

**SURESH KUMAR BANSAL & ANUJ
GOYAL & ORS.**

VS

UNION OF INDIA

2016 (6)- TMI 192- DELHI HC

BCA Suburban Study Circle

STATUTORY BACKGROUND

Construction of residential complex services & Preferential location services

Section 65(105)(zzzh)- Construction of residential complex services (16 June 2005)

Services provided to any person, by any other person, in relation to construction of complex

1 July 2010- Explanation-

For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer

Section 65(105)(zzzzu)- Preferential location services (1 July 2010)

service provided to a buyer, by a builder of a residential complex, or a commercial complex, or any other person authorised by such builder, for providing preferential location or development of such complex but does not include services covered under sub-clauses (zzg), (zzq), (zzzh) and in relation to parking place.

Explanation.- the purposes of this sub-clause, "preferential location" means any location having extra advantage which attracts extra payment over and above the basic sale price;

FACTS OF THE CASE

FACTS

- *The Petitioners are individuals who have entered into separate agreements with a builder to buy under construction flats in a multistorey group housing project*
- *The builder has recovered consideration along with Service Tax towards sale of under-construction flat*
- *In addition to the consideration for the flats, amount was also recovered towards preferential location charges along with Service Tax*

CONTENTIONS

CONTENTION ON LEGISLATIVE COMPETENCE

Contention of Assessee

The agreements entered into by them with the builder are for purchase of immovable property and the Parliament does not have the legislative competence to levy service tax on such transaction. Explanation introduced by virtue of Finance Act 2010 as being ultra vires of the Constitution of India.

Contention of Department

*Challenge to the explanation to Section 65(105)(zzzh) and Section 65(105)(zzzzu) introduced by virtue of the Finance Act, 2010 was rejected and legislative amendment introduced by the Finance Act, 2010, namely, insertion of explanation to Section 65(105)(zzzh) and clause (zzzzu), were valid and enforceable. (**Confederation of Real Estate Developers' Association and Anr. v. Union of India & Ors** - Karnataka HC- 12th December, 2012 in W.P.(C) 2405051/2010 and **MCHI v. Union of India and Ors** - Bombay HC -20th January, 2012 in W.P.(C) 1456/2010)*

CONTENTION ON MECHANISM TO LEVY TAX

Contention of Assessee

The power of Parliament to levy tax would be limited to only on the service component after excluding the value of goods as well as the value of land from such contracts.

Since neither the Act nor the rules made thereunder provide any machinery provisions for ascertaining the service component of such composite contracts, the levy of service tax must fail

Reliance on CCE vs L&T- 3 elements of taxation- Subject of tax, person who is liable to tax and rate/ measure of tax

Contention of Department

Assessee is entitled to abatement to the extent of 75% and only 25% of the gross amount charged by a builder from a flat buyer is charged to service tax. This indicated that the value of the immovable property as well as the property in goods incorporated in the works would stand excluded

CONTENTION ON PREFERENTIAL LOCATION

Contention of Assessee

There was no service element in preferential location charges which were levied by a builder and the same related only to the location of the immovable property and, therefore, such charges were not exigible to service tax.

Contention of Department

In case of preferential location charges, the entire amount charged by a developer is for value addition and, therefore, the gross amount charged for such services is chargeable to service tax under Section 66 read with Section 65(105)(zzzzu) of the Act.

ISSUES BEFORE HON'BLE HIGH COURT

ISSUES BEFORE HC

- *Whether the explanation to Section 65(105)(zzzh) of the Act introduced by virtue of Finance Act 2010 as being ultra vires of the Constitution of India?*
- *Even if levy is constitutionally valid, would the levy fail in absence of valuation mechanism?*
- *Whether Service Tax charged on preferential location charges is valid?*

OBSERVATIONS OF HIGH COURT

ON LEGISLATIVE COMPETENCE

- *We do not find any merit in the contention that the imposition of service tax in relation to a transaction between a developer of a complex and a prospective buyer impinges on the legislative field reserved for the States under Entry 49 of List II of the Seventh Schedule to the Constitution of India.*
- *While the legislative competence of the Parliament to tax the element of service involved cannot be disputed but the levy itself would fail, if it does not provide for a mechanism to ascertain the value of the services component which is the subject of the levy.*

ON MACHINERY PROVISION

- *Section 65(86) of the Act defines the expression "prescribed" to mean as " 'prescribed' by rules made under this Chapter". Thus, by virtue of Section 67(1)(iii) of the Act, in cases where the consideration for provision of services is not ascertainable, the same was to be determined in accordance with the Rules made under the Act.*
- *For the purposes of ascertaining the value of services, the Central Government has made Service Tax (Determination of Value) Rules 2006 (hereafter 'the Rules'). However none of the rules provides for any machinery for ascertaining the value of services involved in relation to construction of a complex.*
- ***Neither the Act nor the Rules framed therein provide for a machinery provision for excluding all components other than service components for ascertaining the measure of service tax. The abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract.***

