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

Appeal(s) Involved:

ST/445/2009-DB

[Arising out of Order-in-Original No. 16/2008 dated 31/12/2008 passed by the Commissioner of Central Excise, Bangalore.]

Purvanakar Projects Limited
No.130/1, Ulsoor Road
Bangalore – 560 042.

Appellant(s)

Versus

The Commissioner of Central Excise
PB.NO.5400, QUEENS ROAD,
CENTRAL REVENUES BUILDING,
BANGALORE -560001
KARNATAKA

Respondent(s)

Appearance:

Mr. Syed Peeran, Advocate
LAKSHMI KUMARAN & SRIDHARAN
WORLD TRADE CENTRE NO.404-406,
4TH FLOOR, SOUTH WING BRIGADE GATEWAY
CAMPUS NO.26/1, DR. RAJKUMAR ROAD,
BANGALORE - 560 055
KARNATAKA

For the Appellant

Mr. Rama Holla, Superintendent (AR)

For the Respondent

Date of Hearing: 01/11/2019
Date of Decision: 14/11/2019

CORAM:

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

Final Order No. 21002 /2019

Per : S.S GARG

The present appeal is directed against the impugned order dated 31.12.2008 passed by the Commissioner of Central Excise wherein the

Commissioner has confirmed the demand on various services viz., Health Club and Fitness Centre Service; Real Estate Agent Service; Maintenance or Repair Service and also confirmed the demand of Rs.36,41,830/- being the CENVAT credit utilized in excess of 20% along with interest and penalties.

2. Briefly the facts of the present case giving arise to this appeal is that the appellants are developers and builders engaged in the construction of residential complex and selling the same to the customers since 1986. In the year 2005 when the service tax was brought in for construction service, the appellant applied for registration under 'Commercial or Industrial Construction Service' and 'Construction of Complex Service' and have since been paying service tax with effect from 16.6.2005 on the considerations received from the customers. The said business of construction and selling of residential apartments are undertaken by the appellant on the land owned by them and also on the land owned by others. In the case of land owned by others, the appellant enter into a Joint Development agreement with the owner in which case after the construction of residential apartment, a fixed percentage of the built up area is given as co-developer share to the owner. In both the cases, appellant initially enter into an agreement with the prospective buyer for sale of the undivided share in the immovable property. Simultaneously also enter into a construction agreement with the prospective buyer. The above two agreements put together amount to sale of residential apartment including the common facility/area as mentioned in the agreement which also describe the appellant's name, floor, door number, etc. Further, as per the agreement, the customers / clients are required to make an initial lump sum payment at the time of entering into an agreement and thereafter, periodical payments as set out in the agreement. The amount so paid is treated as an amount paid towards the works contract and the appellant bifurcated the value into services and goods and paid service tax on the value of services under 'Construction of Complex Service' and VAT at appropriate rate; whereas in the case of Joint Development where percentage share of constructed property is handed back to the co-developer, there will be no sale deed as the co-developer is already the owner.

2.1 In March 2006, DGCEI started investigations and recorded the statements of certain persons working with the appellant. During investigation, the appellant had a strong belief that they are not liable to pay service tax but still they calculated the service tax liability and interest for the period from 16.6.2005 to 31.3.2006 after applying the abatement provided under Notification No.1/2006-ST for 'Construction of Complex Service' and paid a sum of Rs.19,041/- towards the demand of service tax and Education Cess under 'Health Club and Fitness Centre Service' and a sum of Rs.1,63,329/- towards the demand of Service Tax and Education Cess under Real Estate Agent Service. Thereafter, appellant received a show-cause notice dated 20.11.2006 proposing to levy service tax under the following heads:

Sl. No.	Service	Service Tax Demand
1	Health Club and Fitness Centre Service	Rs.19,69,871/-
2	Real Estate Agent Service	Rs. 5,79,221/-
3	Interior Decoration Service	Rs.11,28,033/-
4	Maintenance or Repair Service	Rs. 9,62,011/-

In addition to the above, the show-cause notice also proposed to demand service tax on the ground that the appellant provided both the taxable and exempted services without maintaining separate accounts with respect to input and input services and therefore, the credit utilization cannot be in excess of 20%. As per the show-cause notice, exempted service provided by the appellant was for the sale of apartment to the co-developer (owner of land) in the case of Joint Development. Appellant filed detailed reply to the show-cause notice and after following the due process, the Commissioner vide Order-in-Original dated 31.12.2008 confirmed the proposal in the show-cause notice except demand pertaining to 'Interior Decoration Service'.

