



# Issues in Real Estate

– **Keval Shah**

February 02, 2016

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# **Case Study 1: Pathan Brothers Limited**

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# Case Study 1

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- > **Builder selling under-construction flats to customers**
  - > **Over and above the agreed price for the flat value, the builder recovers various other charges such as:**
    - > **Legal Charges**
    - > **Documentation Charges**
    - > **Development Charges**
    - > **Water Charges**
  - > **Currently abatement is claimed on the entire value including additional charges**
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# Taxability of Service

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## Whether these are separate identifiable services

## Whether these are bundled services

- (2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.
- (3) Subject to the provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely:-
- (a) if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character;
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# Bundled service contd...

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(b) if various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax.

Explanation.- For the purposes of sub-section (3), the expression "bundled service" means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services."

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# Education Guide

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## **9.2.4 Manner of determining if the services are bundled in the ordinary course of business**

Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below –

- The perception of the consumer or the service receiver. If large number of service receivers of such bundle of services reasonably expect such services to be provided as a package then such a package could be treated as naturally bundled in the ordinary course of business.
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# Education Guide

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- Majority of service providers in a particular area of business provide similar bundle of services. For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines.
  - The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service.
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# Preferential Location

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## **MAHARASHTRA CHAMBER OF HOUSING INDUSTRY Vs Union of India 2012 (25) S.T.R. 305 (Bom.)**

The constitutional validity of service tax on preferential location was upheld.

**Mumbai Commissioner – F.NO.V/ST-I/Tech –  
II/463/11 dated 31.08.2012**

Floor rise – considered as naturally bundled service

Preferential location – no comments

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# **Case Study 2: Association of Person**

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# Case Study 2

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- > **Four flats owned by four sons which were inherited on death of father**
  - > **The walls between them were broken and a common agreement was entered with Bank**
  - > **Rent was received individually by each of the owners**
  - > **Service Tax department alleges that the same constitutes an AOP and accordingly exemption shall apply only once and not to all owners individually**
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# Some references

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- > The term 'associate' as defined in the Oxford Dictionary means to join in common purpose or to join in an action
  - > In CIT v. Indira Balkrishna (1960) 39 ITR 546 (SC), it was held that the definition of AOP hits combination of individuals who were engaged together in some joint enterprise but did not constitute partnership in law
  - > Also an element of joint venture for profit is necessary to constitute an AOP – CAIT v. Raja Ratan Gopal (1966) 59 ITR 728 (SC)
  - > Merely entering into a common agreement or the service receiver cannot be the determinative factor for deciding whether the individuals constitute an AOP/BOI
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# Judicial Precedents



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## **Commissioner of Central Excise, Nashik Vs Deoram Vishrambhai Patel 2015 – VIL – 501 – CESTAT – MUM – ST**

*Co-owners of the property cannot be considered as liable for payment of service tax jointly or severally – Since the rent was distributed equally among each of the appellants, it is evident that each of them received an amount below the exemption limit of eight lakhs and ten lakhs during the relevant period. The Appellants were, therefore, not liable to pay service tax on the amounts received by them during these two years by virtue of Notification No 06/2005 – ST dated 01.03.2005.*

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# Judicial Precedents



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- **Dineshchandra V. Patel Vs Commr. of Service Tax, Ahmedabad 2013 (31) S.T.R. 296 (Tri. - Ahmd.)**
  - **Vamini Nitinkumar Shah Vs Commr. of Service Tax, Ahmedabad 2013 (31) S.T.R. 239 (Tri. - Ahmd.)**
  - **Minaxiben J. Thakker Vs Commissioner of Service Tax, Ahmedabad 2013 (31) S.T.R. 329 (Tri. - Ahmd.)**
  - **Pankajbhai Champaklal Parekh Vs Commr. of S.T., Ahmedabad 2013 (31) S.T.R. 325 (Tri. - Ahmd.)**
  - **Chuniben S. Jadia Vs Commissioner of Service Tax, Ahmedabad 2013 (30) S.T.R. 479 (Tri. - Ahmd.)**
  - **Bhavna R. Shah Vs Commr. of Service Tax, Ahmedabad 2013 (30) S.T.R. 462 (Tri. - Ahmd)**
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# **Case Study 3: Maintenance Charges**

