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ADVOCATES HIGH COURT

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MVAT LIABILITY ON BUILDERS & DEVELOPERS

Sr. No	Particulars	Comments
1.	Charging provision S. 6 of MVAT Act.	Sales Tax shall be levied on the sale of goods as per schedule entries. Turnover of sales means aggregate amount of sales price received or receivable. Sale price means valuable consideration paid or payable in respect of sale of goods.
2.	Sale u/s 2(24) of MVAT Act	S.2 SALE 1. Sale means Sales of Goods **made within the State** for cash or deferred payment or other valuable consideration…… 2. Explanation (a) A sale within the state includes a sales determined u/s 4 of CST Act. (b) II] the transfer of property of goods (whether as goods or in some other form) involved in the execution of a works contract- "including an agreement for carrying out for cash, deferred payment or other valuable consideration the building, construction, manufacture, processing, fabrication, erection, installation, fitting of, improvement, modification, repair or commissioning of any movable or immovable property. ***(w.e.f 20.06.2006)***."
3.	Determination of Sales Price-Rule 58 of MVAT Act	R.58. Determination of sale price & purchase price in respect of sale by transfer pf property in goods(whetherasgood orinsome otherform) involved in the execution of a works contract under mvat act:-

		The value ofthe goods at the time ofthe transferofpropertyinthegoods (whetherasgoods orinsome other form) involvedintheexecutionofaworks contractmay be determinedby effecting thefollowingdeductionsfromthe value ofthe entire contract,insofarasthe amounts relatingto thedeductionpertainto the said workscontract:— ….. …… ….. Providedthat where the contractorhas not maintainedaccountswhichenableaproperevaluationoft he differentdeductionsasabove orwheretheCommissionerfinds that the accountsmaintainedbythe contractorarenotsufficientlyclear orintelligible,the contractoror,asthe case may be, theCommissionermay inlieu ofthe deductionsasabove providealump sumdeductionasprovidedinthe Table belowand determineaccordinglythe saleprice ofthe goods atthe time ofthe said transferofproperty. **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 if the contract provides for separate charging of tax. **<u>Amendment dated 29.01.2014</u>** ***The cost of the land determined under sub-rule 1A will be deducted.*** 1A) In case ofaconstruction contract,wherealongwiththe immovableproperty,the land or, asthe case may be, interestintheland,underlyingthe immovablepropertyistobeconveyed,and thepropertyinthe goods (whetheras goods or in some

		other form)involved in theexecution of the construction contract is alsotransferredtothe purchasersuch transferisliable totax underthisrule. The value ofthe said goods atthe time ofthe transfershall be calculatedafter **making the deductionsundersub-rule(1)and** the costoftheland from the total agreementvalue. **Amendment dated 29.01.2014** Replaced the above highlighted portions and substituted "**deduction of"** The cost ofthe land shall bedeterminedinaccordancewith the guidelinesappendedtothe AnnualStatementofRates preparedunderthe provisionsofthe Bombay Stamp (DeterminationofTrue Market Value ofProperty)Rules, 1995, asapplicableonthe 1stJanuary oftheyear inwhichtheagreementtosell the propertyisregistered: Providedthat,deductiontowardscostofland underthis sub-ruleshallnotexceed 70%ofthe agreementvalue.**(Vide notification no VAT 1512/CR-84/Taxation-1 dated 30.07.2012 the proviso is deleted)** **Amendment dated 29.01.2014 added proviso *"Provided that, after payment of tax on the value of goods, determined as per this rule, it shall be open to the dealer to prove before the Department of Town Planning and Valuation that the actual cost of the land is higher than that determined in accordance with the Annual Statement Rates (including guidelines) prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995. On such actual cost being proved to be higher than the Annual Statement of Rates, the actual cost of land will be deducted and excess tax paid, if any shall be refunded."*** **Even in the notification sub-rule 1(B) & 1(C) is added.** (2) The value ofgoods soarrivedat undersub-rule(1)shall, forthepurposesoflevy oftax, bethe sale price or,asthe case may be,thepurchase price

