**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI
COURT HALL No. III**

SERVICE TAX APPEAL No.40047 to 40048 OF 2014

(Arising out of Order-in-Original No.29 & 30/2013 dated 29.03.2013 passed by the Commissioner of Service Tax, M.H.U. Complex, Nandanam, Chennai 600 035).

M/s. Srinivasa Shipping & Property Developers Ltd.…Appellant
VIII Floor, Challa Mall,
No.11, Thiyagaraya Road, T. Nagar
Chennai 600 017

Versus

The Commissioner of GST & Central Excise, …Respondent
Chennai South Commissionerate
MHU Complex, No.692, Anna Salai
Nandanam, Chennai 600 035.

APPEARANCE:

Ms. Radhika Chandrasekhar, Advocate
For the Appellant

Shri. M. Ambe, Deputy Commissioner (A.R)
For the Respondent

CORAM :

**HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**

Date of Hearing : 08.12.2023
Date of Decision : 08.12.2023

FINAL ORDER Nos.41107-41108/2023

ORDER : Per Ms. SULEKHA BEEVI C.S.

Brief facts are that the appellant is engaged in providing construction services. They are registered with the Service Tax Commissionerate, Chennai under the category of Construction of Residential Complex service, Commercial or Industrial Construction service, works contract service, renting of immovable properties service and management consultancy services.

2. During the course of audit of accounts of the appellant by the internal audit group and subsequent verifications done, it was noted that the appellant had provided construction services in respect of various residential complexes and commercial buildings on the basis of joint development agreement entered into with the land owners. It was noted by the department that appellant sold the undivided share of land to the customers, on the strength of power of attorney given by the land owners and provided construction service to such customers in terms of agreements entered with customers. As per the Joint Venture agreement, the appellant handed over agreed percentage of built up right over the land. On verification, it was noted that though the appellant discharged service tax on the builders portion (built up area) had not discharged the service tax on the land owners portion (built up area given to land owner). In regard to the construction of Matrix Tower, the appellant had not discharged appropriate service tax on the builders share also. Show Cause Notice dated 24.10.2011 was issued for the period April 2006 to September 2010 proposing to demand the short paid service tax along with interest and for imposing penalties. Subsequently, statement of demand was issued for the period October 2010 to September 2011 raising the very same allegations and proposing to demand service Tax along with interest and for imposing penalty. After due process of law, the original authority confirmed the demand of service tax along with interest and imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

3. On behalf of the appellant the learned counsel Ms.Radhika Chandrasekar appeared and argued for the appellant. The Appellant is engaged in development of commercial and residential projects, which are clearly in the nature of works contract. The Appellant has entered into Joint Development Agreement with land owners for development of the property. In terms of the agreement the Appellant has handed over agreed portion of built-up area of the constructed building / structure to the land owners.

4. Even though as a developer there is no liability to pay service tax prior to 01.07.2010, on such services when the construction is provided in the land owned by them as per Joint Venture agreement, the appellant had discharged service tax on their share and did not discharge service tax with respect to landowner’s share.

5. The Department conducted an audit and alleged that the appellant had provided construction services with respect to commercial buildings as well as residential complex and did not discharge service tax on the land owner’s portion of built-up area and also short paid service tax in respect of (builders portion) in their own constructed area.

6. The Appellant objected to the SCN and the SOD on the ground that the activity of the Appellant merits classification under Works Contract Service and therefore the proposal to demand Service Tax under Commercial or Industrial Construction Service / Construction of Residential Complex Service is not tenable. Further for the first time Finance Act, 2010 has brought developers into the ambit of Service Tax w.e.f. 01.07.2010 through introduction of explanation to Section

65(105)(zzq) as well as (zzzh). That the extended period is not invocable as the Department had knowledge in view of the Show Cause Notice No.353/2010 dated 10.06.2010 issued for the period April 2007 to September 2009. With respect to the SOD No.257/2012 dated 17.09.2012 the appellant objected the same on the ground that there is over lapping of the disputed period for the demands as the Show Cause Notice No.575/2011 dated 24.10.2011 covers the period upto September 2010 also.

7. The Commissioner of Central Excise, Customs & Service Tax vide Order-in-Original No.29 & 30/2013 dated 29.03.2013 confirmed Service Tax under Construction of Commercial or Industrial Construction services as well as under Residential Complex services on the ground that the services of the appellant are not classifiable under works contract service; that the case laws relied upon by the Appellant cannot be made applicable to the facts of the case. Further extended period is invocable as the Appellant has suppressed the facts. The Order in Original however has set aside the demand for the extent of Rs.12,48,212/- out of the total demand of Rs.31,50,404/- proposed vide SOD No.257/2012 on the ground that there is overlapping of demand with respect to project SSPDL Crescent.

8. The activity of the appellant merits classification under the category 'works contract service'. The appellant is in the business of executing works contract. These are basically contracts, which involve both material and services and are indivisible contracts in contrast to pure contract of supply of materials. Therefore, demand of service tax

under commercial or industrial construction services / construction of residential complex services is not tenable.

