

**(2008) 05 GAU CK 0055**  
**In the Gauhati High Court**

|                                          |            |
|------------------------------------------|------------|
| Magus Construction Pvt. Ltd. and Another | APPELLANT  |
| Vs                                       |            |
| Union of India (UOI) and Others          | RESPONDENT |

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**Date of Decision :** 15-05-2008

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 37B  
Constitution of India, 1950 — Article 226, 268A, 270  
Finance Act, 1994 — Section 65, 66, 68, 69

**Citation :** (2008) 217 CTR 442 : (2009) 3 GLR 514 : (2009) 3 GLT 161 : (2008) 11 GLT 225 : (2009) 11 Vat Reporter 46 : (2008) 15 VST 17

**Hon'ble Judges :** I.A. Ansari, J

**Bench :** Single Bench

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**Judgement**

I.A. Ansari, J.—By making this application under Article 226 of the Constitution of India, the petitioners, who claim that petitioner No. 1 is a private limited company, engaged in the business of development and sale of immovable property, i.e., real estate, have impugned a notice, dated March 6, 2006 issued by respondent No. 3, namely, Superintendent of Central Excise, to the petitioner, whereby the petitioner-company has been asked to get itself registered u/s 69 of the Finance Act, 1994 (hereinafter referred to as, "the Finance Act, 1994"), inasmuch as the petitioner-company has been, according to respondent No. 3, "providing commercial or industrial construction service/construction of complex service". The petitioners challenge the very authority of respondent No. 3 to issue the notice, which stands impugned in the present writ petition, the case of the petitioners being, in brief thus: Petitioner No. 1 is a private limited company engaged in the business of development and sale of immovable properties, i.e., real estates. The petitioner-company constructs buildings and sells premises/flats in such buildings. During the course of development of such property and construction of buildings thereon and also after completion of such construction, the petitioner-company enters into "flat purchase agreements" with various premises/flat purchasers, whereunder the petitioner-company allots and sells flat/premises, in such buildings, to the purchasers. The said transaction is a

transaction of sale of flats/premises and the consideration is payable to the petitioner-company in instalments as per the terms, which may be mutually agreed upon, though the terms of the agreement are, usually, co-related to the extent and the stage of the development of the constructional work. The agreement for sale of such flats is stamped as sale of flat/premises for the entire consideration. Before accepting money as advance payment or deposit out of the sale price, the petitioner-company enters into an agreement for sale, which is registered. The agreement contains various details and price including area of the flat, the price of the flat (the price of common areas and facilities being shown separately) and various other facilities concerning the flat, etc. For the purposes of carrying out construction work of the buildings, the petitioner-company engages various contractors for obtaining construction related services to the petitioner-company. Thus, in their various projects, the petitioners have engaged reputed contractors. The petitioners, at times, engage contractors, who supply labour. Sometimes, the petitioners carry out part of the constructional activities. However, the petitioners carry out such constructional activities for themselves and for their own purposes and not for any one else. The transaction between the petitioners and the flat purchasers is purely a transaction for sale of the flat/ premises and cannot be treated as a contract for rendering of service of any nature whatsoever. On certain occasions, instead of purchasing the land from the owners, the petitioners enter into agreements with the owners of the land, such agreements being popularly known as "development agreement". Under such agreements, the petitioners become entitled to construct a building on the land and sell the flats, which may be constructed thereon. The petitioners acquire all the rights, title, interest and advantages of the owners including the entitlement to sell, transfer, deal with, dispose of all the premises and areas in the building or structures to be constructed by the petitioners. The petitioners are given the right to enter upon the land, to raise constructions thereon and sell flats constructed on such land. Even after execution of such agreements, the constructional activities, carried out by the petitioners, are mostly through other persons working as external contractors. In any case, such constructional/ developmental activities are carried out by the petitioners for themselves and for their own benefits and not for any other entity or person.

2. The respondents have resisted the writ petition by filing an affidavit, their case being, briefly stated, as under:

(i) As per the definition of "construction of complex service", appearing in Section 65(105)(zzzh) of the Finance Act, 1994 (as amended), since the petitioner-company is providing service to its clients, the service, so provided by them, is taxable under "service tax". Hence, the petitioner-company is required to get, as per Section 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules, 1994 (in short, "the said Rule"), as amended, registered so as to pay the "service tax".

