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

Appeal(s) Involved:

ST/439/2008-DB & ST/1262/2011-DB

[Arising out of Order-in-Appeal No. 156/2008 dated 30/03/2008 passed by the Commissioner of Central Excise (Appeals), Bangalore.]

[Arising out of Order-in-Original No. 03/2011 dated 31/01/2011 passed by Commissioner of Central Tax, Bangalore North.]

M/s. ADARSH DEVELOPERS
10, VITTAL MALYA ROAD,
BANGALORE – 560 001.

Appellant(s)

Versus

The Commissioner of Central Excise and Service Tax
BANGALORE SERVICE TAX- I
1ST TO 5TH FLOOR,
TTMC BUILDING,
above BMTC BUS STAND, DOMLUR
BANGALORE – 560 071.
KARNATAKA

Respondent(s)

Commissioner Of Central Tax, Bangalore North
No.59, HMT Bhawan
Ground Floor, Bellary Road
BANGALORE – 560 032.
KARNATAKA

Appearance:

Mr. Rajesh Kumar.T.R., CA
HIRAGANGE & ASSOCIATES
#1010, 1st floor (Above Corp. Bank)
26th Main, 4th T Block, Jayanagar,
BANGALORE – 560 041.
KARNATAKA

For the Appellant

Mr. Matrupsaran, AR For the Respondent

Date of Hearing: 04/07/2018
Date of Decision: 10/07/2018

CORAM:

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

Final Order No. 20942 - 20943 / 2018

Per : P. ANJANI KUMAR

The appellants are developers. They are engaged in joint development of land and building of residential /commercial complexes. They have undertaken projects in and around Bangalore and the projects were known by the name of 'Adarsh Esplanade', 'Adarsh Palm Meadows', 'Adarsh Palm Retreat', 'Adarsh Vista' and 'Adarsh Rhythm'. The Department alleged that on the verification of the records of the appellants, it was seen that they were providing the services under the category of 'Construction of Residential Complexes' in terms of Section 65(30A) of the Finance Act, 1994. It was also alleged that the services rendered by appellants also included maintenance of immovable property service and appellants are also liable to service tax on reverse charge mechanism for the services they have utilized from overseas architects. The appellants have paid during the course of enquiry/investigations, an sum of Rs.42,32,331/-. The department has issued a show-cause notice dated 2.7.2007, which was confirmed by the Commissioner vide Order-in-Original No.3/2011 dated 31.1.2011. At about the same time the appellants have filed a refund claim on the service tax they have paid during investigation. The department vide show-cause notice dated 26.6.2007 sought to reject the refund. The same show-cause notice was confirmed by Order-in-Original No.71/2007 dated 31.1.2011 and was confirmed by Order-in-Appeal No.156/2008 dated 30.3.2008. Aggrieved by both the orders, the appellants have filed these appeals.

2. The appellants have submitted that there are three issues involved in the present case.

(i) Whether the construction of residential complex (including the construction of villa is liable for service tax before 1.7.2007?

(ii) Whether the maintenance deposit collected is taxable under the maintenance or repair service?

(iii) Whether the architect service is liable for service tax under reverse charge mechanism for the period 16.8.2002 to 31.1.2007?

2.1 They submitted that they are developers and as such, they are not chargeable to service tax before 1.7.2010 for construction services. The same was clarified by CBEC vide Circular No.151/2/2012-ST dated 10.2.2012 wherein at para 2.1(A)(i), it was categorically clarified that for the period prior to 1.7.2010 construction service provided by a builder/developer will not be taxable; Tribunal in the case of M/s. Krishna Homes and M/s. Raj Homes vs. CCE, Bhopal: 2014-TIOL-402-CESTAT-DEL., held that no tax is payable by builder/promoter prior to 1.7.2010; they have also relied upon Tribunal's decision in the case of R.F. Properties and Trading Ltd. vs. CCE, Jaipur: 2013 (31) STR 578 (Tri.-Del.). They have submitted that in both the cases the Hon'ble Tribunal relied upon the judgment of Bombay High Court in the case of ***Maharashtra Chambers of Housing Industry vs. UOI: 2012 (25) STR 305 (Bom.)*** wherein the Bombay High Court considered the issue whether the explanation was prospective or retrospective in operation and Rule that the explanation inserted by 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 or during or after construction ……. 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 service rendered to the buyer to himself.