		relating to the transferof property in goods(whetherasgoods orinsome other form) involvedinthe executionofaworks contract. **Amendment dated 29.01.2014** ***<u>The place sub-rule 1 added with 1A & 1B.</u>***
4.	Effects of the Amendments	➢ Those who have already filed returns and paid tax liability and Audit Reports are also filed. • ***Reliance Jute Industries v/s CIT (120 ITR 921) (SC)*** "It a cardinal principal of tax law that the law to be applied is that inforce in the assessment year unless otherwise provided expressly or by necessary implications." ➢ Supreme Court vide interim order dated 28.08.2012 directed the developers to register by 15.10.2012 and file returns by 31.10.2012 and if payment is made no coercive action of tax, interest and penalty will be made. However, the payment is subject to the final decision of this court. ➢ Direction of Supreme Court in para. 124 (65 VST 1) please read pg. 54 is directed to make rule so as to determine the value of transfer of immovable property. In short, Supreme Court has directed to give method of valuation of land cost. However, by way of amendment State Government has inserted 1B & 1C which not as per the direction and further, indirectly it creates chargeability. • ***<u>Hukamchand v/s UOI (1972) (2 SCC 601)</u>*** The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act to supplement it. • ***<u>Agriculture Market Committee v/s Shalimar Chemicals Works Ltd (AIR 1997 SC 2502)</u>***

		The legal fiction cannot be widened by rules or byelaws to provide further that it notified market area, it shall be deemed to have been sold or purchased in that area. • ***Future gaming Solutions India (P) Ltd v/s UOI (67 VST 58)*** It is well-settled position of law that charging provision is an essential and indispensable ingredient of taxation. Subordinate legislation cannot override the statutory provisions and in the absence of a charging provision no tax can be levied solely on the basis of a machinery for collection of tax. ➢ There is no rational logic in determining the percentage for arriving at the value of goods involved in works contract. ➢ If actual books of account maintained stage wise then whether, such quantification can be ignored and 58(1)(B) will supersede is a matter of debate. ➢ There is no method given for land capable of using TDR which is one of the measure for stamp duty valuation. Land capable for using TDR for Mumbai City & Mumbai suburb should be valued at 1.4 times the land rate as per ready reckoner keeping in mind the rate for 1 FSI. ➢ The decisive factor is not only the cost of the land but also ***interest in the land.***The term interest in the land used is a wide connotation, any cost pertaining to such land other than the value of land will form part of interest in the land. For eg: TDR, FSI, payment made to landlord towards loss on such value of the property etc; Therefore, out of the total value not only the land cost is to be deducted but also cost of interest in the land is to be deducted.

5.	Liabilitystarts from the date of agreement with the buyer.	**In L & T v/s UOI (65 VST 1) para 115 held that the activity of construction undertaken by the developer would be works contract only from the stage, the developer enters into 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. Hence, Rule 58(1) (B) describing the stages and percentages is contrary to the ratio and principle laid down by Hon'ble Supreme Court and will lead into violation of Article 141 of Constitution.**
6.	Whether a constructed flat is sold whether the same is taxed? Further, when a construction is said to be completed i.e when can one say that a ready flat is sold.	In K.Raheja judgment Hon'ble Supreme Court in second last para has observed that it must be clarified that if an agreement is entered after a 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 works contract. Even in L& T v/s UOI Hon'ble Supreme Court in para 117 had approved the view taken in K.Raheja matter and disagreed the counted view advanced by Mr. K N Bhatt from State of Karnataka. But the moot question remains that when one can say that construction is said to be completed? Under the Local Act like the Municipality Act which governs the building construction contract activity, contains provisions in this respect. When we talk about BMC Act, S. 535A deals with such issue. In alternate the Licensed Supervisor/RCC consultant certificate dealing with completion of construction will be taken into account to decide whether ready flat is sold or not.
7.	When the development area is exchanged then whether the same can be taxed?	hWhen area against area is exchanged the same will not fall under the ambit of the tax since, it is the sale price which measured for the purpose of levying tax and in the absence of sales price the same cannot be brought under the tax net, either it will termed as exchanged or barter. Judgment can be looked into in the matter of M/s Ozone Properties P Ltd (52 VST 371)(Kar) even a reference can be made to CIT v/s Motor & General Stores (66 ITR 629) (SC), State of Rajasthan v/s Rajasthan Chemistry Association (147 STC 542) (SC) &Darampur SugarMilss Ltd v/s Commissioner Trade Tax U.P (147 STC 57)

