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Chief Executive Officer

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June 24, 2015

Sub.: Payment of service tax in cases where the entire consideration for sale of a complex, building, civil structure or a part thereof, including a complex or building is received from the buyer after issuance of a completion certificate by the licensed surveyor etc./occupancy or part occupancy certificate by the Commissioner of the Municipal Corporation of Greater Mumbai in respect of the premises being sold to such buyer.

Dear

1. The Maharashtra Chamber of Housing Industry is the body of Real Estate Developers in Mumbai and MMR and is making the present representation with regard to the difficulties being faced by its members and other developers of real estate/ builders with regard to the non application of the exceptions/exemptions with regard to payment of service tax as contained in Section 66E (b) of the Finance Act, 2012 and/or the mis-interpretation thereof by the Department of Service Tax. Such interpretation have resulted in the demand for service tax in respect of sales of a complex, building, civil structure or a part thereof, including a complex or building although the entire consideration for sale of the concerned premises is made by the concerned buyer after the concerned premises have been completed as inter alia demonstrated by the issuance of a completion certificate by the licensed surveyor/ architect certifying that the concerned premises have been completed and the further issuance of a part occupancy certificate/ occupancy certificate by the Commissioner, Municipal Corporation of Greater Mumbai certifying that the concerned premises are complete and are fit for occupation.

2. The said section 66E of the Finance Act, 2012 defined "declared services" for the purposes of service tax. Clause (b) of the said section 66E of the Finance Act, 2012 pertains to construction of a complex, building, civil structure or a part thereof, including a complex or building and states that the same shall be a declared service when they are intended for sale to a buyer, wholly or partly save and except where the entire consideration is received after issuance of a completion certificate by the competent authority. We are for the purpose of convenience setting out below the said Section 66E(b) of the Finance Act, 2012 which is as under:

"66E. The following shall constitute declared services, namely:-

*.....
(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."*

Explanation - For the purpose of this clause,

(1) the expression 'competent authority' means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following namely:-

- (A) architect registered with the Council of Architecture constituted under the Architects Act, 1972; or
 - (B) chartered engineer registered with the Institution of Engineers (India); or
 - (C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;
- (II) *the expression construction includes additions, alterations, replacements or remodeling of any existing civil structure."*

The said provision came into effect from 1st July, 2012.

3. An analysis of the said Section 66E(b) discloses that service tax is payable on the 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. However the said Section carves out an exception namely in cases where the entire consideration is received after issuance of a completion certificate by the competent authority. The rationale for excluding transactions wherein the entire consideration is received from the prospective buyers after the grant of the completion certificate is that such sales are sales of immovable property since the sales take place and the entire consideration is received after the completion of the concerned premises. The proviso that a complex, building, civil structure or a part thereof including a complex or building shall not constitute a declared service and as a consequence thereof be exempt from payment of service tax thereon where the entire consideration is received after issuance of a completion certificate is thus apposite and makes it clear that the said exemption is in respect of the entire building or a part thereof as the case may be. The said rationale is also supported by the following judgements of the Hon'ble Supreme Court which deal with the topic of Works Contract Tax but the principles laid down wherein are also applicable in the matter of service tax.

- (a) The Supreme court has vide its judgement dated 26th September, 2013 in the case of M/s. Larsen & Toubro Limited & Anr. Vs. State of Karnataka & Anr. held in paragraph 115 that *"It may, however, be clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government."* In common parlance, it means that only when a prospective buyer is identified and a contract by whatever name is entered into with him and work carried out on his behalf that the consideration received for the work done would attract tax by the State Government and not otherwise.
- (b) In another decision of the Supreme Court of India, dated 5th May, 2005 in the case of M/s. K. Raheja Development Corporation Vs. State of Karnataka (2005-TIOL-77-SC-CT) in para 7 it was held that *"It must be clarified that if the agreement is entered into after the flat or unit is already constructed, then there would be no works contract. But so long as the agreement is entered into before the construction is complete, it would be a works contract."*

4. The competent authority for the purposes of the said Section 66E of the Finance Act, 2012 as specified therein is:

- (i) the Government or any authority authorized to issue completion certificate under any law for the time being in force; and

- (ii) where there is no requirement for issuance of a completion certificate by the Government or authority referred to in (i) above, any of the following:
- (A) architect registered with the Council of Architecture constituted under the Architects Act, 1972; or
 - (B) chartered engineer registered with the Institution of Engineers (India); or
 - (C) licensed surveyor of the respective local body of the city or town or village or development or planning authority.

