IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

Appeal No. ST/200/2010

(Arising out of Order-in-Original No. 2/2010 dated 25.1.2010 passed by the Commissioner of Service Tax, Chennai)

M/s. Creations — Appellant

Vs.

Commissioner of Service Tax, Chennai — Respondent

Appeal Nos. ST/41166/2015 and ST/42468/2015

(Arising out of Order-in-Appeal No.113/2015 (STA-II) dated 16.4.2015 passed by the Commissioner of Service Tax (Appeals – II), Chennai)

M/s. Creations
Commissioner of Service Tax, Chennai — Appellants

Vs.

Commissioner of Service Tax, Chennai
M/s. Creations — Respondents

Appearance

Shri V. Ravindran, Advocate for the Assessee
Shri B. Balamurugan, AC (AR) for the Revenue

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **09.05.2018**

Final Order Nos. **41649-41651 / 2018**

Per Bench

Brief facts are that the assessee is a proprietary concern of which Shri R. Kumar is the proprietor and is mainly engaged in promotion of residential complex. The department was of the view that assessee is liable to discharge service tax under construction of residential complex and show cause notices were issued proposing to demand service tax along with interest and for imposing penalties. After due process of law, the lower authorities confirmed the demand along with interest and also imposed penalties. However, the penalty under section 76 was waived. Aggrieved by the confirmation of demand, the assessee is now before the Tribunal. The department has filed Appeal No. ST/42468/2015 against the order of Commissioner (Appeals) who has set aside the penalty imposed under section 76 of the Finance Act, 1994.

2. On behalf of the assessee, the ld. counsel Shri V. Ravindran submitted that the period involved in ST/200/2010 is from April 2007 to December 2008 and in Appeal No.ST/41166/2015, the period involved is from January 2009 to September 2010. The assessee had constructed 71 flats and was using his own staff and labour for the construction activity. The assessee has not engaged any contractor / builder / developer for the construction work. Therefore, as per circular F.No. 332/35/2006 dated 1.8.2006, the activities would not fall

under construction of residential complex services. The flats were built on the land belonging to the assessee and since no other contractors were hired, the same would be excluded from the definition of construction of residential complex service as it would amount to a self-service for which there can be no levy of service tax. The said aspect has been explained by the Board vide circular No. 96/7/2007-ST dated 23.8.2007. It was further clarified and explained vide Board circular dated 29.1.2009. Therefore the levy of service tax for the period April 2007 to December 2008 in Appeal No. ST/200/2010 cannot sustain.

3. In respect of the demand of service tax for the period January 2009 to September 2010, he submitted that vide amendment dated 1.7.2010, Section 65(105)(zzzh) had been amended by adding an Explanation. Thus, when advances are received by the builder, prior to grant of completion certificate, the activity would be deemed to be construction of residential complex service. In the case of assessee, though he had received advances, the construction activity of the flats was completed on 19.11.2008 which is evident from the completion certificate granted by the Chennai Metropolitan Development Authority. Thus, the services having been completed on 19.11.2008, the amendment brought forth on 1.7.2010 which has only prospective application cannot be pressed upon the assessee to demand service tax. The department has alleged

that the services would fall within the definition of construction of residential complex alleging that the assessee has received amounts from the prospective buyers by sale of undivided share in the property. Such allegation has been strongly denied by the assessee even in the reply to the show cause notice. The property always remained in the ownership of assessee till the construction was completed. This aspect is established from the fact that the permission for construction of the complex was granted by CMDA as well as Corporation of Chennai in the name of the assessee. He referred to the permission certificates dated 9.3.2007 and 23.3.2007. Thus, the activities of construction of flats having been completed prior to the amendment to Section 65(zzzh), the demand of service tax for the three months after 1.7.2010 is also not sustainable. He relied upon the decisions in the cases of Josh P John and Others Vs. Commissioner of Service Tax, Bangalore – 2014 (9) TMI 597 and Jain Housing Vs. Commissioner of Service Tax, Chennai – 2014 (36) STR 1010 (Mad.).

4. The ld. AR Shri B. Balamurugan reiterated the findings in the impugned order. He submitted that the assessees has sold the undivided share in the property (UDS) in the property to the prospective buyer by entering into an agreement with them. A separate agreement was entered into for the construction activity. Thus, the legal right of ownership of the UDS has been

registered in the name of the prospective buyer. The subsequent agreement for construction has allowed the promoter-assessee to carry out the construction work on behalf of such land owners / prospective buyers. Thus the assessee not being the owner of the land, the circulars are not applicable to the facts of the case. Only as a trade practice prevalent in the construction industry, the promoter/assessee has obtained the planning and building permits for construction of residential flats in his name, though the UDS has been sold to the prospective flat buyers. Thus the assessee has agreed to construct the flats for the individual purchasers of the UDS of land and activity of such construction is fully covered under construction of residential complex service. Thus, the confirmation of demand requires no interference.

5. Heard both sides.

6. For better appreciation, the definitions are reproduced as under:-

> “Residential Complex
>
> Section 65(105)(zzzh): Taxable service means any service provided or to be provided to any person, by any other person, in relation to construction of complex;
>
> Section 65[(30a) “construction of complex” means –
>
> (a) construction of a new residential complex or a part thereof; or
>
> (b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or
>
> (c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;]

> Section 65(91a) "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"