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# Case Study 3

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- > **Society is not yet formed**
- > **Maintenance charges paid by the builder**
- > **Subsequently recovered from the members**
- > **Applicability of service tax on the amounts so collected from the builder?**

# Judicial Precedents

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## **Kumar Beheray Rathi Vs CCE, Pune - III (89) E.L.T. 247 (S.C.):**

*They act only as trustee or as pure agent. When the cooperative society is formed even the deposit account is shifted to Flat Owner's Cooperative Society. We also note that this is a statutory obligation on the appellants in terms of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963*

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# **Case Study 4: Yuvraj Builders**

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# Case Study 4

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- > **Yuvraj Builders is engaged in construction services**
  - > **An application is already for obtaining an occupation certificate since the work is already complete**
  - > **Service Tax law provides for taxability in case of amounts received prior to CC**
  - > **Whether taxability arises?**
  - > **If yes, to what extent?**
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# Occupation Certificate

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An occupancy certificate (OC) is a document issued by a statutory body such as a local governing body or building department **certifying that the building is in compliance with the building rules and regulations of that area and meets the required health and safety standards. It also states that the building is not encroached upon and can be occupied by the applicants.**

After the construction of a building is completed, the builder or the buyer has to submit an OC application form to the concerned local body. The application form for obtaining OC should be submitted within 30 days of completing the construction.

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# Press Release...26<sup>th</sup> October 2015

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In order to resolve a long standing issue relating to levy of Service Tax on sale of flats/dwellings etc. after issue of occupancy certificate but before issue of completion certificate in areas under the jurisdiction of Municipal Corporation of Greater Mumbai i.e. Brihanmumbai Municipal Corporation (BMC), it has been conveyed to the Service Tax Authorities in Mumbai on Friday, 23rd October, 2015 that sale of flats/dwellings etc., where the entire consideration is received after issue of occupancy certificate by BMC, leading to a mere transfer of title in immovable property, falls outside the definition of "Service" provided in Section 65B (44) of the Finance Act, 1994, and is therefore, not taxable.

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# Agreement after certain period of completion

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## **Section 66E – Declared Service**

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority

## **Notification 26/2012 – ST dated 20.06.2012**

In line with the provision of section 66E of the Finance Act, 1994 and provides for abatement in respect of value of taxable services but does not define value

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# Decision of Apex Court

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## **Larsen & Toubro Limited & Anr Vs State of Karnataka & Anr (Civil Appeal No 8672 of 2013)**

If the developer has undertaken to build for the prospective , then to that extent, the contract is works contract and there is a deemed sale of material (goods) used in the construction of building.

The activity for construction is undertaken by the developer would be a 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 can only be made chargeable to sales tax**

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# **Case Study 5 : Sachin Construction Company**

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# Case Study 5

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- > **Construction services are provided to BMC**
  - > **The said services were exempted upto 31.03.15 and thereafter being made taxable**
  - > **Work completed upto 20% of the entire contract**
  - > **The milestone provides for billing only when 25% of the work is complete**
  - > **Whether service tax is payable on 5% value or entire 25% value.**
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# Taxable Event

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- > **Levy is on manufacture**
  - > **Collection on clearance of goods from the factory**
  - > **Manufacture or production of an 'excisable article' is the 'taxable event' for Central Excise, though duty can be levied and collected at a later stage for administrative convenience**
    - > Wallace Flour Mills decision – Exemption
    - > Vazir Sultan Tobacco decision – Excisable
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# Relevance to the current case

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## Whether this is a new levy or a change in rate

RULE 5. Payment of tax in case of new services. — Where a service is taxed for the first time, then, -

(a) no tax shall be payable to the extent the invoice has been issued and the payment received against such invoice before such service became taxable;

(b) no tax shall be payable if the payment has been received before the service becomes taxable and invoice has been issued within fourteen days of the date when the service is taxed for the first time.

