

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 21914 of 2015

(Arising out of Order-in-Original No. COC-EXCUS-000-COM-02/15-16
dated 17.04.2015 passed by the Commissioner of Central Excise,
Customs and Service Tax, Cochin.)

**Commissioner of Central Excise,
Customs and Service Tax,**
Cochin Commissionerate,
Cochin – 680 018.

Appellant(s)

VERSUS

M/s. Desai Homes
40/7669 C-40, 1st Floor,
DD Vasthamahal,
Market Road,
Kochi – 682 011.

Respondent(s)

APPEARANCE:

Mr. K. Vishwanatha, Superintendent (AR) for the Appellant

Mr. Sneha J.P, Chartered Accountant (CA) for the Respondent

**CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER
(TECHNICAL)**

Final Order No. 20226 /2025

DATE OF HEARING: 02.09.2024

DATE OF DECISION: 28.02.2025

PER : D.M. MISRA

This is an appeal filed by the Revenue against the Order-in-Original No.02/2015-16/ST dated. 06.04.2015 passed by the Commissioner of Central Excise, Customs & Service Tax, Cochin.

2. Briefly stated the facts of the case are that the respondents are engaged in rendering 'Construction of Complex

Service', 'Commercial or Industrial Construction Service' etc. during the relevant period March 2009 to June 2010. Consequent to the scrutiny of their financial records by the Department, a show-cause notice was issued to them on 21.04.2014 alleging that the respondent had received payments from their customers but not shown the taxable value in their ST-3 returns submitted in respect of the period from March 2009 to June 2010. It was alleged that they have not discharged service tax on 'Works Contract Service'(WCS, for short) on the ground that the services of construction of residential complex rendered by them covered under the Circular No.108/02/2009 dated 29.01.2009. Thereby, failed to discharge service tax of Rs.2,16,44,283/-; hence the same was proposed to be recovered along with interest and penalty. On adjudication, the demand was dropped by the learned Commissioner. Hence, the Revenue is in appeal.

3. At the outset, the learned AR for the Revenue reiterating the grounds of appeal has submitted that the respondent is engaged in the business of construction of residential units, flats, complexes and supplying the dwelling units to various customers. They have been classifying their services under the category of WCS right from the beginning i.e. 01.06.2007 and paying service tax upto 31.12.2008 under the category of WCS; however, during the period January 2009 to June 2010, the respondent had not paid any service tax on the entire amount received from their clients towards for providing services under WCS. Thus, as per the definition of Works Contract contained under Section 65(105)(zzzza) of the Finance Act, 1994, the services rendered by the respondent squarely fall under the category of WCS. Assailing the impugned order, learned AR for the Revenue has submitted that the adjudicating authority, apart from referring to CBEC Circular No.108/02/09-ST dated 29.01.2009 as relied by the respondent before him, also

referring to the CESTAT's order dated 20.08.2014, which is not relevant to the facts of the present case, dropped the demand notice observing that no tax liability on the part of the respondent under the category of WCS arose. Further, the learned AR has submitted that the adjudicating authority considering that the respondent is the owner of the land on which residential complex was constructed observed that service tax amounts received by respondent from individual buyers of flats/apartments could not be levied prior to 01.07.2010 and accordingly dropped the demand notice. He has further submitted that para 3 of the Circular dated 29.01.2009 quoted by the learned Commissioner is not applicable to the present case in as much as the sale agreement executed by the respondent is in the nature of agreement to sell the proportionate undivided share of land only and as far as the building is concerned, there is an agreement for construction of the complex. For the purpose of levy of service tax on the taxable service in the instant case, what is relevant is the construction of the building. With reference to the "building", the respondent has executed a construction agreement consisting of various clauses and subsequent to the agreement to sell in respect of the proportionate land property, separate agreement was executed after completion of building; the consideration for the construction was received on various dates during the progress of construction, as per the construction agreement. It is his contention that after having executed the agreement to sell the undivided share of the property for the purpose of getting them a flat constructed by the respondent and having received consideration for such land and for the portion of the building constructed on various stages of construction, it cannot be said that the respondent/builder retains full interest in the property and it is constructed for himself so that no service is rendered by one person to another and it is a 'self-service'. If the construction service was carried

out by the builder himself, a sale agreement for the building would have been sufficient and there is no need for construction agreement. It is their contention that the adjudicating authority ought to have been verified each and every agreement made between the respondent and their clients in order to ascertain whether there is a contract of construction of a new residential complex or part thereof between the respondent and the clients.