The purport and purpose of the said exception and the said explanation is clear, that no service tax is payable in the case of premises which are completed prior to receipt of the sale consideration from the prospective buyers.

5. For a proper understanding of the said exception and as to who is the competent authority for the purposes of the said exception it is necessary in the first instance to ascertain whether there is a requirement (under the law) for issuance of a completion certificate by the Government or authority in respect of a complex, building, civil structure or a part thereof in terms of the said Section 66E(b). We may at the outset mention that the provisions of the Finance Act, 2012 are applicable throughout the country and it is for the said precise reason that Clause (1) (A), (1) (B) and Clause (1) (C) to the Explanation to 66E(b) of the Finance Act, 2012 have been included in the said Section to provide for the different provisions which apply to completion of buildings in various parts of the country. This is more so with regard to construction activities in Greater Mumbai which are governed by a different set of rules (since while there is only provision for issuance of a completion certificate before a building can be occupied in most other parts of the country, the Regulations applicable in the case of Greater Mumbai require obtaining instead of an occupancy certificate / part occupancy certificate before a building can be occupied). The words and terms used in the said Section 66E(b) are to be interpreted in a manner which would give effect to the intention behind the said exception and not in a restrictive manner which would defeat the very purpose of the said Exemption and lead to a situation where service tax is sought to be levied on completed buildings (whether sold in part or in entirety). Since the present representation is restricted to the applicability of the said Exception to the sale to a buyer of a complex, building, civil structure or a part thereof in Greater Mumbai, we are only setting out hereunder and dealing with the statutory provisions as applicable to Greater Mumbai.

6. Construction activity in Greater Mumbai is governed by (a) the Development Control Regulations for Greater Mumbai, 1991 which have been sanctioned by the Government of Maharashtra under the provisions of the Maharashtra Regional and Town Planning Act, 1966 and (b) by the Mumbai Municipal Corporation Act, 1888.

7. As regards a "completion certificate" the provisions in respect thereof are contained in Regulation 6(6) of the Development Control Regulations for Greater Mumbai, 1991 ("D.C. Regulations") and Section 353A of the Mumbai Municipal Corporation Act, 1888 ("the BMC Act").

The said Regulation 6(6) is as under:

"Completion certificate: The owner through his licensed surveyor/ engineer/structural engineer/ supervisor or his architect who has supervised the construction shall furnish a building completion certificate to the Commissioner in the form in Appendix XX. These certificates shall be accompanied by three sets of plans of the completed development. The Commissioner shall inspect the work and after satisfying himself that there is no deviation from the

approved plans, issue a certificate of acceptance of the completion of the work in the form in Appendix XXI."

The term "Commissioner" in the said Regulation refers to the Municipal Commissioner for Greater Mumbai and includes an additional Municipal Commissioner and an Acting Commissioner vide Regulation 2(2) of the D.C. Regulations and Section 3(d) of the BMC Act.

8. It would thus be seen that the D.C. Regulations do not have provision for or requirement of issuance of a completion certificate by the competent authority. The D.C. Regulations instead require that the owner shall through his licensed surveyor/ engineer/ structural engineer/ supervisor or architect, who has supervised the construction, furnish a building completion certificate to the Commissioner. It is the licensed surveyor/ engineer/ structural engineer/ supervisor or architect who is to issue the completion certificate. The Commissioner merely issues a certificate of acceptance of the completion of the work after inspection thereof. It is, in the circumstances, submitted that in the case of construction in Greater Mumbai it is the proviso to the explanation to Section 66E(b) of the Finance Act, 2012 which is applicable and no service tax would be payable in cases where the entire consideration is received after issuance of a completion certificate by any of the said three functionaries named therein i.e. (a) architect registered with the Council of Architecture constituted under the Architects Act, 1972; or (b) chartered engineer registered with the Institution of Engineers (India); or (c) licensed surveyor of the respective local body of the city or town or village or development or planning authority.

