IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

VATAP No. 26 of 2010 (O&M)
Date of decision: 12.02.2016.

M/s S.M.V.Agencies Pvt. Ltd. Zirakpur
..... Appellant

Vs.

The State of Punjab and another
.... Respondent

CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE RAJ RAHUL GARG

Present: Mr. Sandeep Goyal, Advocate for
Mr. Rishab Singla, Advocate
for the appellant.

Ms. Sudeepti Sharma, DAG, Punjab.

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AJAY KUMAR MITTAL,J.(ORAL)

The appellant has approached this Court by filing appeal under Section 68(2) of the Punjab Value Added Tax Act, 2005 (in short 'the Act') against the impugned order dated 27.11.2009 (Annexure A7), passed by the Value Added Tax Tribunal, Punjab (hereinafter to be referred as 'the Tribunal').

2. Briefly relevant facts of the case are being taken. The appellant is a real estate project developer who is engaged in the construction and sale of residential flats, buildings and infrastructure facilities all across the country. As per averments made in the appeal, the appellant company is developing land at Patiala and VIP Road at Zirakpur, Tehsil Derabassi, District Mohali. The appeal was admitted for determination of substantial questions of law which are as under:-

(i) Whether on the facts and circumstances of the case, the Ld. Tribunal was justified in holding

that the appellant is engaged in the works contract and is thus liable to be registered under the provisions of the Punjab VAT Act, 2005?

(ii)*Whether on the facts and circumstances of the case, the appellant is liable to be registered under the Punjab VAT Act, 2005 as a taxable person and liable to pay tax on the sale of flats constructed by it on land purchased by it in its own name?*

3. We have heard learned counsel for the parties and perused the record.

4. The primary dispute herein relates to whether the appellant is liable to be registered under the provisions of the Act or not.

5. It was not disputed that the appellant who is a works contractor is required to pay VAT on the material used for carrying out the works contract in respect of the sale of flats on the amount of material incorporated therein after the date of sale of the flat. Accordingly, it was also not disputed that as a consequence, the appellant would be required to be registered under the provisions of the Act.

6. There was consensus between the parties, that in view of the decision of the Supreme Court in ***K. Raheja Development Corporation Vs. State of Karnataka (2005) 5 SCC 162***,which was approved in ***Larsen & Toubro Limited v. State of Karnataka, (2014) 1 SCC 708*** and followed by this Court in **CHD. Developers Limited Karnal Vs. The State of Haryana and others** in CWP No. 5730 of 2014, decided on 22.04.2015, the issue involved herein stands already concluded against the appellant. It was observed in the said decision as under:-

"19. To consider whether the Appellants are executing works contract one needs to look at a typical Agreement entered into with the purchaser. The relevant clauses are clause (q), (r) of the recitals and clauses 1, 5(c) and 7, which read as follows:

"(q) (i) Construction of the said multi-storeyed building;

(ii) Sale of the units in the aforesaid multi-storeyed building to different persons in whose favour ultimately a Deed of Conveyance would be obtained by the Holders, directly from the Vendors, of an undivided fractional interest in the said land (i.e. the area of 5910.17 sq. metres described in the First Schedule hereunder written) and such owner of units would own, on ownership basis, the respective units on condition that an Agreement would be entered into between the Holders on the one hand and the persons (desiring to acquire on ownership basis a unit in such multi-storeyed building) on the other hand and it would be an essential, integral and basic concept, term and condition of the proposed transaction (which would be by way of a package deal not capable of being segregated or separated or terminated one without the corresponding effect on the other) that K. Raheja Development Corporation as the Land-holder would agree to sell to such persons an undivided fractional interest in the said land described in the First Schedule hereunder written on condition that they i.e. M/s K. Raheja Development Corporation as Developers on behalf of and as Developers of such person would construct for, as a unit ultimately to belong to such person a unit or units that would be so mutually selected and settled by and between K. Raheja Development Corporation and the person concerned;

r) The Prospective Purchaser is interested in acquiring ownership rights in respect of unit/s Nos. 1101 on the eleventh floor/s of the said multi-storeyed building named `Raheja Towers' and also car parking space/s No./s nil in the basement/ground floor of the said building (hereinafter referred to as `the said Unit')"

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1. As and by way of a package deal:

a) K. Raheja Development Corporation, (as Holders) agree to sell to the Prospective Purchaser an undivided 0.42% share, right, title and interest in the said land described in the First Schedule hereunder written (with no right to the Prospective Purchaser to claim any separate sub-division and/or right to exclusive possession of any portion of the said land) for a lump sum agreed and quantified consideration of Rs.3,25,000/- (Rupees three lacs twenty five thousand only) to be paid by the Prospective Purchaser to the Holders at the time and in the manner stated in Clause 2 hereof;

b) K. Raheja Development Corporation, (as

Developers) agree to build the said building named `Raheja Towers', having the specifications and amenities therein set out in the Second Schedule hereunder written and as Developers for the prospective Purchaser, the Developers shall build for and as unit/s to belong to the Prospective Purchaser, the said premises (details whereof are set out in the Third Schedule hereunder written) for a lump sum agreed and quantified consideration of Rs. 5,07,000/- (Rupees five lacs seven thousand only) to be paid by the Prospective Purchaser to the Developers at the time and in the manner set out in Clause 3 hereof. The said premises shall have the amenities set out in the Fourth Schedule hereunder written.

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5. The undermentioned terms and provisions are express conditions to be observed, performed and fulfilled by the Prospective Purchaser, on the basis of which this Agreement has been entered into by the Holders/Developers and the due and proper fulfillment whereof are to be conditions precedent to any title being created and/or being capable of being documented by the Prospective Purchaser in the aforesaid fractional interest in the land described in the First Schedule hereunder written and/or in the said premises:

a) XX XX XX
b) XX XX XX
c) The overall control and management of the project and the development and completion of the said building shall be with the Developers and furthermore the Developers are and shall continue to be in possession of the said land and building and shall be entitled to a lien thereon and that the Prospective Purchaser shall not be entitled to

> claim or demand from the Holders possession of any portion of the said land or to claim or demand from the Developers possession of the said premises unless and until the Prospective Purchaser has paid in full through the Holders the full consideration money payable to the Holders under Clause 2 above and the full consideration money payable to the Developers under Clause 3 above.
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7. If the Prospective Purchaser commits default in payment of any of the instalments of consideration aforesaid on their respective due dates (time being the essence of the contract) and/or in observing and performing any of the terms and conditions of this Agreement, the Holders/Developers shall be at liberty, after giving 15 days notice specifying the breach and if the same remains not rectified within that time, to terminate this Agreement, in which event, a sum equivalent to 10% of the amounts that may till then have been paid by the Prospective Purchaser to the Holders and the Developers respectively shall stand forfeited. The Holders and the Developers shall, however, on such termination, refund to the Prospective Purchaser the balance amounts of the installments of part payment, if any, which may have till then been paid by the Prospective Purchaser to the Holders and the Developers respectively but without any further amount by way of interest or otherwise. On the Holder/Developers terminating this Agreement under this Clause, they shall be at liberty to dispose off the said Unit/s and the said fractional interest in the land to any other person as they deem fit, at such price as they may determine and the Prospective Purchaser shall not be entitled to

> question such sale, disposal or to claim any amount from them."
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> 20. 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 off 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."

In view of the above, the substantial questions of law are answered against the assessee. Accordingly the appeal is dismissed.

(AJAY KUMAR MITTAL)
JUDGE

12.02.2016 **(RAJ RAHUL GARG)**
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