		(SC).Even in L &T judgment Hon'ble Supreme Court has made a reference that the monetary consideration is subject matte rof levy in para 114 observed that "***That definition of works contract is inclusive and refers to building contracts and diverse construction activities for monetary consideration, viz; for cash, deferred payment or other valuable consideration as works contract."***
8.	1% composition whether will be paid when the agreement is entered even though no work started and no involvement of goods. Whether, one can challenge 1% scheme being arbitrary in this context.	No doubt once a registered dealer opts administered benefit like composition foregoing the regular methods and benefits available then he is bound to go with conditions therein. Hence, in 1% composition payment is to be made in the month in which agreement is registered by taking the agreement value in the returns. But on account of certain contingency if the construction is not at all started then whether the composition can be refunded back remains in a question mark. Hon'ble Bombay High Court in MCHI in para 51 had observed that composition is available at the option of the registered dealer. The court may in an extreme instance interfere in the exercise of power of judicial review only where the terms of a composition scheme ex-faice arbitrary and extraneous so as to be violative of Article 14 that has not been established before eth court in this case. Hence, the issue is still open on the basis of the present illustration; one can challenge the condition No. 2of the composition scheme bringing the fact though the document is registered on which tax has been paid but the construction has not been started for number of years.
9.	Applicability of VAT on the Sale agreement entered prior to 20.06.2006 and if the involvement of goods is after 20.06.2006; whether the same can be taxed?	As per the charging provisions under the MVAT Act, the aggregate amount of sales price (turnover of sales) is subject matter of levy of tax and sale price is received on account of sale. Under definition of sale u/s 2(24) an agreement for carrying out for cash, deferred payment or other valuable consideration the building, construction ……. At the time of entering into the agreement which is prior to 20.06.2006 it

		was not falling into the definition. Hence, no charge is created and if any subsequent involvement of goods on such non-sale transaction and even though consideration is received it cannot be converted to sale so as to levy tax. Inorder, to impose tax there are 3 aspects are needed charging, incidence and measurement of tax. If any one of the present 3 aspect is absent then imposition of tax is not permissible. Charging aspect is agreement to a construct a building or flat, incident is involvement of goods and measurement is the price consideration of involvement of goods. In the present illustration the agreement was entered prior to 20.06.2006 at that time there was no charging provision in the statute book, hence, subsequently involvement of goods and price makes no difference. Therefore, in non-sale transaction on account of subsequent receipt of money or involvement of goods cannot be brought under tax net. Even the present proposition is understood from the maxim ex-post facto law, it is the term used in the law signifying something done after, or as arising from, or to effect another thing that was committed before. It is one which operated upon a subject not liable to it at the time the law was made. For eg: An Act imposing duty of customs on goods imported before the passing of the Act (Tomlins Law Disctionary can be referred).
10.	When can one say that a builder/developer has entered an agreement?	To answer the present proposition let us look into the statutory provisions in this respect. Section 2(24) of the MVAT Act defines the term 'sale' for the purpose of the Act which includes "the transfer of property in goods, (whether as goods or in some other form) involved in the execution of a works contract including an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property." **The term an agreement for carrying out the building, construction ….. is having greater significance.** The term agreement used in the definition is in the context of contractual obligations between the builder developer and the flat buyer. Hon'ble Bombay High Court in the matter of MCHI v/s