9. Section 353A of the BMC Act which has been referred to in Form in Appendix XX of the D.C. Regulations has provisions similar to those of the D.C. Regulations and provides that a licensed surveyor or person approved by the Commissioner shall after the completion of the erection of such building or the execution of such work issue a certificate in the form of Schedule T and send or cause to be delivered or sent to the Commissioner a notice in writing of such completion accompanied by the said certificate. The Commissioner may after receipt of such notice and inspection of work give permission for occupation in such building or part thereof.

The said Section 353A of the BMC Act is reproduced below for easy reference:

"(1) Every person who employs a licensed surveyor or person approved by the Commissioner to erect a building or execute any such work as is described in section 342 shall, within one month after the completion of the erection of such building or the execution of such work, deliver or send or cause to be delivered or sent to the Commissioner at his office, notice in writing of such completion, accompanied by a certificate in the form of Schedule T signed by the person employed under section 344A, who is hereby required immediately upon completion of the work and upon demand by the person employing him to sign and give such certificate to such person, and shall give to the Commissioner all necessary facilities for the inspection of such building or of such work:

Provided that-

such inspection shall be commenced within seven days from the date of receipt of the notice of completion, and

the Commissioner may, within seven days from the date of commencement of such inspection, by written intimation addressed to the person from whom the notice of completion was

received, and delivered at his address as stated in such notice, or, in the absence of such address, affixed to a conspicuous part of the building to which such notice relates-

give permission for the occupation of such building or for the use of the building or part thereof affected by such work, or

refuse such permission in case such building has been erected or such work executed so as to contravene any provision of this Act or of the bye-laws.

(2) *No person shall occupy or permit to be occupied any such building, or use or permit to be used the building or part thereof affected by any such work, until-*

the permission referred to in proviso (b) to sub-section (1) has been received, or the Commissioner has failed for twenty-one days after receipt of the notice of completion to intimate as aforesaid his refusal of the said permission."

The Form of Schedule T of the BMC Act, to be issued by the licensed surveyor etc., is as follows:-

BUILDING COMPLETION CERTIFICATE

I do hereby certify that the following building work (insert full particulars of the work) has been supervised by me and has been completed to my satisfaction; that the workmanship and the whole of the materials used are good; and that no provision of the Act or the bye-laws and no requisitions made, conditions prescribed or order issued thereunder, has been transgressed in the course of the work.

10. It is thus clear from a reading of the said Section 353A of the BMC Act that the said Act also does not have any requirement for issuance of a completion certificate by the Commissioner; and that the certificate is to be given by the licensed surveyor etc. of the builder.

11. In the aforesaid circumstances, it is submitted, a completion certificate for a complex, building, civil structure or a part thereof issued by (A) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or (B) a chartered engineer registered with the Institution of Engineers (India); or (C) a licensed surveyor of the respective local body of the city or town or village or development or planning authority is sufficient to bring sales made to a buyer, where the entire sale consideration is paid by the buyer to the builder/ developer after issuance of such completion certificate, out of the ambit of service tax and that no service tax is payable in respect of such sales.

12. We may also point out, as stated above, that unlike many other parts of the country where the "completion certificate" issued by the Government or concerned authority is the only certificate required to put a building to use or permitted to be occupied, as far as Greater Mumbai is concerned it is essential to obtain what is termed as an occupation/ occupancy/ part occupancy certificate prior to permitting any buyer to occupy any building or part thereof. The said provision is contained in sub-section 2 of Section 353A of the BMC Act which states that no person is permitted to occupy any building until the Commissioner gives permission for the occupation of such building as per proviso (b) to sub-section 1 of the said Section 353A which has been referred to and reproduced hereinabove. The said permission for occupation of a building is governed by Regulation 6(7) and Regulation 6(8)

of the D.C. Regulations which relate to issue of an occupancy certificate or a part occupancy certificate. The said Regulations are reproduced hereunder for easy reference.

