

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI**

Appeal No. ST/384/2011

(Arising out of Order-in-Original No. 04/2011 dated 07.03.2011 passed by the Commissioner of Central Excise, Chennai-I Commissionerate)

M/s. Golden Ventures : Appellant

Vs.

Commissioner of C.E. & S.T., Chennai : Respondent

Appearance:-

Shri PrasannaKrishanan V, Consultant
for the Appellant

K. Veerabhadra Reddy, JC (AR)
for the Respondent

CORAM:

Hon'ble Shri V. Padmanabhan, Member (Technical)
Hon'ble Shri P Dinesha, Member (Judicial)

Date of Hearing/Decision: **01.06.2018**

Date of Pronouncement: **02.07.2018**

Final Order No. **41938 / 2018**

Per Bench :

The appellant is a partnership firm in the construction business, but it executed only one project. The brief facts, in a nutshell, are that the appellant procured land from land owners, after obtaining necessary permission from different authorities concerned and after identifying prospective buyers, they entered into two separate agreements with them; one was agreement of sale of undivided share

of land ('**UDS**' for short) and two, for construction of flat for each of the buyers. Of course, it is an admitted fact that both the agreements were executed simultaneously and that only after construction of flat, sale deeds for UDS alone were registered with the registering authority and the possession of the constructed flats was handed over thereafter. It is also an admitted fact that each of such sale deeds executed did not include the value of the constructed flat. The dispute relates to the period from April, 2006 to March, 2009.

2. The Revenue, through a Show Cause Notice ('(SCN' for short) dated 24.03.2010, on the ground that the activities of the appellant was a taxable service under Section 65 (105)(zzzh) read with Section 65(91a) of the Finance Act, 1994, put the appellant on Notice as to why:

" (i) a sum of Rs. 1,18,41,933/- (Rupees One crore eighteen lakhs forty one thousand nine hundred and thirty three only) being the Service tax payable for the period from 01.04.2006 to 31.03.2009 as detailed in Annexure to this notice should not be demanded from them under proviso to Section 73(1) of Finance Act, 1994;

(ii) Interest at appropriate rate should not be demanded from them under Section 75 of the Act from the due date of payment till the date of actual payment of the amount demanded above;

(iii) Penalty under Section 76, 77 and 78 of the said Act, should not be imposed on them for the contravention of the Act and Rules mentioned above with an intention to evade payment of Service Tax"

3. During the adjudication proceedings, the appellant, through its representative contended *inter-alia* that the flats were constructed for its own use; that its claim was supported by clarifications issued in Circulars viz., CBEC Circular. No. 332/35/2006-TRU, Circular No. 80/10/2004 and CBEC Circular No. 108/02/2009; and that the decision of Hon'ble Guwahati High Court in the case of Magus Construction Pvt. Ltd. Vs. Union of India – 2008 (11) S.T.R. 225 (Gau.) and also Prince Foundation Pvt.Ltd.Vs. The Commissioner of Service Tax, Chennai, etc.. The adjudicating authority (hereinafter referred to as 'AA') after going through the submissions, both written and on hearing the AR of the appellant, vide order-in-original dated 07.03.2011 has confirmed the demand, interest and penalty as proposed in his SCN. Seriously aggrieved by the same, the appellant is before this forum. Shri PrasannaKrishanan V., Consultant, appeared for the appellant and Shri K. Veerabhadra Reddy, JC (AR), appeared for the Revenue.

4. It was contended by the learned Consultant for the appellant that primarily, the act of the AA/Commissioner is against the CBEC Circular No. 332/35/2006 dated 01.08.2006. It was further contended by the Ld. Consultant during the course of hearing that when the appellant had commenced its construction activities, it had brought its activities to the notice of the Dept. as early as in June, 2008 vide replies(in O.C. No. 10/16/2018/2008 dated May, 2008) to the Superintendent of Service Tax about its only project namely 'Golden Ventures' and therefore, no suppression could be attributed to the appellant; that its

case was that since it had engaged the services of a contractor for the construction of residential complex having more than 12 residential units, if at all any liability was there then it was the contractor who was liable to pay service tax on the gross amount charged for the construction services and, therefore, the service tax, if any, was to be met by the contractor and not the appellant since the appellant was only acting in the capacity of a promoter. This was referred to by the learned Consultant to the effect that the Department, having issued SCN nearly after two years of the above intimation, chose to issue SCN dated 24.03.2010 without alleging suppression and, therefore, the same was hit by limitation. It was further argued by the learned Consultant that the appellant, as a promoter, had entered into agreement with the contractor for the construction of flats, the ownership of which had remained with it and, therefore, this was in the nature of self-service, which is not liable for service tax; and that the learned AA/Commissioner has overlooked both the decisions relied on by the appellant as well as the CBEC instructions/circulars and, therefore, the impugned order is not sustainable.