3. Heard both the parties and perused the records.

4. 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. He further submitted that it is undisputable fact that the entire activity of construction of residential

apartment by the appellant is in the nature of indivisible works contract involving transfer of property in goods along with the transfer of service. He further submitted that the appellant has obtained VAT Registration in the State of Karnataka and discharged applicable tax by treating the transaction as works contract. It is his further submission that it is now well settled law that service tax liability on indivisible works contract arises only with effect from 1.6.2007 with the introduction of taxable service of works contract under Section 65(105)(zzzza) in terms of the ratio laid down by the Hon'ble Supreme Court in the case of ***Commissioner of Central Excise and Cus. Kerala vs. Larsen & Toubro Ltd.: 2015 (39) STR 913 (SC)*** wherein it has been categorically held that prior to 1.6.2007, there was no charging section to specifically levy service tax on works contract service or any mechanism to tax service element derived from gross amount charged for works contract less value of property in goods transferred in execution of works contract. Further, the Supreme Court in the case of ***Commissioner of Central Excise and Service Tax, Karnataka vs. M/s. Shoba Developers Ltd.: 2017-TIOL-29-SC-ST*** held that the decision in the case of Larsen and Toubro does not require reconsideration. The said decision of the apex court has been consistently followed by the Tribunal in the following cases:

- ***HAL vs. CST, Bangalore in Appeal No.ST/75/2006-DB vide Final Order No.21067/2017 dated 25.4.2017***
- ***Craft Int. Décor Ltd. vs. CCE & ST: 2018-TIOL-3471-CESTAT-BANG.***
- ***ABB Ltd. vs. CCE & ST: 2018-TIOL-957-CESTAT-BANG.***
- ***Skyline Engineering Contract (India) Pvt. Ltd. vs. CST: 2018-TIOL-1262-CESTAT-DEL.***

4.1 He further submitted that prior to 1.6.2007, the taxable category of 'Construction of Residential Complex Service' covered only those contracts which were purely for service and composite contracts involving transfer of goods and provision of service would only be covered under Works Contract service post 1.6.2007. For this, he relied upon the following decisions:

- ***Real Value Promoters Ltd.: 2018-TIOL-2867-CESTAT-MAD.***
- ***Ashwini Apartment vs. CGST & ST: 2018-TIOL-3350-CESTAT-MAD.***
- ***Vishranthi Homes Pvt. Ltd. vs. CSGT & ST: 2018-TIOL-498-CESTAT-MAD.***

4.2 He further submitted that the period involved in the present case is prior to 1.6.2007 and therefore, the entire demand for the period prior to 1.6.2007 under various categories of service i.e., Health Club and Fitness Centre Service; Maintenance or Repair Service; Real Estate Agent Service is unsustainable. He further submitted that the very demand of tax prior to 1.6.2007 is unsustainable in law then the demand of excess utilization of CENVAT credit by application of Rule 6 of the CENVAT Credit Rules does not arise. The alleged excess utilization of CENVAT credit is entirely in respect of service tax liability which is non-existent inasmuch as the activity of construction of residential complex is not taxable prior to 1.6.2007. In such circumstances, the demand of service tax is legally unsustainable as submitted by the learned counsel. The learned counsel also submitted that the appellants are not providing Health Club and Fitness Centre Service. Primarily the appellants are engaged in the construction and sale of residential flats and as part of the whole plan, the appellant provides the facility of club house and the cost of which is also included in the total value which the appellant charged from the customers. In the construction agreement, the appellants have specified a separate consideration for the club house facility and in the club house, the appellant has also constructed the health and fitness facility. Learned counsel read out the definition of Health and Fitness Centre Service as provided in the Finance Act and also the taxable service as provided under Section 65(105)(zw) and submits that it is not even the case of the Department that the appellants are providing any service for physical wellbeing. The only activity undertaken by the appellant is construction of club house for which the appellants have charged some amount from the prospective owners. Once the club is constructed the same is handed over to the owners association who will manage and operate the said Club. The appellants do not operate the club or provide any service in relation to club at all. In this regard, they relied upon the decision rendered in the case of ***Raheja Universal Pvt. Ltd. vs. Commissioner of Service Tax, Mumbai-I: 2017 (5) GSTL 289 (Tri.-Mum.)***. Further, the learned counsel submitted that the appellants are also not providing any Real Estate Agent service. He further submitted that at times the buyer during the course of construction or before the completion of construction or just before the Registration of Sale Deed upon completion of construction would sell the right to a third person and the buyer in such case would himself find a third person buyer and enter into an agreement with such person, which is intimated to the appellant accordingly. The appellant makes the necessary changes in the records maintained in order to recognize and transfer the right / apartment to a new person which was initially in the name of the original buyer. For doing this, the appellants have charged some amount as presently transfer charges from the buyer. On this amount, service tax has been presently demanded by the Department under the head Real Estate Agent Service. He then referred to the definition of Real Estate Agent Service and submitted that there is absolutely no agency function being conferred to the appellants and the appellants only recover certain charges to update and amend their records and registers. In support of this submission, he relied upon the decision rendered in the case of ***Commissioner of Service Tax vs. Ansal Properties & Infrastructures Ltd.: 2018 (8) GSTL 58 (Tri.-Del.)***.

