

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 12268 OF 2019-DB

[Arising out of Order-in-Original/Appeal No RAJ-EXCUS-000-APP-139-2019 dated 09.07.2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT]

Jagdish Pala

Dwarika Hills Flat No. 402, Opp. Madhapar Bus Stand
RAJKOT, GUJARAT

.... Appellant

VERSUS

Commissioner of Central Excise & ST, Rajkot

Central Excise Bhavan, Race Course Ring Road
Income Tax Office, Rajkot, Gujarat, 360001

.... Respondent

APPEARANCE :

Shri Pankaj Rachchh, Advocate for the Appellant
Shri Vinod Lukose, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

DATE OF HEARING : 07.01.2022

DATE OF DECISION : 12.04.2022

FINAL ORDER NO. A/10337 / 2022

RAMESH NAIR :

Appellant has filed this present appeal being aggrieved by Order-in-Appeal No. RAJ-EXCUS-000-APP-139-2019 dated 09.07.2019 passed by the Commissioner (Appeals), Rajkot.

2. The brief fact of the case is that based on intelligence that Appellant was not paying Service tax on the Construction activities carried out by him, a detailed inquiry was carried out and statements of Shri Jagdish Pala were recorded. Investigation revealed that the Appellant had constructed residential and commercial complexes and received booking amounts as well as installments amount from his buyer but had not obtained service tax registration and also did not pay Service Tax. After completing the

investigation a Show Cause Notice dated 07.09.2009 was issued to the Appellant demanding Service tax under Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Act and proposing penalty under Section 76, Section 77 and Section 78 of the Act. The Adjudicating Authority adjudicated the case vide OIO dated 28.03.2018 and dropped the proceedings initiated against the Appellant. Aggrieved by the said order, Department filed appeal before the Commissioner (Appeals), and Learned Commissioner (A) has allowed the department's appeal by way of remand for quantification of demand. Hence, the present appeal.

3. Shri Pankaj Rachchh learned Counsel Appearing on behalf of the Appellant submits that Learned Commissioner (Appeals) has travelled beyond the scope of Show Cause Notice as well as grounds of appeal filed by department. It was not issue before him that whether explanation under clause (zzq) of sub-section(105) of Section 65 of the Finance Act, 1994 with effect from 01.07.2010 is of clarificatory nature and always retrospective nature or otherwise? He has grossly erred in finding the explanation are clarificatory in nature and does not introduce new taxable service but explain in the service already taxable. An explanation is enacted to remove doubt or to clarify a fact already in existence and hence always retrospective in nature. The Department had preferred an appeal on the ground that the adjudicating authority has erred in extending the benefit of exemption to the appellant on the construction of 'Commercial Complex' or 'Construction of residential cum commercial complex' based on Circular No. 108/02/2009-ST dated 29.01.2009 as it can be seen from the said Circular that it is applicable for 'Construction of Residential Complex' only. That the Adjudicating authority has erred in wrongly interpreting the wording of the D.O.F. No. 334/1/2010-TRU dated 26.02.2010 as it is not the case that the

entire consideration for the property has been received after the completion of construction (i.e. after the issue of completion certificate). The Ld. Commissioner (Appeals) has not given a single finding on the grounds of appeals.

4. He submits that it is admitted facts in the show cause notice that the appellant had entered into agreement with his buyers for sale of shops during the construction of commercial complexes and residential cum commercial complexes and Service tax was demanded classifying the service as 'Commercial or Industrial Construction' under Section 65(105)(zzq) of the Finance Act, 1994. As per clarification issued by CBEC vide Circular No. B1/6/2005-TRU dated 27.07.2005 at Para 13.3 that residential complex may also contain other facilities such as market or shopping complex etc. Therefore, reliance placed on Circular No. 108/02/2009-ST dated 29.01.2009 by the Assistant Commissioner was very much correct.

5. He also argued that the Ld. Commissioner (Appeals) has failed to appreciate that the Assistant Commissioner had correctly and judiciously dropped the proceedings only after understanding the entire facts and clarification on the subject matter as is evident from findings discussed in his order. Therefore, order passed by the Ld. Assistant Commissioner was legal and proper and the Ld. Commissioner (Appeals) has grossly erred in remanding the matter back for de-novo proceedings.

