TAXATION OF RESIDENTIAL COMPLEX SERVICE –A JOURNEY.

By

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While dealing with the journey of applicable tax, it would be profitable to examine the various legal provisions and to cursory look at the decisions with regard to levy of Service Tax on construction of "Residential Complex Services".

2: During pre-GST regime, Service Tax was levied by the Centre as per its legislative competence under Article 265 read with Entry 97 of List I of this Schedule. Tax, on sale or purchase of goods, falls in the competence of States as per List II. Initially, Constitution of India (as well as its predecessor Government of India Act, 1935) did not provide for taxing the goods used in executing composite, indivisible works contracts treating such use of goods as sale. The State's attempt to tax in such a ……

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manner was struck down by the Constitutional Bench of Hon'ble Supreme Court in the case of State of Madras v. Gannon Dankerley & Co. (Madras) Ltd. - 1959 SCR 379 = 2015 (330) E.L.T. 11 (S.C.). Thereafter, Parliament passed the 46th amendment to the Constitution in 1983 by inserting Clause (29A) to Article 366, the definition clause as follows :

Article 366(29A) "tax on the sale or purchase of goods" includes -

> b) tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract; and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

2: The question as to whether such taxation is covered by the charging section of the Service Tax provisions (Finance Act, 1994) or otherwise, was examined by the Hon'ble Supreme Court in a landmark judgment in the case of CCE Vs. Larsen & Toubro Ltd. [2015 (39) S.T.R. 913 (S.C.)]. The charging sections in this Act are Sections 66 and 66A. While Section 66 provides for charging services within India, Section 66A provides for charging the recipient of a service for services received from outside India.

POSITION OF LEVY OF SERVICE TAX PRIOR TO 1.6.2007

3: As a consequence of, the established legal position is that 'Works Contract Service' can be charged as 'works contracts' only under Section 65(105) (zzzza) and only with effect from 1-6-2007. In other words, if the service of (a) supply of goods (b) supply of service – both together called “composite service” and in legal parlance called “Works Contract”. In the case of L & T (supra), the Supreme Court clearly held that “Works Contract” is not at all taxable prior to 1.6.2007.

POSITION OF LEVY OF SERVICE TAX AFTER 1.6.2007

4: At the same time, after 1.6.2007, "Works Contract" became taxable. However, in case, Department has issued a Show Cause Notice seeking to a raise demand under "Construction of Commercial & Industrial Service" and not under the "Works Contract" service then, by virtue of judgment of L&T, no Service Tax could be recovered even after 1.6.2007 and Service Tax could be levied and charged only when the SCN has been issued seeking to raise a demand under "Works Contract" service. In the SCN, if the Service Tax is sought to be demanded merely on "service" simplicitor and not a composite service i.e. (i) supply of goods (ii) supply of service, then demand of service tax can be raised by issuing SCN under "Construction Service" but, repeating at the cost of repetition, if it is both (i) supply of service and (ii) service of goods, then service tax cannot be demanded if the SCN only talk of "Construction Service" and does not raise demand under "Works Contract" Service.

5: It is well settled principle of law that classification cannot be changed at the time adjudication by the Adjudicating Authority viz. Deputy Commissioner or Commissioner as has been settled by a landmark judgment of the Hon'ble Supreme Court in the case of Precision Rubber Industries (P) Ltd Vs. CCE MANU/SC/0538/2016. In other words, in case the SCN seeks to raise a demand of Service Tax under "Construction Service", the demand of Service Tax cannot be confirmed under

“Works Contract” service as it is quite likely, later on, due to judgments of either of Supreme Court or High Court, there is a change of thought on the part of Department.

6: The Hon’ble Tribunal in the case of Shrishti Constructions (P) Ltd Vs. CCE MANU/CJ/0095/2017, has held that “where appellant had constructed Residential Complex along with materials, therefore, the proper classification would be under “Works Contract” as it is not contract pure for “service” only and “composite contract” shall not be liable to Service Tax prior to 1.6.2007 and subsequent to 1.6.2007 as long as it is not classified as “Works Contract” in SCN even for the period 1.6.2007 onwards.

