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

Appeal(s) Involved:

**ST/21725/2018-DB**

[Arising out of Order-in-Original No. BLR-EXCUS-COM-86-2015-16 dated 27/04/2016 passed by Commissioner of Central Tax, Bangalore North.]

**M/s. Adarsh Developers**
#10, Vittal Mallya Road,
BANGALORE – 560 001.
KARNATAKA

Appellant(s)

**Versus**

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

Respondent(s)

**Appearance:**

**Mr. Cheriyan Punnoose, Advocate**
**A.K.B. ASSOCIATES**
#311-312, 'Commerce House'
9/1, Cunningham Road,
BANGALORE – 560 052.
KARNATAKA

For the Appellant

**Mr. Madhup Sharan,**
**Asst. Commissioner (AR)**

For the Respondent

Date of Hearing: 27/11/2019

Date of Decision: 29/11/2019

**CORAM:**

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

## Final Order No. 21191 /2019

**Per : P. ANJANI KUMAR**

M/s Adarsh Developers, the appellants have filed this appeal against Order-in-Original dated 31.03.2016/27.04.2016.

**2.** The appellants are engaged in construction of Residential complexes/ Villas and in providing Architect/Consulting Engineer Service. Revenue issued a Show Cause Notice, dated 19.10.2012, demanding the service tax of Rs 62, 33, 39,968 under construction of Residential complex Service and Rs 25, 75,843 under Architect/ Consulting Engineer Service, for the period 01.04.2007 to 31.03.2012. The SCN was confirmed by above cited OIO along with interest and penalty of Rs.62, 59, 15,811 under Section 78; Rs.10,000/- under Section 77of the Finance Act, 1994.

**3.** Learned counsel for the appellants at the outset submits that the issue is settled by this very bench for the period up to 01.07.2010 by Final Order No.20942-20943/ 2018 dated 04.07.2018/10.07.2018; the case is barred by limitation as extended period has been invoked in the subsequent show cause notice; construction of independent villas was never sought to be taxed; in respect of construction of Residential complexes under taken by them due allowance was not given for the value of the materials. He however, submits that they are not pressing on the levy of Service Tax demanded on 'Consulting Engineer Service' since they have paid duty before issue of Show Cause Notice.

**3.1.** Learned counsel submits that the Commissioner has confirmed the demand inter alia on the ground that the explanation inserted to Section 65(105) (zzzh) w.e.f. 01.07.2010 is clarificatory in nature and hence retrospective. Therefore, the Appellants were liable to pay service tax on the activity of sale of flats/villa from the period April 2007; in respect of demand for an earlier period, confirmed vide Order-in-Original Sl.No.3/2011 dated 31.01.2011, this bench, vide Final Order No.20942-20943/2018 dated 04.07.2018/10.07.2018, decided in favour of the Appellants and held that the Appellants were not required to pay any service tax for the construction services before 01.07.2010. Hon'ble Tribunal in the following cases have also held that the insertion of explanation w.e.f. 01.07.2010 is prospective in nature and the builders were not liable to service tax prior to 01.07.2010:-

(a) CCE Chandigarh Vs UB Construction (P) Ltd. 2013 (32) STR 738 (Tri.-Del.)

(b) Krishna Homes Vs CCE, Bhopal 2014 (34) STR 881 (Tri-Del.)
(c) Josh P John & Others Vs CST, Bangalore 2014 (9) TMI 597-CESTAT-BANG