(ii) The activities undertaken by the builders for construction of flats/ buildings,

for and on behalf of prospective buyers, for consideration of cash or deferred payment is covered under "works contract" and not "sale". Although it has been stated by the petitioners that the agreements, signed between the petitioner-company and the prospective purchaser of the flat/ building, are termed as "deed of agreement for sale of flat and land", the fact remains that such agreements are of "works contract" and, hence, the petitioner-company is required to get itself registered and pay "service tax".

(iii) The petitioner-company agrees that it accepts money as advance or deposit on the basis of agreements for sale. Such an agreement contains various details, price, the area of the flat, the common areas and amenities/ facilities that will be available in the flat. Thus, the agreement, in such a case, is basically an agreement for construction of the flat as per specifications contained in the agreement.

(iv) The petitioner-company admits that it has to enter into agreement for sale before accepting money as advance or deposit. If it be so, the agreement is signed before the buildings are made. At that time, the buildings/flats are to be found only in the specifications of the agreements. Whatever name the agreements may bear, the saleable products/things are not made/produced/constructed at the time of making of the agreement. A non-existent thing cannot be sold against consideration. Hence, construction is the essential and immediate obligation of the petitioner-company and that too, according to the specifications/ dictation of the second party within the stipulated period of time. Thus, the petitioner-company has been rendering/providing service of construction of complex to the parties in compliance with the agreements against the advances received by, or deposits made with, the petitioner-company.

(v) The definition of "construction of complex service", as given in Section 65(105)(zzzh) of the Finance Act, 1994, is wide enough to include estate builders, such as, the petitioner-company.

(vi) The agreement is executed between the petitioner-company and the prospective buyers before the commencement of the works of the flat/ building or prior to the completion of the work of the relevant flat or building. Thus, the agreement signed between the petitioner-company and the prospective buyers is nothing, but works contract and, as such, the petitioners are liable to pay "service tax". The transaction between the petitioner-company and the prospective buyers is purely transaction for construction as per specifications in the agreements for sale. The very fact that the petitioner-company receives advances/deposits and gets the agreement registered makes the petitioner-company work for and on behalf of the prospective buyers.

3. I have heard Dr. A. K. Saraf, learned Senior Counsel, for the petitioners and Mr. H. Rahman, learned Assistant Solicitor General, appearing on behalf of the respondents.

4. The moot question, which the present writ petition has raised, is this: whether

the petitioner-company has been working, as a "service provider", for those persons with whom the petitioner-company enters into agreements and constructs flats for the purpose of sale to those with whom such agreements are entered into ?

5. In order to ascertain the exact nature of work, which the petitioner-company has been carrying on, a careful scrutiny of the relevant clauses of the agreement, which the petitioner-company enters into with prospective buyers, is necessary. One of such agreements for sale of the flats has been annexed to the writ petition. Some of the relevant clauses of the agreement for sale are extracted below:

1. That the first party agrees to sell and the second party agrees to purchase the flat described in Schedule B along with the proportionate and undivided share of land for a total sale of price of Rs. 7,86,500 (rupees seven lacs eighty six thousand five hundred only) which shall be paid by the second party to the first party as per the payment Schedule below:

(a) On booking and agreement

Rs. 1,00,000

(b) On or before June 30, 2005

Rs. 3,50,000

(c) On or before December 31, 2005

Rs. 2,50,000

(d) On or before June 30, 2006

Rs. 86,500

2. That the second party shall pay stamp duty and registration fees as per prevailing immovable property transfer laws, cost of society formation, cost of sale permission from the Deputy Commissioner, Kamrup and Guwahati Metropolitan development authority, lawyer's fees, Guwahati Municipal Corporation assessment/holding fees, etc.

5. That the flat shall be handed over on or before 24 (twenty four) months of this agreement. However in case of unforeseen circumstances, acts of nature, legal impediments, stays, Government restrictions, "force majeure" events, etc., the said period of handing over shall be extended.

6. That time being the essence of the agreement, the second party specifically agrees to make the payment of the sale price strictly as per the payment schedule described above.

9. The possession of the flat shall be given to the second party only after the second party has made payment of the sale price of the flat/ apartment to the

first party as stated in paragraphs 1, 2 and 3 above.

