certification, tables, schedules and annexures are filled appropriately and are arithmetically self-consistent.]

(2) If any dealer liable to get his accounts audited under sub-section (1) fails to furnish a copy of such report within the time as aforesaid, the Commissioner may, after giving the dealer a reasonable opportunity of being heard, impose on him, in addition to any tax payable, a sum by way of penalty equal to one tenth per cent. of the total sales

Provided that, if the dealer fails to furnish a copy of such report within the period prescribed under sub-section (2), but files it within one month of the end of the said period, and the dealer proves to the satisfaction of the Commissioner that the delay was on account of factors beyond his control, then no penalty under this sub-section shall be imposed on him.

(2A) Where a dealer liable to file audit report under this section has knowingly furnished the audit report which is not complete, then the Commissioner may, after giving a reasonable opportunity of being heard, impose on him, in addition to any tax payable or any other penalty leviable under this section or any other section, a sum by way of penalty equal to one tenth per cent., of the total sales.]

(3) Nothing in sub-sections (1) and (2) shall apply to Departments of the Union Government, any Department of any State Government, local authorities, the Railway Administration as defined under the Indian Railways Act, 1989 (24 of 1989), the Konkan Railway Corporation Limited and the Maharashtra State Road Transport Corporation constituted under the Road Transport Corporation Act, 1950 (64 of 1950).]

IMPORTANT RULES APPLICABLE

52. Claim and grant of set-off in respect of purchases made during any period commencing on or after the appointed day.

(1) In assessing the amount of tax payable in respect of any period starting on or after the appointed day, by a registered dealer (hereinafter, in this rule, referred to as "the claimant dealer") [the Commissioner shall subject to the provisions of rules 53, 54 and 55] in respect of the purchases of goods made by the claimant dealer on or after the appointed day, grant him a set-off of the aggregate of the following sums, that is to say,—

(a) the sum collected separately from the claimant dealer by the other registered dealer by way of [tax] on the purchases made by the claimant dealer from the said registered dealer of goods being capital assets and 3[goods the purchases of which are debited to the profit and loss account or, as the case may be, the trading account],

53. Reduction in set-off.

The set-off available under any rule shall be reduced and shall accordingly be disallowed in part or full in the event of any of the contingencies specified below and to the extent specified.

(7A) If the claimant dealer has purchased office equipment, furniture or fixtures and has treated them as capital assets and he is not engaged in the business of transferring the right to use these goods (whether or not for a specified period) for any purpose, then the corresponding amount of set-off to which he is otherwise entitled shall be reduced by an amount equal to [three per cent of the purchase price] on which such set-off is calculated and the balance shall be allowed.]

54. Non-admissibility of set-off.

No set-off under any rule shall be admissible in respect of,—

(a) purchases of motor vehicles [(being passenger vehicles)] which are treated by the claimant dealer as capital assets and parts, components and accessories thereof unless the claimant dealer is engaged in the business of transferring the right to use (whether or not for a specified period) for any purpose, in respect of the said vehicles and the expression "motor vehicles" and "goods vehicles" shall have the same meanings as respectively assigned to them in the Motor Vehicles Act, 1988

(h) purchases of any goods by a dealer, the property in which is not transferred (whether as goods or in some other form) to any other

person, which are used in the erection of immovable property other than plant and machinery;

55. Condition for grant of set-off or refund and adjustment ofdrawback, set-off in certain circumstances

(1) No set-off or refund under these rules shall be granted to a dealer in respect of any amount of tax recovered from him on the purchase of any goods or paid by him or in respect of entry of any goods,—

[(a) unless the goods are purchased or entry is effected on or after the 1st April of the year in which the dealer has obtained registration and,—

(1) the goods are treated as capital assets by the dealer and have not been sold before the date of effect of registration, or

(2) the goods are not treated as capital assets and have not been sold or disposed of before the date of effect of registration, or

(3) the goods are not treated as capital assets and have been used or consumed in manufacture and the manufactured goods have not been sold before the date of effect of registration, or

(4) the dealer was a registered dealer at the time of such purchase or entry]

(b) unless such dealer has,—

(i) maintained a true account in chronological order of all the purchases of goods made by him on or after the appointed day, showing the following details:—