9. The Department has also granted abatement of 67% while arriving at the service tax liability. This itself indicates that the contract is a composite contract which involves material as well as labour portion. Therefore, the confirmation of demand under Commercial or Industrial Construction services and Residential Complex services is not tenable. That Section 65(105) (zzzza) deals with service tax on works contracts and the said provision has come into force only w.e.f. 01.06.2007. It is submitted that the issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of ***Commissioner of C.Ex. & Cus. Kerala Vs Larsen & Toubro Ltd. (2015) 39 STR 913*** wherein it has been held that works contract services cannot be taxed prior to 01.06.2007 since there was no charging section specifically levying service tax only on works contract.

10. The Appellant relies upon the decision of this Hon'ble Tribunal in the case of ***Real Value Promoters Pvt Ltd Final Order 42436-42438/ 2018 dated 18.09.2018,*** wherein it has held that works contract cannot be taxed prior to 01.06.2007 and in respect of any contract which is a composite contract service tax cannot be demanded under CICS/CCS for the period after 01.06.2007.The same view has been taken in the case of ***URC Construction Ltd. (Final Order 42037-42038/ 2016 dated 14.07.2016)***.

11. The Tribunal in the case of ***Jain Housing and Construction Ltd Vs CST vide Final Order Nos. 40077-40079/2023*** has held that

works contract service cannot be classified under construction of residential complex services for the period post 01.06.2007. In the said decision the Tribunal had relied upon the decision in the case of ***Real Value Promoters***. The department had filed a Civil Appeal against the said decision of the Tribunal. The Hon'ble Supreme Court vide order dated 05.09.2023 has affirmed the decision of the Tribunal reported in ***Commissioner of Service Tax Vs Jain Housing And Construction Ltd. (2023) 10 Centax 171 (S.C.).*** The said decision is squarely applicable to the instant case and the impugned Order in Original is liable to be set aside.

12. The Appellant relies upon the following decisions wherein this Hon'ble Tribunal has followed the decision of the Hon'ble Supreme Court in Jain Housing and Construction Ltd. and set aside the orders on the ground of mis-classification:

(a) GET Power Pvt Ltd. vide F.O.No.40920/2023 dt.13.10.2023

(b) Visanthi & Co. vide F.O.No.40937/2023 dt.12.10.2023

The Adjudicating Authority has relied upon the decision in the case of ***Nagarjuna Construction*** to deny the benefit of abatement under Notification 1/2006. It is submitted that the said decision cannot be made applicable in view of the subsequent decision of the Hon'ble Supreme Court in the case of L & T referred to supra. Without prejudice to the above contention the Appellant would like to make the following submissions:

The Finance Act, 2010 has for the first time brought developers into the ambit of service w.e.f 01.07.2010 through the introduction of explanation to Section 65(105)(zzq) as well as

65(105)(zzzh) and hence there is no question of service tax on developers prior to 01.07.2010. The explanation clearly states that "*a builder or any person authorized by the builder…..shall be deemed to be service provided by the builder to the buyer*". Therefore there is no liability to pay service tax prior to 01.07.2010 as a developer.

13. The Tribunal in the case of ***R.F Properties & Trading Ltd Vs CCE 2013 (31) STR 578*** has held that in view of the explanation to Section 65(105)(zzq) w.e.f. 01.07.2010 there cannot be a demand of Service Tax on the developer for the prior period.

14. The Tribunal in the case of ***Krishna Homes Vs CCE (2014) 34 STR 881*** has held (Para 9) that during the period of dispute there was no intention of the government to tax the activity in terms of agreements between the builder/developer and the prospective customers for the construction of residential units against payments made in instalments, in terms of which possession of the residential unit is to be handed over to the customer on completion of residential complex and on full payment. The Tribunal further observed that works contracts involving transfer of immovable property were brought within the purview of the taxable service by adding Explanation to Section 65 (105) (zzzh) with effect from 01.07.2010 and therefore it has to be held that such contracts were not covered by Section 65(105)(zzzh) during the period prior to 01.07.2010. The same view is taken in the case of ***Pragati Edifice Pvt Ltd. Vs Commissioner of CCE & ST – Final Order No. 31010-31011/2019.***

- ***South India Shelters Pvt Ltd Vs CCE vide Final Order No. 40123-40124/2023***
- ***Jain Housing and Construction Ltd Vs CST vide Final Order Nos. 40077-40079/2023***
- ***Vijay Shanthi Builders Ltd. Vs Commissioner of Service Tax (2018) 9 GSTL 257***

15. The SCN No.575/2011 dated 24.10.2011 is time barred as none of the ingredients that are required for invoking the extended period of 5 years are present. In terms of Section 73(1) of the Finance Act, 1994 as amended the period within which a Show Cause Notice can be issued within a period of one year from the relevant date. The Show Cause Notice dated 24.10.2011was issued by the department for the demanding service tax for the period April 2006 – September 2010.The extended period in terms of proviso to Section 73 (1) can be invoked only when there is fraud, collusion, wilful misstatement, suppression of facts, contravention of any of the provisions of the Chapter or of the Rules made there under with intent to evade payment of service tax.