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# **Case Study 6 : Sourav Housing**

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# Case Study 6

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- > **CENVAT Credit availed on various services consumed prior to completion of construction**
  - > **Service tax paid on all agreements sold prior to OC.**
  - > **Agreement sold after OC not liable for payment of service tax**
  - > **Whether reversal of CENVAT Credit required**
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# Whether exempted service

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**(e) “exempted service” means a -**

(1) taxable service which is exempt from the whole of the service tax leviable thereon; or

(2) service, on which no service tax is leviable under section 66B of the Finance Act; or

(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;

but shall not include a service which is exported in terms of rule 6A of the Service Tax Rules, 1994.

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# Whether input service

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**(I) “input service” means any service, -**

(i) used by a provider of output service for providing an output service;  
or.....

**Orion Appliances Ltd Vs CCE, Ahmedabad (2010 (5) TMI 85 (Tri)**

*In cases where an assessee is undertaking activities which cannot be called a service or which cannot be called manufacture that activity goes out of the purview of both Central Excise Act as well as Finance Act, 1994. Therefore, we have a situation where an assessee would not be eligible to take input service tax credit on an output which is neither a service nor excisable goods*

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# **Case Study 7 : Architect Service**

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# Case Study 7

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- > **Architect provides services of designing for construction of a bridge**
  - > **Construction of bridge exempted from payment of service tax**
  - > **Can architect claim exemption on the basis that since design is the essential element in construction?**
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# Prior to Negative list based taxation of service

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(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams

## **Representation by Jaiprakash Associates Circular No. 138/07/2011 – Service Tax**

The services received by the WCS provider from its subcontractors are distinctly classifiable under the respective sub clauses of section 65 (105) of the Finance Act by their description. When a descriptive sub clause is available for classification, the service cannot be classified under another sub clause which is generic in nature. As such, the services that are being provided by the sub contractors of WCS providers are classifiable under the respective heads and not under WCS.

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# After introduction of Negative list

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13 Services provided **by way of** construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

(a) a road, bridge.....

29 Services by the following persons in respective capacities –

(h) sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt

**Only Works contract services are exempted from payment of service tax**

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# **Case Study 8 : Gautam Builders**

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# Case Study 8

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- > **Gautum Builders have sold flats to various customers**
  - > **These flats are bought back from the customers and sold to fresh buyers**
  - > **Separate agreements are entered for purchase of flats by the builder**
  - > **Whether service tax is applicable on buy back transaction**
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# Taxability of Buyer to Builder Sale

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**Whether it is a transaction of transfer in title of immovable property**

***2.6.1 What is the significance of the phrase 'transfer of title'?***

***'Transfer of title' means change in ownership. Mere transfer of custody or possession over goods or immovable property where ownership is not transferred does not amount to transfer of title. For example giving the property on rent or goods for use on hire would not involve a transfer of title***

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# Taxability of Buyer to Builder Sale

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**6.2.8 If the person who has entered into a contract with the builder for a flat for which payments are to be made in 12 installments depending on the stage of construction and the person transfers his interest in the flat to a buyer after paying 7 installments, would such transfer be an activity chargeable to service tax?**

Such transfer does not fall in this declared service entry as the said person is not providing any construction service. In any case transfer of such an interest would be transfer of a benefit to arise out of land which as per the definition of immovable property given in the General Clauses Act, 1897 is part of immovable property. Such transfer would therefore be outside the ambit of 'service' being a transfer of title in immovable property

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# Taxability of builder to Fresh buyer

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## **Section 66E – Declared Service**

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority

**Possibility of double taxation – Supreme court decision of Larsen & Toubro Limited & Anr Vs State of Karnataka & Anr (Civil Appeal No 8672 of 2013)**

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# Taxability of builder to Fresh buyer

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**6.2.3 When a certain number of flats are given by the builder/developer to a land owner in a collaborative agreement to construct, in lieu of the land or development rights transferred, will such transferee be required to pay service tax on further sale of flats to customers?**

Yes. The service tax will be required to be paid by such transferee if any consideration is received by him from any person before the receipt of completion certificate.