7: Similarly, in the case of Real Value Promoters Pvt. Ltd. 2018 (9) TMI 1149-CESTAT, Chennai, the question which arose was whether a demand can be made on 'Commercial and Industrial Construction Service' under Section 65(105)(zzzh) of the Finance Act, 1994 after 1-6-2007 where the nature of contract is a composite contract involving both supply of materials and rendition of services. It has been held that "For the period post 1-6-2007, Service Tax liability under the category of 'commercial or industrial construction service' under Section 65(105)(zzzh), 'Construction of Complex Service' under Section 65(105(zzzq) will continue to be attracted only if the activities are in the nature of services simpliciter.

POSITION AFTER 1.6.2007 BUT PRIOR TO 1.7.2010

8: In the case of M/s. Krishna Homes v. CCE, Bhopal and CCE, Bhopal v. M/s. Raj Homes as reported in 2014 (3) TMI 694-CESTAT, Ahmedabad, the scope of taxing "Composite Works Contracts" rendered in connection with construction of complex services prior to 1-7-2010 was examined. 'Construction of Complex Services' was covered in Section 65(105) (zzzh) and in this clause, an explanation was added w.e.f. 1-7-2010. The said "explanation" reads as follows :

> (zzzh) to any person, by any other person, in relation to construction of complex;
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> "Explanation. - For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorized 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 the person authorized by the builder before 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."

9: Before the introduction of the explanation in [sub-clause] (zzzh) w.e.f. 1-7-2010, in all cases where the builder entered into an agreement to sell flats and collected advances, but the actual transfer of the property took place only after the completion certificate is issued, the service was considered as "self- service" by the builder only and not a "service" provided to the customer and hence was not taxable. Similarly, where the semi- built flats are sold and then the customer enters into an

agreement with the builder for its completion, such agreement, being in the nature of service for a flat for personal use, was also excluded from the definition of 'residential complex' under Section 65(91a) which reads as follows :

(ii) "Residential Complex" means any complex comprising of -

i) a building or buildings, having more than twelve residential units;
ii) a common area; and
iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;
(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;

10: Thus, as far as Service Tax, under “Construction of Complex Service” in respect of residential complexes is concerned, prior to 1-7-2010 (when the explanation was

inserted), no tax could be levied. It was also clarified by the C.B.E. & C. in Circular No. 108/2/2009-S.T., dated 29-1-2009. The question as to whether this limitation on taxation prior to insertion of the explanation in construction of complex services also extends to cases where such services are rendered as works contract service was examined and answered in affirmative in the case of Krishna Homes (Supra) by the Hon'ble Tribunal.

11: The Hon'ble Division Bench of Delhi High Court in the case of S K Bansal Vs. Union of India MANU/DE/1414/2016 has held that no Service Tax is leviable prior to 1.7.2010. The above judgment of Division Bench of Delhi High Court has been consistently followed by the different bench of Hon'ble Tribunal and latest judgment delivered on 29.11.2019 in the case of Adarsh Developers Vs. CST MANU/CB/0267/2019

12: To sum up, as far as construction of 'Residential Complexes' by the Developers/Builders are concerned:

i) Prior to 1-6-2007, if it is a composite works contract, no Service Tax is leviable in view of the judgment of the Hon'ble Apex Court in the case of "Larsen & Toubro (supra).

ii) After 1-6-2007, it is chargeable as 'works contract' only if it is a composite contract and under 'construction of complex services' if it is a service simpliciter.

iii) However, after 1-6-2007 but prior to 1-7-2010, whether it is a service simpliciter or a works contract, if the service is rendered prior to issue of completion

certificate and transfer to the customer, it is not taxable being in the nature of self service.

iv) Further, whenever the service is rendered for completion or construction of a flat for personal use of the service recipient, no Service Tax is payable in view of the exclusion in the definition of “Residential Complex Service.

(v): After 1-7-2010, Service Tax is chargeable under the head of 'construction of complex services' if it is service simpliciter and under 'works contract service' if it is a composite works contract.

13: In view of the above, it is well settled legal position that whether the service is rendered as service simpliciter or as a works contract, no Service Tax can be levied on construction of residential complex prior to 1-7-2010. The above article could be useful for the appeals which are pending either before the Commissioner (Appeals) or before Hon’ble Tribunal.

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