10. That after the payment of all dues by the second party, deed of sale will be registered by the first party in favour of the second party as per prevailing Stamp Act, Registration Act, Property Transfer Acts and Rules framed thereunder.

11. That the second party shall be entitled to have the flat/apartment assessed by the Guwahati Municipal Corporation and obtain individual holding number in own name.

18. That after receiving possession of the flat, the second party shall have no claims upon the first party in respect of any matter relating to the flat/apartment and/or the building.

6. A combined reading of the various clauses of the agreement for sale makes it abundantly clear that the transaction between the petitioners, on the one hand, and the flat purchaser, on the other, is that of purchase and sale of premises and not for carrying out any constructional activities on behalf of the prospective buyers. What the petitioner-company sells is, thus, the flat/ premises and the entire transaction is nothing, but sale and purchase of immovable property. The flat purchasers are entitled to seek specific performance of the contract and there is an obligation, on the part of the petitioner-company, to refund any part of money received together with interest if possession is not handed over to the prospective buyers in time. There is also an obligation, on the part of the petitioner-company, to register sale deeds and agreements. Even the registering authorities concerned treat these documents as agreements for sale/purchase of flats/premises inasmuch as the consideration is for sale and not for carrying out constructional activities. Stamp duty is, therefore, levied on the sale consideration.

7. Asserting that the petitioner-company does not render any taxable service and is not engaged in any such activities, which can make it liable to pay "service tax", under the Finance Act, 1994, the petitioners, in the present writ application, have challenged, as already indicated above, the legality and validity of the impugned notice and the very jurisdiction of the authority concerned to issue such a notice.

8. It may be pointed out, at the very outset, that tax on services is an "indirect tax" and is a relatively new concept in India. As a matter of fact, Government of India had introduced the levy of "service tax", i.e., tax on the services, for the first time, in the year 1994, borrowing the concept from developed countries. The basic purpose of this levy has been to increase revenue, treating the act(s) of rendering service, as an additional source of revenue. Depending upon its own socio-economic compulsions, each country evolves its system of taxation adapting either a "comprehensive approach" or "selective approach". Under the concept of "comprehensive approach", all services are taxable unless any of the services is specifically excluded; whereas under the system of "selective approach", only specified services are taxable and it is the system of "selective

approach ", which India has adopted. This distinction needs to be kept in mind, when we proceed further.

9. On May 28, 1994 in his budget speech for the year 1994-95, the Union Minister of Finance, while proposing to introduce "service tax" observed as under:

Over the years, while attempts have been made to widen the tax base for domestic indirect taxes, the service sector has not been subjected to taxation. Yet this sector accounts for about 40 per cent of our GDP and is showing strong growth. There is no sound reason for exempting services from taxation, when goods are taxed and many countries treat goods and services alike for tax purposes. The Tax Reforms Committee has also recommended imposition of tax on services as a measure for broadening the base of indirect taxes, I, therefore, propose to make a modest effort in this direction by imposing a tax on services of telephones, non-life insurance and stock brokers. The tax will be charged at five per cent on the amount of telephone bills, the net premium charged by the insurance companies, and the brokerage or commission charged by the stock brokers in relation to their services. These proposals will come into force from a date to be notified later on.

10. In India, the law of "service tax" is regulated by the Finance Act, 1994. Although there was no entry in the Union List or the State List, which had authorised levy of "service tax" till 2003, the Central Government had initially imposed such taxes by taking resort to powers under the residuary entry in the Union List; but in the year 2003, the Government moved a Bill seeking Constitutional amendments, which provided, formally, for levy on services by the Central Government. This Constitutional amendment aimed at enabling the States to collect and appropriate the proceeds of the levy on "service tax". Thus, the Constitution (95th Amendment) Bill, 2003, was introduced, on March 7, 2003, seeking to amend the Constitution, by providing tax on services as a specific entry in the Union List and evolve principles for determining the modalities of levying "service tax" by the Union Government and collection of the proceeds thereof by the Central and the State Governments. By the said amendment, a new entry was inserted in List I of the Seventh Schedule to the Constitution of India, which reads as under:

92-C. Taxes on services.

11. Coupled with the above, a new article, namely, article 268A was also inserted. This article reads as under:

Article 268A(1). Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India and the States in the manner provided in Clause (2).

