

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

Appeal(s) Involved:

ST/271/2009-DB, ST/973/2010-DB, ST/1023/2010-DB

[Arising out of Review Order No. 7/2009 dated 23/01/2009
passed by the Commissioner of Service Tax, Bangalore]

[Arising out of Order-in-Original (De novo) No. 07/2010
dated 19.02.2010 passed by the Commissioner of Service
Tax, Bangalore]

[Arising out of Order-in-Original (De novo) No. 07/2010
dated 19.02.2010 passed by the Commissioner of Service
Tax, Bangalore]

**C.C.E & C.S.T.-Bangalore
Service Tax- I**

1st To 5th Floor,
TTMC Building, Above BMTC Bus
Stand, Domlur
Bangalore - 560 071
Karnataka

Appellant(s)

Versus

Keerthi Estates Pvt. Ltd.,
G-1, Keerthi Ornatta, C.V. Raman
Nagar Road, Nagavarapalya
Bangalore – 560 093

Respondent(s)

Appearance:

Mr. Pradyumna G.H., Advocate

For the Appellant

Mr. K. Murali, Superintendent (AR)

For the Respondent

Date of Hearing: 04/10/2018

Date of Decision: 10/10/2018

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order Nos. 21594 - 21596 /2018

Per : S.S GARG

The present appeal is directed against the De novo order passed by the Commissioner dated 19.02.2010 whereby the Commissioner of Service Tax has confirmed the demand of service tax on the appellant. The Revenue has also filed two appeals against the impugned order challenging the non-imposition of penalty under Section 78 of the Act. All the three appeals are being disposed of by this common order. The facts of the case in the assessee's appeal is that the appellant-assessee is engaged in the business of developing residential complex and are registered under service tax w.e.f. 06.07.2005 as per Section 69 of the Act for said Construction of Residential Complex Service. On the basis of intelligence gathered, the officers of DGCEI, Bangalore conducted the investigation and recorded the statement of authorized signatory of the appellant. The appellants were proceeded alleging non-payment of service tax under the category of 'Construction of Residential Complex Service' for the period 16.06.2005 to 31.01.2007. On completion of the investigation, show-cause notice dated 02.07.2007 demanding service tax of Rs. 1,21,60,938/- (Rupees One Crore Twenty One Lakhs Sixty Thousand Nine Hundred and Thirty Eight only) was made. An amount of Rs. 60,33,021/- (Rupees Sixty Lakhs Thirty Three Thousand and Twenty One only) was paid by the appellant after initiation of proceedings was proposed to be appropriated against the demand. The said show-cause notice was adjudicated by Commissioner of Service Tax vide Order-in-Original dated 23.01.2009 wherein the service tax demanded in the

show-cause notice was confirmed along with interest and penalties under Section 76 and 77 of the Finance Act were also imposed. Aggrieved by the said order of the Commissioner, the appellant preferred an appeal before CESTAT assailing that the demand was unsustainable in view of the clarification issued by the Board. Tribunal vide Final Order No. 1193/2009 dated 09.10.2009 remanded the case to the Commissioner with a direction to examine the issue in the light of Board's Circular No. 108/2/2009-S.T. dated 29.01.2009. After the remand, the Commissioner of Service Tax passed De novo Order-in-Original dated 19.02.2010 and held that the appellants are liable to pay service tax as demanded in the show-cause notice. Aggrieved by the said order, the appellants have filed the present appeal.