# Provision of Rule 6(3)

(3) Where an assessee has issued an invoice, or received any payment, against a service to be provided which is **not so provided by him either wholly or partially for any reason**, or where the amount of **invoice is renegotiated due to deficient provision of service**, or any terms contained in a contract the assessee may take the credit of such excess service tax paid by him, if the assessee,

(a) has refunded the payment or part thereof, so received along with the service tax payable thereon for the service to be provided by him to the person from whom it was received;

(b) has issued a credit note for the value of the service tax not so provided to the person to whom such an invoice had been issued.

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# **Case Study 9 : Retention Money**

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# Case Study 9

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- > **Builder avails services of contractors**
  - > **Payment made to contractors after retaining certain portion of the invoice**
  - > **The retention money is paid after conclusion of the project**
  - > **How the CENVAT Credit needs to be claimed keeping in view the provision of Rule 4(7) of CENVAT Credit Rules, 2004.**
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# Circular No 122/03/2010

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(b) In the cases where the receiver of service reduces the amount mentioned in the invoice/bill/challan and makes discounted payment, then it should be taken as final payment towards the provision of service. The mere fact that finally settled amount is less than the amount shown in the invoice does not alter the fact that service charges have been paid and thus the service receiver is entitled to take credit provided he has also paid the amount of service tax, (whether proportionately reduced or the original amount) to the service provider. The invoice would in fact stand amended to that extent. The credit taken would be equivalent to the amount that is paid as service tax. However, in case of subsequent refund or extra payment of service tax, the credit would also be altered accordingly

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# CCE Vs Hindustan Zinc Limited

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- > **The CENVAT credit of full invoice value is rightly availed by the taxpayer for the following reason:**
    - > Rule 4(7) of CENVAT Credit Rules, 2004 have been framed to prevent a situation where on the basis of invoice issued by a service provider, the service recipient takes the CENVAT Credit, even though the service provider has not paid the service tax
    - > Since, in the present case there is no dispute that applicable service tax has been paid by the service provider on the full value even though he has not received full payment from the service receiver
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# **Case Study 10 : Valuation**

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# Declared Services...66D

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*(b) **construction of a complex**, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, **except where the entire consideration is received after issuance of completion-certificate** by the competent authority*

*(h) service portion in the **execution of a works contract***

**Whether more specific would prevail over the general?**

**Whether service tax payable only after entering into agreement?**

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# Valuation & Credits

12. Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly, except where entire consideration is received after issuance of completion certificate by the competent authority,-	Taxable Portion of Service	(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004
(a) for a residential unit satisfying both the following conditions, namely :-	25	(ii) The value of land is included in the amount charged from the service receiver
(i) the carpet area of the unit is less than 2000 square feet; and		
(ii) the amount charged for the unit is less than rupees one crore		
(b) for other than the (a) above.	30	

# Works Contract Valuation

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Nature of Works Contract	Presumptive Service Value
i) execution of original works	40% of the <b><i>total amount charged</i></b>
ii) Other than Original Works	70% of the <b><i>total amount charged</i></b>

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# Judicial Precedents

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## ***Mathuram Agrawal v. State of M.P., (1999) 8 SCC 667***

*The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter*

# Judicial Precedents

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## ***Govind Saran Ganga Saran v. CST, 1985 Supp SCC 205***

*The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity*

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# Useful Reference

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## ***Notification 11/2012 – ST dated 17.03.2012***

*(a) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent. of the total amount charged for the works contract:*

*Provided that where the gross amount charged includes the value of the land, in respect of the service provided by way of clause (8) of section 66E of the Act, service tax shall be payable on twenty five per cent of the total amount including such gross amount;*

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**THANK YOU !**

# **Consulting**Edge

204, Avior,  
Nirmal Galaxy,  
Opp. Johnson & Johnson Ltd.,  
Mulund West,  
Mumbai 400 080.

**Email :** keval@consultingedge.in

**Mob:** 98674 62965

**Office No:** 66925601/02