(2) The proceeds in any financial year of any such tax levied in accordance with the provisions of Clause (1) shall be--

(a) collected by the Government of India and the State ;

(b) appropriated by the Government of India and the States, in accordance with such principles of collection and appropriation as may be formulated by the Parliament by law.

12. A consequential amendment to article 270 of the Constitution was also made enabling thereby the Parliament to formulate, by law, principles for determining the modalities of levying the "service tax" by the Central Government and collection of the proceeds thereof by the Central Government as well as the State Governments.

13. The Finance Act, 1994, provides the method of levy of "service tax", and defines "taxable services", their computation, procedures and rules along with the prescribed forms. Certain provisions of the Central Excise Act, 1944, were also made applicable to the "service tax".

14. Section 68 of the Finance Act, 1994, which makes provision for payment of "service tax", reads as under:

68. Payment of service tax.--(1) Every person providing taxable service to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed. (2) Notwithstanding anything contained in Sub-section (1), in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in Section 66 and all the provisions of this chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

15. Section 66 of the said Act, being the charging section, is reproduced below:

Section 66. Charge of service tax.--There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in Sub-clauses (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zd), (ze), (zf), (zg), (zh), (zi), (zj), (zk), (zl), (zm), (zn), (zo), (zp), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzj), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzzb), (zzzc), (zzzd), (zzze), (zzzf), (zzzg), (zzzh), (zzzi), (zzzj), (zzzk), (zzzl), (zzzm), (zzzn), (zzzo), (zzzp), (zzzq), (zzzr), (zzzs), (zzzt), (zzzu), (zzzv) and (zzzw) of Clause (105) of Section 65 and collected in such manner as may be prescribed.

16. Section 69 of the said Act makes it mandatory for a person, who is, otherwise, liable to pay "service tax", to get himself registered under the said Act. Section 69 states as under:

69. Registration.--(1) Every person liable to pay the service tax under this Chapter or the Rules made thereunder shall, within such time and in such manner and in such form as may be prescribed, make an application for registration to the Superintendent of Central Excise.

(2) The Central Government may, by notification in the Official Gazette, specify such other person or class of persons, who shall make an application for registration within such time and in such manner and in such form as may be prescribed.

17. Section 65(105) of the Finance Act, 1994, defines "taxable service". Clause (zzq) of Sub-section (105) of Section 65, prior to its amendment by the Finance Act of 2005, read as under:

(zzq) service provided or to be provided to any person, by a commercial concern, in relation to construction service

18. Prior to its amendment by the Finance Act, 2005, Clause (30a) of Section 65 of the Finance Act, 1994, which contained the definition of "construction service", read as under:

(30a) "construction service" means--

(a) construction of new building or civil structure or a part thereof ; or

(b) repair, alteration or restoration of, or similar services in relation to, building or civil structure,

which is--

(i) used, or to be used, primarily for ; or

(ii) occupied, or to be occupied, primarily with ; or

(iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include road, airport, railway, transport terminal, bridge, tunnel, long-distance pipeline and dam.

19. By the Finance Act, 2005, the definition of "construction service" was amended. With the amendment, so introduced, Section 65(30a), now, reads as under:

(30a) "construction of complex" means--

(a) construction of a new residential complex or a part thereof; or

(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services ; or

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex.

20. By the Finance Act, 2005, Clause (zzq) of Section 65(105) of the Finance Act, 1994, was amended on June 16, 2005. With the amendment, so made, Clause

(zzq) reads as under:

(zzq) to any person, by any other person, in relation to commercial or industrial construction service.

21. A new clause, namely, Clause (zzzh) was also inserted in Section 65(105) with effect from June 16, 2005, which the respondents rely upon. This clause reads as under:

(zzzh) to any person, by any other person, in relation to construction of complex.

