CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, BANGALORE

REGIONAL BENCH - COURT NO. 2

Service Tax Appeal No. 1599 of 2010

[Arising out of Review Adjudication Order No. 17/2010 dated 26.04.2010 passed by the Commissioner of Service Tax, Bangalore]

N.D. Developers Private Limited
No. 398, First Floor, 7th Cross
Mico Layout, B.T.M. 2nd Stage
Bangalore – 560 004 ……………**Appellant**

Versus

Commissioner of Service Tax
Bangalore Service Tax – I
1st to 5th Floor
TTMC Building, Above BMTC Bus Stand
Domlur
Bangalore – 560 071 ……………..**Respondent**

Appearance:

Mr. Nayaz Pasha, CA for the Appellant
Mr. K. Vishwanath, Authorised Representative for the Respondent

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

<u>Final Order No.: 20689 / 2024</u>

Date of Hearing: 19.06.2024
Date of Decision: 19.06.2024

Per: Pullela Nageswara Rao

M/s. N.D Developers Private Limited, the appellant is a company engaged in the construction of residential complexes and is registered under Service Tax with effect from 27.04.2005.

2. The brief facts of the case are service tax is levied on 'Construction of Complex Service' with effect from 16th June 2005. The Board vide Circular No. 80/10/2004 dated 17.09.2004 clarified that the estate builders, who construct buildings/premises for themselves (for their own use, renting it out or for subsequent sale thereof) are not covered under the ambit of 'Construction Services'. The appellant contended that; on the basis of the Circular they entertained a belief that the service tax is not applicable to them as they are building flats themselves for subsequent sale; the doubt involved was whether the builder *per se* is a service provider; whether they are liable to pay service tax merely because they have got rights to develop the property; owing to this confusion, they were not paying service tax nor filing returns; the Service Tax Department officials visited them and sought information, which was furnished. The appellant contended that they have not collected any service tax from the flat buyers and the supporting documents were also furnished. However, since the respondent has informed the appellant that they are liable to pay service tax, they paid service tax amounting to ₹18,10,995/- along with interest of ₹82,418/- during March and April 2006, before the issue of the show cause notice.

3. The appellant in the appeal contends that; in the reply sent to the Commissioner of Service Tax on 28 April 2006, they have clarified their stand on the payment of service tax, wherein they clearly stated that they have paid the service tax involved along with interest under protest and also made it clear that in case the courts rules or the CBEC issues clarification on this issue, they would file a refund claim; they

clearly mentioned that they were never in belief that they are liable for service tax and paid the service tax and did not protest the issue later; show cause notice dated 24.08.2006 was received proposing to adjust the service tax and interest already paid and to levy penalty under Sections 76, 77 and 78 of the Finance Act, 1994; they filed a reply stating that since confusion prevailed as regards levy of service tax on construction service, citing the Circulars of the Board and requested to drop the penal proceedings.

4. The proposals in the show cause notice for demand of service tax along with interest was confirmed and the adjudicating authority dropped the penalties proposed under Sections 76, 77 & 78 of the Finance Act, 1994 on the following grounds:

a) There was no intention on the part of the appellant to suppress the value of service and to evade the tax, if that were to be their intention, they would not have paid the service tax with interest and would have contested the same.

b) The delay in non-payment of service tax was due to the confusion and doubt on applicability of service tax on real estate developers/builders in initial days.

c) The confusion appears to be genuine as the tax being new and there appeared contradictory clarifications in the press those days of initial imposition of service tax.

d) Therefore, the assessee has no intention to evade tax and imposing penalty on such tax compliant that too voluntary compliant does not seem plausible.

5. Subsequently, the Commissioner of Service Tax has reviewed the order of the adjudicating authority under Section 84 of the Finance Act, 1994 and issued a show cause notice dated 08.01.2010 proposing to revise the Order-in-Original passed by the Adjudicating Authority proposing levy of penalty under Sections 76, 77 and 78 of Finance Act, 1994. The Commissioner passed the order dated 26.04.2010 and imposed penalties under Sections 76, 77 and 78 of the Finance Act, 1994. Aggrieved by the impugned order, the appellant has filed this appeal before the Tribunal.

6. During the hearing, the learned CA has relied on the following case-laws:

a) Mr. Josh P. John and others Vs. Commissioner of Service Tax, Bangalore reported in 2014 (4) ECS (178) (Tri.-Bang.)

b) M/s. National Power Engineering Company Vs. Commissioner of CGST and Central Excise, Siliguri Commissionerate

c) M/s. Alstom T&D India Ltd. Vs. Commissioner Central Excise and Service Tax, Chennai

7. The learned Authorised Representative (AR) for the Revenue has reiterated the findings in the impugned order.

8. Heard both sides and perused the records.

9. We find in this case, the appellant is registered under the Service Tax in 2005, before the 'Construction of Complex Services' were brought under service tax. The appellant has contended that; as there was no clarity with respect to service tax payable on 'Construction of

Complex Services', especially when such construction is undertaken for themselves and the constructed flats were sold after they are completed; the Board Circular also had not given them clarity with regard to payment of service tax on their activity; the Service Tax officials have visited them and have informed them about the liability to pay service tax and they have paid the service tax along with interest; subsequently, the Department has issued a show cause notice proposing demand and appropriation of the service tax paid along with interest and proposed imposition of penalties; the adjudicating authority had confirmed the demand with interest and appropriated the amount already paid and dropped the penalties under Sections 76, 77 and 78 of the Finance Act, 1994.

10. We find that the order of the adjudicating authority was reviewed by the Commissioner under Section 84 and show cause notice was issued and adjudicated, wherein penalties under Sections 76, 77 and 78 have been imposed, which is the impugned order before us. The appellant submits that they have already paid the service tax involved along with interest before the show cause notice was issued, though they have paid this amount under protest, they have not pressed this aspect later and the appeal is filed only for setting aside the imposition of penalties under Sections 76, 77 and 78 of the Finance Act, 1994. In support, we find that they have relied on the case-laws cited in para 6 (supra), wherein it has been held that once the appropriate service tax along with interest is paid before the issue of show cause notice, the imposition of penalties under Sections 76, 77 and 78 of the Finance Act, 1994 are not warranted. We do not find any reason to differ with the

decisions of the Tribunal cited above by the appellant. Accordingly, we find that the appeal filed by the appellant for setting aside the imposition of penalties under Sections 76, 77 & 78 of the Finance Act, 1994 is sustainable and can be allowed and we do so.

11. Accordingly, the appeal filed by the appellant is allowed and the penalties imposed under Sections 76, 77 and 78 of the Finance Act, 1994 are set aside. Appeal is allowed to the above extent.

(Operative portion of the order was pronounced
in Open Court on 19.06.2024)

(P.A. Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

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