**3.2.** Learned Counsel submits that there was no valuation machinery to levy service tax on composite transaction involving land, material and labour and therefore the levy has been struck down by the Hon'ble high court of Delhi. The Commissioner has confirmed the demand of tax on the ground that the Appellants have provided the service of construction of residential complex to the flat/villa purchasers and adopted the cumulative figure mentioned in the balance sheet as the gross value and after applying the abatement of 67% under Notification No.01/2006-ST dated 01.03.2006. The Appellants submit that the essential requirement for levy of service tax is the existence of service in the transaction. The term 'service' is generally understood to be an intangible effort in the form of labour, skill or advise. Sale of land which is a transfer of immovable property and sale of materials which is transfer of materials can in no case be considered to be service for the purpose of levying service tax. Since the Central Government does not have the power to levy tax on transfer of property, the same needs to be excluded while computing the value of service for the purpose of levy of service tax. In case such exclusion is not provided under Statute or the Rules, then the collection of tax would not be in accordance with law. The Appellants submit that there is no such valuation mechanism provided under the entire gamut of Finance Act, 1994 and Rules made thereunder. The Central Government has only provided for an exemption notification under Notification No.01/2006-ST dated 01.03.2006, which would not take away the requirement to enact a statutory provision or Rule to ascertain the actual value of service after deducting the value of materials and land value involved in the transaction. The Appellants further submit that the retrospective amendment made to Rule 2A of the Service Tax (Determination of Value) Rules, 2006 is also not applicable to the present case, since Rule 2A is applicable only to "works contract service" and the present demand is under the taxable category of "construction of residential complex service". In terms of Article 265 of the Constitution of India, no tax should be levied or collected except by the authority of law. Therefore, the basic requirements under Article 265 are that (a) There must be a law (b) The law must authorize the tax and(c) The tax must be levied and collected according to the law. In the present case, the tax is not levied and collected in accordance with the law, as there is no statutory provision or a Rule determine the quantum of service portion in a composite transaction involving construction and sale of land. Therefore, any demand of service tax on a composite transaction involving construction and sale of land without a statutory machinery to determine the value of service, is in violation of Article 265 of the Constitution of India. He relies upon

*(a). Govind Saran Ganga Saran Vs CST1985 Supp SCC 205*

*(b). CCE & Cus. Kerala Vs Larsen & Toubro Ltd 2015 (39) STR 913 (SC)*

*(c). Suresh Kumar Bansal Vs. UOI in 2016 (43) STR 3 (Del.)*

It has been held that neither the Finance Act nor the Rules framed therein provide for a machinery provision for excluding all components other than service components for ascertaining the measure of service tax. The abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract. Hence, no service tax could be charged under Section 66 of Act read with Section 65(105) (zzzh) in case of composite contracts involving construction as well as sale of land.

**3.3.** Learned Counsel submits that no service tax is liable to be paid on construction of villas; villa is a single residential unit for a family with all the facilities like car parking, terrace etc; for the period prior to 01.07.2012, service tax is liable to be paid under 'construction of residential complex service' only if the assessee constructs a 'residential complex' as defined; as per the definition, the complex should have more than twelve residential units in it. This is the first and foremost condition under the definition. The other conditions liked parking facility, common areas, common facilities, common layout etc., are only supplementary to the main condition that complex should have a building having more than twelve residential units or the buildings in the complex should have more than twelve residential units in it. Villa is a single residential unit and the entire project would not have a building with more than twelve residential unit to fall within the ambit of definition of 'residential complex' under Section 65 (91a). Hence, the construction of villa would not fall within the ambit of 'construction of residential complex service' and no service would be liable to be paid on villa receipts. He relies upon

***(a). Macro Marvel Projects Ltd Vs CST, Chennai 2008 (12) STR 603 (Tri.-Chennai) (Affirmed by the Hon'ble Supreme Court in 2012 (25) STR J154 (SC)***

***(b). Baba Construction Pvt Ltd Vs CCE & ST., Ghaziabad 2018 (15) SGTL 345 (Tri.-All.)(Affirmed by the Hon'ble Supreme Court in Commissioner Vs Baba Construction Pvt Ltd 2018 (15) GSTL J120 (SC)***

