

The “complex” construction.

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Levy of service tax on construction related activity is beset with lot of complications, ever since the introduction of the levy. To recapitulate the legislative history, service tax was imposed on commercial or industrial construction activities with effect from 10.09.2004 and service tax was imposed on construction of residential complex services with effect from 16.06.2005. The varied practices being followed in different states have given rise to various issues in administering the levy. Placing these services again under the definition of works contract, which became a taxable service with effect from 01.06.2007, has led to further confusion, as to whether these activities, which are in the nature of works contracts are taxable or not, prior to 01.06.2007.

Transactions in the construction sector comprises of the following nature of transactions.

- a) Persons owning large extent of land entering into Joint Development agreement with the builder / promoter / developer, to construct commercial / residential buildings and sharing the constructed area among themselves in fixed proportions, where could be an element of service rendered by the builder / promoter / developer to the land owner, for which the consideration is the builder / promoter / developer's share of land obtained from the land lord.
- b) Entering into agreement to sell with prospective buyers and registering the property after completion of construction by way of a sale deed. The sale consideration would be received in stages.
- c) Selling the Undivided portion of land and entering into a construction agreement.

The CBEC's circular No. 108/2/2009 dated 29.01.2009 has sought to put at rest many raging controversies in relation to construction of residential complex service. It was clarified therein that if the constructed property is ultimately sold by execution of a sale deed, it is a transaction of sale of immovable property at a future date and there is no service provider service receiver relationship and hence no tax would be payable. It was further clarified that if a person gets a residential complex (the definition of which also included a part thereof) constructed for his personal use, there is no service tax liability on the builder / promoter / developer. Finally, the circular clarified that the levy will be attracted only when the services are rendered by contractors to the builders.

Despite the above clarification, the field officers sought to proceed to demand service tax, claiming in applicability of the circular. One argument of the department was that the circular was issued in the context of construction of residential complex service and hence not applicable to works contract service, even though as per the definition of term “residential complex” used in the definition of “works contract”, the exclusion for personal use is applicable under works contract service also.

At this junction, the following explanation is sought to be introduced in the definition of taxable service for commercial or industrial construction and construction of residential complex, respectively.

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 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 the person authorised 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.

Explanation : For the purposes of this sub-clause, the 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 the person authorised 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.

The various effects of the above said amendment are identified below.

As per the CBEC circular referred to above, if the transaction in construction of a residential complex is effected by way of entering into an agreement for sale, coupled with stage wise receipt of payments and if the property is finally registered in favour of the buyer through a sale deed, the same is not at all a service activity. The same clarification would apply to commercial construction also.

But, as per the Explanation now sought to be introduced, the benefit of the circular can be pleaded, only if the builder does not receive any money from the buyer, till the issue of completion certificate. To this extent, the clarification issued by the CBEC has now been diluted.

The second leg of the clarification issued by the CBEC, to the effect that if a person is getting a residential complex built for his "personal use", service tax would not apply, is unaffected by this amendment. The definition of the term "personal use" and the exclusion provided for the same in the definition of "residential complex" remain in tact. Since any such property built for the personal use of the ultimate buyer is outside the ambit of the definition of the term "residential complex", the mode of receipt of money from the buyer in such case is not at all relevant.

This is where the present amendment can be misinterpreted. The department may argue that even in cases where the house is built for the personal use of a person, the same would go out of the levy, only if the entire consideration is paid after the issue of completion certificate. But a careful reading of the amendment and the scope of the amendment as clarified in the TRU's letter, would help in coming to a correct conclusion. The TRU letter says that the amendments would only expand the scope of the existing service, which otherwise remain unchanged. The definition of the term "residential complex" provides for an exclusion, if the construction is for personal use and the said exclusion still continues. What is outside the ambit of the levy, cannot be brought inside, by virtue of this explanation. Hence, when an ultimate owner is getting himself constructed a house / flat in a residential complex, for his personal use, there would be no service tax liability, irrespective of the mode and time of payment of the price.

The liability of various contractors providing services to the builder / promoter / developer would continue as such.

The liability of the builders / promoters / developers under the following circumstances would continue.

- (a) Where the commercial construction service is provided through sale of UDS portion and a construction agreement.
- (b) Where the construction of residential complex service is provided through sale of UDS portion and a construction agreement, where the buyer is not buying for his personal use.
- (c) Liability in respect of the services provided to land owners, in terms of the Joint development agreements.

Another amendment relating to this sector is expanding the scope of the levy to cover certain other services also in the ambit of the levy, such as providing preferential location, development of the complex, excluding provision of parking space.