# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
## CHANDIGARH

REGIONAL BENCH - COURT NO. I

**Service Tax Appeal No.900 of 2010**

[Arising out of Order-in-Appeal No.30/ST/APPL/CHD-II/2010 dated 5.3.2010 passed by the Commissioner (Appeals) of CGST (Appeals), Chandigarh)

**M/s. Silver City Construction Ltd.** **Appellant**
(M.C.Zirakpur, Chandigarh-Ambala Highway, Zirakpur)

*VERSUS*

**CCE, Chandigqarh-I** **Respondent**
(Plot No.19, C.R.Buildng, Sector 17C, Chandigarh-160017)

**APPEARANCE:**
Present for the Appellant: Shri Rakesh Khanna, CA
Present for the Respondent: Shri Shivani, AR

**CORAM: HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)**
**HON'BLE MR. P.V.SUBBA RAO, MEMBER (TECHNICAL)**

**FINAL ORDER NO.60874/2021**

**DATE OF HEARING: 07.07.2021**

**DATE OF DECISION:10.08.2021**

**PER ASHOK JINDAL**

The appellant is in appeal against the impugned order wherein the demand on construction of complex and work contract service for the period April, 2005 to February, 2008 has been confirmed against the appellant.

2. The brief facts of the case are that the appellant is engaged in construction of complex services and is registered with the Central Excise department as service provider under the category of construction of complex services. The appellant constructed more than 12 apartments in a common area at Zirakpur-Ambala Road, Zirakpur

(Punjab) under the name "Silver Heights, Silver Themes and Silver Green. The appellant is engaged in selling of flats to the allottees/customers construed by self or through contractor engaged by it on land owned by it. The appellant has also entered into agreement with various allottees/customers and advance receipt has been issued and after completion of sale deeds were executed handed over the possession of flats to the prospective allottees/customers. Revenue is of the view that under the category of construction of complex services with effect from 16.6.2005 vide Notification No.15/2005 (ST) dated 7.6.2005 wherein it has been defined under section 65 (105) (zzzh) of the Finance Act, 1994 and means 'any service provided or to be provided to any person by any other person, in relation to construction of complex', the appellant was providing Construction of Complex service, therefore, it has been alleged that that appellant is providing service to the prospective buyer of construction of complex service. Accordingly, a show cause notice dated 8.10.2008 was issued to the appellant for the period April, 2005 to February, 2008 to demand of service tax under the category of construction of complex service and to impose penalty. The matter was adjudicated and the demand of service tax was confirmed along with interest but penalty was dropped. Against this order, the appellant is before us.

3. Ld. Counsel for the appellant submits that the appellant is engaged in selling flats constructed through contractors engaged by it on land owned by it.

4. It is his submission that the appellant is not rendering any service to its allottees/customers and as such there is no relation of

service provider and service recipient between the appellant and its allottees/customer, a pre-requisite to get covered under the purview of service tax. The actual relationship between the appellant and its allottees/customers is of seller and buyer. He also relied on the CBEC's Circular No.108/2 of 2009-ST dated 29.1.2009 which explained that till the time the sale deed is not executed, it is the builders who will be regarded as the owners and not the allottees. Since till completion of construction and execution of sale deed, the ownership remains with the builder, the construction of residential complex would be in nature of self service and it cannot be said that the appellant is the service provider and doing construction on behalf of the allottees.

5. It is his submission that in view of the circular, no service tax is payable by the appellant as they executed sale deed and the relationship between buyer/allottee or customer is buyer and seller. To support his contention, he relied on the decision of this Tribunal in the case of Skynet Builders, Developers, Colonizer reported as 2012 (21) taxmann.com 439 (New Delhi – CESTAT). He also relied on the decision of this Tribunal in the case of Bairathi Developers Pvt.Ltd. vs. CCE- 2016 (43) STR 455 (Tri.-Del.). He prayed that the impugned order be set aside.

6. On the other hand, Ld.AR opposed the contention of ld. Chartered Accountant and submits that the appellant is builder and as per decision of Hon'ble Supreme Court in the case of Raheja Developers Corporation vs. State of Karnataka reported as 2005 NTC Vol.(27)- 273 (SC) "that the activity undertaken by builders for construction of flat/building for or on behalf of the prospective customers for consideration in cash or deferred payment is covered

under the works contract and not under sale." Therefore, the appeal is to be dismissed.

7. Heard and considered the submissions.

8. On careful consideration of the submissions, reliance placed and arguments adduced by both sides, we find that it is fact on record that for the period April, 2005 to February, 2008 the model of work by the appellant is that they executed sale deed to the allottees/customer after completion of flats. They were not providing any service to the allottees/customers prior to execution of sale deed by the appellant. Any service rendered by the appellant prior to the sale of the flats is self-service in terms of CBEC's Circular No.108/2 of 2009-ST dated 29.1.2009 and hence is not chargeable to service tax.

9. This issue has been examined in detail by this Tribunal in the case of Skynet Builders, Developers, Colonizer (supra) wherein this Tribunal clarified. Further, the same view was taken by this Tribunal in the case of Bairathi Developers Pvt.Ltd.(supra). Further, in the case of Indo Global Estates vs. CCE, Chandigarh- 2014 (46) taxmann.com.254 (New Delhi-CESTAT), this Tribunal held that "when construction of residential complex is for sale of flats and same is ultimately sold to customer under agreement, it cannot be held that there were any service being provided by builders to their customer, even if, a part amount of cost of flats is being received in advance. Such advance amount is against sale consideration of flat and building and not for obtaining any service, so as to make it leviable to service tax".

10. The case law of Raheja (supra) relied upon by Ld.AR is not relevant to this case firstly, because, there is CBEC's Circular No.108/2 of 2009-ST dated 29.1.2009 which clarified that any service by a builder prior to sale of the flats is a self service and hence is no exigible to service tax. The circular of the Board is binding on the Revenue and it is not open for the Revenue to take a different stand. Secondly, this judgment was doubted by the Supreme Court in a subsequent case of Larsen and Toubro vs State of Karnatak 2008 (12) S.T.R. 257 (S.C.) and referred to a larger bench of the Supreme Court. Thirdly, even if the argument is carried that the nature of contract is not one of sale of flats but one of works contract is considered, service tax can be demanded only under 'Works Contract Service' from 1.7.2007 as held in the Commissioner of Central Excise Kerala vs Larsen and Toubro 2015 (39) S.T.R. 913 (S.C.). The current demand is under Construction of Complex Services giving 67% abatement on the gross amounts charged. It has been held by Supreme Court in para 17 of this judgment that *"a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In Gannon Dunkerley, 1959 SCR 379, this Court recognized works contracts as a separate species of contract*". For all these three reasons, the impugned order confirming a demand of service tax under construction of complex services is not sustainable and is liable to be set aside.

11. In the result, the appeal is allowed with consequential relief, if any.

(pronounced in the open court on 10.08.2021)

**(ASHOK JINDAL)**
**MEMBER (JUDICIAL)**

**(P.V.SUBBA RAO)**
**MEMBER (TECHNICAL)**

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