22. A new definition of "commercial and industrial construction service" was also provided by the Finance Act, 2005, by inserting Clause (25b) to Section 65(105) of the Finance Act, 1994. This clause, [i.e., Clause (25b)] reads as under:

(25b) "commercial or industrial construction service" means--

(a) construction of a new building or a civil structure or a part thereof; or

(b) construction of pipeline or conduit ; or

(c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure ; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is--

(i) used, or to be used, primarily for ; or

(ii) occupied, or to be occupied, primarily with ; or

(iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, runnels and dams ;

23. The Finance Act, 2005, also provides a specific definition of "residential complex" by inclusion of Clause (91a) to Section 65(105) of the Finance Act, 1994, which reads as under:

(91a) "residential complex" means any complex comprising of--

(i) a building or buildings, having more than twelve residential units ;

(ii) a common area ; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority

under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation.--For the removal of doubts, it is hereby declared that for the purposes of this clause,--

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration ;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence ;

24. Thus, beginning from June 16, 2005, construction of residential complex was also brought within the purview of "service tax" provided that the construction, carried out, is one, which satisfies the relevant definitions as mentioned hereinabove. From a conjoint reading of Section 68, Section 65(105) (zzq) and (zzzh) together with the definitions, contained in Clauses (25b), (30a) and (91a), what becomes evident is that "taxable service" is a service, which is provided or agrees to be provided to a person in relation to construction of commercial or industrial building or structure or for construction of a complex, which includes a residential complex.

25. The term "service" has not been defined in the Finance Act, 1994, by way of any Explanation or otherwise or by the Rules framed thereunder. Service has been defined differently under various laws. Under the Income Tax Act, 1961, service means service of any description, which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial nature, such as, accounting, banking, communication, conveying of news, information, advertising, entertainment, amusement, education, financing, insurance, chit funds, real estate, construction, transport, storage, processing, supply of electrical or other energy, boarding and lodging.

26. Under the Monopolies and Restrictive Trade Practices Act, 1969 "service" has been defined as under:

"Service" means service of any description which is made available to potential users and includes the provisions of facilities in connection with banking, financing, insurance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service.

27. The term "service", as defined under the Consumer Protection Act, 1986, reads as under:

"service" means service of any description which is made available to potential

users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying of news or other information but does not include the rendering of any service free of charge or under a contract or personal service.

28. I The Foreign Exchange Management Act, 1999, also defines "service", which reads as under:

Service means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

29. In the light of the various statutory definitions of "service", one can safely define "service" as an act of helpful activity, an act of doing something useful, rendering assistance or help. Service does not involve supply of goods ; "service" rather connotes transformation of use/user of goods as a result of voluntary intervention of "service provider" and is an intangible commodity in the form of human effort. To have "service", there must be a "service provider" rendering services to some other person(s), who shall be recipient of such "service".

30. Under the Finance Act, 1994, "service tax" is levied on "taxable service" only and not on "service provider". A "service provider" is only a means for deposit of the "service tax" to the credit of the Central Government. Although the term "service receiver" has not been defined in the Finance Act, 1994, the "service receiver" is a person, who receives or avails the services provided by a "service provider".

31. From the provisions of the law extracted hereinabove, it becomes abundantly clear that the burden of registration and payment of "service tax" is on the person, who provides "taxable service" to any person. According to the petitioner-company, it does not provide any "taxable service" to any person so as to warrant its registration under the Finance Act, 1994, and/or to pay any "service tax" thereunder. Any part of constructional activity for construction of building, which is carried out by the petitioner-company, is not a "service" rendered to any one, but an activity, which is carried out by the petitioner-company, for its own self. Since the very concept of rendering of "service" implies two entities, one, who renders the "service", and the other, who is recipient thereof, it becomes transparent that an activity carried on by a person for himself or for his own benefit, cannot be termed as "service" rendered.

32. Prior to the amendment of the Finance Act, 1994, in the year 2005, the Central Board of Excise and Customs, vide Circular No. 80/10/2004, dated September 17, 2004, clarified that "estate builders", who construct buildings/

premises for themselves (for their own use, renting it out or for sale thereof subsequently) are not covered within ambit of the "construction services". Clause 13.1 of this circular states as under:

13.1 Services provided by a commercial concern in relation to construction, repairs, alteration or restoration of such building, civil structures or parts thereof which are used, occupied or engaged for the purposes of commerce and industry are covered under this new levy. In this case the service is essentially provided to a person who gets such constructions, etc., done, by a building or civil contractor. Estate builders who construct building/civil structures for themselves (for their own use, renting it out or for selling it subsequently) are not taxable service providers. However, if such real estate owners hire contractor/contractors, the payment made to such contractor would be subjected to "service tax" under this head. The tax is limited only in case the service is provided by a commercial concern. Thus, service provided by a labourer engaged directly by the property owner, or a contractor who does not have a business establishment would not be subject to "service tax".

