IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT : Division Bench B1]

Appeal No.: ST/00396 & 00397/2012

[Arising out of Orders-in-Original No. 02 & 03/2012 dated 26.03.2012 passed by the Commissioner of Central Excise, Chennai-I Commissionerate]

M/s. Golden Constructions, **: Appellant**
AC 63, 5th Avenue, Anna Nagar,
Chennai – 600 040

Versus

The Commissioner of G.S.T. & Central Excise, **: Respondent**
Chennai North Commissionerate

Appearance:-
Shri. Prasanna Krishnan V., Consultant
for the Appellant
Shri. K. Veerabhadra Reddy, ADC (AR)
for the Respondent

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

Date of Hearing: 04.12.2018

Date of Pronouncement: 28.12.2018

Final Order No. 43164-43165 / 2018

Per P. Dinesha :

The assessee is registered under the category of Construction of Complex Service. 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 June 2005 to March 2009 and April 2009 to June 2010.

2.1 The Revenue through Show Cause Notice No. 122/2010 dated 07.04.2010 proposed to demand service tax since according to it, the appellant was liable to pay service tax on the gross amount received from its customers for the services rendered in connection with construction of complexes which is 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) Service Tax of Rs. 7,10,19,261/- (Rupees Seven Crore Ten Lakhs Nineteen Thousand Two Hundred and Sixty One Only) payable by them as detailed in Annexures for the period from

16.06.2005 to 31.03.2009 should not be demanded from them, as per proviso of Section 73(1) of the Finance Act, 1994.

(ii) Interest calculated at appropriate rates should not be demanded under Section 75 of the said Act till the date of payment of the above demand.

(iii) Penalty under Sections 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.

2.2 Another Show Cause Notice No. 525/2010 dated 27.09.2010 was issued to the appellants for the period from April 2009 to June 2010 under which an amount of Rs. 12,83,912/- was demanded towards service tax along with proposition of interest under Section 75 ibid. and penalty under Section 76 ibid. After due process of law, Orders-in-Original No. 02 & 03/2012 dated 26.03.2012 came to be passed by the Commissioner confirming the above proposals, against which the present appeals have been filed by the assessee.

3. Today when the matter came up for hearing, Ld. Advocate Shri. Prasanna Krishnan V. appearing for the assessee primarily contended that the appellant being a promoter is not rendering any of the services and that therefore there is no service tax liability. In

this regard, he relied on the Order of this Bench of the Tribunal in the case of ***M/s. Golden Ventures Vs. Commissioner of C.E. & S.T., Chennai in Final Order No. 41938/2018 dated 02.07.2018*** and also relied on the subsequent Order of CESTAT, Chennai in the case of ***M/s. Real Value Promoters Pvt. Ltd. Vs. Commissioner of G.S.T & Central Excise, Chennai in Final Order Nos. 42436-42438/2018 dated 18.09.2018.***

4. *Per contra,* Ld. AR Shri. K. Veerabhadra Reddy appearing for the Revenue supported the findings of the adjudicating authority and contended that there was no clarity whether it was involving a composite contract or not. He also relied on the decision of the Delhi Bench of the Tribunal in the case of ***M/s. BCC Developers and Promoters Pvt. Ltd. Vs. Commissioner of C.Ex., Jaipur – 2017 (52) S.T.R. 22 (Tri. – Del.).***

5. We have heard the rival contentions, perused the documents placed on record and have also gone through the Orders referred to during the course of hearing.

6.1 We find that the issue is more or less identical to the Order of this Bench in the case of *M/s. Golden Ventures (supra)* wherein this Bench after analyzing various Orders/decisions and Circulars, has held as under :

" 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:-*
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> > *" 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."*
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> *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 assesse and thus the service tax liability would not sustain.

15. From a perusal of materials on record vis-a-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. "

We also note that the above view has also been supported by a subsequent Order of this very Bench in the case of *M/s. Real Value Promoters Pvt. Ltd. (supra).*

5.2 From the Order of the Principal Bench of the Tribunal in the case of *M/s. BCC Developers and Promoters Pvt. Ltd. (supra)* relied on by the Ld. AR, we note that the same is rendered on a different factual background. The Hon'ble Principal Bench has observed that for the entire period there was no dispute with regard to the liability to service tax. Moreover, the issue also relates to the liability being demanded from the appellant when the appellant's principal had discharged the liability towards the service tax which was also remanded for further verification. Therefore, this Order is of no help to the Revenue. Further, with regard to the nature of contract, the adjudicating authority has observed that there were two sets of agreements, as per paragraph 10 page 8 of the Order-in-Original. We are therefore of the considered opinion that there is no service tax liability on the appellant.

6. The appeals stand allowed with consequential reliefs, if any, as per law.

*(Pronounced in open court on **28.12.2018**)*

(P Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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