2. Heard both the parties and perused the records.

3. The learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law on the point. He further submitted that this issue has been settled in favour of the assessee by various decision of the Tribunal. He further submitted that it is on record that the appellants had entered into Development Agreements with landowners in terms of which the appellants were conferred the rights to develop the property at their own cost and deliver certain portion of the constructed complex along with common areas, amenities and car parking areas. He further submitted that till the construction of residential complex was completed, the property

belonging to the appellant as a Power of Attorney Holder and hence in terms of Board's Circular No. 108/2/2009-ST dated 29.01.2009, the construction services were deemed to be for the self (i.e. the builder/developer) and the service tax was not leviable during the said material period. He further submitted that in order to put an end to various disputes an explanation was added to Section 65(105)(zzzh) of the Finance Act, 2010 whereby the *"Construction of a Complex 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 a person authorized by the builder before the 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."* He further submitted that after the explanation was added by Finance Act 2010 levy of Service Tax on Construction of a Complex by a builder or a developer became taxable only from 01.07.2010. He further submitted that the Board Circular No. 151/2/2012 ST dated 10.02.2012 wherein it is made clear in para 2.1(A) that construction service provided by the builder/developer for the period prior to 01.07.2010 was not taxable in terms of Board Circular No. 108/2/2009-ST dated 29.01.2009. He further submitted that this issue has been considered by the Tribunal in various decisions and in one of the decisions in the case of **CCE, Chandigarh Vs. U.B. Construction (P) Ltd. – 2013 (32) S.T.R. 738 (Tri.-Del.)** wherein it is held that levy of service tax on the services rendered by a builder is prospective from 01.07.2010 by virtue of explanation added to Section 65(105)(zzzh) of the Finance Act,

2010. He further relied upon the decision of ***Krishna Homes Vs. CCE, Bhopal*** reported in **2014 (34) S.T.R. 881 (Tri.-Del.)** wherein the Tribunal relying upon the decision of the Hon'ble Supreme Court in the case of ***Larsen & Tourbo Ltd.*** as reported in **2014 (34) S.T.R. 481** has held that works contract involving transfer of immovable property is taxable only from 01.07.2010. The decision of the **Krishna Homes** has been followed by CESTAT, Chennai in the case of ***Vijay Shanthi Builders Ltd. Vs. CST, Chennai – 2018 (9) G.S.T.L. 257 (Tri.-Chennai)*** wherein the demand for the period 16.06.2005 to 31.03.2007 was set aside.

4. On the other hand the learned AR reiterated the findings of the impugned order. He further submitted that the Department has filed two appeals against non-imposition of penalty under Section 78 of the Act.

5. After considering the submissions of both the parties and perusal of the material on record, we find that the appellant is engaged in the Construction of Residential Complex in terms of the Development Agreements entered with land owners and prospective buyers. The period of dispute is from 16.06.2005 to 31.01.2007. Further we find that an explanation was added for the Finance Act 2010 in Section 65(105) (zzzh) of the Finance Act 1994 whereby it was clarified that levy of service tax on construction of complex by builder will be taxable only from 01.07.2010 and further the Board vide its Circular dated 10.02.2012 clarified that prior to 01.07.2010 service tax is not chargeable from builders/developer. Further we find that this issue has been considered by the Division Bench of this Tribunal in the case of **CCE**

Vs. U.B. Construction (P) Ltd. cited supra wherein the Tribunal in para 5 has observed as under:

“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.”

5.1. Further we find that in the case of **Krishna Homes**, the Division

Bench of the Delhi Tribunal in para 9 has held as under:

“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.”

6. Similarly the Chennai Bench of the Tribunal in the case of **Vijay Shanthi Builders Ltd.** has followed the decision of **Krishna Homes** and has held that the service tax is not chargeable on construction of residential complex during the period prior to 01.07.2010. In view of the various

decisions cited supra, we are of the considered view that prior to 01.07.2010 builders/developers are not liable to pay service tax for the Construction of Residential Complex Service and in the present case, the period involved is from 16.06.2005 to 31.01.2007. Consequently, we hold that the impugned order is not sustainable in law and we set aside the same by allowing the appeal of the appellant with consequential relief, if any. Since we have allowed the appeal of the appellant, the two appeals filed by the Revenue seeking imposition of penalty under Section 78 is not maintainable and are hereby dismissed.

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

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(S.S GARG)
JUDICIAL MEMBER

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