33. The clarification offered under the abovementioned circular, shall be applicable even after amendment of the Finance Act, 2005, whereby "construction service" includes construction of "residential complex". Thus, construction of "residential complex" has also been brought within the purview of "service tax" and what kind of activities for "residential complex" would attract "service tax" would have to be understood in the light of the clarification, which the circular aforementioned offers.

34. Referring to K. Raheja Development Corporation Vs. State of Karnataka, , learned Assistant Solicitor-General has submitted that when the constructional activities are carried on by a person by creating its own agency, it would amount to construction service. There can be, no doubt, that when a person creates an entity and engages such entity for its own constructional activities for the purpose of construction of residential complex not for itself, but for others, it would amount to construction service. What may, however, be pointed out is that the decision of the apex court in K. Raheja Development Corporation Vs. State of Karnataka, , which the respondents rely upon, is not applicable to the case at hand inasmuch as this decision was rendered on the facts of its own case. In the present case, the petitioner-company is not shown to have undertaken any construction work for and on behalf of proposed customer/allottees and the title, in the flat/apartments so constructed, passes to the customer only on execution of sale deeds and registration thereof. Until the time the sale deed is executed, the title and interest, including the ownership and possession in the constructions made, remain with the petitioner-company. The payments made by prospective purchasers, in instalments, are aimed at facilitating purchase of the flat/premises by these probable purchaser so that they may not be required to pay whole of the price at a time. From the condition so incorporated in the relevant agreement for sale, it cannot be inferred that the petitioner-company is making construction

for and on behalf of the probable allottees or purchasers.

35. Further, in K. Raheja Development Corporation Vs. State of Karnataka, , the apex court was considering the issue relating to "sales tax" and the issue therein was not at all related to "service tax". While interpreting the provisions of "sales tax" under the Karnataka Sales Tax Act, 1957, the apex court held, in K. Raheja Development Corporation Vs. State of Karnataka, , that the definition of "works contract", given under the Finance Act, 1994, is very wide and is not restricted to the "works contract" as commonly understood, i.e., a contract to do some work on behalf of someone else. The apex court, therefore, held as under (at page 302 of STC):

...The definition would therefore take within its ambit any type of agreement wherein construction of a building takes place either for cash or deferred payment, or valuable consideration. To be also noted that the definition does not lay down that the construction must be on behalf of an owner of the property or that the construction cannot be by the owner of the property. Thus even if an owner of property enters into an agreement to construct for cash, deferred payment or valuable consideration a building or flats on behalf of anybody else it would be a works contract within the meaning of the term as used under the Finance Act, 1994.

36. In K. Raheja Development Corporation Vs. State of Karnataka, , the agreement provided that K. Raheja Development Corporation, as developers, on its own behalf, and also as developer for those persons, who would, eventually, purchase the flats, do the construction works. Thus, K. Raheja Development Corporation was not only undertaking construction work on its own behalf, but also on behalf of others, who were prospective buyers. It is, in such circumstances, that K. Raheja Development Corporation was treated to have been doing the "works contract". In the present case there is no material to show that the petitioner-company constructs the flat/apartments on behalf of the prospective allottees and, hence, it cannot be said that the constructions, done by the petitioner-company, are the constructions undertaken by the petitioner-company for and on behalf of their prospective buyers/allottees. Thus, there is no "service" rendered by the petitioner-company to the prospective allottees. Similar view has been taken by the Allahabad High Court in Assotech Realty Private Limited v. State of Uttar Pradesh [2007] 8 VST 738, wherein the court has held as under (at page 759):

...In the present case, we find that the petitioner is constructing the flats/apartments not for and on behalf of the prospective allottees but otherwise. The payment schedule would not alter the transaction. The right, title and interest in the construction continue to remain with the petitioner, It cannot be said that the constructions were undertaken for and on behalf of the prospective allottees and, therefore, the constructions in question undertaken by the petitioner would not fall under Clause (m) of Section 2 read with Section 3F of the Act and are outside the purview of the provisions of the Act. In other words, they cannot be

subjected to tax under the Act and the action in imposing tax on such constructions treating them to be works contract, is wholly without jurisdiction....