Regulation 6(7) :

Occupancy certificate: On receipt of the acceptance of completion certificate in the form in Appendix XXI, the owner, through his licensed surveyor/engineer/structural engineer/supervisor or his architect shall submit to the Commissioner a development completion certificate in the form in Appendix XVIII with three copies of the completion plan, one of which shall be cloth mounted for record. The Commissioner may inspect the work and after satisfying himself that there is no deviation from the sanctioned plans, issue an occupancy certificate in the form in Appendix XXII or refuse to sanction the occupancy certificate within 21 days from the date of receipt of the said completion certificate, failing which the work shall be deemed to have been approved for occupation, provided the construction conforms to the sanctioned plans. One set of plans, certified by the Commissioner as the completed plans, shall be returned to the owner along with the occupancy certificate. Where the occupancy certificate is refused or rejected, the reasons for refusal or rejection shall be given in intimation of the rejection or refusal.

Regulation 6(8) :

Part occupancy certificate: When requested by the holder of the development permission, the Commissioner may issue a part occupancy certificate for a building or part thereof, before completion of the entire work as per the development permission, provided sufficient precautionary measures are taken by the holder to ensure public safety and health. The occupancy certificate shall be subject to the owner's indemnifying the Commissioner in the form in Appendix XXIII.

The said MMC Act is a substantive legislation whereas the said DC Regulations is a regulation sanctioned under sub-section (l) of Section 31 of the Maharashtra Regional and Town Planning Act, 1988 (hereinafter referred to as "the said MRTTP Act. The said MRTTP Act is another substantive legislation. These legislations lay down the provisions and mechanism for grant of the Completion Certificate. Hence they need to be read together. Hence the completion certificate for the purposes of 'service tax' referred to under Section 66E(b) of the said Act is a certificate as contemplated in the said MMC Act read with the said DC Regulations.

The said Section 353A of the BMC Act reproduced hereinabove has similar provisions to the issuance of an occupation certificate.

13. The said permission for occupation of a building viz. issuance of an occupancy certificate/ part occupancy certificate by the Commissioner is as per the provisions of Regulation 6(6) read with Regulations 6(7) or 6(8) of the D.C. Regulations and Section 353A of the BMC Act to be given only after the building has been completed. It may be noted that the occupancy certificate/ part-occupancy certificate is issued by the Commissioner only after he has satisfied himself that the premises in question are not only complete but also that they are fit for occupation. The said certificates are to be issued subsequent to acceptance of the completion certificate submitted by the licensed surveyor/ architect etc. to the Commissioner and the issuance of the occupancy certificate/ part-occupancy certificate for the concerned premises. The very fact that the Commissioner has issued an occupancy certificate/ part occupancy certificate permitting a building/ a part of a building to be occupied in terms of Regulation 6(7) and 6(8) of the D.C. Regulations and Section 353A of the BMC Act itself postulates that the building has been completed.

14. It may in the above context be noted that construction of huge multi-storeyed buildings is the norm in Greater Mumbai. The Builder in the circumstances at time completes the construction of the entire building as far as the structural aspects thereof are concerned and thereafter carries out the finishing works such as tiling, painting, etc. floor by floor. As a consequence quite often the said finishing works are initially carried out on the lower floors of the building and the builder furnishes a building completion certificate issued by the licensed surveyor/ architect in respect of the floors where the finishing works have been carried out for the purpose of obtaining an occupancy certificate/ part occupancy certificate from the Commissioner as per the provisions of Regulation 6(7) or Regulation 6(8) of the D.C. Regulations. The builder after issuance of the occupancy certificate/ part occupancy certificate from the Commissioner is in a position to hand over possession of the concerned premises to the buyer. The finishing work is similarly carried out on the other floors of the building and a similar process is adopted in respect thereof viz. furnishing of the completion certificate by the licensed surveyor/ architect in respect of the said floors where the finishing work has been completed for the purpose of obtaining a part occupancy certificate in respect thereof and handing over of possession of the said premises to the concerned buyers. Although the occupancy certificate is obtained in part, the structure of the entire building and its structural aspect are completed prior thereto.