5. Per contra, the learned Department Representative - DR, Shri K. Veerabhadra Reddy appearing for the Revenue contends that the construction of residential complex service was introduced in the statute with effect from 16.06.2005 and the appellant having commenced its construction activities after that date, was required to get itself registered under the said category and pay service tax as applicable, in time. The learned DR further contends, *inter-alia*, that

the residential complex of the appellant consisted of more than 12 residential units, had a common area with one or more facilities as stated in the definition, within the premises; that the appellant is only trying to take shelter under a clarification which did not cover the appellant's situation; that the Circulars/clarifications of Board do not provide for mere exclusion of builder/promoter from payment of service tax since it does not refer to cases where the promoter enters into a construction agreement with individual buyers and land owners; that the clarification of CBEC presupposes a situation where the promoter uses the complex personally or sells the essential units to independent clients; that, in any case, it has to be understood that there is always an ultimate customer/client, which fact has not been discussed since the assessee, as a promoter, would not retain all the flats; it was not disputed by the appellant that it had entered into a construction agreement with its buyers and with the land owner and that it had agreed that certain units out of the constructed area would be allotted to its buyers/customers as per the construction agreement. To conclude, the learned DR emphasized the fact that the Board circulars would apply only if a complex constructed by a person directly engaging any other person, was intended for the personal use as residence by such person, which is not the case on hand here. He also stressed that the number of dwelling units in this case was 106 and, therefore, the case of the appellant was clearly covered under the construction of residential complex.

6. On the decision of Magus Construction (supra), the learned AR relied on the findings given by the AA at paragraph 6.6 of the impugned order to the effect that the Hon'ble High Court was dealing with a situation of the sale and purchase of flats only and not on carrying out any construction activities on behalf of the prospective buyers.

7. With regard to invocation of a larger period, the learned AR again relied on the findings of AA at paragraphs 7.1,7.2,7.3 and 7.4 of the impugned order, to say in a nutshell, that the fact on the taxability of the construction of complex service is not disputable till 20.01.2006;the assessee had neither obtained registration certificate within 30 days of providing the taxable service nor paid any service tax from the introduction of the services under Service Tax Net, nor had it filed any ST-3 returns. Thus, it is evident that the assessee has suppressed the facts or contravened the provisions of the Act, with an intention to evade payment of tax.

8. We have considered the rival submissions, perused the materials available on record. Section 65(91a) of the Finance Act, 1984, which bears an exclusion, reads as under:

" (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;"*

9. A reading of the above clearly indicates that what is sought to be excluded is only a person who directly engages any other person, far from the construction of such complex, which is intended for his personal use as residence. This, read with the explanation provided for "personal use" coupled with the facts of the case on hand for construction of 106 units, makes it abundantly clear that the

residential complex so constructed, was not for the personal use as residence of the appellant.

10. We shall now discuss the decisions relied on by the Ld. Consultant. The issue involved in the case of Magus Construction Pvt.Ltd. (supra) is, according to us, clearly in the context of builders who construct flats and then effect sale of the same, as contrary to the sale of UDS alone in the case on hand.

11. With regard to the other decisions of the learned Counsel, namely, Jain Housing Vs. Commissioner of Service Tax, Chennai, 2014 (36) S.T.R. 1010 (Mad.), our understanding is that the Hon'ble Madras High Court was only dealing with a stay matter and that too for the dispensation of pre-deposit. The Hon'ble High Court has only discussed the Tribunal's directions on the pre-deposit, has modified the Tribunal's direction, which, according to us, does not lay any law, especially on the issue involved to extend the benefit of the same to the appellant. This is in fact very clear, from the conclusions drawn by the Hon'ble court, which is as under :

" 26. For the foregoing reasons, we pass the following order :

(i) On the questions of law raised, we are of the view that the Tribunal was not justified in ordering the pre-deposit in the manner stated in its order dated 29-7-2013;

(ii) Consequently, the order of the Tribunal dated 29-7-2013 is modified to the effect that the pre-deposit of balance dues, as ordered by the Tribunal, is waived; and

(iii) The order of the Tribunal dated 17-3-2014 dismissing the appeals for non-compliance of the conditional stay order is set aside and the appeals are restored to the file of the Tribunal.

....."

The other decision of the Principal Bench, New Delhi, in the case of Krishna Homes (supra), as noted by the Hon'ble Court, the facts are that the appellant therein had entered into two separate agreements with each customer: the first being one between the appellant, as the seller with a prospective buyer/customer as a purchaser not for UDS, but with construction up to column, beams, roof, along with brick-work. The second agreement between the very same parties – for the purpose of carrying on the finishing work like plastering, water supply, sanitary and electric fittings, floorings, etc. The appellant therein had engaged contractors for construction and finishing and only after completion of the construction and finishing, flats were handed over to the customers. As noted by the Principal Bench, the period in dispute was from December, 2005 to October, 2006 and it was the case of the Revenue that the appellant was liable to pay service tax under Section 65 (105) (zzzh) as the service provider on the amount charged by him from the buyers of the flats. Thereafter, on the basis of a subsequent CBEC Circular No. 332/35/06-TRU dated 01.08.2006, the appellant made a request for refund of the service tax paid for the impugned period.

