

No Service Tax liability can be imposed on the Builder on cancellation of booking by flat buyer

The CESTAT, Mumbai in *Credence Property Developers Pvt. Ltd v. Commissioner of CGST & Central Excise [Service Tax Appeal No. 85780 of 2020 dated January 5, 2023]* has held that once the buyer of a flat cancelled the booking and the consideration for service was returned, the service contract got terminated and once it is established the no service is provided, then refund of tax for such service becomes admissible.

Facts:

Credence Property Developers Pvt. Ltd. (“**the Appellant**”) is engaged in providing Construction of Residential Complex Service and had filed two refund claims under Section 11B of the Central Excise Act, 1944 (“**the Central Excise Act**”) read with Section 83 of the Finance Act, 1994 (“**the Finance Act**”) amounting to INR 1,09,367/- and INR 55,123/- respectively, seeking refund of Service Tax paid in respect of two flats which were booked by a buyer but were later cancelled. Upon cancellation, the Appellant refunded advance amount paid by the buyer along with Service Tax amount collected by them.

The Revenue Department (“**the Respondent**”) issued a deficiency memo regarding the refund claim filed by the Appellant and vide Order-in-Original dated October 17, 2018 rejecting the refund claim on the ground that the refund of Service Tax does not arise as the Appellant has not paid any excess Service Tax but has paid only that much which they were liable to pay for consideration received by them on the invoice issued. Thereafter, the Appeal filed by the Appellant was dismissed vide order dated February 28, 2020. The Appellant submitted that the cancellation of flat is considered as non-provision of service as specified by Rule 6(3) of Service Tax Rules, 1994 (“**the Service Tax Rules**”) and thus, they cannot be burdened with any Service Tax liability.

Hence, this appeal has been filed.

Issue:

Whether the Appellant is entitled to receive the refund of Service Tax in case of booking of flat was cancelled and advance amount received on booking was refunded by the Appellant?

Held:

The CESTAT, Mumbai in ***Service Tax Appeal No. 85780 of 2020*** held as under:

- Noted that, as per Rule 6(3) of the Service Tax Rules, in construction service, Service Tax is required to be paid on amount received from buyers towards booking of flat before the issuance of completion certificate and the booking can be cancelled by the buyer any time before taking possession of the flat.
- Opined that, if any service has been provided which is taxable as specified in the Finance Act, then certainly the Appellant is liable to pay, but when no such service has been provided then the Appellant cannot be saddled with any such tax and in that case the amount deposited by the Appellant with the exchequer will be considered as merely a 'deposit' and keeping of the said amount by the department is violative of Article 265 of the Constitution of India.
- Observed that, the first principle of Service Tax is that tax is to be paid on those services only which are taxable under the statute. But for that purpose there has to have some 'service', and unless service is not there, no Service Tax can be imposed. Thus, for the applicability of the provisions, the pre-condition of 'service' is required.
- Stated that, no service has been provided by the Appellant as the service contract got terminated and the consideration for service has been returned.

- Further stated that, once it has been held that there is no service, then by any stretch the provisions can't be roped in as for the applicability of the rules, firstly providing of any 'service' by the Appellant has to be established.
- Held that, once the buyer cancelled the booking and the consideration for service was returned, the service contract got terminated and once it is established that no service is provided, then refund of tax for such service becomes admissible.
- Further held that, the Respondent was not justified in invoking the provisions for denying the refund and the Appellant would be entitled for refund of Service Tax amount.

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