15. The Commissioner, as per the D.C. Regulations and the BMC Act is entitled to issue a part occupancy certificate or a full occupancy certificate in respect of the said completed premises as the case may be. However it is to be noted that the Commissioner does not issue separate occupancy certificate for the entire building once he has issued a part occupancy certificate for a part of the building but only issues further part occupancy certificates for other portions of the said building as and when they are completed and fit for occupation and that the part occupancy certificate is final in all respects with regard to the said completion of the premises and their being fit for occupation. The said permission is as per the format of Appendix XXII of the D.C. Regulations.

16. It is for the reasons aforesaid submitted that no service tax is payable in cases where the entire sale consideration for the premises under sale is received by the builder after issuance of a completion certificate in respect thereof by the licensed surveyor/ architect in terms of the aforesaid Regulations of the D.C. Regulations and the aforesaid Section of the BMC Act read with Section 66E(b) of the Finance Act, 2012 which specifically excludes from "declared services" construction where the entire consideration is received after issuance of completion certificate by the competent authority. This would be more so in cases where the entire sale consideration for the premises under sale is received by the builder only after issuance of occupancy certificate or part occupancy certificate by the Commissioner of the Municipal Corporation in respect thereof.

17. The Department of Service Tax has however, contrary to the said specific provision contained in Section 66E(b) of the Finance Act, 2012 been demanding that service tax be paid even in respect of the sales where the consideration thereof is received after completion of the concerned premises signified by (a) issuance of the completion certificate by the Competent Authority specified in Clause (1)(A), (1)(B) or (1)(C) of the explanation to the said Section 66E(b) in respect of the premises being sold or (b) issuance of the certificate by the Competent Authority specified in Clause (1) of the explanation to the said Section 66E(b) by way of an "occupation certificate" or "part occupation certificate" in respect of the premises being sold since it is the contention of the Department that the exemption from payment of service tax in terms of Section 66E(b) of the Finance Act, 2012 is applicable only

upon a "completion certificate" being issued by the Commissioner of the Municipal Corporation. The said contention and view of the Department is, it is submitted, patently incorrect.

18. We are in the circumstances making the present representation to your Honour with a request that your officers and staff be directed not to demand or insist on service tax in respect of consideration which has been received/ is received by the real estate developer/ builder from the prospective buyers after the completion of the premises sold to them as signified by (i) issuance of the completion certificate by the concerned Architect, Chartered Engineer or Licensed Surveyor as per the D. C. Regulation 6(6) and (ii) the issuance of an occupation/ part occupation certificate by the Commissioner in respect thereof for the reasons stated hereinabove and which are recapitulated hereinabove.

- (a) As per Section 66E(b) of the Finance Act, 2012 the construction of a complex, building, civil structure or part thereof shall not constitute a declared service and no service tax shall be payable where the entire consideration for sale to a buyer is received after (i) issuance of a completion certificate by the Government or any authority authorized to issue a completion certificate under any law for the time being in force; or (ii) where there is no requirement of a completion certificate from the competent authority by issuance of a completion certificate by (a) architect registered with the Council of Architecture constituted under the Architects Act, 1972; or (b) chartered engineer registered with the Institution of Engineers (India); or (c) licensed surveyor of the respective local body of the city or town or village or development or planning authority.
- (b) Construction activities in Greater Mumbai are governed by the aforesaid provisions of the D.C. Regulations and the BMC Act.
- (c) There is no requirement or provision either under the D.C. Regulations or the BMC Act for issuance of a "completion certificate" from the Government or other authority with regard to construction in Greater Mumbai.
- (d) What is required under the D.C. Regulations and the BMC Act is that an occupation certificate should be obtained from the Commissioner of the Municipal Corporation, prior to any person being put into possession of any building or part thereof.
- (e) It is essential in order to obtain an occupation certificate from the Commissioner of the Municipal Corporation to furnish to him a completion certificate issued by the licensed surveyor/ architect.
- (f) The Commissioner of the Municipal Corporation after being furnished with a completion certificate issued by the licensed surveyor/ architect inspects the concerned building/ part thereof and on being satisfied that it is complete and fit for occupation issues an occupation certificate or part occupation certificate as the case may be.
- (g) There is thus a two fold procedure laid down by the D.C. Regulations and the BMC Act for ensuring that a building or part thereof is complete and fit for occupation viz. (i) furnishing of a completion certificate by the licensed surveyor/ architect and (ii) issuance of an occupancy certificate/ part occupancy certificate by the Commissioner of the Municipal Corporation after he has inspected the concerned

building or part thereof and satisfied himself that the same is complete and fit for occupation.