		State of Maharashtra (51 VST 168) had referred to the judgment of Hon'ble Bombay High Court in the matter of Vrindavan (Borivali) Co-operative Housing Soc. Ltd v/s Karmakar Brothers [1983] 2 Bom .C. R. 267, in the said judgment Hon'ble High Court had noted that "an agreement under MOFA is not an ordinary agreement like a contract of sale because it is required to be executed in conformity with the provision of Section 4 of MOFA and has to be registered. The agreement involves a statutory compulsion to provide certain terms." Hon'ble High Court has also referred another matter known as Maria Philomina Pereria v/s Rodrigues Construction [AIR 1991 Bom 27] wherein it was observed that "whenever a builders enters into an agreement with any flat purchaser containing provisions which are to be incorporated as provided under the Ownership Flats Act, all such agreement must necessarily be held to be special agreement." Hon'ble Bombay High Court in MCHI had relied upon the judgment of Hon'ble Supreme Court in the matter of Jayantilal Investments v/s Madhuvihar Co-operative Housing Society [2007 (9 SCC 220)] wherein it has noted that an agreement between the promoter and flat purchaser is mandatorily required to be complied with the **prescribed form V.** The Supreme Court held that clause 3 & 4 of the prescribed form are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give particulars of land, amenities and facilities among other things but he is obliged to make full and true disclosure of potential of the plots which is the subject matter of agreement. The Supreme Court noted that **at the time of execution of agreement** with the flat taker the promoter is obliged statutorily to place the entire project/scheme. Further, a reference was made to the judgment of Hon'ble Bombay High Court in the matter of State of Maharashtra v/s Mahavir Lal Chand Rathod [1992 2 Bom.C.R. 1] to understand the nature of agreement under MOFA. In the said judgment it was held that agreements for sale executed in terms of Section 4 of MOFA in its effects and for all purposes are

		conveyances in as much as the rights title and interest in the flat would stand transferred in favour of purchaser on payment of installment. The present judgment is affirmed by the Supreme Court in Veena Hasmukh Jain v/s State of Maharashtra [1999 (5 SCC 729)]. After careful analysis of the above judgment Hon'ble Bombay High Court in MCHI matter held that ***"As a result of statutory provision an agreement which is governed by the MOFA is not an agreement simpliciter 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."*** Even Supreme Court in the matter of L&T had approved the aforesaid observations. Hon'ble Supreme Court in the matter of L&T v/s State of Karnataka (65 VST 1) had clarified that ***"activity of construction undertaken by the developer would be works contract only at the stage where 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."*** Hence, to sum up it is the date of the execution of an agreement is the date from which liability in the hands of builders and developer will commence. In my opinion from the date of letter of allotment or on receiving substantial quantum of advance without execution of agreement cannot be implied to be contractual relationship entered. Hence, the incidence of tax in the hands of builder and developer starts from the execution of the agreement with the flat buyer and any property in goods transferred into the flat shall be subject matter of levy of tax under the MVAT Act
11.	If a developer obtains for composition payment of 5% and if he wants to change to 1% composition whether it is permissible and vice-versa?	There is condition as such for changing composition from 5% to 1% u/s 42(3) of the Act. Hence, a developer can change the composition method to 1%, but in such circumstances the condition laid down in the notification dated 9.07.2010 is required to be complied i.e he has to forgo