(A) the date on which the goods were purchased;
(B) the name of the selling dealer and his registration certificate number, if registered, from whom the goods are purchased, and the description of the goods;

(C) the number of the tax invoice under which they were purchased;

(D) the purchase price of the goods;

(E) 2[the amount of tax], if any, recovered from him by the selling dealer;

(ii) in the case of goods in respect of the purchase of which tax has been [recovered from the claimant dealer or is payable by him as purchase tax under an earlier law, maintained a true account in chronological order of the goods so purchased and held by him on the appointed day, which shall show the particulars mentioned at (A) to (E) above, and the amount of tax recovered under each of the earlier laws separately.

(2) The claimant dealer shall, if so required, produce before the Commissioner the original bill/invoice/cash memorandum relating to each purchase in respect of which the claim for set-off has been made in respect of any purchase made before the appointed day, and a tax invoice in respect of any purchase made after the appointed day.

3[(3) (a) Where a dealer has filed a return in respect of any period contained in a year, then he may, subject to the other provisions of these rules, adjust the aggregate of

(i) any payment made in respect of the said period before filing of the said return,

(ii) the total value of the tax deduction certificates received by him in that period,

[(iiA) the total value of the collection certificate received by him in that period, and]

(iii) the amount adjustable by way of refundadjustment order issued in respect of that period.

4[(iv) set-off or refund to which the dealer has become entitled in the said period.

(v) deposit paid towards voluntary registration.]

(A) against the tax payable according to the said return, or

(B) against the tax payable according to thereturn for the said period filed by him under the Central Sales Tax Act, 1956, or

(C) against the tax payable according to the return which may be due or may become due under the Maharashtra Tax on Entry of Goods into Local Areas Act, 2003.

(b) If after making adjustment, if any, as provided in clause (a), there be any excess, then the dealer may claim refund of the excess or part of excess in accordance with the rules, or carry forward the same for adjustment towards the tax payable as per the returns to be filed for any subsequent period contained in the said year under the Maharashtra Value Added Tax Act, 2002, the Central Sales Tax Act, 1956 or the Maharashtra Tax on the Entry of Goods into Local Areas Act, 2003.]

(4) Where a notice under sub-section (4) of section 32 or, as the case may be, a notice under the corresponding provisions of any earlier law has been issued for the payment of any sum by a dealer or the dealer has filed any return or revised return without full payment of tax and who is entitled to a refund under these rules or, as the case may be, under any earlier law, the amount so due by way of refund, shall first be applied towards the recovery of the amount in respect of which such notice has been issued or towards the payment of the said tax and the balance amount, if any, shall thereafter be claimed as refund.

(5) Where the claimant dealer is unable to identify the goods purchased with the goods resold or with the goods used in the manufacture of goods or in the packing of goods, it shall be presumed for the purpose of reduction or disallowance of set-off that the goods so purchased have been used or consumed in the chronological order in which they were acquired whether before or after appointed day.

(6) Set-off of the tax paid under the Maharashtra Tax on Entry of Motor Vehicles into the Local Areas Act, 1987 and of the tax paid under the Maharashtra Tax on Entry of Goods into the Local Areas Act, 2002 in respect of any goods shall be granted to a dealer as if such tax is a tax levied under this Act or, as the case may be, under any earlier law and all of the provisions of these rules including those relating to reduction in set-off and non-admissibility of set-off shall mutatis mutandis apply accordingly.

5[(7) Where a registered dealer liable to pay tax under this Act, (i) dies and the business in which the dealer was engaged
is continued after his death, by any person or persons,

(ii) transfers or otherwise disposes of his business in whole or in part or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or part thereof, by any other person,

then the person succeeding shall be entitled to take credit of any set-off that is carried forward, if any, at the time of the said death, transfer, disposal or change]

Rule 58. (1) The value of the goods at the time of the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract may be determined by effecting the following deductions from the value of the entire contract, in so for as the amounts relating to the deduction pertain to the said works contract:--

(a) labour and service charges for the execution of the works;

(b) Amounts paid by way of price for sub-contract, if any, to sub-contractors;