2.2 Regarding the chargeability of maintenance and repair service, the appellants contended that the amounts collected from the prospective buyers were only in the nature of deposit. It can be seen at page 226 of the paper-book that the deposit so collected were shown under liabilities in the Balance Sheet. They submitted that no service is rendered by the developer towards the prospective buyers. The amounts are either returned to the buyers or transferred to housing societies that may be formed after any such societies are formed. It has been held by Mumbai High Court in the case of Green Valley Developers: 2018-TIOL-288-HC-MUM that the builders are not liable to pay service tax under the category of maintenance or repair services on one time maintenance charges collected from flat buyers.

2.3 Coming to the allegation on the service tax leviable on them on the service they have availed from overseas architects, they submitted that the demand on architectural service was for the period 16.8.2002 to 31.1.2007. The reverse charge mechanism for payment of service tax for the services obtained was introduced with insertion of Section 66A only in 18.4.2006. They submitted that Bombay High Court has given a categorical judgment on this issue in the case of Indian Ship Owners Association vs. UOI: 2009 (13) STR 235 (Bom.), which was maintained in Hon'ble Supreme Court in 2010 (17) STR J57. The show-cause notice at para 8 has clearly indicated that for the period 18.4.2006 to 31.1.2007 an amount of service tax of Rs.3,52,102/- was payable by them. So they submit that service tax liability, if any, on the said service would be applicable only for a period 18.4.2006 to 31.1.2007 i.e., Rs.3,52,102/-. The appellants submitted that the same may be appropriated from the refund due to them. In respect of refund, they have submitted that they have not raised any invoices and the amounts have not been recovered from any customers. Therefore, there can be no case of unjust enrichment. The Chartered Accountant has also certified the facts. Therefore, the refund may be granted.

3. The Departmental Representative has reiterated the findings given by the Commissioner and submitted that it was clearly brought out by the adjudicating authority as well as the appellate authority that it was the duty of the appellants to

furnish all the documents covering the refund amount and it will not suffice if only sample copies are furnished especially in view of the fact that not only the eligibility to refund but also the question of taxability of the activity undertaken by the appellant has to be examined and decided on the basis of documents called for by the department. It is also neither legal nor logical on the part of the appellant to express that the facts and circumstances of the sample copies of documents should be made applicable to the entire case even without pursuing all the relevant documents. It was brought to the notice of the Bench that the said Chartered Accountant certificate was not attached along with the submissions before the Commissioner (A).

4. Heard both sides and perused the records. We find that all the three issues raised therein in the appeals have been settled in favour of the appellants. Going by the ratio of the judgments cited supra, we are very clear that the appellants were not required to pay any service tax for the construction services before 1.7.2010 and they were also not liable to pay any service tax on the deposits received for management, maintenance or repair services and they are not liable to pay any service tax on reverse charge mechanism basis for the services they have

utilized from the overseas architects for the period prior to 18.4.2006. We uphold that the appellants are required to pay service tax of Rs.3,52,102/- on this count for the period 18.4.2006 to 31.1.2007.

5. As regards the refund, i.e., appeal No.ST/1262/2011, we find that it needs to go back to the original adjudicating authority to examine the documents that may be submitted by the appellants and to sanction the refund while appropriating the amount of Rs.3,52,102/- which is held to be payable by the appellants.

6. The appeals are allowed as per para (4) and (5) above.

(Order was pronounced in Open Court on **10/07/2018.)**

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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