- (h) The certificate issued by the licensed surveyor/ architect certifying that the building is complete is the only certificate required under the Explanation to Section 66E(b) of the Finance Act, 2012 for exemption of payment of service tax on sales in respect of the premise for which the said certificate has been issued.
- (i) In any view of the matter no service tax is payable where the entire sale consideration in respect of a building or part thereof is received by the builder after the licensed surveyor/ architect has issued a completion certificate in terms of the D.C. Regulations and the BMC Act for the said building or part thereof or where the Commissioner of the Municipal Corporation has issued occupancy certificate or part occupancy certificate for the building or part thereof.
- (j) Insistence by the Department on a "completion certificate" in a pedantic manner is contrary to the very purpose of the explanation or exemption to payment of service tax incorporated in Section 66E(b) of the Finance Act, 2012. It has to be appreciated that the Finance Act, 2012 applies to the entire country and that the term "completion certificate" as used therein is used in a generic manner and it is not proper to go only by the nomenclature of a certificate - it is the contents and purport of the certificate which have to be taken into consideration.

19. As per the provisions of Service Tax, 'Completion' is 'Completion of Work'. 'Completion of Work' could be either a complex or a building or part of civil structure. Occupation Certificate is an advanced stage of completion. Occupation Certificate is right to occupy as the work is completed. Completion is in the form of Appendix - XX specified by D.C. Rules, 1981, whose format is already submitted in our earlier submission.

20. In all the aforesaid circumstances the insistence by your Department for issuance of a "completion certificate" from the Commissioner prior to receipt by the builder of the sale consideration from the buyer in order to enable a builder/ buyer to avail of the exemption from payment of service tax in respect of the sale consideration paid by the buyer from service tax and its refusal to accept the completion certificate issued by the licensed surveyor/ architect and/or the occupancy certificate/ part occupancy certificate issued by the Commissioner of the Municipal Corporation for the purpose of such exemption is not proper and is against both the letter and spirit of the Section 66E(b) of the Finance Act, 2012.

21. Therefore, it is our submission that :

- (i) issuance of the completion certificate by the licensed surveyor/ architect in respect of the concerned premises is sufficient to exempt the payment of service tax on consideration received after issuance of such completion certificate and
- (ii) Issuance of the part occupancy/ occupancy certificate by the Commissioner in respect of the concerned premises is also sufficient to exempt the payment of service tax on consideration received after issuance of such occupancy certificate.
- (iii) Service tax is not leviable on buildings/ part of a building where the entire consideration is received by the real estate developer/ builder from the buyer after issuance of the said completion certificate and/or the occupancy certificate - part or full.

The service tax being a tax law imposing liability on the subject will have to be strictly construed. The subject is not to be taxed, unless the words of the taxing statute unambiguously impose the tax. The subject is not to be taxed without clear words for that purpose. The Courts have disregarded the rule of strict literal construction. If such interpretation or construction leads to an absurd result or defeats the purpose of the Act, it won't hold good legally.

We in the circumstance request you to issue directions to your officers and staff not to demand service tax in respect of sale consideration received from prospective buyers after issuance of the said completion certificate by the licensed surveyor/ architect and/or the occupancy certificate - part or full and to drop any proceedings that they may have been initiated/ proposed to initiate therefore.

We may be kindly called for a discussion/ hearing for any clarification that may be required from our part in the matter.

Yours



(S. S. Hussain)

To,
Shri R. Sekar (I.R.S.)
Principal Commissioner
Service Tax - II
Government of India
Mumbai

Dharmesh Jain
President

Nainesh Shah
Secretary