6. He also submits that impugned order is ex-facie illegal, frivolous and has been passed without going through the provisions of Section 65(30a) as it stood prior to 16.06.2005 and after 16.06.2005, Section 65(25b) inserted with effect from 16.06.2005, Explanation inserted under clause (zzq) and clause (zzzh) of Section 65(105) with effect from 01.07.2010, circulars

dated 17.09.2004, 27.07.2005, 29.01.2009, 26.02.2010, 01.07.2010, 10.02.2012 and also following decisions on the subject case.

(i) Magus Construction Pvt. Ltd. Vs. UOI- 2008(11) STR 225 (Gau.).

(ii) Commissioner of Service tax vs. Sujal Developer – 2013 (31) STR 523(Guj)

(iii) Saumya Construction Pvt. Ltd. Vs. CST, Ahmedabad- 2016(STR) 723 (Tri. Ahmd)

7. He further submits that levy of Service tax on "Construction Service" was introduced with effect from 10.09.2004 and same was defined under Section 65(30a) of the Finance Act, 1994. As per the said definition, "Construction Service" means construction of new building or civil structure or a part thereof which is used, or to be used, primarily for; or occupied, or to be occupied, primarily with; or to be engaged, primarily in, commerce or industry.

8. The said definition at clause (30a) of Section 65 was substituted by new definition with effect from 16.06.2005 "Construction of Complex" means construction of a new residential complex or part thereof; and simultaneous new definition at clause (25b) of Section 65 was inserted with effect from 16.06.2005 viz "Commercial or Industrial Construction Service" means – Construction of a new building or a civil structure or part thereof which is used primarily in commerce or industry or work intended for commerce or industry. It means that with effect from 16.06.2005, "Construction Service" at clause (30a) was renumbered and replaced by "Commercial or Industrial Construction Service" at clause (25b) and new levy on "Construction of Complex" means construction of a new residential complex or a part thereof etc. was introduced and defined at clause (30a).

The said taxable services were defined at clause 65(105) (zzq) as Commercial or Industrial Construction Service and at 65(105)(zzzh) as Construction of Complex.

9. He also submits that CBEC at the time of introduction of the Finance Bill, 2010 vide D.O.F. No. 334/1/2010-TRU dated 26.02.2010 had inter alia clarified that at paragraphs 3.1. as under :

“In the definition of the taxable services ‘Construction of Complex service’ [section 65 (105) (zzzh)], and ‘Commercial or industrial construction service’ [section 65 (105) (zzq)], it is being provided that unless the entire consideration for the property is paid after the completion of construction (i.e. after issuance of completion certificate by the competent authority), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the service tax would be charged accordingly”

The said Circular in Annexure -B at paragraph 8.1, 8.2 and 8.6 further clarified as under:

“8.1 The service tax on construction of commercial or industrial construction services was introduced in 2004 and that on construction of complex was introduced in 2005.

8.2 As regards payment made by the prospective buyers/flat owners, in few cases the entire consideration is paid after the residential complex has been fully developed. This is in the nature of outright sale of the immovable property and admittedly no Service tax is chargeable on such transfer. However, in most cases, the prospective buyer books a flat before its construction commencement/completion, pays the consideration in instalments and takes possession of the property when the entire consideration is paid and the construction is over.

8.6 In order to achieve the legislative intent and bring in parity in tax treatment, an Explanation is being inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after the completion of construction (including its certification by the local authorities), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the Service tax would be charged accordingly. This would only expand the scope of the existing service, which otherwise remain unchanged.”

10. He also submits that CBEC had at the time of enactment of Finance Bill, 2010 on 08.05.2010 again clarified that vide Finance Act, 2010 eight new services were added to the list of taxable service while scope of nine

existing services were modified. As these changes became effective from 01.07.2010, activities that are covered under taxable service categories due to above addition or modifications would start attracting services from this date. The said Circular at paragraph 6.1 and 6.2 further clarified that

"6.1 In the Finance Act, changes have been made in the construction services, both commercial construction and construction of residential complex, using 'completion certificate' issued by 'competent authority'. Before the issuance of completion certificate if agreement is entered into or any payment is made for sale of complex or apartment in residential complex, service tax will be leviable on such transaction since the builder provides the construction service....."

"6.2 After the Budget was introduced views were expressed that the tax liability on construction sector has been tightened at a time when the sector was recovering after recession."

This clearly proves that levy of Service tax on construction service provided by builder/ promoter/ developer like present Appellant came into effect first time with effect from 01.07.2010 only.

