CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 2

Service Tax Appeal No. 1478 of 2011

(Arising out of Order-in-Revision No. 03/2011/ST dated 23.02.2011 passed by the Commissioner of Central Excise & Customs, Cochin Commissionerate, Cochin.)

M/s. Wexco Homes Private Limited
Thellakam. P.O.,
Kottayam – 686 016.

Appellant(s)

VERSUS

The Commissioner of Central Excise & Customs and Service Tax,
Cochin Commissionerate,
I.S. Press Road,
Kochi – 682 018.

Respondent(s)

APPEARANCE:

Shri Cherian Punnoose, Advocate for the Appellant.

Shri Akshay Kumar, Superintendent, Authorised Representative for the Respondent.

CORAM:

HON'BLE MR. P.A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20510 / 2025

DATE OF HEARING: 03.04.2025
DATE OF DECISION: 03.04.2025

PER : R. BHAGYA DEVI

Briefly the facts are that the appellant M/s. Wexco Homes are engaged in the 'Construction of Residential Complex', registered under service tax who had undertaken three projects namely 'West Brook', 'Olive Yard' and 'Harward Heights' and had paid tax under the category of 'Construction of Residential Complex Service'. Based on the Board's Circular No. 108/02/2009-ST dated 29.01.2009, the appellant filed a refund claim stating that they are not liable to pay service tax as clarified by the above circular. The original authority after verification of the necessary documents, sanctioned the refund amount of Rs.12,21,799/- vide Order-in-Original No.2/2009-ST(Refund) dated 19.05.2009. This order was taken up for review and the Commissioner vide Order-in-Revision No. 3/2011/ST dated 23.02.2011 set aside the above Order-in-Original sanctioning the refund on the ground that the appellant is not eligible for exemption as per the Board's Circular referred above, hence this appeal.

2. The Learned Counsel submits that the period involved is from June 2005 to June 2007 and during this period, the appellant was not liable to service tax since the Explanation to the definition of taxable service of 'Construction of Residential Complex Service' under Section 65(105)(zzzh) was inserted only with effect from 01.07.2010. The Board's Circulars dated 29.01.2009 and 10.02.2012 have categorically clarified that the above service was not liable to service tax prior to 01.07.2010; since, the refund claim pertains to the period prior to 01.07.2010, the impugned order rejecting the refund claim cannot be sustained. Relied on the following decisions:

- CCE, Chandigarh vs. U.B. Construction (P) Ltd.: 2013 (32) STR 738 (Tri. -Del.)
- Krishna Homes vs. CCE, Bhopal: 2014 (34) STR 881 (Tri. -Del.)
- CCE & ST, Bangalore-I vs. Keerthi Estates Pvt. Ltd. 2019 (26) GSTL 227 (Tri. -Bang.)
- Asian Builders & Developers vs. CCE, Secunderabad: 2023 (10) TMI 429-CESTAT Hyderabad
- Adriot Urban Developers P. Ltd. vs. CGST, Chennai: 2024 (7) TMI 66-CESTAT Chennai.

3. The Learned Authorised Representative for the Revenue reiterated the findings of the learned Commissioner in the impugned Order-in-Revision.

4. Heard both sides. The short issue involved in the present appeal is whether the appellant is liable to pay service tax under the category of 'Construction of Residential Complex' service prior to 01.07.2010 in view of the Explanation and the Board's Circulars referred above. The issue is no longer *res integra* in as much as the Principal Bench in the case of **Krishna Homes vs. Commissioner of Central Excise, Bhopal** (supra) has observed as follows:

> **"8.** Coming first to the question as to whether the activity of M/s. Krishna Homes and M/s. Raj Homes was taxable during the period of dispute or not, by Finance Act, 2005, Clause (zzzh) was introduced into Section 65(105) of Finance Act, 1994, so as to bring within the purview of the term 'taxable service', a service provided or to be provided to any person by any other person "in relation to construction of complex". The expression "construction of complex" was defined in sub-section (30a) of Section 65 and accordingly this expression covered - "(a) construction of a new residential complex or a part thereof or (b) completion of finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or (c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex". The expression residential complex was defined in Section 65(91a) of the Finance Act, 1994 as any complex comprising of - "(i) a building or buildings, having more than twelve residential units; (ii) a common area; and (iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by any authority under law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person". There is no dispute that the complex constructed by both the assessees in these appeals are covered by the definition of "residential complex" as given in Section 65(91a). There is also no dispute that both the assessees had engaged contractors for

construction of the complexes. The dispute in these appeals is as to whether the assessees would be liable to pay Service Tax on the amounts charged by them from their customers with whom they had entered into agreements for construction of the residential units and whose possession was to be handed over on completion of the construction and full payment having been made by the customers. It is seen that on this point, the Tax Research Unit of the Central Board of Excise & Customs, which is a wing of the C.B.E. & C. dealing with legislation work, had vide Circular No. 332/35/2006-TRU, dated 1-8-2006 clarified that in case where a builder, promoter, developer builds a residential complex having more than 12 residential units by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay Service Tax on the gross amount charged for the construction service provided to the builder/promoter/developer under construction of complex service falling under Section 65(105)(zzzh) of the Finance Act, 1994 and that if no person is engaged by the builder, promoter, developer for construction work who undertakes construction work on his own without engaging the services of any other person than in such cases, in absence of the service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise. W.e.f. 1-7-2010 an explanation was added to Section 65(105)(zzzh) which was as under :-

> *"Explanation. - For the purposes of this sub-clause, the construction of a new building 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 the person authorized by the builder before 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."*

Thus, in terms of this explanation, when a builder/promoter/developer got a residential complex constructed for his customers with whom he had individually entered into agreements, in terms of which the prospective customers were required to make payments for the residential units to be constructed in instalments and the possession of the residential units was to be given to the customers on completion of the complex and full payment having been made, the builder/promoter/developer was to be treated as a deemed provider of construction of residential complex service to his customers. Thus, by this explanation, the scope of the Clause (zzzh) of Section 65(105) has been expanded and this amendment by adding an explanation has been held by this Tribunal in the case of *CCE, Chandigarh* v. *U.B. Construction (P) Ltd.* (supra) as prospective amendment. In this regard, para 5 of this judgment is reproduced below :-

> *"5. In Maharashtra Chamber of Housing Industry v. Union of India - 2012 (25) S.T.R. 305 (Bom.), the validity of the 'Explanation' added to Sections 65(105)(zzq) and (zzzh) was challenged on several grounds. The Bombay High Court, also considered the issue whether the explanation was prospective or retrospective in operation and ruled that the explanation inserted by the Finance Act, 2010 brings within the fold of taxable service a construction service provided by the builder to a buyer where there is an intended sale between the parties whether before, during or after construction; that the 'Explanation' was specifically legislated upon to expand the concept of taxable service; that prior to the explanation, the view taken was that since a mere agreement to sell does not create any interest in the property and the title to the property continues to remain with the builder, no service was provided to the buyer; that the service, if any, would be in the nature of a service rendered by the builder to himself; that the explanation expands the scope of the taxable service, provided by builders to buyers pursuant to an intended sale of immovable property before, during or after the construction and therefore the provision is expansive of the existing intent and not clarificatory of the same; and is consequently prospective".*

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".

5. Similarly, this Tribunal vide Final order No.21127/2024 dated 18.09.2024 relying upon the various settled decisions held that the appellant is not liable to pay service tax on 'Construction of Residential Complex' Service prior to 01.07.2010.

6. In view of the above, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per law.

(Operative portion of the order was pronounced
in Open Court on conclusion of hearing.)

(P.A. AUGUSTIAN)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

rv