***(c) A.S. Sikarwar Vs CCE, Indore 2012 (28) STR 479 (Tri.-Del.)***

***(d) Beriwal Constructions Co Vs CCE & ST, Agra [2017] 88 taxmann.com 222 (Allahabad-CESTAT)***

***(e) Ashok Kumar Mittal Vs CCE & ST, Raipur 2019 (3) TMI 863-CESTAT NEW DELHI***

***(f) Amit Kumar Jain Vs CCE & ST., Raipur 2018 (10) TMI 398-CESTAT New Delhi***

**3.4.** Learned Counsel further submits that Commissioner in the impugned order has taken the cumulative figure declared in the balance sheet as the gross amount. The Appellants submit that on receiving the receipts from the prospective buyers of various projects, the same would be accumulated year on year under the head 'flat advances' (liability side of the balance sheet), till the sale entry is accounted in the books of accounts. The sale entry would be accounted only on handing over the possession of the apartment/villa. Therefore, unless sale entry is accounted in the books of accounts and the amounts received would be reflected in each year's balance sheet as 'flat advances'. The Appellants submit that the actual receipts pertaining to the financial year 2007-08 though it was offered to tax in the same financial year, was again adopted as the taxable value by Commissioner for the subsequent periods. The Commissioner in the impugned order has adopted the same calculation pattern for the subsequent financial years also. Hence, in the impugned order, the Commissioner has confirmed the demand of service tax on the very same receipts more than once. This manner is accounting is in accordance with Accounting Standard (AS)-7 issued by The Institute of Chartered Accountants of India (ICAI). The Commissioner in the impugned order has not considered the Appellants claim for deduction of receipts towards the value of land and included the same in the gross value and confirmed the demand of service tax after allowing abatement of 67% provided under Notification No.01/2006-ST, which is legally unsustainable. In case land value has to be included, then also in terms of Notification No.01/2006-ST, the Appellants were entitled for abatement of 75%, which has not been extended by the Commissioner. Assuming without admitting that the Appellants are liable to pay service tax on their activity for the period, then the Appellants submit that they are eligible for the benefit of deduction of value of materials under Notification No.12/2012-ST dated 20.06.2003. Assuming without admitting that the Appellants are liable to service tax as held in the impugned Order-in-Original, and then the manner of calculation of the service tax liability is incorrect as the Appellants are entitled for the benefit of cum-tax.

**3.5.** The Learned Counsel submits that department had earlier issued a Show Cause Notice dated 02.07.2007 invoking longer period of limitation. In the present case also, the Commissioner has confirmed the demand of service tax on the very same activity by invoking longer period of limitation. Department was well aware of the activities and transactions while issuing the first show cause notice itself. Therefore, no suppression could be held against the Appellants and invoked while raising demand for the subsequent periods. He relies upon.

***(a) Nizam Sugar Factory Vs CCE, A.P. 2008 (9) STR 314 (SC)***
***(b) ABB Ltd Vs CCE & ST, Bang 2019 (24) GSTL 55 (Tri.-Bang.)***
***(c) Rasi Travels & Cargo P Ltd Vs CCE, Trichy 2018 (9) GSTL 123 (Tri.-Chennai)***

For the reasons stated for setting aside the invocation of longer period would be squarely applicable against the imposition of penalty. As the issue is periodical one and the department was completely aware of the entire facts, for the subsequent proceedings, penalty under Section 78 cannot be imposed. Further, in respect of penalty imposed on the demand under 'architect/consulting engineer service', the Appellants submit that they had paid the service tax along with interest much before the issuance of the show cause notice and in any case, the amount of service tax paid under reverse charge was available as Cenvat credit to the Appellants. The delay in payment under reverse charge was of the bona fide belief that no service tax was payable. Immediately on releasing that the same was payable, the Appellants remitted the service tax with interest. Penalties imposed are liable to set aside in terms of Section 80 as the Appellants had a reasonable cause for the non-payment of service tax.

**4.** Learned AR for the department reiterates the findings of the OIO.

**5.** Heard both sides and perused the records of the4 case. The brief issue involved in this case is to decide whether the appellants are liable to pay service tax on the 'constructions of complex services' and 'Consulting Engineer Service' for the period 01.04.2007 to 31.03.2012 and whether the SCN is time barred. We find that the present SCN is issued on 19.10.2012. We find that the explanation was added on 1-7-2010, the services rendered by the appellants before the issuance of completion certificate were not taxable as they were deemed to be services rendered by the builder to himself. CBECD circular dated 29-1-2009 and the trade Facility notice No 1/2011 dated 15-2-2011 issued by Pune Commissionerate have amply clarified that same. As submitted by the appellants, the tribunal has consistently taken the stand that the explanation inserted in 2010 cannot be retrospective. Under the circumstances, it is to be held that such service was not liable to service tax before 1-7-2010.

**6.** The appellants submit that prior to the present proceedings, Revenue issued another show cause notice to the appellants which came to be confirmed by Order-in-Original Sl.No.3/2011 dated 31.01.2011; this bench, vide Final Order No.20942-20943/2018 dated 04.07.2018/10.07.2018, decided in favour of the Appellants and held that the Appellants were not required to pay any service tax for the construction services before 01.07.2010. Department was well aware of the activities and transactions while issuing the first show cause notice itself. Therefore, no suppression could be held against the Appellants and invoked while raising demand for the subsequent periods. We find that extended period cannot be invoked in subsequent SCN, more so, when the first SCN itself was issued invoking extended period. We rely on ***Nizam Sugar Factory Vs CCE, A.P. 2008 (9) STR 314 (SC)***. Therefore, we hold that the demand is hit by limitation and therefore, demand raised for the period 01.04.2007 to 31.3.2011 is not sustainable.