11. He also submits that despite clear position of law, on reference being made from the field formation seeking clarification, the CBEC vide circular No. 151/2/2012-ST dated 10.02.2021 had issued clarification regarding the levy and collection of Service tax on Construction Service [clauses (zzq), (zzzh) of Section 65(105) of the Finance Act, 1994] as under :

(A) Taxability of the construction service :

(i) For the period prior to 1-7-2010 : construction service provided by the builder/developer will not be taxable, in terms of Board's Circular No. 108/2/2009-S.T., dated 29-1-2009 [2009 (13) S.T.R. C33].

(ii) For the period after 1-7-2010, construction service provided by the builder/developer is taxable in case any part of the payment/development rights of the land was received by the builder/ developer before the issuance of completion certificate and the service tax would be required to be paid by builder/developers even for the flats given to the land owner.

This circular in unequivocal terms clarify for both the construction services [Clauses (zzq) and (zzzh) of Section 65(105) of the Finance Act, 1994] as it uses the words "Construction Services" provided by the builder /developer will not be taxable for the period prior to 01.07.2010 in terms of Board's Circular dated 29.01.2009.

12. He also submits that the CBEC vide said Circular No. 108/2/2009-ST dated 29.01.2009, on the doubts being raised regarding the applicability of Service tax in a case where developer/ builder/promoter enters into an agreement, with the ultimate owner for selling a dwelling unit in a residential complex at any stage of construction (or even prior to that) and who makes construction linked payment had inter-alia clarified that :-

"Generally, the initial agreement between the promoters/builders/ developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax.- -----."

The above clarification clearly states that levy of Service tax was on contractor, designer or a similar service provider and not on promoters/builders/developers.

13. He also argued that extended period cannot be invoked to demand service tax and service tax cannot be demanded beyond the period of one year. There was no suppression of facts etc. to avoid payment of Service tax. Appellants contention also supported by the Judgment of Hon'ble

Principal Bench in the case of *M/s Adhikrut Jabti Evam Vasuli vs. Commissioner of Central Excise, Indore – 2017-TIOL-3115-CESTAT-DEL.*

14 On the other hand, Shri Vinod Lukose, learned Superintendent (AR) appearing for the Revenue reiterates the findings of the impugned order.

15. We have considered the submissions made by both the sides and perused the records.

16. We find that the Appellant are engaged in the construction of Residential and Commercial Complexes and received the booking amount as well as instalment amount from his buyers. Revenue proceeded against them on the ground that they have evaded payment of Service Tax on the services rendered by them to their customers in the category of “Commercial or industrial Construction Services” during the period 2004-2005 to 2008-09. Whereas, we find that an explanation was added by the Finance Act, 2010 in Section 65(105)(zzzh) of the Finance Act, 1994 which reads as under :

“Construction of a Complex which is intended for sale, wholly or partly, by a builder or any person authorized 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 a person authorized by the builder before the 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.”

Further, the Board issued clarification on the construction service vide Circular No. 151/2/2012-S.T., dated 10-2-2012 as under:

A) Taxability of the construction service :

(i) *For the period prior to 1-7-2010 : construction service provided by the builder/developer will not be taxable, in terms of Board's Circular No. 108/2/2009-S.T., dated 29-1-2009 [2009 (13) S.T.R. C33].*

(ii) *For the period after 1-7-2010, construction service provided by the builder/developer is taxable in case any part of the payment/development rights of the land was received by the builder/ developer before the issuance of completion certificate and the service tax would be required to be paid by builder/developers even for the flats given to the land owner.*

From the above position, we are of the considered view that prior to 1-7-2010 builders/developers are not liable to pay service tax for the Construction Service and in the present case, the period involved is from 2004-2005 to 2008-09. Consequently, we hold that the impugned order is not sustainable in law.

17. We also find that in the case *Collector of Central Excise, Vadodara v. Dhiren Chemical Industries -2002 (139) E.L.T. 3 (S.C.)*, the Apex Court held as under :

"We need to make it clear that regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue."

In *Collector of Central Excise, Meerut vs. Maruti Foam P. Ltd. - 2004 (164) E.L.T. 394 (S.C.)*, the Apex Court held that the construction of statutory phrase, placed by a circular issued by the Central Board of Excise and Customs, although different from the one placed by the Supreme Court, was binding on the Revenue till the same was withdrawn.

18. In the light of above decisions , it becomes clear that the circular, is binding on the department and this circular makes it more than abundantly

clear that *construction service provided by the builder/developer will not be taxable* for the period prior to 01.07.2010.

19. In the circumstances, the impugned order is not sustainable, hence the same is set aside. The appeal is allowed with consequential relief, if any.

(Pronounced in the open court on 12.04.2022)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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