4.1. *Per contra*, the learned consultant for the respondent has submitted that the respondent is the owner and promoter / builder of the project; as owner of the land, agreed to sell the undivided share of land and for construction of the apartment / independent units which includes car parking / common facilities / amenities etc. as per the agreement undertook the construction. Further it is submitted that the agreement is for construction of apartment / individual unit in a complex and not for construction of complex for each of the buyers. Referring to the Circular dated 29.01.2009, it is submitted that if any contractor is engaged in construction of complex (comprising of more than 12 units), then such services is taxable prior to 01.07.2010. The respondent had entered into construction agreement for construction of individual unit in a residential complex which is only after completion of the construction. The Sale Deed is executed for sale (transfer) of undivided share of land along with building. Thus, the ownership of the land in constructed property is transferred only after the execution of the sale deed with the buyers. Therefore, construction service provided till the execution of sale deed is a self-service in terms of the Board's Circular dated 29.01.2009. They have submitted that even if assuming the Circular dated 29.01.2009 is applicable for construction of complex services and not for WCS, even then no liability would be fastened on builders prior to 01.07.2010 as decided in a series of cases, which are:

- (a) Commissioner of Cus, CE & ST vs Pragati Edifice Pvt Ltd 2019 (31) GSTL 241 (Tri.-Hyd)
- (b) M/s. Shanmuga Construction Services vs The Commissioner of ST 2023-TIOL-352-CESTAT-MAD
- (c) M/s. South India Shelters Private Limited vs Commnr of CE in ST Appeal No. 40297-40298/2013 vide Final Order No. 40123-40124 / 2023 dated 07.03.2023
- (d) Sree Rosh Properties Pvt. Ltd vs Commissioner of CE & ST 2024 (3) TMI 74 - CESTAT CHENNAI

4.2. Learned Chartered Accountant has further submitted that the demand notice was issued on 21.04.2014 demanding service tax from 01.01.2009 to 30.06.2010 whereas on the issue of non-payment of service tax under WCS, the Department has initiated proceedings by way of show-cause notice dated 16.10.2008 for the very same project; hence, the present show-cause notice issued in the year 2014 for the subsequent period is barred by limitation. In support, they have referred to the judgment of the Hon'ble Supreme Court in the case of Nizam Sugar Factory Vs. CCE [2006(197) ELT 465 (SC)]

5. Heard both sides and perused the records.

6. The Revenue has come in appeal against the order of the learned adjudicating authority on the ground that the respondent rendered WCS but not paid the tax, the learned Commissioner has wrongly dropped the demand against the respondent considering that the services rendered by the respondent are in the nature of construction of residential complex service and not leviable to service tax prior to 01.07.2010.

7. Assailing the impugned order, the Revenue in their grounds of appeal averred that the respondent discharging the service tax under the WCS prior to March 2009 but discontinued to pay service tax for the period March 2009 to June 2010 referring to the Circular dated 29.01.2009. However, on going through the show-cause notice and the order of the learned

Commissioner, nowhere it has been brought on record that the respondent had been paying service tax from 01.06.2007 to February 2009 under the WCS. In the show-cause notice, it is alleged that the amount received by the appellant during the period March 2009 to June 2010 as recorded in their financial records not suffered service tax even though they have rendered the WCS. On going through the sample agreement placed by the respondent during the course of argument between the respondent and one Mr. Justin Joseph, the buyer, it is clear that the respondent were engaged in the construction of two towers and 19 residential individual units and the lands owned by them and after construction of the said units sold the same to the buyers. The allegation of the Revenue on the other hand in their grounds of appeal is that the respondent as a promoter / developer of residential complexes received payments on installment basis against contracts from the prospective purchasers of the units in the developed project during the course of construction of the complex. But no such sample agreement has been placed by the Revenue. On the contrary, the payment schedule in the sample agreement shows that the units have been completely constructed and sold to the buyers. In such circumstances, the Circular dated 29.01.2009 is applicable. The said Circular is reproduced below:-

**Construction of Residential Complex service —
Service tax liability of builders, promoters,
developers and contractors clarified**

Circular No. 108/2/2009-S.T., dated 29-1-2009
F.No. 137/12/2006-CX.4
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

*Subject : Imposition of Service tax on Builders -
Regarding.*

Construction of residential complex was brought under service tax w.e.f. 1-6-2005. Doubts have arisen 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. The 'Construction of Complex' service has been defined under Section 65 (105)(zzzh) of the Finance Act as **"any service provided or to be provided to any person, by any other person, in relation to construction of a complex"**. The 'Construction of Complex' includes construction of a 'new residential complex'. For this purpose, 'residential complex' means any complex of a building or buildings, having more than twelve residential units. A complex constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex intended for personal use as residence by such person has been excluded from the ambit of service tax.