		the set-off claimed and reverse it and further, he is not entitle to issue declaration in Form C on interstate transaction and similarly cannot issue Form 409 to his sub-contractor. However, if any dealer opts for composition for 1% he shall no switch over to any other method of computation of liability in respect of that contract.
12.	Whether set-off can be claimed fully if the builder/developer is adopting composition u/s 42(3)?	Full set-off is not allowable on account of reduction of set-off u/r 53(4)(b) to the extent of 4% of the purchase price will be reduce.
13.	If the principal contractor like developer avoid sub-contract wholly or partially and sub-contractor is involving material and labour and developer is under composition scheme, then whether, full set-off available in the hands of sub-contractor?	Explanation to Rule 53(4) expressly provides reduction even in the hands of the sub-contractor if the main contractor is under composition. In short, sub-contractor is not eligible for full set-off irrespective of the methods.
14.	If the main contractor or the employers supply part or whole of goods to sub-contractor and deduct out of the total contract value, whether the sub-contractor while charging tax will reduce the material received from the employer?	Sub-contractor has to pay tax on the total contract value entered with the main contractor. There are two relationship entered with, 1st as a sub-contractor and 2nd as the buyer of the goods. And the main contractor has to charge tax as if an ordinary trader and sub-contractor is entitle set-off benefit. Sub-contractor has to discharge tax on the entire sub-contract value.Please refer N.M Goel (109 STC 425) and Rashritya Ispat Nigam Ltd judgments for reference.
15.	Whether stamp duty and other expenses form a part of Contract Price?	No, stamp duty does not form part of contract price as per S.2(25) it clearly indicates only in Explanation to the definition of Sale Price that "The amount of duties **levied or leviable on goods under the Central Excise Act, 1944 (1 of 1944) or the Customs Act, 1962 (52 of 1962) or the Bombay Prohibition Act, 1949 (Bom. 25 of 1949),** shall be deemed to be part of the sale price of such goods, whether such duties are paid or payable by or on behalf of, the seller or the purchaser or any other person". Since, stamp duty is not covered under the said explanation it shall not form part of Contract Price. Further, Hon'ble Bombay High Court in the matter of M/s Shergal Autoriders P Ltd (43 VST 398) it is held that "In respect of insurance and registration charge collected in the invoices you are acting an agent on behalf of the customer. The same cannot be termed as amount of sale consideration hence it is not subjected to tax. Therefore,

		department has no right to charge tax from insurance and registration charge collected from the customers".
16.	Whether advances paid on maintenance, electricity charges will form part of contract price when it is included in agreement?	No the same shall not form part of contract price they are reimbursement in nature, hence cannot form part form of sale price for the purpose of levy.
17.	How the value of land shall be determined which is capable of using TDR?	Under the stamp valuation rule land capable of using TDR of Mumbai suburbs should valued 1.4 times of the Land ready reckoner rate.
18.	Whether the value of land cost will be reduced if the developer opts for composition scheme?	No reduction of land cost is available. He has to discharge the tax on total contract value.
19.	Whether service tax component will form part of the total contract value?	In my opinion service tax should not form part of contract value but the issue is sub-judice before Hon'ble Tribunal in the matter of M/s Nikhil Comforts, M/s Sujata Printers and M/s Abhijeet Interiors.
20.	Out of the total constructed area a portion is required to transfer to land owner, balance sold to land owner whether, total set-off allowable on purchases?	As earlier opined exchanged area is not subjected to levy and will not come under the VAT law, material used in those flats builder is not eligible for set-off.
21.	Development right obtained by builder against flat, whether tax payable on such flat?	No tax payable on such flat.
22.	In an undergoing construction flat an agreement is entered and tax collected and paid, subsequently agreement is cancelled and sold to another person whether, on second agreement also tax is payable?	No, tax is payable on the second agreement since involvement of goods is subject matter of levy. Once it is charged second time no tax is leviable.
23.	When an agreement is executed and tax is collected and paid, subsequently on cancellation of agreement and retained by the developer until full construction of flat and sold as immovable property, whether, amount paid	Yes, since there is no transfer of property in goods in the execution of works contract to others. It is not subjected to tax. Hence, you can claim refund as per the procedure. Even in L&T judgment in para 114 Hon'ble Supreme Court has observed that "***unless the agreement is terminated it remains works contract."***

	can be refundable?	Therefore, if the agreement is terminated it is not works contract and not subject to levy.
24.	Whether common area like parking space is sold is subjected to levy?	Hon'ble Bombay High Court has referred to MOFA in which flat includes a garage (S.2a-1 of MOFA Act). Hence, the value is subject matter of levy.
25.	The developers who are not registered yet what are the method of computation of liability in his hands?	The methods available u/r 58 or S.42(3) but he is not eligible to opt 1% composition u/s 42(3A).
26.	Whether, developer has to deduct TDS on sub-contact value?	In lieu of proviso to Section 31(1) no TDS is required to be deducted on the payment made to sub-contractor.

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