37. The Central Board of Direct Taxes has also, vide Circular No. 332/35/ 2006-TRU, dated August 1, 2006, clarified that if no person is engaged for construction work and the builder/promoter/developer undertakes construction work on its own without engaging the services of any other person, then, in such cases, in the absence of a relationship of "service provider" and "service recipient", the question of providing taxable service to any person by any other person does not arise. The relevant portion of the circular, dated August 1, 2006, is reproduced below:

Sl. No.

Issue

Legal position

1.

Is "service tax" applicable on builder, promoter or developer who builds a residential complex with the services of his own staff and employing direct labour or petty labour contractors whose total bill does not increase 4.0 lacs in one financial year ?

In a case where the builder, promoter or developer builds a residential complex, having more than 12 residential units, by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay "service tax" on the gross amount charged for the construction services provided, to the builder/promoter/ developer under "construction of complex" service falling u/s 65(105) (zzzh) of the Finance Act, 1994.

If no other person is engaged for construction work and the builder/promoter/ developer undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise.

38. The quoted portions of the abovementioned circular make it very clear that the activities of the petitioner-company do not fall within the purview of "taxable service" so as to attract levy of "service tax". In Commissioner of Income Tax Vs. Aspinwall and Co. Ltd., , the Kerala High Court has held that a circular of the Central Board of Direct Taxes has the force of law and can even supplant the law in the cases, where it is beneficial to the assessee and has mitigated or relaxed the rigour of the law.

39. In Keshavji Ravji and Co. v. Commissioner of Income Tax , the apex court held as under (at page 17):

This contention and the proposition on which it rests, namely, that all circulars

issued by the Board have a binding legal quality incurs, quite obviously, the criticism of being too broadly stated. The Board cannot pre-empt a judicial interpretation of the scope and ambit of a provision of the Act by issuing circulars on the subject. This is too obvious a proposition to require any argument for it. A circular cannot even impose on the tax-payer a burden higher than what the Act itself, on a true interpretation, envisages. The task of interpretation of the laws is the exclusive domain of the courts. However,--this is what Sri Ramachandran really has in mind--circulars beneficial to the assesseees and which tone down the rigour of the law issued in exercise of the statutory power u/s 119 of the Act or under corresponding provisions of the predecessor Act are binding on the authorities in the administration of the Act. The Tribunal, much less the High Court, is an authority under the Act. The circulars do not bind them. But the benefits of such circulars to the assesseees have been held to be permissible even though the circulars might have departed from the strict tenor of the statutory provision and mitigated the rigour of the law. But that is not the same thing as saying that such circulars would either have a binding effect in the interpretation of the provision itself or that the Tribunal and the High Court are supposed to interpret the law in the light of the circular. There is, however, the support of certain judicial observations for the view that such circulars constitute external aids to construction.

40. In *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, , the apex court has held as under (at page 612):

But the construction which is commending itself to us does not rest merely on the principle of *contemporanea expositio*. The two circulars of the CBDT to which we have just referred are legally binding on the Revenue and this binding character attaches to the two circulars even if they be found not in accordance with the correct interpretation of Sub section (2) and they depart or deviate from such construction. It is now well-settled as a result of two decisions of this court, one in *Navnitlal C. Javeri Vs. K.K. Sen*, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, and the other in *Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta*, that circulars issued by the CBDT u/s 119 of the Act are binding on all officers and persons employed in the execution of the Act even if they deviate from the provisions of the Act....

41. In *Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta*, , the Supreme Court pointed out as follows: (at page 921)

Now, coming to the question as to the effect of instructions issued u/s 5(8) of the Act, this court observed in *Navnitlal C. Javeri Vs. K.K. Sen*, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, , 203:

It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act u/s 5(8) of the Act. This circular pointed out to all the officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of

genuine transactions of loans, and the idea was not to affect such transactions and not to bring them within the mischief of the new provision.

The directions given in that circular clearly deviated from the provisions of the Act, yet this court held that the circular was binding on the Income Tax Officer.

42. The decisions, in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, and *Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta*, , make it more than abundantly clear that a circular, issued by the Central Board of Direct Taxes, is binding on all officers and persons employed in the execution of the Act, whereunder the circular may have been issued, even if the circular deviate from the provisions of the Act. However, the ultimate responsibility of interpreting the provisions of a given law is the business of the courts and though the courts may not be bound by the circulars issued by the Central Board of Direct Taxes, the officers of the department, to whom the circular applies, are bound by such circulars and cannot deviate therefrom.

