Kanakia Spaces Reality Pvt. Ltd. Vs. Commissioner of CGST & Central Excise, Mumbai

Refund of service tax paid on flat booking advances where bookings were cancelled and the amount and tax were returned – Section 142(5) of the CGST Act, 2017.

Date of Order: March 14, 2024
Case Law No: GIB-CESTAT-2024-24
Source: GST INDIA Biz (www.gstindia.biz)

CASE DESCRIPTION / SUMMARY

Background

The appellant, a developer providing construction of residential complex service, collected booking amounts from prospective apartment buyers and paid service tax on them. Several allottees later cancelled their bookings, and the appellant returned the booking amounts along with the service tax collected. Contending that the Rule 6(3) route for adjusting excess service tax was not available in GST returns, it filed three refund claims (6 March, 27 April and 29 June 2018) under Section 11B of the Central Excise Act, 1944 read with Section 142(5) of the CGST Act, 2017, aggregating ₹24,58,250 (revised from ₹35,14,597). The adjudicating authority rejected the claims and the Commissioner (Appeals), by common order dated 11.03.2020, upheld the rejection, holding that the GST law has no provision for such a refund and that mere cancellation does not mean no service was provided. In appeal, the Tribunal examined whether it had jurisdiction over such refund claims and whether the refund was admissible.

Final Verdict

Following the Larger Bench decision in Bosch Electrical Drive India Private Limited v. Commissioner of Central Tax, Chennai (21.12.2023), the Tribunal held that appeals against refund orders under Section 142 of the CGST Act lie before CESTAT and, relying on Wave One Private Limited v. Commissioner of CGST & Central Excise, Delhi CESTAT, New Delhi and Jai Jai Mateshwaari Steels Pvt. Ltd. v. Commissioner, CGST, Dehradun, Customs, Excise & Service Tax Appellate Tribunal (CESTAT), New Delhithat the limitation under Section 11B cannot be invoked against claims under Section 142(5). On merits, it held that service tax presupposes a taxable service; where the buyer cancels and receives back the consideration with tax, the service contract stands terminated, the tax deposited is merely a deposit and its retention would violate Article 265 of the Constitution. **"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." The right to refund of excess service tax had accrued to the appellant and was protected by Section 174, with Section 142(5) providing the refund route; the appeals were allowed with consequential relief as per law.

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