

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

Appeal(s) Involved

ST/395/2009-DB

[Arising out of Order-in-Original No. 12/2009 dated
02/02/2009 passed by Commissioner of Service Tax,
Bangalore]

**M/s. AKSHAY EMINCE
DEVELOPERS PVT LTD.**

NO.39/8,2 2nd STAGE,
BANGALORE-560038

Appellant(s)

Versus

**Commissioner Of Central Tax,
Bengaluru East**

BMTC BUILDING
OLD AIRPORT ROAD, DOMLUR,
BANGALORE - 560071
KARNATAKA

Respondent(s)

Appearance:

**Mr. Raghuvendra, Advocate
V. RAGHURAMAN**

#466, 9TH CROSS,
1ST BLOCK, JAYANAGAR, NEAR MADHAVAN
PARK,
BANGALORE - 560011
KARNATAKA

For the Appellant

Mr. K.Murali, AR

For the Respondent

Date of Hearing: 14/12/2018

Date of Decision: 14/12/2018

CORAM:

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

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

Final Order No. 21914 / 2018

Per : P. ANJANI KUMAR

The appellants, M/s. Akshay Eminence Developers Pvt.
Ltd., are engaged in providing construction of complex services
as defined under Section 65 (30a) of the Finance Act, 1994. An

investigation was conducted on the books of accounts of the appellants and Department has issued a SCN dated 07.09.2007 demanding a Service Tax of Rs.56,22,788/- for the period from June 2005 to March 2006 and seeking to impose penalties thereof. The Commissioner of Customs vide Order No. 12/2009 dated 23.01.2009 has confirmed the demand of Rs.36,39,685/- along with interest and penalty of Rs.5000/- under Section 77 of the Finance Act, 1994 and has also appropriated Rs.21,00,000/- paid by the appellants. Hence, this appeal.

2. The Ld. Counsel for the appellants contended that Circular No. 151/2/2012 dated 10.02.2012 and 108/2/2009-ST dated 28.01.2009, developer/builder was not liable to Service Tax on the construction and sale of the apartments. He submitted that various decisions are also to the extent that developer/builder was not liable to pay Service Tax, more so prior to 01.07.2010; the entire building is built by entering in to individual agreements for construction, therefore, the said construction would be out of tax net as the residential unit is used for personal use; amounts collected from customers are not only towards sale of apartments as the appellant is a mere "builder/developer" of the property and construction services are in fact, under taken by the contractor and no service is rendered

by developer to the buyer of the apartment. He also submitted that it is pertinent to note that Hon'ble Supreme Court in the case of L&T held that works contract is not liable to Service Tax prior of 01.06.2007 relied upon the following cases:

(i) Commr. of ST Vs. Shrinandnagar Co-Op. Housing Society Ltd. 2011 (23) STR 439 (Guj.).

(ii) Principal Commissioner of Service Tax Vs. Nithesh Estates Ltd. 2008-TIOL-1369-HC-KAR-ST.

(iii) Commr. of ST Vs. Sujal Developers 2013 (31) STR 523 (Guj.).

(iv) Suresh Kumar Bansal Vs. UOI 2016 (43) STR (Del.).

(v) Maharashtra Chamber of Housing Industry Vs. UOI 2012 (25) STR 305 (Bom.).

(vi) Macro Marvel Projects Ltd. Vs. Commr. of ST 2008 (12) STR 603 (Tri. Chennai)- Maintained by SC in 2012 (25) STR J154 (SC).

(vii) M/s. Adarsh Developers Vs. CCE, 201-TIOL-2798-CESTAT-BANG.

(viii) Sreevatsa Real Estates Pvt. Ltd. Vs. CCE, 2018-TIOL-3402-CESTAT-MAD.

(ix) Vinayaka Homes Vs. CCE, 2016 (43) STR 251.

(x) Saumya Construction Pvt. Ltd. Vs. CST, Ahmedabad, 2016 (46) STR 723 (Tri. Ahmd.).

(xi) Classic Promoters and Developers Vs. CCE, 2009 (15) STR 77 (Tri. Bang.)

(xii) Mohtisham Complexes (P) Ltd. Vs. Commr. of C.Ex., Manglore 2011 (21) STR 551 (Tri. Bang.)

(xiii) Commr. Vs. L&T, 2015 (39) STR 913 (SC).

(xiv) Magus Construction Pvt. Ltd. and Anr Vs, UOI and Others, 2008 (11) STR 225 (Gauhati).

(xv) Assotech Realty Vs. State of UP, 2007 (7) STR 129 (All.)

2.1 He also submitted that the SCNs barred by limitation and as there was no deliberate intention to evade payment of duty and as subsequently it was settled by the Central Govt. and Hon'ble Supreme Court that composite works contracts were not taxable before 01.06.2007, no penalty can be imposed. Benefit of Section 80 of the Finance Act, 1994 would be applicable. He relied upon the following cases:

(i) CCE Vs. Rajasthan Renewable Energy Corpn. Ltd. 2018 (15) GSTL 661 (Raj.).

(ii) Padmini Products Vs. Collector 1989 (43) ELT 195.

(iii) CCE Vs. Chemphar Drugs & Liniments, 1989 (40) ELT 276.

3. The Ld. AR has reiterated the findings of OIO.

4. Heard both sides and perused the record of the case. We find that CBEC vide Circular No. 108/2/2009-ST dated 29.01.2009 has clarified at Para 3 that "The matter has been examined by the Board. Generally, the initial agreement between the 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 an interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the 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 such sale deed would be in the nature of 'self-service' and consequently would not attract Service Tax. Further, if the ultimate owner enters into a contract for construction of a residential complex 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 the 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".

We also find that the issue is squarely covered by a catena of judgments cited above which do not require reiteration or explanation.

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

(Operative portion of the Order was pronounced
in Open Court on **14/12/2018**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

Parveen...