CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/684/2008-DB & ST/685/2008-DB

[Arising out of Order-in-Appeal No.139/08 dated 17/09/2008 passed by the Commissioner of Central Excise (Appeals), Mangalore.]

M/s. CLASSIC PROMOTERS AND DEVELOPERS
CITY LIGHT, BALMATTA ROAD,
MANGALORE – 575 001.

Appellant(s)

M/s. CLASSIC PROPERTY
SHOP NO.4, DIVYA DEEPA ARCADE
BENDOORWELL,
MANGALORE – 575 001

Versus

The Commissioner of Central Excise and Service Tax
7TH FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE,
KARNATAKA
575003

Respondent(s)

Appearance:

Mr. K. S. Naveen Kumar &
Mr. Dakshina Murthy, Advocates
K.S. RAVI SHANKAR
152, RACE COURSE ROAD,
BANGALORE – 560 001.
KARNATAKA

For the Appellant

Mr. Matrupsharan, AR For the Respondent

Date of Hearing: 08/06/2018
Date of Decision: 13/06/2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, JUDICIAL MEMBER

Final Order No. 20812 - 20813 /2018

Per : P. ANJANI KUMAR

M/s. Classic Property and M/s. Classic Promoters and Developers have been alleged to have evaded service tax on construction of complex services, falling under sub-clause (91a) of clause 65 of the finance Act, 1994, rendered to their customers during the period 16.6.2005 to 30.6.2006. The lower authorities have confirmed the demands and imposed penalties. The appellate authority has dealt both the cases vide a single order Order-in-Appeal No.139/2008 dated 17.09.2008 and confirmed the demands and hence these appeals.

2. The appellants are engaged in the activity of developing of land and getting constructed thereon residential/commercial buildings for individual buyers. They purchase land and plan/lay out of the buildings and engage independent architects, civil contractors, electrical and plumbing contractors to carry on the actual work of construction and other services for buildings. After completion of the buildings, they are sold to individual buyers. Agreements are entered into for sale of undivided interest in the land and apartment. They are registered and assessed to Tax under VAT laws under the category of works contracts.

3. The learned counsel for the appellants submitted that the findings in the Order-in-Original that their activity falls under 'works contracts' services; works contract became taxable only w.e.f. 1.6.2007 in terms of a prospective amendment in bringing a new section 65(105)(zzzza); the types of services mentioned under 65(105)(zzzza) were new type of services previously not subjected to service Tax; moreover the Hon'ble Supreme Court in the case of ***CCE vs. Larsen &Toubro: 2015 (39) STR 913 (SC)*** held that works contract services were taxable only from 1.6.2007; Hon'ble supreme Court further held in ***CCE & ST vs. Sobha Developers: 2017-TIOL-29-SC-ST*** held that the decision in ***CCE vs. Larsen &Toubro*** does not require reconsideration.

3.1. The counsel for the appellants further submitted that the following decisions held that work contract services cannot be retrospectively imposed

(a). Vijay Shanthi Builders Ltd vs. CST 2018(9)GSTL 257(T)

(b). Vistar Construction P. Ltd vs. CST 2016 (44) STR 675(T)

(c). Madhukar Mittal vs. CCE 2017(4) GSTL 412(T)

(d). URC Construction Pvt. Ltd. vs. CCE 2017-TIOL-1214-CESTAT-MAD

(e). Krishna Homes vs. CCE 2014 (34) STR 881 (T)

(f). Asia Brown Boveri Ltd. vs. CCE&ST, 2018-TIOL-957-CESTAT-BANG

(g). Hindustan Aeronautics Ltd. vs. CST 2017-TIOL-3591-CESTAT-BANG

3.3. He further submitted that the developers who got buildings and complexes constructed by contractors came into service tax net from 1.7.2010 after an amendments made with insertion of 65(105)(zzzh) and (zzq). They relied upon the following judgments:

(a). Mohtisham Complexes P Ltd Vs CCE2016-TIOL-1817-CESTAT-BANG
(b). CCE Vs UB Construction Pvt Ltd 2013(32) STR 738 (T) and
(d). Krishna Homes vs. CCE 2014 (34) STR 881 (T)
(e). Trade Facility Circular No 1/2011 issued by Pune Commissionerate.

