

\$~
*
3.
+

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 667/2014

**DEVELOPERS & BUILDERS FORUM
THROUGH: ITS PRESIDENT & ORS.**

..... Petitioners

Through: Mr. Sudhir Nandrajog, Senior Advocate
with Mr. Gaurav Goyal, Mr. Ayushya Kumar and
Mr. J.K. Goyal, Advocates.

versus

**GOVT. OF NCT OF DELHI THROUGH: PRINCIPAL
SECRETARY & ORS.**

..... Respondents

Through: Mr Gautam Narayan, Additional
Standing Counsel with Mr R. A. Iyer, Advocate
with Dinesh Pandey, Assistant Commissioner (Spl.
Zone).

WITH

4.
✓

W.P.(C) 706/2014

**J.K GOYAL ESTATE DEVELOPERS PVT. LTD.
THROUGH: ITS DIRECTOR MUNISH GOYAL**

..... Petitioner

Through: Mr. Sudhir Nandrajog, Senior Advocate
with Mr. Gaurav Goyal, Mr. Ayushya Kumar and
Mr. J.K. Goyal, Advocates.

versus

**GOVT. OF NCT OF DELHI THROUGH: PRINCIPAL
SECRETARY & ORS.**

..... Respondents

Through: Mr Gautam Narayan, Additional
Standing Counsel with Mr R. A. Iyer, Advocate
with Dinesh Pandey, Assistant Commissioner (Spl.
Zone).

40

AND

5.

+

W.P.(C) 707/2014

**METRO BUILDTECH PVT. LTD. THROUGH:
ITS DIRECTOR RAJINDER KUMAR GOYAL**

..... Petitioner

Through: Mr. Sudhir Nandrajog, Senior Advocate
with Mr. Gaurav Goyal, Mr. Ayushya Kumar and
Mr. J.K. Goyal, Advocates.

versus

**GOVT. OF NCT OF DELHI THROUGH: PRINCIPAL
SECRETARY & ORS.**

..... Respondents

Through: Mr Gautam Narayan, Additional
Standing Counsel with Mr R. A. Iyer, Advocate
with Dinesh Pandey, Assistant Commissioner (Spl.
Zone).

**CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU**

**ORDER
02.03.2016**

%

1. These are three petitions where a challenge is being laid to the notification No. F.3(16)/Fin.(Rev-1)/2013-14/dsVI/785 dated 20th September 2013 issued by the Finance (Revenue-I) Department, Government of National Capital Territory of Delhi by which the Lieutenant Governor, in exercise of the powers conferred by Section 102 of the Delhi Value Added Tax Act, 2004 ('DVAT Act') made amendments to Rule 3 of the Delhi Value Added Tax Rules, 2005, (DVAT Rules).

W1

2. By the impugned Notification, the Delhi Value Added Tax (Third Amendment) Rules, 2013 were notified whereby Rule 3 of the DVAT Rules was substituted. It must be mentioned at this juncture that the Petitioners have since the filing of this petition given up their challenge to Rule 3(1A) and (1B). The challenge is confined to the substituted Rules 3(1), 3(3) and 3(5). For ready reference the substituted Rules 3(1), (3) and (5) are reproduced under:

“3. Works Contract

(1) In the case of turnover arising from the execution of a works contract, the amount included in taxable turnover is the total consideration paid or payable to the dealer under the contract and exclude-

(i) the charges towards labour, services and other like charges; and

(ii) the charges towards cost of land, if any, in civil works contracts,

subject to the dealer's maintaining proper records such as invoice, voucher, challan or any other document evidencing payment of above referred charges to the satisfaction of the Commissioner.

Explanation - the term “civil works contracts” for the purpose of this rule shall include construction of building or complexes – residential or commercial, bridges, flyovers, dams, barriers, canals, diversions, other works of similar nature, and the collaboration agreements or joint development agreements or similar other agreements/arrangements between the land-owner(s) and the contractor(s) / builder(s) / developers / collaborations/ similar other persons by whatever name called for construction of complex or property.”

.....

(3) For the purpose of sub-rule (1), the cost of land, if any, in a civil works contract carried on by the

WZ ✓

builder for the intended purchaser, shall be determined in the following manner:

(a) Where separate conveyance/sale deed of the land has been executed between the builder and the intended purchaser, the consideration amount of land stated in that deed;

(b) Where separate conveyance/sale deed of the land has not been executed for transfer of land between the builder and the intended purchaser, then the value of land in the value of composite works contract inclusive of land may be arrived at on any of the following basis:-

(i) Where proportionate land is transferred by the land-owner to the builder by executing a conveyance/sale deed: On the basis of rate of land arrived at from such deed for the purpose of payment of stamp duty.

