CESTAT: No Tax Liability under 'Construction of Complex Service' or 'Works Contract' on Builder/Developer/Promoter Prior To July 2010

Order Date: 7th March, 2023

The Chennai Bench of Customs, Excise, and Service Tax Appellate Tribunal (CESTAT) has observed that there is no liability for paying tax either under 'construction of complex service' or 'works contract' would lie on the builder/developer/promoter, where the duty has been demanded prior to 1 July, 2010.

The factual matrix of the case is that the appellant/assessee- M/s. South India Shelters Private Limited, engaged in the business of constructing residential complexes, which became taxable on 16 June, 2005, but they were registered with the Department only in June 2008. Further, they had failed to file periodical ST-3 returns.

It appeared to Revenue that the assessee had not paid appropriate Service Tax on the construction activity, under the classification 'Construction of Residential Complex Service.' Hence Notices were issued to them demanding Service Tax of Rs. 2,64,33,866/- for the period from May 2006 to September 2009 and a follow up Show Cause Notice dated 6 April, 2011 was issued demanding Service Tax of Rs.72,66,757/- for the period from October 2009 to June 2010, under the provisions of the Finance Act, 1994 (the Act).

Smt. Radhika Chandrasekhar, Learned Advocate on behalf of the appellant contended that a developer of residential complex was not liable to pay Service Tax for the period prior to 1 July, 2010; as per the Central Board of Excise and Customs (C.B.E.C.) Circular No. 108/02/2009-S.T. dated 29 January, 2009, construction services provided by the builder/developer will not be taxable for the period prior to 1 July, 2010.

Shri R Rajaraman Learned AR appearing for Revenue, stated that the appellant had entered into two agreements with their customers. One for sale of undivided share of land the other for the construction of flat/ apartment.

A sale deed was later entered into only or the undivided share of land and no sale deed is executed for the completely constructed flat. The stamp duty was paid only on the cost of undivided share of land and not on the complete constructed apartment.

The Revenue was of the view that the appellant undertook construction service to their clients. Section 65(105)(zzzh) of the Act specifies construction of complex service as taxable service

from 16 June, 2005. Revenue opposed that just because Contract Service was brought under the service tax levy from 1 June, 2007 does not mean that such services provided by the assessee was not taxable prior to 1 June, 2007.

The issue that came up for consideration before the two-member bench of P. Dinesha (Judicial Member) and M. Ajit Kumar (Technical Member) was whether the appellant has rendered pure service to his clients which would make the service taxable under 'Construction of Residential Complex Service' as done by the impugned order.

The bench referred the decision passed by the Hon'ble Supreme Court in the CCE vs. Larsen and Toubro Ltd. (2015) which held that 'construction services' under section 65(105)(zzq) and 'construction of complex services' under section 65(105)(zzzh) among others, would refer to service contracts simpliciter and not to composite work contracts. Such composite work contracts will not have constitutional validity and would not be liable to service tax levy prior to 1 June, 2007.

The CESTAT opined that the said judgment of the Apex Court clarified that an agreement for the construction of residential complex which is not a pure service and involves a provision of service as well as transfer of property in goods would be leviable to service tax only after the introduction of works contract service.

This being so the demand for duty on the services rendered by the appellant, who was a developer, under the composite contract agreement post 1 July, 2007 under the category of 'construction of residential complex service' and not as a service of 'works contract' must also fail, observed the CESTAT.

The CESTAT ruled that, "*Works Contract Service came under Service Tax levy with the introduction of section 65(105)(zzzza) in the Finance Act 1994 from 1 June, 2007. The period covered under the demand for works contract as per the impugned order is post 1 June, 2007 and hence the service rendered by the appellant is prima facie eligible for the levy of service tax.*"

The Tribunal held that it was only on 1 July, 2010 that an explanation was added to section 65(105)(zzzh) where by a builder/developer/promoter who got a residential complex constructed for his customer with whom he had individually entered into agreements, was to be treated as a deemed provider of construction of residential complex to his customers.

Since the period where duty was demanded in the impugned order was prior to 1 July, 2010, CESTAT ruled that no liability for paying tax either under 'construction of complex service' or 'works contract' would lie on the builder/developer/promoter during the period covered by the impugned order.

REFERENCE- https://www.livelaw.in/news-updates/builderdeveloperpromoter-service-tax-construction-complex-service-works-contract-cestat-223662