(c) Charges for planning, designing and architect's fees;

(d) Charges for obtaining on hire or otherwise, machinery and tools for the execution of the works contract;

(e) Cost of consumables such as water, electricity, fuel used in the execution of works contract, the property in which is not transferred in the course of execution of the works contract;

(f) Cost of establishment of the contractor to the extent to which it is relatable to supply of the said labour and services;

(g) Other similar expenses relatable to the said supply of labour and services, where the labour and services are subsequent to th1e said transfer of property;

(h) profit earned by the contractor to the extent it is relatable to the supply of said labour and services:

In the alternative, i.e. if dealer cannot ascertain the labour portion on its own as per above, dealer can adopt the standard deduction given in Table in Rule 58(1). The said table is as under.

"Table

Serial No.	Type of Works contract	*Amount to be deducted from the contract price (as a %of the contract)
(1)	(2)	(3)
2	Installation of air conditioners and air coolers	Ten per cent.
3	Installation of elevators (lifts) and escalators	Fifteen per cent.
4	Fixing of marble slabs, polished granite stones and tiles (other than mosaic tiles)	Twenty five per cent.
5	Civil works like construction of buildings, bridges, roads, etc.	Thirty per cent.
8	Fixing of sanitary fittings for plumbing, drainage and the like	Fifteen per cent.
9	Painting and polishing	Twenty per cent.
10	Construction of bodies of motor vehicles and construction of trucks	Twenty per cent.
11	Laying of pipes	Twenty per cent.
15	Any other works contract	Twenty five per cent

*Note: The percentage is to be applied after first deducting from the total contract price, the quantum of price on which tax is paid by the sub-contractor, if any, and the quantum of tax separately charged by the contractor if the contract provides for separate charging of tax.

(1A) In case of construction contract, where along with the immovable property, the land or, as the case may be, interest in the land, underlying the immovable property is to be conveyed, and the property in the goods (whether as goods or in some other form) involved in the execution of the construction contract is also transferred to the purchaser such transfer is liable to tax under this rule. The value of the said goods at the time of the transfer shall be calculated after making the deduction sunder sub- rule (1) and the cost of the land from the total agreement value.

Cost of the land shall be determined in accordance with the guidelines appended to the Annual statement of Rates prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995, as applicable on the 1st January of the year in which the agreements to sell the property is registered:

Provided that, deduction towards cost of land under this sub-rule shall not exceed 70% of the agreement value.

(2) The value of goods so arrived at under sub-rule(1) shall, for the purposes of levy of tax, be the sale price or, as the case may be, the purchase price relating to the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract."

It can be seen that as per Rule 58(1) main provision, contractor can determine his own labour portion and take deduction of the same from gross contract value. The balance will be liable to tax. The said taxable portion is to be divided between 0%, 4%/5% and 12.5% goods and tax be worked out accordingly.

(iii) In the alternative, i.e. if contractor cannot ascertain the labour portion on his own, he can adopt the standard deduction given in Table. The portion remaining after given deduction will be liable to tax at applicable rates i.e.0%,4%/5% and 12.5%.

It may also be mentioned that if one follows any of above methods, he can avail full set off on goods purchased under VAT from local RD, subject to other conditions of set off.

.***RECORDS TO BE MAINTAINED BY BUILDERS***

It will be necesserry for the builder (Contractor) to maintain the sales register, purchaser register in chronological order in addition to cash book, ledger etc. (Rule 55). The builder will not be entitled to set off and will have to face other problems at the time of vat audit and assessment. It is not necessary to re-write the books but create these registers in excel sheet and take the figures from the original books which are audited for tax audit.