4.3 With regard to the demand under 'Maintenance or Repair Service', the counsel submits that at the time of agreement, appellant collected an advance amount as maintenance charges incurred on behalf of the apartment owners on a cost to cost basis only to cover the common expenses such as security, electricity charges and water charges for common area and miscellaneous maintenance expenses of the common area including the administrative charges. It is only a system of pooling the amount from all the owners and spending for the purpose of maintenance of common area owned by them, and therefore, there is no service. For this, the learned counsel relied upon the decision of the Tribunal in the case of ***Adarsh Developers vs. CCE: 2018-TIOL-2798-CESTAT-BANG.*** Learned counsel also submitted that prior to 18.4.2006, reimbursable expenses cannot be subjected to service tax. For this submission, he relied upon the following decisions:

- ***Commissioner of Service Tax, Chennai vs. Sngamitra Services Agency: 2014 (33) STR 137 (Mad.)***
- ***M/s. S. K. Enterprises Palakkad vs. Commissioner of Customs & Central Excise (Appeals), Calicut: 2008 (10) STR 171 (Tri.-Bang.)*** SLP of the Department dismissed ***in Commissioner vs. S.K. Enterprises: 2009 (14) STR J20 (SC)***

4.4 He further submitted that Rule 6 of the CENVAT Credit Rules, 2004 is not attracted in the present case because as per the agreement the appellant would construct the apartment on such land and after the construction is over, the land owner will be given fixed number of apartment as his share as a co-developer.

5. On the other hand, the learned AR defended the impugned order and submitted that the appellants have charged from the ultimate customers for these services and therefore, they are liable to pay the service tax on the said services. In support of his submission, Revenue relied upon the decision in the case of ***Satya Prakash Builders Pvt. Ltd. vs. Commissioner of Central Excise, Jaipur-I: 2017 (4) GSTL 393 (Tri.-Del.)***.

6. After considering the submission of both the parties and perusal of the material on record, we find that it is not in dispute that the entire activity of the appellant is construction of residential apartments and such activity is in the nature of indivisible works contract involving transfer of property in goods along with provision of service. We also find that appellants are paying VAT under the State Government by treating the said transaction as works contract. We note that now it is settled law that indivisible works contract is taxable only with effect from 1.6.2007 with the introduction of separate taxable service of works contract under Section 65(105)(zzzza). The Hon'ble Supreme Court in the case of ***Commissioner of Central Excise vs. Larsen & Toubro Ltd.*** (supra) had held that prior to 1.6.2007, there was no charging section to specifically levy service tax on works contract on service and in the present case, the entire period is prior to 1.6.2007, therefore, the appellants are not liable to pay service tax on the entire activity of raising the construction and providing the various category of services viz., Health and Fitness Centre Service, Maintenance or Repair Service or Real Estate Agent Service. Further, we have also seen the individual service and their definition in the Finance Act and we find that the appellants are not rendering those services viz., Health and Fitness Service because they do not fit into the definition of Health and Fitness Service as provided under the Finance Act. Similarly, appellant also do not fit into the Real Estate Agent service as provided under the Act. Further, the appellant

are also not rendering any maintenance or repair service rather they are charging for maintenance service to create a fund which will be transferred to the Resident Association on completion of the project. In view of the various case laws relied upon by the appellants cited supra, no service tax is to be charged on this 'Maintenance or Repair Service'. Further, we find that Rule 6 is not applicable in the present case. The contention of the Department in demanding excess of 20% is that the appellants are providing both taxable as well as exempted service and therefore, hit by Rule 6(3)(c) of CENVAT Credit Rules, 2004. We have also seen the definition f exempted service as provided in Rule 2(e) of CENVAT Credit Rules, 2004 and find that the preliminary requirement to fall within the definition of exempted service is that the activity undertaken should be service whereas the activity undertaken by the appellant in the present case is not defined to be a taxable service. In the present case, the appellant give full constructed apartment to the owner of the land and this by no stretch of imagination can be seen as a service provided by the appellant to the land owners. Co-developers do not provide any service to each other and this has further been clarified by the CBEC in Circular No.108/02/2009 dated 29.1.2009.

6.1 In view of our discussion above, we find that the impugned order is not sustainable in law and therefore, we set aside the same by allowing the appeal of the appellant.

(Order was pronounced in Open Court on **14/11/2019**.)

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

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