

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

**Application No.ST/Misc/41618/2017
Appeal No.ST/573/2012**

[Arising out of Order-in-Appeal No.59/2012 dt. 30.03.2012 passed by
Commissioner of Service Tax, Chennai]

Hallmark Infrastructure Pvt. Ltd.

Appellant

Versus

Commissioner of GST & Central Excise,
Chennai South Commissionerate

Respondent

Appearance :

Ms. Vishnupriya, Advocate
For the Appellant

Ms. T. Usha Devi, DC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

**Date of hearing : 13.11.2018
Date of Pronouncement :18.12.2018**

FINAL ORDER No. 43116 / 2018

Per Shri Madhu Mohan Damodhar

The facts of the case are that appellants were providing construction services and site formation services. From the investigation caused by the department, it emerged that appellants were rendering construction of residential complex in respect of Golden Country Project at Maraimalai Nagar, Kanchipuram District concerning 240 flats in Phase-I. It also appeared that they were engaged

in providing site formation and clearance service with respect to their real estate projects at Silver County, Platinum County and other projects. Department took the view that appellants had not paid appropriate service tax; not filed periodical ST-3 returns in respect of the said services provided by them. Hence a show cause notice dt. 29.07.2010 was issued inter alia, demanding service tax liability of Rs.1,36,61,900/- in respect of construction residential complex service for the period 2006-07 to 2008-09 and Rs.31,16,246/- in respect of site formation and clearance service during the period 2006-07 to 2007-08 with interest thereon and also proposing imposition of penalties under various provisions of law. In adjudication vide the impugned Order No.59/2012 dt. 30.03.2012, the adjudicating authority confirmed the aforesaid demands, however extended cum duty benefit and thereby reduced the demand to Rs.83,77,188/- under construction of residential complex service for the period April 2006 to March 2009 and Rs.27,76,231/- under site formation and clearance service for the period April 2006 to March 2008, totalling to Rs.1,11,53,419/- towards service tax liability along with interest thereon. Equal penalty was imposed under Section 78 of the Act. Penalty was also imposed under Section 77 (2) ibid for not filing ST-3 returns. Hence this appeal.

2. When the matter came up for hearing, on behalf of the appellants, Ld. Advocate Ms. Vishnupriya made oral and written submissions which can be broadly summarised as under :

(i) With regard to the demand made under "residential complex service", the issue as to whether a composite contract involving provision of service as well as transfer of property in goods could be covered under "Residential Complex

Service” (hereinafter referred to as “RCS”) from the date of introduction of service tax on such services was being litigated upon and which was finally settled by the Hon’ble Supreme Court in the case of CCE Vs Larsen and Toubro Ltd – 2015 (39) STR 913 (SC). The Apex Court observed that in as much as Section 67 of the Finance Act (hereinafter referred to as the “Act”), dealing with valuation of taxable services, refers to the gross amount charged for service, the service of RCS would cover only pure service activity as any contrary view would imply that the union government can levy service tax on the gross amount, including the value of transfer of property in goods also, which is constitutionally impermissible. The Hon’ble Apex Court also held that it was only with the introduction of Works Contract Service (WCS) as a separate taxable service with effect from 01.06.2007, the statutory mechanism to exclude the value of transfer of property in goods has been prescribed. Therefore, in view of the above, the effect of the aforesaid decision is that Residential Complex Service would cover only pure service contracts, without any transfer of property in goods involved and cannot be invoked for composite contracts entered into by the Assessee prior to 01.06.2007.

(ii) For an activity involving construction of new residential complex involving indivisible composite contract, such services will require to be exigible to service tax only under “Works Contract Service”. It is settled law that for an activity involving indivisible composite contract, such service will be exigible to service tax only under “works Contract Service” on or after 01.06.2007 and not under “Residential Complex Service” as per the judgment of this Hon’ble Tribunal in the case of Real Value Promoters Pvt Ltd Vs Commissioner of GST and Central

Excise – final order no.42436-42438/2018 dated 18.09.2018. Therefore, in view of the above, the demand proposed under “Residential Complex Service” cannot sustain.

(iii) With regard to the demand made under “site formation and clearance service”, the amount of Rs.2,38,89,740/- (FY 2006-07) has been subjected to service tax erroneously. This amount consists of two figures, namely, a sum of Rs.1,91,89,740/- received from one of the promoters of the Appellant Company, namely, Mr.Anand and Rs.47,00,000/- income received from sale of land.

(iv) Appellant submits only effected outright sale of land during the financial year 2006-07 and the aforesaid figures i.e. Rs.1,9,89,740/- and Rs.47,00,000/- are nothing but income from sale of UDS.

