CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

Service Tax Appeal No. 85780 of 2020

(Arising out of Order-in-Appeal No. NA/GST/A-III/MUM/264/2019-20 dated 28.02.2020 passed by the Commissioner (Appeals-III), GST & CX, Mumbai)

Credence Property Developers Pvt. Ltd. .....Appellant
702, Natraj MV Road Junction,
Western Express Highway
Andheri (E)
Mumbai

VERSUS

Commissioner of CGST & Central Excise, Mumbai East .....Respondent
9th Floor, Lotus Infocentre
Near Parel Station,
Parel East, Mumbai

APPEARANCE:

Shri Anand Desai, Chartered Accountant for the appellant
Shri S B P Sinha, Superintendent (AR) for the respondent

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/85004 / 2023

DATE OF HEARING : 14.12.2022
DATE OF DECISION : 05.01.2023

Per: AJAY SHARMA

This appeal has been filed assailing the order dated 28.2.2020 passed by the Commissioner (Appeals-III), GST&CX,

Mumbai by which the learned Commissioner rejected the appeal filed by the appellant.

2. The issue involved herein is about the refund of Service Tax amount which the builder has returned/refunded to the buyer alongwith the advance amount paid, upon the cancellation of the two flats booked by the said buyer?

3. The facts of the matter in brief are as follows. The appellant is engaged in providing *Construction of Residential Complex Service*. They had filed two refund claims under Section 11B of the Central Excise Act read with Section 83, Finance Act, 1994 amounting to Rs.1,09,367/- and Rs.55,123/- respectively seeking refund of Service Tax paid in respect of two flats in *Project Central Park* which were booked by a buyer M/s. Symbio Generics, but were later cancelled by the said buyer. Upon cancellation, the appellant refunded advance amount paid by the buyer alongwith Service Tax amount collected by them. The appellant had filed the refund claim for the cancelled booking upon which the department issued deficiency memo on 23.7.2018. The Adjudicating Authority vide Order-in-Original dated 17.10.2018 rejected the refund claim on the ground that the question of 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 and in such a situation there is no provision for refund of service tax. On appeal being filed by the appellant, the same was dismissed vide impugned order dated 28.2.2020.

4. Learned Chartered Accountant for the Appellant submits that the issue regarding the cancellation of flat is considered as non provision of service as specified by Rule 6(3) of Service Tax Rules, 1994. He further submits that in post-GST regime there is no mechanism available to claim such credits [*as specified in*

Rule 6(3)ibid] in GST returns and therefore the only remedy available with them is to claim refund of such service tax paid in excess. He also submits that in the absence of any service the Appellant cannot be burdened with any Service Tax. Per contra learned Authorised Representative appearing for Revenue reiterated the findings recorded in the impugned order and prayed for dismissal of Appeal.

5. The first principle of service tax is that tax is to be paid on those services only which are taxable under the said statute. But for that purpose there has to have some *'service'*. Unless service is there no service tax can be imposed. For the applicability of the provisions as referred to in the deficiency memo or in the Adjudication order or appellate order, the pre-condition is *'service'.* If any service has been provided which is taxable as specified in the Finance Act, 1994 as amended from time to time then certainly the assessee is liable to pay, but when no such service has been provided then the assessee cannot be saddled with any such tax and in that case the amount deposited by the assessee 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 which specifically provides that "No tax shall be levied or collected except by authority of law." Since Service Tax, in issue, received by the concerned authority is not backed by any authority of law, the department has no authority to retain the same. Buyer booked the flat with the appellant and paid some consideration. The appellant as a law abiding citizen entered the same in their books of accounts and paid the applicable service tax on it after collecting it from the buyer. But when the buyer cancelled the said booking on which service tax has been paid and the appellant returned the booking amount along with service tax collected then where is the question of providing any service by the appellant to that customer. The cancellation of booking coupled with the fact of refunding the booking amount along

with service tax paid would mean as if no booking was made and if that is so, then there was no service at all. If there is no service then question of paying any tax on it does not arise and the department can't keep it with them. No law authorises the department to keep it as tax. The net effect is that now the amount, which earlier has been deposited as tax, is merely a deposit with the department and the department has to return it to the concerned person i.e. the assessee. In the fact of this case it can be safely concluded that no service has been provided by the Appellant as the service contract got terminated and the consideration for service has been returned.

6. As per Rule 66E(b), Service Tax Rules, 1994 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 by the competent authority and the booking can be cancelled by the buyer any time before taking possession of the flat. Once the buyer 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 become admissible. The authorities below are not correct in their view that mere cancellation of booking of flats does not mean that there was no service. If the booking is cancelled and the money is returned to that buyer then where is the question of any service? Once it has been held that there is no service then by any stretch 'Point of Taxation Rules, 2011' can't be roped in as for the applicability of the said Rules firstly providing of any 'service' by the Appellant has to be established. Therefore, the authorities below were not justified in invoking the Provisions of Point of Taxation Rules, 2011 for denying the refund.

7. In view of the facts of this case and the discussions held in the preceding paragraphs, I am of the considered view that the

Appellant is entitled for refund and the appeal is accordingly allowed.

(Pronounced in open Court on 05.01.2023)

(Ajay Sharma)
Member (Judicial)

//SR