

Construction of residential complex – New Twist by P & H High Court

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The levy of service tax on construction of residential complex is already beset with so much of complex issues (Refer to my earlier article Service tax on residential complex – will anybody answer?). The decision of the Hon'ble High Court of Punjab and Haryana, in the case of G.S. Promoters Vs UOI has further triggered more complex issues.

To recapitulate, during last budget, an Explanation was added in the definition of taxable service pertaining to construction of residential complex and commercial complex, to the effect that even if it is a transaction of sale, where an agreement to sell is entered into and ultimately the property is sold by registering the property for full value and on payment of stamp duty on full value, the Explanation sought to deem a service element in such sale, if any payments are received before obtaining completion certificate for the complex in question. The CBEC Circular No. 108/2/2009 dated 29.01.2009 has earlier clarified that in such cases there is no service provider service recipient relationship but only a self service. This clarification has been overruled by the insertion of the Explanation. The Explanation seeks to deem a service, even in such sale transactions, if any part of the payment for the purchase of the flat is made by the buyer, before the issue of completion certificate for the complex in question.

What was under challenge before the Hon'ble High Court of Punjab and Haryana as well as before various other High Courts was, whether the Union Government can encroach upon the legislative powers of the State Governments and seek to levy service tax on a transaction involving sale of immovable property, which is the States' domain.

The State Governments' right to tax the sale of goods present in a composite transaction like works contracts or the Union Government's power to tax the service element in a composite transaction like works contracts (works contract service) is not in dispute. The moot question is, whether in a pure sale transaction, can a service be deemed, which unfortunately been answered in the affirmative by the Hon'ble High Court. If that be so, the Union Government can go on deeming a service in any activity and they can deem a service by the shopkeeper to the consumer, when he sells a grocery to the consumer, which would be nothing but a mockery on the Constitutional provisions.

Before parting...

Construction for personal use is excluded from the levy of service tax as per the definition of the term residential complex, as well as clarified by the CBEC in its circular dated 29.01.2009. Even when a person buys a flat, for his personal use and if the Government is going to deem it as a service, the benefit of exclusion available for personal use can be claimed for that deemed service also. So all is not lost.