Even assuming tax was payable, it was the actual person who did the construction work was liable to be taxed in view of CBEC circulars dated 1.8.2006, 23.8.2007 and 29.1.2009 which are binding on departmental officers.

3.4. The learned counsel for appellants submitted that the same Commissioner (Appeals) in respect of an Order-in-Appeal No.159/2007 passed in their own case had held that no service tax is leviable during the period 1.8.2006 to 31.3.2017 in view of the CBEC Circular No 108/02/2009 dated 29.1.2009 (issued from file No 137/12/ 2006 CX-4).

3.5. The learned counsel lastly submitted that as the duty demand itself does not survive; there was no question of interest or penalty.

4. The Departmental Representative for the department reiterated the findings of Order-in-Original and Order-in-Appeal and further submitted that from the agreements, it is clear that the appellant has undertaken the activity of construction; in terms of Section 65(zzzh), any activity undertaken in relation to construction of complex is taxable; Board Circular No.332/35/2006-TRU dated 1.8.2006 and Master Circular No. 354/28/2007-TRU are applicable to only recipient of service whereas the appellants are service providers; duty was correctly calculated; the service rendered by the appellants is squarely covered under Construction of complex service as explained in CBEC Circular No.98/2007-ST dated 4.1.2008; ***Ratio of Fire Pro Systems Pvt. Ltd. vs. Commissioner of Service Tax, Bangalore: 2008 (10) STR 606 (Tri-Bang.)*** is squarely applicable.

5. Heard both sides and perused the records. Precise issue to be decided in the instant case is as to whether the activities undertaken by the appellants were taxable during the relevant time. The appellants contended that it has been repeatedly confirmed in the Order-in-Original that their work comes under composite contracts; they purchase land and plan/layout of the buildings and engage independent architects, civil contractors, electrical and plumbing contractors to carry on the actual work of construction and other services for buildings; After completion of the buildings, they are sold to individual buyers. Even in cases the appellants have taken advances from the prospective buyers of the flats or complexes, the work undertaken by them is composite in nature as is borne by such agreements. The appellants enter into contracts with individual buyers for sale of undivided interest in the land and apartment, such prospective buyers do not enter into individual itemized contracts with the appellants or others for the work of construction, labour or material etc.; the value of such individual items are not mentioned in the agreements. Under these circumstances, it would be fair to consider such contracts as composite work contacts. Going by the ratio of Hon'ble Supreme Court's decision in the case of ***CCE vs. Larsen &Toubro*** (supra) held that works

contract services were taxable only from 1.6.2007. In cases where the appellants do not receive any bookings or advances, the appellants complete the construction and offer the flats for sale. No service element exists. Services rendered by the appellants in the course of construction is a service but to themselves. Therefore, either way no tax can be levied on such activity.

6. It is interesting to note that that the same Commissioner (Appeals) in respect of an Order-in-Appeal No.159/2009 passed in their own case has held that no service tax is leviable during the period 1.7.2006 to 31.3.2007. Learned Commissioner (Appeals) has relied upon CBEC Circular No.108/02/2009 dated 29.1.2009 (issued from file No 137/12/ 2006 CX-4). The circular has amply clarified in para 3 as under:

> *"The matter has been examined by the Board. Generally, the initial agreement between 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 or charge on such property. The property remains under the ownership of the seller (in the instant case promoters/builders/developers). It is only after the completion of 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 sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters in to a contract 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 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."

The Circular further directs that all pending issues may be disposed of accordingly. We find that the appellant's case is squarely covered by the clarification. The above clarification was used by the learned Commissioner (Appeals) in the cases of appellants themselves for a subsequent period. Therefore, nothing survives in the case. We also find that the appellant's case is covered by Hon'ble Supreme Court's decision in the case of ***CCE vs. Larsen & Toubro*** (Supra) and other judgments cited (supra).

7. The appeals are allowed with consequential reliefs if any.

(Order was pronounced in Open Court on **13/06/2018**.)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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