(ii) Where clause (i) is not applicable, on the basis of rate of land arrived at by adding the amount paid by the builder through account payee cheque/draft/pay order/electronic transfer to the land-owner towards the land rights and value of construction transferred by the builder to the land-owner determined as per sub-rule (1A).

.....

(iii) In all other cases where clauses (i) and (ii) are not applicable, the value of land shall be determined on the basis of notified circle rates of land prevailing at the time of execution of agreement between the builder and the intended purchaser.

Provided that where separate circle rates for land and construction have not been notified in respect of certain properties, then circle rate for land and construction prevailing in that locality for other properties in respect of

W3

which separate circle rates have been notified, shall be taken for the purpose of determination of value under this sub-rule.

Provided further that where land has been valued at circle rate and the value of conveyance/sale deed with the intended purchaser exceeds the circle rate, then the difference between the two shall be proportionately divided between the value of land and the works contract (comprising material and services).

.....

Explanation 1: The term "Builder" for the purpose of this sub-rule means the person who undertakes the construction of property, either as owner of the land or under an agreement of power of attorney with the land owner or under some other arrangement, and transfers the property to some other person before completion of construction for a consideration, which may be received by the builder either as a composite sum or under separate agreements for land and construction. The term "builder" shall also include the land-owner(s) who transfers the property to the intended purchaser before completion of construction.

Explanation 2: The term "intended purchaser" for the purpose of this sub-rule means the person who agrees to buy the property before completion of construction and pays the consideration, in full or part, before such completion.

Explanation 3: For the purpose of this sub-rule, construction shall be deemed to be completed at the time of issuance of completion certificate by the competent authority, or at the time and in the manner notified by the Government for this purpose.

.....

(5) Where an agreement is executed by the builder

h4

with the intended purchaser before completion of construction as referred in sub-rule (3),

- (i) total value of agreement, as reduced by cost of land, and amount of labour, services and like charges, determined in accordance with this Rule, shall be deemed to be taxable turnover of sale;
- (ii) tax shall be payable at the time of receipt of consideration, in whatever form or manner, from the intended purchaser in relation to (i) above;
- (iii) the builder shall be eligible to deduct labour, services, other like charges in relation to (i) above in the tax period when output tax becomes payable; and
- (iv) the builder may claim input tax credit under section 9 in relation to turnover of sale stated in (i) above in that tax period on the basis of separate books of accounts maintained for that property."

3. It is further clarified that as far as the challenge to Rule 3(3) is concerned, the challenge is specifically directed at Explanation 3 thereto which states that construction shall be deemed to be completed "at the time of issuance of completion certification by the competent authority, or at the time and in the manner notified by the Government for this purposes".

4. While, the Petitioner No. 1 in W.P.(C) No.667/2014 is the Developers & Builders Forum, a forum of real estate professionals, the other Petitioners in the said petition are entities which are developers. Likewise, the Petitioners in W.P.(C) 706 and 707 of 2014 are also developers.

5. The immediate provocation for the filing of these writ petitions are the show cause notices ('SCNs') issued to the developers by the Department of Trade and Taxes ('DT&T') under Section 59 of the DVAT Act requiring the

W

Petitioners to disclose the complete accounts, agreements and other relevant documentation, etc., relating to the construction activities carried out by them. The purpose of this exercise was to determine what could be the taxable turnover in relation to the works contract being undertaken by the developers.

6. The difficulty has arisen for the Petitioners because, in determining whether there is a works contract, there is no clarity whether the construction of buildings by the developers/builders for themselves pursuant to development/collaboration agreements entered into between them and the land owners would also qualify as a 'works contract'. The second difficulty is in determining taxable turnover where the sale of the constructed building or portion thereof takes place, not at the beginning of the construction but either during the progress of construction or after its completion. There is at least one instance in these petitions where no agreement was entered into with the prospective purchaser till the completion of the construction. An incidental question that arises in such instance is whether subsequent to the completion of the construction, as may be certified by an Architect, and till the issuance of a 'completion certificate' by the competent authority, for instance the Municipal Corporation of Delhi, can it be said that there is a works contract in respect of which taxable turnover has to be determined in terms of Rule 3 of the DVAT Rules as substituted by the Notification dated 20th September, 2013?