CONTENTS OF SALES REGISTER (columns given in vertical order)

Sr. No.	Particulars
1	Date of agreement
2	Date of agreement registration
3	Number of flat/shop
4	Name of purchaser
5	TIN NO. of purchaser. (If applicable)
6	Built-up area of the flat /shop
7	Rate per sq. ft.
8	Total agreement value
9	Agreement value for agreements after 1/4/2010 tax payable @ 1%
9a	Agreements given free of charge to land owners
10	Agreement on which tax is calculated & paid u/s 42(3) @ 5% - Const contract
11	Balance
12	Proportionate Land deduction
13	-- % completion of the work as per architect certificate on agreement date
	Deduction for Completed work on date of agreement (Immovable property)
14	Balance amount in which there is trf. of property
15	Sub contract value
16	Other deductions u/r 58 (1) or 30%
17	Balance on which tax is payable
18	--% completed on dd/mm/yyyy (Write the figures quarter wise)
19	Transfer of property in that quarter
20	Tax payable @ 4/5%
21	Tax payable @ 12.5%
22	Total Tax Payable

CONTENTS OF PURCHASER REGISTER

Sr. No.	Particulars	Sub column
1	Date	
2	Invoice/bill No.	
3	Nature of goods purchased	
4	Vat TIN NO. of supplier	

5	Total amount of invoice	
6	Labour charges/ Contract	
7	Local Tax free	
	Sub contract	Net
		WCT 5%
8		Net
		WCT 8%
		Total Sub contracts
	Local purchases Tax paid separately	Net
9		4/5%
		Net
		12.5%
10	O.M.S. Purchases (Incl. Tax)	4/5% (Material as per local rate of tax)
		12.5%
11	URD Purchases	4/5%
		12.5%
12	R.D. Purchases (Tax not shown separately)	4/5%
		12.5%
13	Import purchases	4/5%
		12.5%
14	Total Sub contracts	Total of column 8
15	Total Labour charges	Total of column 6
16	Total 4/5% purchases (Excl tax)	
17	Total 12.5% purchases (Excl Tax)	
18	Total taxes paid	
19	Total area in which there is trf. of property	Total area of project X --% in column 18 of S.R.
20	Area on which 1% or 5% is payable	
21	Area in which there is trf. of property	19 - 20
22	Proportion of transfer area & total area	21/19%
23	Proportionate set off available	18 X 22

FINANCE DEPARTMENT

Mantralaya, Mumbai 400 032, dated the 9th July 2010

NOTIFICATION

THE MAHARASHTRA VALUE ADDED TAX ACT, 2002.

No. VAT. 1510/CR-65/Taxation-I.—In exercise of the powers conferred by sub-section (3A) of section 42 of the Maharashtra Value Added Tax Act, 2002 (Mah. IX of 2005), the Government of Maharashtra hereby, provide a scheme of composition for the registered dealers specified in column (1) of the following Schedule, who under takes the construction of fiats, dwellings or buildings or premises and transfer them in pursuance of an agreement along-with land or interest underlying the land and prescribes the rate of tax specified in column (2) of the said Schedule by way composition, in lieu the amount of tax payable on the transfer of goods whether as goods or in some other form, in the execution of such works contract by such registered dealer under the Act, subject to the conditions and restrictions specified in column (3) of the said Schedule.

Schedule

Class of dealer	Composition amount	Conditions
(1)	(2)	(3)
A registered dealer who under takes the construction of flats, dwellings or buildings or premises and transfer them in pursuance of an agreement along with land or interest underlying the land	One percent of the aggregate amount specified in the agreement or value specified for the purpose of Stamp Duty in respect of said agreement under Bombay Stamp Act, 1958, whichever is higher (3)	(1) All the agreements, which are registered on or after 1st April 2010 shall be covered under this composition scheme. (2) The claimant dealer shall make e-payment of the amount of composition for the return period in which the agreement is registered and include such agreement value as turnover of sales in the said return. (3) The claimant dealer opting to pa composition under this scheme sha not be eligible to claim set-off of tax paid in respect of the purchases. (4) The claimant dealer shall not

		transfer the property in goods, procured from out side the State, using the declarations in Form C under Central Sales Tax Act, 1956 in the contract for which the composition for tax payment is opted. (5) The claimant dealer shall not issue declaration in Form 409 to his sub-contractor in respect of the works contract for which composition is opted, (6) The claimant dealer shall not be entitled to change the method of computation of tax liability in respect of contract for which he has opted for this composition scheme, (7) The claimant dealer shall not issue Tax Invoice.

By order and in the name of the Governor of Maharashtra,

CHITRA KULKARNI,

Officer on Special Duty to Government