43. This position of law has been made more explicit and precise in *The Paper Products Ltd. Vs. Commissioner of Central Excise*, , wherein the apex court has held as under:

The question for our consideration in this appeals is what is the true nature and effect of the circulars issued by the Board in exercise of its powers u/s 37B of the Central Excise Act, 1944? This question is no more *res integra* in view of the various judgments of this court. This court in a catena of decisions has held that the circulars issued u/s 37B of the Finance Act, 1944 are binding on the department and the department cannot be permitted to take a stand contrary to the instructions issued by the Board. These judgments have also held that the position may be different with regard to an assessee who can contest the validity or legality of such instructions but so far as the department is concerned, such right is not available.

44. In *Commissioner of Income Tax Vs. T.V. Ramanaiah and Sons*, , the Andhra Pradesh High Court expressed similar views, when it pointed out as follows: (at page 306)

...The law is fairly settled that the instructions and directions given by the Central Board of Direct Taxes u/s 119 of the Act are binding on all the subordinate officers in the execution of the Act. Reference may be invited to the decisions of the Supreme Court in *Navnitlal C. Javeri Vs. K.K. Sen*, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, , *Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta*, and *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, . In *Navnitlal C. Javeri Vs. K.K. Sen*, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, , the instructions given by the Central Board of Direct Taxes ran counter to the provisions of Section 2(6A)(e) and Section 12(1B) of the Indian Income Tax Act, 1922. Even so, the Supreme Court held that the instructions given by the Central Board of Direct Taxes were binding on the Revenue. Similarly, the instructions

contained in the circular, which was considered by the Supreme Court in *Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta*, , were contrary to the provisions of the Act. Even so, the Supreme Court held that the circular was binding on the officials of the Income Tax Department.

45. In *M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise*, , the Supreme Court has held that the whole objective of the circular is to adopt a uniform practice and to inform the persons, involved in a trade, as to how a particular product will be treated for the purposes of excise duty. The apex court has also held in that it does not lie, in the mouth of the Revenue, to repudiate a circular issued by the Board on the basis that it is inconsistent with a statutory provision. The apex court held, in *M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise*, , that consistency and discipline are of far better importance than winning or losing court proceeding. In the face of the decision in *The Paper Products Ltd. Vs. Commissioner of Central Excise*, , there remains no room for doubt that the department cannot be permitted to take a stand contrary to the instructions issued by the Central Board of Direct Taxes, while interpreting the provisions of a given Act; but so far as an assessee is concerned, he can contest the legality and validity of the instructions issued by a circular.

46. In *Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries*, , the apex court further held as under: (at page 125 of STC)

We need to make it clear that regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue.

47. In *Collector of Central Excise, Meerut Vs. Maruti Foam (P) Ltd.*, , the apex court held that the construction of statutory phrase, placed by a circular issued by the Central Board of Excise and Customs, although different from the one placed by the Supreme Court, was binding on the Revenue till the same was withdrawn.

48. In the light of what has been laid down in the catena of decisions referred to above, it becomes clear that the circular, dated August 1, 2006, aforementioned, is binding on the department and this circular makes it more than abundantly clear that when a builder, promoter or developer undertakes construction activity for its own self, then, in such cases, in the absence of relationship of "service provider" and "service recipient", the question of providing "taxable service" to any person by any other person does not arise at all. In the present case too, the materials placed by the writ petitioners clearly show that the construction activities, which the petitioners have been undertaking, are in respect of the petitioners' own work and it is only the completed construction work, which is sold by the petitioner-company to the buyers, who may have made agreements for sale before the construction had actually started or during the progress of the construction activity or at the end or completion of the construction activity. Any

advance, made by a prospective buyer, or deposit received by the petitioner-company, is against consideration of sale of the flat/building to such prospective buyer and not for the purpose of obtaining "service" from the petitioner-company.

49. In the result and for the reasons discussed above, this writ petition succeeds and the impugned notice is hereby set aside and quashed.

With the above observations and directions, this writ petition shall stand disposed of.

No order as to costs.