7. One such instance is described in W.P.(C) No. 706/2014 filed by J. K. Goyal Estate Developers Pvt. Ltd. ('J K Goyal'). A determination was sought

hb

by J K Goyal from the Commissioner, DT&T by filing an application under Section 84 of the DVAT Act on 8th November, 2013. J K Goyal had entered into a collaboration agreement dated 17th June 2010 with the owner of the property measuring 300 sq. yards at J-296 Malviya Nagar Extension (now known as Saket) New Delhi-110017 for the development and construction comprising a basement, ground, first, second and third floors. J K Goyal was the power of attorney holder of the owner and undertook to construct a building after demolishing the old one. This was to be done using J K Goyal's "own funds and resources including the borrowed money." No monetary or other kind of consideration was received by J K Goyal from the other party except the undivided share in the property in the shape of constructed floors in lieu of the amount paid by J K Goyal to the owner of the property and also in lieu of the entire cost of construction borne by J K Goyal. After completion of construction, J K Goyal sold the entire first floor (i.e. their share) to the ultimate buyers by a Sale Deed dated 27th February 2012. It was contended that this transaction was in fact a sale of immovable property covered under Section 17(1)(b) of the Indian Registration Act, 1908 in which the proper stamp duty etc. of conveyance had already been paid by J K Goyal on the strength of the power of attorney executed in its favour by the owner. The question posed to the Commissioner was whether the work undertaken by J K Goyal on the above property was in the nature of a works contract?

8. By a determination dated 20th February 2014, the Commissioner, VAT answered the said question in the affirmative. After referring to the decision of the Supreme Court in *K. Raheja Development Corporation v. State of*

59

Karnataka (2005) 5 SCC 162 it was held that the work undertaken by J K Goyal was in the nature of a works contract. Similar determinations were issued at the instance of the other Petitioners as well.

9. The fact of the matter is that under Section 76(1) of the DVAT Act the aforementioned order/determination by the Commissioner is appealable before the Appellate Tribunal (AT), VAT. However, the Petitioners urged the Court to read down Rules 3 (1) and 3(5) of the DVAT Rules and clarify Explanation 3 to Rule 3 (3) (b) as substituted by the impugned Notification dated 20th September 2013. A declaration is sought that the execution of the construction by the developer/builder pursuant to an agreement with the owner but without an agreement with a prospective purchaser and the construction, should not be brought within the ambit of "civil works contract" in respect of which the taxable turnover will be determined in terms of the amended Rule 3 of the DVAT Rules. In other words, the prayer is not so much for striking down the aforementioned Rules as much as interpreting them to make them consistent with the DVAT Act and the decisions of the Supreme Court which have explained the law on the aspect. The Petitioners have placed reliance on the decision of the Supreme Court in **Larsen and Toubro Limited v. State of Karnataka (2014) 1 SCC 708** where similar provisions under the Karnataka Sales Tax Act 1957 and the Maharashtra Value Added Tax Act 2002 came up for consideration.

10. Pursuant to the notices issued in the present petitions, a counter affidavit was filed by the Respondents. There was an additional affidavit filed on behalf of the Petitioners on 3rd January 2015 to which a reply was filed by

Wb

the Respondents. It is the stand taken by the Respondents in this reply to the additional affidavit that is significant for the present purposes. After referring to the decision of the Supreme Court in *K Raheja Development Corporation (supra)* as well as *Larsen and Toubro Limited (supra)*, the Respondents state in para 3 of this affidavit as under:

“3. That the so called grievances of the petitioner in the additional affidavit is the requirement of submitting the completion certificate issued by the competent authority as required by rule 3(3). The reason for requiring the dealer to furnish the completion certificate is that in both *Raheja Development Corporation v. State of Kamataka (2005) 141 STC 298 (SC)* as well as *Larsen and Toubro Limited and Another v. State of Kamataka & Another (2013) 65 VST 1 (SC)*, the Court had held that the liability of a builder who enters into an agreement with the prospective buyer and constructs the building is till the time the building is completed. Once the construction has been completed and the builder enters into an agreement with the buyer, then it will be the sale of immovable property. Therefore, in order to decide the cut off point when the building may be said to be completed, completion certificate is the most authentic evidence to establish this fact. Any other evidence will be fraught with uncertainty. This is the reason why explanation to Rule 3(3) requires furnishing of completion certificate.”

11. As far as Explanation 3 to Rule 3(3)(b) of the DVAT Rules as substituted, the stand of the Respondents is as under:

“4. The Petitioner in the additional affidavit is seeking to challenge Explanation-3 to sub-rule (3) of Rule 3 of DVAT Rules, 2005 which reads as under:

“Explanation-3. For the purpose of this sub-rule, construction shall be deemed to be completed at the time of issuance of completion certificate by

W9

the competent authority, or at the time and in the manner notified by the Government for this purpose.”