(v) The sum of Rs.2,38,89,740/- (total) received by the Appellant has been spent on the expenses incurred on the land prior to sale. These expenses include expenses such as site filling and other site preparatory expenses. The amount of Rs.2,90,76,680/- has been spent towards land development expense towards land development prior to the sale of approved plots.

(vi) Though an amount of Rs.2,38,89,740/- has been accounted separately as land development expense, the transaction in substance is a sale and only for accounting purpose it was accounted separately. i.e. part of it as sale of Land and part of it as land development income and this land development income was reported in the profit and loss account of the respective financial years.

(vii) A sum of Rs.1,58,08,252/- (FY 2007-08) is accounted as sale of land in the Profit and Loss Account for the year ending 31st March 2008 and an amount of Rs.15,54,548/- is shown as land development charges under the head “Income”.

Actually, both these figures are nothing but income from sale of UDS. The sum of Rs.1,58,08,252/- has been accounted as income from sale of land in the Profit and Loss account for the year ending 31st March 2008 and an amount of Rs.15,54,548/- has been accounted under the head "Land Development Charges" in the Profit and Loss Account for the year ending 31st March 2008.

(viii) It is a settled law that any expense incurred before the transfer of goods forms part of the sale price and cannot form part of any service tax liability.

(ix) The aforesaid amount of Rs.2,38,89,740/- is a reimbursement for the expenses (i.e. Rs.2,90,73,680/-) incurred by them without any provision of service.

3. On the other hand, Ld.A.R Ms. T. Usha Devi supports the impugned order. With respect to the demand under site formation and clearance service, appellants had collected consideration from the buyers of flat under two separate categories as sale of land and land development charges, namely, consideration towards land cost which is reflected in the sale deed and the balance amount towards land development charges. It is therefore clear that site formation and clearance service has been provided by the assessee to the buyers of flats and consideration towards the said activity has also been collected from the buyers.

4. Heard both sides and have gone through the facts.

6.1 With respect to the demand under construction service, the period involved is 2006-2009. It is not disputed that the appellants entered into an composite works contract involving both provision of service and supply of materials for providing the above service. This being so, the Ld. Advocate is correct in her assertion that as per the law laid down by the Hon'ble Supreme

Court in the case of *Larsen & Toubro Ltd.* (supra) and the decision of this very Bench in the case *Real Value Promoters* (supra), the said activity will be exigible to service tax only under “Works Contracts Service” and not under Residential Complex Service as has been demanded in the impugned order. In view thereof, we have no hesitation in setting aside the demand of Rs. Rs.83,77,188/- with interest thereon under the category of construction of residential complex service. The portion of the impugned order to the contrary demanding the aforesaid amount with interest thereon is set aside.

6.2 The second demand relates to site formation and clearance service allegedly provided by the appellant. During the adjudication proceedings appellants have contended that the said activities were undertaken before sale of land took place, hence the service was a self-service and there is no service provider and service recipient relationship and therefore they are not liable for service tax demand. The adjudicating authority has however held that though site formation and clearance activity took place before sale of land, as the assessee collected consideration from the buyers of flats as land development charges; that even if appellant had entered into an agreement for sale of flats, it is a composite agreement wherein element of sale and service are clearly discernible and therefore value of service portion is chargeable to service tax. We are unable to appreciate such a line of argument. It is not disputed that the land in question belonged to the appellants themselves. It is also not disputed that site formation and clearance activity has taken place before they effected sale of land. Ostensibly, such activity would have been done by the appellants to enhance the saleability quotient of the land in question. It clearly appears to reason that a

piece of land where site formation and clearing activity has already been carried out, the plotting of the land with various parcels will naturally fetch higher price for the land. This being so, the site formation and clearance activity has obviously been done by the appellant by themselves, for themselves. Further neither the agreement for sale had not seen light of the day, nor were the buyers visible on the horizon, at the time when the site formation etc of the land was carried out by the appellant.

6.3 We therefore have no doubt in our mind that the such activity was a self service and hence the same cannot be exigible to service liability under the Finance Act,1994. This being so, portion of the the impugned order to the contrary demanding Rs.27,76,231/- with interest thereon under the category of site formation and clearance service cannot be sustained and will have to be set aside, which we hereby do. The demands having been set aside, in consequence penalties are also set aside.

7. Appeal is therefore allowed in toto with consequential benefits, if any, as per law.

8. The MA filed by Revenue for change of cause title consequent to the introduction of GST and the resultant change in the jurisdiction of the Commissionerate is allowed.

(order pronounced in Court on 18.12.2018)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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