7. The short issue for consideration is whether service tax is payable for the construction of residential complex service in respect of the dwelling units constructed by the assessee prior to 1.7.2010 i.e. before introduction of the Explanation to the Section 65(105)(zzzh) and thereafter. The assessee has relied upon various Board circular. As per Board Circular F.No. 332/35/2006-TRU dated 1.8.2006, the Board has categorically clarified that if no other person is engaged for construction work and the builder undertakes construction work on his own, in the land belonging to him, without engaging the services of any other person, then there is no service provider and service recipient relationship in existence and therefore the question of providing taxable service does not arise. This was clarified again in circular dated 23.8.2007. The Board clarified that in such

instance, since the service provided is self-service, the activity of construction would not attract levy of service tax. Again vide circular dated 29.1.2009, the Board has explained that it is usual that initial agreement is entered between the promoter / builder and the prospective buyer, which is in the nature of agreement to sell the UDS in the property. This by itself does not create any interest or charge on such property. The property remains in the ownership of the promoter / builder and therefore when construction of residential complex is undertaken in such land, being self-service, it would not attract levy of service tax. For better appreciation, relevant portion of the circulars are reproduced as under:-

Sl. No.	Issue	Legal Position
1.	Is service tax applicable on Builder, Promoter or Developer who builds a residential complex with the services of his own staff and employing direct labour or petty labour contractors whose total bill does not increase 4.0 lacs in one P/Y?	In a case where the builder, promoter or developer builds a residential complex, having more than 12 residential units, by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay service tax on the gross amount charged for the construction services provided, to the builder/ promoter/developer under 'construction of complex' service falling under Section 65(105)(zzzh) of the Finance Act, 1994 If no other person is engaged for construction work and the builder/promoter/developer undertakes construction work on his own **without** engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise. Service tax exemption for small service providers upto an aggregate value of taxable services of Rs. 4 lakh provided in any financial year vide Notification No. 6/2005-Service Tax, dated 1-3-2005 is applicable for 'construction of complex' service also.

Above clarification was superseded vide Board's Master Circular No. 96/7/2007-ST dated 23.8.2007 which is reproduced below:-

Reference Code	Issue	Clarification
079.01/ **23-8-07**	Whether service tax is liable under construction of complex service [section 65(105)(zzzh)] on builder, promoter, developer or any such person,- (a) who gets the complex built by engaging the services of a separate contractor, and (b) **who builds the residential complex on his own by employing direct labour**?	(a) In a case where the builder, promoter, developer or any such person builds a residential complex, having more than 12 residential units, by engaging a contractor for construction of the said residential complex, the contractor in his capacity as a taxable service provider (to the builder/promoter/ developer/any such person) shall be liable to pay service tax on the gross amount charged for the construction services under 'construction of complex' service [section 65(105)(zzzh)]. (b) If no other person is engaged for construction work and the builder/ promoter/ developer/ any such person **undertakes** construction work on his own without engaging the services of any other person, then in such cases,- (i) service provider and service recipient relationship does not exist, (ii) services provided are in the nature of self-supply of services. Hence, in the absence of service provider and service recipient relationship and the **services** provided are in the nature of self-supply of services, the question of providing taxable service to any person by any other person does not arise.

<u>Board's Circular No. 108/2/2009-S.T., dated 29-1-2009</u>

> "3. 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 <u>'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property</u>. 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".

8. One of the strong arguments raised by the ld. AR is that the assessee has sold the UDS to the prospective buyer and therefore is not the owner of the property. Though it is discussed in the order that the promoter / assessee has sold the USD in the land to a few prospective buyers, we do not find any document to substantiate the same. The permission certificate for construction of the complex as well as the completion certificate is issued in the name of the assessee. These documents therefore strongly indicate that the land belongs to assessee till the completion of construction. The assessee has strongly and consistently submitted that the land always belonged to him and that the construction having been done in his own land, would not attract the levy of service tax. As clarified in circular dated 29.1.2009, it is common practice that the promoter enters into an agreement to sell UDS of the property to the prospective buyers. Such 'agreement to sell' does not transfer any interest in the property to the prospective buyer. The ownership and the possession still remains with the

promoter. In such cases, as clarified by the circular, only after completion of construction and full payment of the agreed sum, the sale deed is executed and only then the ownership of the property (UDS + flat) gets transferred to the ultimate owner. The Board has clarified that even in the case where the prospective buyer enters into a contract for construction of residential complex with the promoter who himself provides the services of design, planning and construction; and after such construction, when such property is for his personal use, then such activity would not be subject to levy of service tax because this would fall under the exclusion provided in the definition of residential complex service and that this situation also does not attract levy of service tax. Thus in the instant case, on facts and evidence placed before us, prior to 1.7.2010, the levy of service tax cannot sustain for the reason that the assessee is the land owner and the construction done by himself without engaging a contractor would amount to self-service. Needless to say that the Board circulars are binding upon the department. The period after 1.7.2010 is to be analyzed in the background of the amendment to Section 65(105)(zzzh) of the Finance Act. The Explanation added to the said Section is reproduced as under:-

> "(zzzh) to any person, by any other person, in relation to construction of complex;]
>
> *Explanation.* — For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised 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 authorised 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"

9. The amendment brought to effect a deeming fiction, that if any sum is received from the prospective buyer before grant of completion certificate would be construction of residential complex service. The said amendment is prospective in nature and would be effective only after 1.7.2010. However, in the instant case, the completion certificate shows that the construction activity has been completed on 19.11.2008. The provision of service, which is the taxable event during the impugned period happened prior to 1.7.2010. Therefore, the said amendment cannot be pressed upon the assessee to demand service tax. The Tribunal in the case of Josh P John (supra) had discussed this issue. Though the relief sought in that case was in respect of refund of service tax, the major issue analysed was with respect to construction of residential complex service prior to 1.7.2010 and after.

10. On the totality of the facts presented before us, appreciating the documents as well as the ratios laid in the above cases, we are of the view that the demand is without legal basis.

11. In the result, the impugned orders are set aside and the appeals filed by assessee are allowed. Consequently, the appeal filed by Revenue in ST/42468/2015 is dismissed.

(Operative portion of the order was
pronounced in open court)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

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