ON PREFERENTIAL LOCATION CHARGES

- *We do not find any merit in the contention that there is no element of service involved in the preferential location charges levied by a builder. We are unable to accept that such charges relate solely to the location of land. Thus, preferential location charges are charged by the builder based on the preferences of its customers.*
- *Such charges may be attributable to the preferences of a customer in relation to the directions in which a flat is constructed; the floor on which it is located; the views from the unit; accessibility to other facilities provide in the complex etc.*
- *Such charges cannot be traced directly to the value of any goods or value of land but are as a result of the development of the complex as a whole and the position of a particular unit in the context of the complex.*

ON REFUND OF AMOUNT ALREADY DEPOSITED

- *The concerned officer shall examine whether the builder has collected any amount as service tax from the Petitioners for taxable service as defined in Section 65(105)(zzzh) of the Act and has deposited the same with the respondent authorities. Any such amount deposited shall be refunded to the Petitioners with interest at the rate of 6% from the date of deposit till the date of refund*

ANALYSIS OF THE RULING

WHETHER BUILDER CAN FILE REFUND CLAIM?

CCE vs Eldeco Housing

(2016-7-TMI-52-
CESTAT-Allahbad)

- *Neither the doctrine of unjust enrichment is attracted with respect to the refund nor the issue of time bar is attracted. As it has been clarified by the CBEC that service tax was not payable on the transactions of the appellant with respect to construction and sale of flats during the financial year 2006-07, the deposit of tax made by the assessee takes the character of deposit, and is not tax. The doctrine of unjust enrichment is attracted only in the case of deposit of tax*
- *I find that although the assessee is not entitled to refund but it is customers of the assessee, who purchased flats, are entitled to the refund*
- *The impugned order is set aside and is remanded back to the adjudicating authority, who shall examine the whereabouts of the person's who deposited the service tax to the appellant, for the purchase of flats, and after such verification having been carried out, shall grant refund to the buyers of the flats*

WHETHER CUSTOMER CAN FILE REFUND AND IF YES WHERE?

**Jindal Steel &
Power Ltd**
(2015-64
Taxmann 383-
DEL-CESTAT)

Appellant who is recipient of a service (which is admittedly not taxable) files a claim for refund within the prescribed period of limitation, it is entitled to do so before the Commissionerate under whose jurisdiction it pursues its taxable activities or before the Commissionerate having authority over the provider of the service.

**Indian
Farmers
Fertilizers Co-
op**
(2016-TIOL-938-
HC-ALL)

We further find that the Tribunal committed a manifest error in nonsuiting the appellant's claim on the sole ground that the appellant was only a buyer and, therefore, was not entitled to claim a refund of the duty. This finding is patently perverse. Section 11B of the Act provides that any person can make an application for refund of duty

**Chambal
Fertilizers &
Chemicals**
(2016-TIOL-1136-
CESTAT- DEL)

I am of the view that since the incidence of service tax has been borne by the appellant itself, the refund claim can very well be lodged by him claiming refund of excess service tax paid to the supplier of goods which was ultimately deposited into the Government Exchequer.

REFUND- TIME BARRING PROVISIONS

**Giriraj
Construction &
Parijat
Construction**

**(2016-6-TMI-414-
CESTAT-Mum)**

- *Contention of appellant- Since there was no levy of Service Tax, the amount paid was without authority of Law and therefore limitation as provided under S 11B would not apply. Numerous Cases relied.*

Held-

- *If this view is accepted then Section 11B will stand redundant.*
- *Appellant have admittedly paid the service tax on Commercial or Industrial Construction Service even though such service was not leviable to service tax.*
- *However for the purpose of claiming refund, Section 11B is the only provision and therefore refund shall be granted in accordance with Section 11B which include the condition of time limitation.*

WHETHER RATIO WOULD APPLY IN CURRENT SCENARIO?

Declared Service

66E. Declared services. 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.

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

S. 67(4)- Valuation

67(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be **prescribed**.

65(86) "prescribed" means prescribed by rules made under this Chapter (effective upto July 1, 2012)

Abatement Notfn 26/2012

(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 (*ST payable on 30% value*)

CONTRARY DECISION

N. Bala Baskar vs Union of India

(2016-43-STR-161-
HC-MAD)

- *In a case where a circular is challenged questioning the very liability, we do not think that the concept of locus standi could be widened.*
- *The contention that the person, to whom the burden of tax is ultimately passed on, is entitled to challenge a levy, if accepted, would lead to disastrous consequences. Millions of consumers are entitled to come and challenge such levies, if such a contention is accepted. Therefore, we are of the considered view that the petitioner has no locus standi to challenge the above circulars.*

POSERS

POSERS

- 1. Whether Delhi HC judgement binding on Mumbai jurisdiction inspite of adverse ruling of MCHI?*
- 2. Should the Builder/ Developer stop collecting and paying Service Tax and surrender the Registration?*
- 3. What would happen in case of other services which are abated. Can the ratio be stretched and applied to such services such as catering contracts, GTA, accommodation services, etc?*

THANK YOU