

GST UPDATE ON DECISION GIVEN BY GUJARAT HIGHCOURT IN CASE OF M/S. ALEMBIC LTD

There is big issue of proportionate reversal of credit on flats sold after receipt of completion certificate. This issue was much disputed in service tax regime and continued under GST regime also. We all know that the flats after the completion certificate become immovable property and no service tax/GST is payable on the same. But the builder has taken the credit on complete input, input services used in all the flats. Hence, the department normally demanded proportionate reversal under erstwhile Service tax regime. The department calculated the complete credit divided by number of total flats and multiplied by unsold flats. But there was no such formula available in service tax rules. Recently in Gujarat High Court took up this matter and decided this matter in favour of assessee.

M/S Alembic metal was engaged in providing services like construction of residential complex, commercial and industrial complex, special services by builders, renting of immovable property, business support services etc. the paid service tax under works contract for the sale of residential units before the receipt of completion certificate. After the receipt of certificate they still had 32% of unsold units which would be sold in future without payment of service tax. They intended to take only proportionate credit after completion on the basis of square fit area which suffered output service tax thereby not taking credit on completed residential units. Same was intimated to department.

Major issues involved and their conclusion drawn by tribunal:

S.NO.	ISSUE INVOLVED	CONCLUSION
1	Whether the receipt of consideration for residential units sold as immovable property after receipt of completion certificate amounts to exempted services and reversal under rule 6 of CCR,04 is required ?	Not required to pay service tax under rule 6 as the service became exempt after the receipt of completion certificate.
2	Whether credit can be allowed to appellants under rule 3 of CCR, 04 in such circumstances ?	Credit of input services received after the completion certificate cannot be wholly allowed and since they have taken only proportionate credit the same is sufficient compliance
3	Whether appellant are required to maintain separate accounts under rule 6	No
4	Whether the Appellants are required to reverse Cenvat Credit availed during the period when output service was taxable before receipt of Completion Certificate, since such services were availed to construct entire property, and portion of such property did not attract Service Tax after receipt of Completion Certificate?	Not required to reverse the credit when output service was wholly taxable before receipt of completion certificate.
5	Connected to the question (d), whether the Appellants are eligible to seek refund of the amount paid under protest towards Credit availed from 2010 till receipt of completion certificate, based on CERA audit objection wherein such credit was sought to be reversed based on considering square foot area where Service Tax was paid and balance area where Service Tax will not be paid after completion certificate.	Yes

Thus, it was held that when the credit was taken then assessee was eligible to avail the same. Hence, the credit cannot be denied. Even the reversal of proportionate credit is also not required as the output service was completely taxable at the time of taking credit.

However, under GST, there is specific provision under Section 17(3) of CGST Act, 2017 wherein the sale of land and sale of building is included in exempt supply. Hence, the proportionate reversal is to be done when the building is sold after completion certificate. But here also, point is raised that the reversal is to be done as per Rule 42 and 43 of CGST Rules, 2017. Hence, the proportionate credit is to be done for the credit taken after the completion certificate. It cannot be applied to credit taken before the completion certificate is received. We have written a series of GST updates on this issue in the month of March 18.

Moreover, the cenvat credit to residential projects is being disallowed henceforth and builder has to pay the tax @ 1% for affordable housing and 5% for non affordable housing without cenvat credit. Hence, this issue will not arise in future.
