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

ST/71/2008

(Arising out of Order-in-Original No. 15/2008 dated 4.2.2008 passed by the Commissioner of Service Tax, Chennai)

M/s.Vijay Shanthi Builders Ltd. Appellant

Vs.

Commissioner of Service Tax, Chennai Respondent

Appearance

Shri Derrick Sam, Advocate for the Appellant
Shri A. Cletus, Addl. Commissioner (AR) for the Respondent

CORAM

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

Date of Hearing / Decision: **01.08.2017**

Final Order No. 41517/2017

Per Bench

The appellants are engaged in construction of residential complex and was registered with the Service Tax Department on 8.7.2005. During the course of audit of accounts, it was noticed that the appellant was not discharging the service tax liability and therefore show cause notice was issued demanding service tax along with interest and also for imposing penalty. After due process of law, the original authority confirmed the demand of Rs.1,24,28,623/- for the period 16.6.2005 to

Customs, Excise & Service Tax Appellate Tribunal

31.3.2007 under the category of Construction of Residential Complex Service as well as Management, Maintenance and Repair Service along with interest and also for imposing penalty under section 76 of the Finance Act, 1994 besides imposing penalty of Rs.1,000/- under section 77 and penalty of Rs.1,50,00,000/- under section 78 of the Act ibid. The amount already paid by the appellant was ordered to be appropriated. Hence this appeal.

2. At the time of hearing, the learned counsel Shri Derrick Sam appearing on behalf of the appellant submitted that for the period from 16.6.2005 to 31.5.2007, the demand is unsustainable as the service rendered by the appellant is not taxable as being the works contract service. It is covered by the judgment of the Hon'ble Supreme Court in the case of CCE Vs. Larsen & Toubro reported in (2015) SCC Online 738. For the remaining period i.e. from 1.6.2007 to 31.7.2007, the activity undertaken by the appellant does not fall under the said category as per the decision of the Tribunal in the case of Krishna Homes Vs. CCE - 2014-TIOL-402-CESTAT-DEL. That the Tribunal in the said case held that the construction of residential units against payments when made in instalments during construction is covered by Explanation 2 Section 65(105)(zzzh) with effect from 1.7.2010. That therefore the said service is not taxable prior to 1.7.2010. That in the case of the appellant also, the appellants were receiving the amount in

Customs, Excise & Service Tax Appellate Tribunal instalments and the ownership of the flat was transferred only on receipt of the entire amount. Further, out of the demand of Rs.1,24,28,623/-, an amount of Rs.11,73,999/- relates to service tax on corpus fund and maintenance charges. The appellant had collected Rs.73 lakhs towards corpus fund and the same is not taxable as it is only a deposit and not a service charge. He submitted that it is a deposit made by the allottee so that in the event of failure to pay the maintenance charges, the unpaid amount would be set off against the said deposit and the allottee will have to recoup it. That if this amount is taxed, it will amount to double taxation for the same activity.

3. Again, he submitted that an amount of Rs.13,04,280/- shown in Annexure A5 towards maintenance charges for 'Rain Tree Project' has not been collected by the appellant at the relevant time as the project was not completed. That the department has taken the said amount from the agreement and not from the appellant's accounts. That since the appellant has not collected the amount, levy of service tax of this amount is not maintainable.

4. The third issue raised is that an amount of Rs.9,87,216/- is collected as maintenance charges towards the project 'Courtyard' and the same is liable to service tax and is not contested by the appellant. He submitted that an amount of Rs.7,97,808/- inadvertently collected as service tax has already been deposited by the appellant along with interest on

30.8.2007. The appellant had inadvertently collected such amount from a few allottes. The appellant does not contest this amount. He therefore pleaded that the demand in respect of the construction of residential complex service as well as maintenance charges may be set aside.

5. The learned AR Shri reiterated the findings in the impugned order.

6. Heard both sides.

7. It is not in dispute that major part of the period for which demand is raised is prior to 1.6.2007. This period is covered by the judgment of the Hon'ble Supreme Court rendered in the case of Larsen & Toubro wherein it has been held that works' contract service are not subject to levy to service tax prior to 1.6.2007. Following the same, we hold that the demand for the period prior to 1.6.2007 in respect of demand made for construction of residential complex service is not sustainable.

8. With regard to the period after 1.6.2007 to 31.7.2007, the appellant has submitted that the judgment in the case of Krishna Homes (supra), analysed the issue as to the applicability of levy of service tax on construction of residential complex when the agreements were entered for construction of residential units and possession was handed over on completion of the construction after full payment was made by the customers. The relevant paragraph of the said judgment is reproduced below:-

"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."

9. The Tribunal has held that in such instances, the services were not covered by section 65(105)(zzzh) during the period prior to 1.7.2010. The appellant has produced sample copy of the agreement which shows that the possession of the constructed residential unit was handed over after completion of construction and completion of the payment. Therefore, the decision laid down in Krishna Homes (supra) is squarely applicable and the demand for the period 1.6.2007 to 31.7.2007 is also unsustainable and requires to be set aside, which we hereby do. Though the appellant has collected service tax from a few allottes, it is submitted that they paid the same to the Government account on 30.8.2007 along with interest. The appellant is not contesting the said amount, therefore, we do not interfere with the amount that has already been paid / appropriated to the Government being the

amount of service tax which is collected by the appellants and paid to the Government in the above said category.

10. The second issue is with regard to the demand made under maintenance and repair services on the corpus fund collected by the appellants. It is submitted by the learned counsel that this is only a deposit and not received as charges for any services rendered. According to appellant, it is a deposit made by the allotee and in the event of their failure to pay the maintenance charges, the unpaid amount would be set off against the said deposit. In the impugned order, it is observed that, at any point of time, even if appellant pays service tax on this fund, and if the corpus fund is refunded / transferred, suitable adjustment in tax liability can be made. It is therefore clear that the corpus fund, even according to the department is not collected for rendering any service of maintenance. It is in the form of a deposit. We, therefore, are of the opinion that the demand of service tax on such deposit under the category of Management, Maintenance and Repair Service is unsustainable. However, this fact needs verification as to how the corpus fund has been put into use. It is also the case of the appellant that an amount of Rs.13,04,280/- shown in Annexure A5 has not been collected by the appellant, during the relevant time as the project was not completed. That the department has levied the service tax basing upon the amount stated in the agreement. From the records, it is not clear as to

whether the department has raised the demand merely basing on agreement and even though appellant has not collected it. This aspect also requires verification.

11. An amount of Rs.9,87,216/- collected as maintenance charges towards the project 'Courtyard' is admitted by the appellant and the same is not contested by them.

12. From the above discussions, we hold that the demand of service tax on the category of construction of residential complex upto 31.7.2007 is not sustainable and therefore set aside. The demand in respect of corpus collected whether only a deposit or not and whether can be subject to service tax under Management, Maintenance and Repair Service is required to be verified. Similarly, the amount of Rs.13,04,280/- in respect of 'Rain Tree Project', whether was collected by the appellant or not has to be verified. For the last two issues, (corpus fund) and (Rain Tree Project), the matter is remanded to the adjudicating authority who shall verify the facts and reconsider these issues.

13. In the result, the appeal is partly allowed and partly remanded in above terms.

(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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