2. A view has been expressed that once an agreement of sale is entered into with the buyer for a unit in a residential complex, he becomes the owner of the residential unit and subsequent activity of a builder for construction of residential unit is a service of 'construction of residential complex' to the customer and hence service tax would be applicable to it. A contrary view has been expressed arguing that where a buyer makes construction linked payment after entering into agreement to sell, the nature of transaction is not a service but that of a sale. Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. It has also been argued that even if it is taken that service is provided to the customer, a single residential unit bought by the individual customer would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax.

3. The matter has been examined by the Board. 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. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.

4. All pending cases may be disposed of accordingly. Any decision by the Advance Ruling Authority in a specific case, which is contrary to the foregoing views, would have limited application to that case only. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned.

Also, in the subsequent Circular No.151/2/2012-ST dated 10.02.2012, the Board has clarified as follows:-

2.1 Tripartite Business Model (Parties in the model : (i) landowner; (ii) builder or developer; and (iii) contractor who undertakes construction) : Issue involved is regarding the liability to pay service tax on flats/houses agreed to be given by builder/developer

to the land owner towards the land /development rights and to other buyers.

Clarification : Here two important transactions are identifiable : (a) sale of land by the landowner which is not a taxable service; and (b) construction service provided by the builder/developer. The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers: (a) from landowner: in the form of land/development rights; and (b) from other buyers: normally in cash.

(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.

8. This Tribunal taking note of the aforesaid circulars in CC,CE&ST Vs. Pragati Edifice Pvt. Ltd. (supra) case, summarised the findings as follows:-

11.

9. In view of the above, though in view of the Apex Court judgment in the case of *M/s. Larsen & Toubro Limited and Others v. State of Karnataka & Others* (supra), the agreements entered into by a builder/promoter/developer with prospective buyers for construction of residential units in a residential complex against payments being made by the prospective buyers in instalments during construction and in terms of which the possession of the residential unit, is to be handed over to the customers on completion of the residential complex and full payment having been made, are to be treated as works contracts, it has to be held that during the period of dispute, there was no intention of the Government to tax the activity in terms of

such contracts a builder/developer with prospective customers for construction of residential units in a residential complex. Such works contracts involving transfer of immovable property were brought within the purview of taxable service by adding explanation to Section 65(105)(zzzh) w.e.f. 1-7-2010, and therefore, it has to be held that such contracts were not covered by Section 65(105)(zzzh) during the period prior to 1-7-2010."

(n) To sum up, as far as construction of 'residential complexes' by the builders are concerned :

(i) Prior to 1-6-2007, if it is a composite works contract, no Service Tax is leviable in view of the judgment of the Hon'ble Apex Court in the case of *Larsen & Toubro* (supra).

(ii) After 1-6-2007, it is chargeable as 'works contract' only if it is a composite contract and under 'construction of complex services' if it is a service simpliciter.

(iii) However, after 1-6-2007 but prior to 1-7-2010, whether it is a service simpliciter or a works contract, if the service is rendered prior to issue of completion certificate and transfer to the customer, it is not taxable being in the nature of self service.

(iv) Further, whenever the service is rendered for completion or construction of a flat for personal use of the service recipient, no Service Tax is payable in view of the exclusion in the definition of residential complex service.

(v) After 1-7-2010, Service Tax is chargeable under the head of 'construction of complex services' if it is service simpliciter and under 'works contract service' if it is a composite works contract.

(o) In view of the above, it is well settled legal position that whether the service is rendered as

service simpliciter or as a works contract, no Service Tax can be levied on construction of residential complex prior to 1-7-2010. Learned Counsel would submit that for the period post 1-7-2010, they have been discharging Service Tax appropriately. This is a fact which can be verified to ascertain the full tax liability for the period post 1-7-2010 or otherwise.

9. In view of the above, we do not find merit in the appeal filed by the Revenue. Consequently, the impugned order is upheld and Revenue's appeal is dismissed.

(Order pronounced in Open Court on 28.02.2025)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

Raja...