IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. ST/248/2012-CU[DB]

(Arising out of Order-in-Appeal No.360-ST/LKO/2011 dated 04/11/2011 passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Lucknow)

M/s Smart Builders **Appellant**

Vs.

Commissioner of Central Excise, Lucknow **Respondent**

Appearance:

Shri Dharmendra Kumar (C.A.) for Appellant
Shri Mohd. Altaf (Asstt. Commr.) AR for Respondent

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 22/05/2018
Date of Decision : 22/05/2018

FINAL ORDER NO. – 70949/2018

Per: Archana Wadhwa

After hearing both the sides we note that the assessee is a builder/developer, having builder's agreement with the Land Owner. As per the agreement, the assessee is entitled to 65% of total constructed area, whereas, it has to bear the entire construction cost including other expenses such as municipal and LDA clearance etc. Assessee after construction of entire building allotted 35% of total constructed area to land owner. The assessee had no connection and involvement in sale of constructed area belonging to the land owner. After substantial construction of building, the assessee opened the offer of sale of its share of constructed area. Accordingly, it received booking amount and installments from persons who were interested in purchase of flats. For constructing the building in question, assessee engaged contractors who paid service tax accordingly.

2. Revenue by entertaining view that the appellant has indulged in providing 'Construction of Residential Complex Services' to its future allottees, raised the demand of service tax by way of Show Cause Notice dated 22/02/2010 to the extent of Rs.8,43,998/- along with proposal to confirm the interest and impose penalty. The said show cause notice resulted in passing of impugned order by Original Adjudicating Authority and upheld by Commissioner (Appeals) confirming the demand as also interest and imposing penalty. Hence the present appeal.

3. After hearing both the sides, represented by Shri Dharmendra Kumar (CA) and Shri Mohd. Altaf (A.R.), we note that the issue stands considered by various judicial as also quasi judicial authorities. The Hon'ble Gauhati High Court in the case of Magus Construction Pvt. Ltd.

vs. UOI And Other reported as 2008-(SR1)-GJX-0196-GAU and 2008-(011)-STR-0225-GAU dealt with identical situation and observed that transaction between the petitioner and the flats purchasers are purely a transaction for sale of the flats/premises and cannot be treated as contract for rendering of services of any nature whatsoever. The Hon'ble High Court also observed that whenever such flats are constructed on the land of other land owners by entering into an agreement with the owners of the land, such agreements are popularly known as "Development Agreement". The petitioners are given the right to enter upon the land, to raise construction on their own and sell flats constructed on such land. Such constructional activities, in most of the cases, are executed by external contractors.

In the present case also, the appellant has engaged contractors for construction of residential flats and paid the entire service tax liability falling upon them. There is no dispute about the said fact. As such the above decision of the Hon'ble Gauhati High Court is fully applicable to the facts of the present case. We also take note of the Tribunal decision in the case of CCE Kanpur vs. VEE AAR Developer, New Delhi 2012-(037)-STT-0109-(CESTAT) wherein by following the precedent decision, the activities of raising of flats under joint agreement with the land owners and subsequent sales were held as not services of construction of residential complex, so as to fix the service tax liability against the builder/developer.

4. The learned A.R. appearing for the Revenue fairly agrees that the decision of Gauhati High Court in the case of Magus Construction fully applies in the present case.

5. In the above scenario, we set aside the impugned order and allow the appeal with consequential relief.

(Dictated & Pronounced in Court)

Sd/-	**Sd/-**
(Anil G. Shakkarwar)	**(Archana Wadhwa)**
Member (Technical)	**Member (Judicial)**

Lks