12. After analysing the implication of the above Circular as also various pleadings made by the parties, the Hon'ble Principal Bench inter alia held that there was no dispute that the complex constructed by the appellant in those appeals were covered by the definition of "residential complex" as given in Section 65 (91a); that there was also no dispute that the appellant had engaged a contractor for

construction of the complexes; that the Board had clarified in the Circular (supra) that in case where a 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 service provided to the builder/promoter/developer under construction of complex service; that if no person is engaged by the builder/promoter/developer for construction work, who undertakes construction work on his own without engaging the services of any other person than 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 would not arise, etc. The Hon'ble Bench after analysing the scope of Section 65 (105) (zzzh), has held as under:

" ...Thus, by this explanation, the scope of the Clause (zzzh) of Section 65 (105) has been expanded and this amendment by adding an explanation has been held by this Tribunal in the case of CCE, Chandigarh v. U.B. Construction (P) Ltd. (supra) as prospective amendment. In this regard, para 5 of this judgement is reproduced below:-

" 5. In Maharashtra Chamber of Housing Industry v. Union of India -2012 (25) S.T.R. 305 (Bom.), the validity of the 'Explanation' added to Sections 65 (105) (zzzh) was challenged on several grounds. The Bombay High Court also considered the

issue whether the explanation was prospective or retrospective in operation and ruled that the explanation inserted by the Finance Act, 2010, brings within the fold of taxable service, a construction service provided by the builder to a buyer where there is an intended sale between the parties whether before, during or after construction; that the 'Explanation' was specifically legislated upon to expand the concept of taxable service; that prior to the explanation, the view taken was that since a mere agreement to sell does not create any interest in the property and the title to the property continues to remain with the builder, no service was provided to the buyer; that the service, if any, would be in the nature of a service rendered by the builder to himself; that the explanation expands the scope of the taxable service, provided by builders to buyers pursuant to an intended sale of immovable property before, during or after the construction and therefore the provision is expansive of the existing intent and not clarificatory of the same; and is consequently prospective".

9. *In view of the above, though in view of the Apex Court judgment in the case of M/s. Larsen & Toubro Limited and Others v. State of Karnataka & Others (supra), the agreements entered into by a builder/promoter/developer*

with prospective buyers for construction of residential units in a residential complex against payments being made by the prospective buyers in instalments during construction and in terms of which the possession of the residential unit, is to be handed over to the customers on completion of the residential complex and full payment having been made, are to be treated as works contracts, it has to be held that during the period of dispute, there was no intention of the Government to tax the activity in terms of such contracts a builder/developer with prospective customers for construction of residential units in a residential complex. Such works contracts involving transfer of immovable property were brought within the purview of taxable service by adding explanation to Section 65(105)(zzzh) w.e.f. 1-7-2010, and therefore, it has to be held that such contracts were not covered by Section 65(105)(zzzh) during the period prior to 1-7-2010.”

13. It is also equally relevant to refer to another decision/order of this very Bench, in the case of CCE .Vs. M/s. Lancy Tanjore Power Co. Ltd., in Final Order No. 40792-93 dated 16.03.2018 wherein, the court has concluded that since the definition provided under S.65(91a) specifically excluded construction undertaken for personal use including permitting the complex use as residence by another person, that exclusion covered the construction activity of the assessee and thus the service tax liability would not sustain.

15. From a perusal of materials on record vis-à-vis the pleadings as also the above judgments/orders of Tribunals, it appears to be clear that there is no service tax liability. According to the Ld. DR, it is matter of concern that the appellant by entering into agreement for selling only UDS is trying to escape tax liability, say, under State Registration Act or under other law for the time being in force. But with due respects, that is not a taxable event to be brought under service tax net.

16. The learned Consultant appearing for the assessee has mainly contended that by virtue of notifications and various case law the demand of service tax has to be set aside. As noted by us in the above paragraphs, the issue here is similar to the one decided by the Principal bench as also this very Bench. Thus going by the ratio decidendi, we have to hold that the appellant who is a builder/promoter is not liable for service tax upon his selling UDS.

17. We, therefore, hold that there will be no service tax liability on the appellant.

18. The appeal is therefore allowed, to the extent above, with consequential reliefs, if any.

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

(P Dinesha)
Member (Judicial)

(V. Padmanabhan)
Member (Technical)

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