

EY Tax Alert

CESTAT holds service tax is not leviable on transfer of development rights

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Executive summary

This Tax Alert summarizes a recent ruling^[1] of Customs, Excise and Service Tax Appellate Tribunal, Chandigarh (Tribunal). The issue involved was levy of service tax on transfer of development rights.

The assessee contended that service tax is not payable on the development rights. Development rights were not transferred till date. The agreement between the assessee and developer was futuristic in nature, stipulating that assessee shall, in future, transfer such development rights.

Relying on the terms of the contract between the assessee and developer, the revenue alleged that the assessee received an advance towards development rights and therefore, liable to pay service tax.

The Tribunal observed that the assessee cannot transfer the development rights as it is not the owner of the land. Further, development rights are benefits arising out of land and thus, are immovable property in terms of the General Clauses Act.

The Tribunal held that the activity in question is only the acquisition of land and hence, not liable to service tax.

^[1] 2019-TIOL-1514-CESTAT-CHD

Background

- ▶ The assessee is engaged in the business of construction and development of integrated township.
- ▶ It also provided the services like renting of immovable property, maintenance and repair, and construction of residential and commercial complexes.
- ▶ A search was conducted by DGCEI at the premises of the assessee and the documents relating to transfer of land development rights executed between the assessee and developer and with various land owning companies (LOC) were scrutinized.
- ▶ The terms of one such agreement entered by the assessee with the developer (a group entity) were:
 - ▶ The developer would provide fund to the assessee for purchasing development rights from LOC;
 - ▶ The assessee would purchase development rights from LOC and transfer those rights without any value addition to the developer;
 - ▶ Amount paid to LOC for purchase of development right would be adjusted against the ad-hoc fund provided by the developer.
- ▶ Further, during the search, the assessee made a statement that they have neither executed any sale deed nor paid any stamp duty to the State Government on the activity of transferring the development rights. Service tax was also not paid on the money received from the developer in this regard.
- ▶ The Revenue alleged that the assessee had transferred development rights and therefore, it was liable to pay service tax. Accordingly, show cause notice was issued and the demand was confirmed.
- ▶ Assessee filed an appeal before the Tribunal.

Assessee's Contention

- ▶ The agreement between the assessee and developer is futuristic in nature. It states that the assessee shall, in future, transfer the development rights.
- ▶ In the present case, no development rights has been transferred.
- ▶ Reference is made to their letters sent to LOC on which the LOC have certified that the refundable performance deposit received by them is not a consideration towards transfer of development rights. The deposit is refundable as and when the sale deed is executed for the land or agreement is entered for transfer of development rights.
- ▶ A Chartered Accountant has also certified that the assessee neither purchased the land nor acquired the development rights.

- ▶ The entire amount received from developers is for land and not for the development rights as various LOC have purchased the land from this amount.
- ▶ The entire amount received by the assessee was given to LOC and nothing was retained by the assessee. Hence, it implies that no fees, charges or compensation has been received by the assessee from the developer. No service tax is payable as no consideration has been received by the assessee.
- ▶ Transfer of title in goods or immovable property are excluded from the definition of service.
- ▶ The authorization given by assessee to the developer to develop the land and sell super structure in perpetuity fall within the words "benefit arising out of land" and therefore, to be treated as an immovable property.
- ▶ The assessee relied on various judgments in this regard.² Accordingly, development rights fall outside the scope of service and consequently no service tax is payable.
- ▶ After development activities are carried out, sale deed is executed between the landowner, developer and purchaser under which the title to undivided portion of the land is transferred as and when the conveyance deed/ sale deed is executed.
- ▶ It is not only the possession, which stood transferred with the right to use, enjoy and construct building/super structure but, at the same time, undivided right, title and interest in the land also stand transferred under the conveyance deed on which stamp duty has been paid and such deed has been registered before the Sub-Registrar.
- ▶ In relation to alleged surrendering of development rights, the assessee stated that it is sharing of profit upon sale of land, and accordingly could not be taxed as service.
- ▶ The assessee highlighted that various letters were filed by the associations to seek clarifications as to whether service tax is payable or not on transfer of development rights. To all these communications, the Government has given no response and hence, extended period cannot be invoked.

Revenue's Contention

- ▶ The Revenue contended that the assessee acquired development rights without the title in land in their favor. The development rights so acquired were shown under the head "inventory" and were transferred to developers as such i.e. without any value addition.
- ▶ Hence, the amount paid by the developer to assessee is towards advance for development rights and service tax is payable.

² Bahadur v. Sikandar [MANU/UP/0016/1905], Ananda Behera v. State of Orissa [AIR 1956 SC 17], Smt. Dropadi Devi v. Ram Das [AIR 1974 All 473], Sadoday Builders (P)

Ltd v. Jt Charity [MANU/MH/0791/2011] and Chheda Housing Development Corpn v. Bibijan Shaikh [2007 (2) Bom CR 587]

Tribunal's Ruling

- ▶ The assessee's activity starts only after acquisition of land i.e., to procure NOC from government authorities and carry out development activities on land.
- ▶ Tribunal also considered the fact that LOC remained the owner of the land and they have not transferred the land in the name of the assessee. Hence, until and unless the assessee become the owner of the land, it cannot transfer the development rights in favor of the assessee.
- ▶ Tribunal noted that the term immovable property includes land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.
- ▶ Referring to the judgments relied upon by the assessee, Tribunal observed that development right is immovable property in terms of section 3(26) of General Clauses Act, 1897 and no service tax is payable as per the exclusion in terms of section 65B(44) of the Finance Act, 1994.
- ▶ Since the Revenue was itself not clear about the taxability of development rights as they have not given any answer to the letters, the period of limitation cannot be invoked.
- ▶ The Tribunal held that the activity in question is only acquisition of land, and hence, no service tax is payable.

Comments

Amongst other aspects considered in deciding the taxability, this is the first speaking order by an appellate tribunal under service tax to conclude that development rights are the benefit derived from land i.e., immovable property and hence not liable to tax.

Since taxability of TDR has always been a matter of debate, litigants under service tax may find support from the ruling, however, under GST, there may be a need to analyze the provisions of the new law and the intent of the government to tax such transactions as evident from the various notifications issued in this regard.

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