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

Appeal(s) Involved:

ST/139/2009-DB, ST/148/2009-DB

[Arising out of Order-in-Original No. 125/2008 dated 25/11/2008 passed by the Commissioner of Central Excise and Service Tax, Bangalore]

[Arising out of Order-in-Original No. 124/2008 dated 25/11/2008 passed by the Commissioner of Central Excise and Service Tax, Bangalore]

Sobha Developers Ltd.
(Division Pune), Gera Legend, North Koregaon Park Road, Pune

Appellant(s)

Sobha Developers Ltd.
No. 43, Second Floor, Dickenson Road, Bangalore

Versus

C.C.E. & S.T.-Bangalore-LTU
100 Ft Ring Road, JSS Towers, Banashankari-III Stage, Bangalore – 560 085, Karnataka

Respondent(s)

Appearance:

Shri G. Shivadass, Advocate — For the Appellant

Shri Madhupsharan, Assistant Commissioner (AR) — For the Respondent

Date of Hearing: 24/07/2018

Date of Decision:26/07/2018

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

Final Order Nos. 21006 - 21007/2018

Per: P. ANJANI KUMAR

M/s. Sobha Developers Ltd. the appellants are rendering the services under the category of "Commercial or Industrial Construction Service" as defined under Section 65 of Finance Act, 1994. The appellants are procuring cement, steel, fittings and fixtures etc which are consumed in the providing of services. They are discharging duty of sales tax as well as service tax in the ratio 70% and 30% respectively on the total value of the property and are availing the benefit under Notification No. 12/2003 ST dated 20.06.2003. The Department contended that the items are consumed by them in the course of providing services and such consumption do not tantamount to sale, therefore, the benefit of the Notification is not available to them. Moreover they are discharging service tax only on 30% of the value without any documentary proof. Department has issued two show-cause notices to the appellants; one to Bangalore Unit and the other to Pune Unit demanding service tax of Rs. 12,63,15,533/- (Rupees Twelve Crores Sixty Three Lakhs Fifteen Thousand Five Hundred and Thirty Three only) and Rs. 1,03,51,424/- (Rupees One Crore Three Lakhs Fifty One Thousand Four Hundred and Twenty Four only) respectively. Commissioner has adjudicated the show-cause notice vide Order 124/2008 and 125/2008 both dated 25.11.2008 along with interest and has also levied penalty under Section 76 of the Finance Act, 1994.

2. Learned counsel for the appellants has submitted that the activity undertaken by them in the instant case involves transfer of property and

goods along with provision of service and is a Works Contract Service. They rely upon the case of *Larsen & Toubro Ltd. – 2015 (39) S.T.R. 913 (S.C)* wherein the Hon'ble Supreme Court categorically held that prior 01.06.2007, there was no charging Section to specifically levy service tax on Works Contract Service or mechanism to tax service element derive from gross amount charged for Works Contract less value of property in goods transferred in execution of Works Contract. He further submitted that this Bench of the Tribunal in their own case in *2010 (19) S.T.R. 75 (Tri.-Bang.).* held that the cost of materials consumed for providing 'Commercial or Industrial Construction Service' was not includible in the value of services if VAT is already paid on such materials. He further submitted that when their own case of Tribunal has reached to the Hon'ble Supreme Court in *2017 (49) S.T.R. J26 (S.C)* they have held that the decision in the case of <u>Larsen & Toubro</u> (supra) does not require a reconsideration and has affirmed the decision of this Bench. He further submitted that when there is no mechanism to tax lower portion of the service itself there can be no question on taxing the material element. Accordingly, no interest or penalty is payable and the entire demand is liable to be set aside.

3. The learned authorized representative of the Department has given a written parawise comments on the appeal and has relied upon *Aggarwal Colour Advance Photo System 2011 (23) STR 608 (Tri.-LB)* wherein it was held that the term 'sold' in Notification No. 12/2003 ST has to be read with 'sale' in Central Excise Act 1944; it does not include 'deemed sale'; in that view only value of goods/materials sold separately by service provider

(photographer) are covered by Notification.

4. Heard both the parties and perused the records. We find that the appellants are builders and are constructing residential or commercial complex and are offering the same for the sale during or after completion of the product. They are paying VAT to the Government of Karnataka and service tax in a ratio of 70:30 on the value of the sale. The Department contended that the material used is consumed in the discharge of the service but was never sold or offered for sale in the course of discharge of the service and that the appellants do not provide any documentary proof of sale of material separately so as to be eligible for the exemption in terms of Notification 12/2003. Basically we find that what the appellants are executing are nothing but 'Works Contract' and as such their case is squarely covered by the Hon'ble Supreme Court judgment in the case of M/s. Larson & Toubro (supra). Hon'ble Supreme Court in that case has held that Works Contract came to be taxed under service tax only w.e.f. 01.06.2007 and that Section 65(105) of Finance Act 94 had levied service tax only on contracts simplicitor and not contested in the Works Contract. There was no charging Section specifically levying service tax only on Works Contract and moreover on tax the service element derived from the gross amount charged for Works Contract less value of property and goods transported under exclusion of Works Contract. Going by the ratio of this case, both demands in the case of the appellants as far as they pertain to a period prior 01.06.2007 are liable to be set aside.

5. Coming to the demands for the month of June 2007, we find that the Larger Bench in the case of appellants themselves has held that mutual exclusivity of service tax and sales tax and the powers to tax assigned by the Constitution to the States and Centre respectively on sales and services was highlighted by the Apex Court in the Gujarat Ambuja Cements Ltd. case. The taxing powers of Centre and States assigned in the Constitution have been restated by the Apex Court in the judgment cited by Sobha Developers Ltd. The different Governments viz. Centre and States cannot intrude on the jurisdiction of each other. The decision of the Commissioner to collect service tax on the value on which the appellants had already paid State VAT is contrary to the principles of fiscal federalism adopted in the Constitution. In the circumstances, we find that the impugned demand of differential duty relating to value of materials supplied in the course of provision of construction of commercial or industrial buildings and construction of residential complex services is not sustainable.

6. Therefore, we find that there is a considerable force in the argument of the appellants. We find that the learned DR choose reliance on Aggarwal Colour Advance Photo System (supra) is not of any help as the case is distinguished on set of facts which are entirely different and moreover the decision in the case of the appellant’s own case has been upheld by the Supreme Court, therefore, the appeals filed by the appellants do succeed on merits. As the appeals succeed on merits, there is no issue of fine and penalty etc.

7. In view of the above, the appeals are allowed.

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

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(S.S GARG)
JUDICIAL MEMBER

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