**7.** Regarding the demand on construction of villas, appellants submit that it will not fall under the definition of Construction of Residential Complex. It will be useful to have a look at the definition at this juncture.Section 65(91a) of the Finance Act, 1994, defines *'residential complex' to be*

> *'residential complex' means any complex comprising of—*
>
> *(i) a building or buildings, having more than twelve residential units;*
> *(ii) a common area; and*
> *(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.*
> *Explanation.—for the removal of doubts, it is hereby declared that for the purposes of this clause,—*
> *(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;*
> *(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;"*

As per the above, residential complex should have more than twelve residential units in it. This is the first and foremost condition under the definition. The other conditions liked parking facility, common areas, common facilities, common layout etc., are only supplementary to the main condition that complex should have a building having more than twelve residential units or the buildings in the complex should have more than twelve residential units in it. Villa is a single residential unit and the entire project would not have a building with more than twelve residential units to fall within the ambit of definition of 'residential complex' under Section 65 (91a). We find that the case of the appellants is covered by the case law cited by them and it would be redundant to reproduce the same again. In view of the above, we find that the construction of villas would not fall within the ambit of 'construction of residential complex service' and no service would be liable to be paid on villa receipts.

**8.** Regarding the activity of construction undertaken by the appellant in respect of other residential complexes, we find that the appellants have submitted various decisions. They appear to be diverse and the issue has not reached finality. We find that the demand on this count if any is sustainable for the normal period i.e. 1-4-2011 to 31-3-2012. Learned Counsel further submits that the Commissioner has not considered their submissions in the impugned order. He has submitted that

(i). Commissioner misunderstood their accounting practice AS-7 standards and has taken the cumulative figure of current liabilities instead of accrual each year
(ii). Commissioner has not considered their request to exclude the land value but extended abatement of 67% as provided in Notification No 1/2006.
(iii). Commissioner did not extend the cum duty benefit.
(iv). Delhi High Court in the case of Suresh Kumar Bansal (Supra)has held that there was no valuation machinery in service tax law on composite transactions.

We find that that for the above reasons, the case needs to go back to the original authority, to appreciate the evidence submitted by the appellants and to re-quantify the duty liability for the period 1-4-2011 to 31-3-2012.

**9.** The appellants have submitted that they are not contesting the duty paid by them in respect of 'Consulting Engineer's Service'. However, they submit that the penalty may be set aside on the ground that entire tax was paid before the issuance of Show Cause Notice. In respect of 'Consulting Engineer's Service' and 'Construction of Residential Complex', we find that though the commissioner has not imposed penalty separately, as per service, he imposed a penalty of 65, 59, and 15,811 which is equivalent to the total demand. In respect of 'Construction of Residential Complex', we hold that most of the demand has been held to be barred by limitation.

Consequentially, the penalty also is not imposable for the period. Moreover, looking in to the facts and circumstances of the case, where the issue is mired by frequent changes in law, clarifications and judicial pronouncements, it is not proper to allege that the appellants had a mens rea in the case. Therefore, for extended period penalty is not imposable. For normal period also, we find that there are enough conditions to waive penalty in terms of Section 80 of Finance Act, 1994. In respect of 'Consulting Engineer's Service' as the demanded duty is paid before the issuance of notice, we hold that no penalty can be imposed. Accordingly, we set aside the penalty imposed under Section 78 of Finance Act, 1994.

**10.** In view of the above, the appeal is partially allowed in the following terms:

(i). Demand under 'Construction of Residential Complex' is held to be time barred. Demand in respect of Construction of Villas is set aside.

(ii). Demand under 'Construction of Residential Complex' on construction of complexes other than Villas is sustained for the period 1-4-2011 to 31-3-2012 and remanded back to the original authority for re-quantification in terms of the discussion.

(iii). Demand under 'Consulting Engineer's Service' has been accepted by the appellants.

(iv). Penalty imposed under Section 78 of Finance Act, 1962 is set aside. Penalty imposed under Section 76 is sustained.

(Order was pronounced in Open Court on **29/11/2019.)**

**S.S GARG**
**JUDICIAL MEMBER**

**P. ANJANI KUMAR**
**TECHNICAL MEMBER**

PAK