The Explanation by providing that the construction shall be considered as complete when the completion certificate is issued by the competent authority, fixes the cut off date when the construction is to be regarded as completed. The reason for the same is that in *Raheja Development Corporation v. State of Karnataka (2005) 141 STC 298 (SC)*, the Supreme Court, inter alia, held that “it must be clarified that if the agreement is entered into after the flat or until 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 works contract”. Similarly, in *Larsen and Toubro Limited and Another v. State of Karnataka & Another (2013) 65 VST 1 (SC)*, the larger bench of the Supreme Court having approved its earlier decision in *K. Raheja*, reiterated the same position.

It is submitted that the completion/occupation certificate issued by the Municipal authority is the most authentic evidence of construction having been completed. Any other evidence would be fraught with uncertainty.”

12. As pointed out by Mr Sudhir Nandrajog, learned Senior Advocate for the Petitioners, the stand in para 3 of the abovementioned reply to the additional affidavit is contrary to the opinion expressed by the Commissioner in the above determination under Section 84 of the DVAT Act. It is submitted that since that determination is by a superior officer in exercise of the statutory powers, it would prevail over the stand taken in the affidavit the deponent of which is a Special Commissioner.

13. The fact is that para 3 of the abovementioned reply to the additional affidavit categorically states that "the liability of a builder who enters into an agreement with the prospective buyer and constructs the building is till the time building is completed. Once the construction has been completed and the builder enters into an agreement with the buyer, then it will be the sale of the immovable property". Although this is stated in the context of the furnishing of the completion certificate, it does clarify that any agreement entered into with the buyer after completion of the construction of the building would be only be a sale of immovable property. This position appears to be consistent with para 110 of the decision in *Larsen and Toubro Limited (supra)* where the Supreme Court clarified as under:

"110. It may, however, be clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government."

14. This also has to be read with the paras 112 and 118 in the same judgment which read as under.

"112. The submission of Mr K.N. Bhat that the view in *Raheja Development [K. Raheja Development Corpn. v. State of Karnataka, (2005) 5 SCC 162]* that when a completed building is sold, there is no works contract and, therefore, no liability to tax is not correct statement of law, does not appeal to us. If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser. That the building is intended for sale ultimately after construction does not make any difference.

51

XXXXXX

XXXXXXX

XXXXXX

118. The value of the goods which can constitute the measure of the levy of the tax has to be the value of the goods at the time of incorporation of goods in the works even though property in goods passes later. Taxing the sale of goods element in a works contract is permissible even after incorporation of goods provided tax is directed to the value of goods at the time of incorporation and does not purport to tax the transfer of immovable property. The mode of valuation of goods provided in Rule 58(1-A) has to be read in the manner that meets this criteria and we read down Rule 58(1-A) accordingly. The Maharashtra Government has to bring clarity in Rule 58(1-A) as indicated above. Subject to this, validity of Rule 58(1-A) of the MVAT Rules is sustained.”

15. It appears to the Court that instead of the Court having to decide this issue in a writ petition under Article 226 of the Constitution, particularly whether the question is essentially regarding the proper interpretation and application of Rule 3(1), (3) and (5) of the DVAT Rules as substituted by the Notification dated 20th September 2013, the better course would be to permit the Petitioners to challenge the determination of the Commissioner under Section 84 of the DVAT Act before the AT, VAT under Section 76(1) of the DVAT Act.

16. Considering that the Petitioners have been before this Court, any delay in the Petitioners filing appeals against the above determinations before the AT accompanied by an application for condonation of delay will be considered by the AT keeping the above fact in view provided that the appeals are filed not later than four weeks from today along with an application for condonation of delay. The Court also places on record the statement of learned counsel for the Respondents that they would not oppose

52 ✓

the prayer for condonation of delay if the appeals are filed not later than four weeks from today.

17. It is further clarified that it will be open to the Petitioners to place before the AT for its consideration the reply filed by the Respondents to the Petitioners' additional affidavit portions of which have been extracted hereinabove.

18. As regards the Explanation 3 to Rule 3(3)(b), the Court is of the view that the requirement of a completion certificate having to be issued by the Competent Authority cannot per se said to be an unreasonable requirement. It is seen that such a requirement is also contained in Section 346 of the Municipal Corporation of Delhi Act as well as Section 251 of the New Delhi Municipal Council Act. There has to be a certain amount of certainty attached to a completion certificate.

19. With the above clarification and directions these writ petitions are disposed of. Order *dasti*.



S. MURALIDHAR, J



VIBHU BAKHRU, J

MARCH 02, 2016
MK