16. The allegation in the show cause notice is that the Appellant had misdeclared the actual taxable value in ST-3 returns and the same was noticed by the audit/ SIR Group during the course of audit. Therefore, the allegation that appellant has suppressed the facts and contravened the provisions of the Act and Rules with intention to evade service tax is not tenable. Entire facts were known to the department as early as in 2010. The department had issued Show Cause Notice No.353/2010 for the period April 2007 to September 2009 proposing to demand service

tax under real estate agency services. Therefore, there is no suppression and extended period is not invocable.

17. The Appellant places reliance on the decision in the case of ***Paro Food Products Vs CCE (2005) 184 ELT 50*** wherein it has been held that all grounds possible should be taken by the department in initiating one proceedings only and that after conclusion of a proceeding for same period department cannot issue Show Cause Notice on another ground.

18. The learned AR Shri M. Ambe appeared and argued for the department. It is submitted by the learned AR that the appellant though registered under commercial construction services and residential complex services has not discharged the service tax on the land owners portion. The discussions made by the adjudicating authority in para 6 to 16 was adverted to by the learned AR who argued that the demand raised as per the Show Cause Notices under construction of residential complex services and commercial construction services for the disputed period is legal and proper as the appellant has not discharged service tax on the Land owners portion. The appellant having entered into the Joint Venture agreement with the land owner has derived the benefit of receiving the land as consideration and is therefore liable to discharge the service tax on the built up area of land owners portion. So also the contention of the appellant that they are not liable to pay service tax on the builders portion for the reason that it is not yet handed over to the customers cannot be accepted. The learned AR prayed that the appeal may be dismissed.

19. Heard both sides.

20. The issue that arises for consideration is whether the appellant is liable to pay the service tax as demanded in the Show Cause Notice under the category of Construction of Residential Complex services and Commercial or Industrial construction (CRC and CIC). The foremost contention put forward by the learned counsel is that part of the demand is prior to 1.6.2007. The contracts are entirely composite in nature involving both element of service as well as supply of goods. The Hon.'ble Supreme Court in the case of *Larsen & Tubro Ltd. 2015 (39) STR 913 (SC)* has held that the demand of service tax on composite contracts cannot be made prior to the introduction of WCS (1.6.2007). Following the said decision, we are of the opinion that the demand prior to 1.6.2007 requires to be set aside. Ordered accordingly.

21. It is submitted by the learned counsel for appellant that after the period 1.6.2007 the department has raised the demand under the category of Construction of Residential Complex services and Construction of Commercial or Industrial Construction services. The said demand cannot sustain for the reason that the contracts involved are again, composite in nature, involving both rendering of services as well as supply of goods. The Tribunal in the case of *Real Value Promoters Pvt. Ltd. and Others Vs. CGST and Central Excise, Chennai 2018 CION 2867, CESTAT, Madras* had observed that even after 1.6.2007 the demand of service tax on composite contracts has to be under works contract services and the demand under Construction of Residential Complex services or Commercial and Industrial Construction services cannot sustain. The relevant part reads as under.

"The issue was analysed by the Hon'ble Apex Court in Larsen & Toubro Case (supra) and held that there can be no levy of service tax on composite contracts (involving both service and supply of goods) prior to 1.6.2007. This read together with the budget speech as above would lead to the strong conclusion that composite contracts were brought within the ambit of levy of service tax only with effect from 1.6.2007 by introduction of Section 65 (105) (zzzza) i.e Works Contracts Services. As pointed out by the Ld. counsels for appellants, there is no change in the definition of CICS/CCS/RCS after 1.6.2007. Therefore only those contracts which were service simpliciter (not involving supply of goods) would be subject to levy of service tax CICS/CCS/RCS prior to 1.6.2007 and after. Our view is supported by the fact that the method / scheme for discharging service tax on the service portion of composite contract was introduced only in 2007".

22. The decision rendered by the Tribunal in the case of Real Value Promoters (Supra) was followed by the Tribunal in the case of Jain Housing and Construction Ltd. Vs. CST Final Order No.40077 to 40079/2023). page 77 In the said decision, the Tribunal set aside the demands raised under Residential Complex Services observing that the demand raised under such services after 1.6.2007 on composite contracts cannot be sustained. The department filed an appeal against the decision of Tribunal before the Hon'ble Supreme Court and as reported in (2023) 10 CENTAX 171 (SC) the Hon'ble Apex Court upheld the decision of the Tribunal by dismissing the appeal filed by the department.

23. This Tribunal in the case of *M/s. GET Power Pvt. Ltd. Vs. CGST and CE* vide Final Order 40920/2023 dated 13.10.2023 followed the decision in the case of *Jain Housing Ltd*. The relevant paragraph reads as under:

14. The Ld. Counsel for the appellant submitted that the demand under the said category cannot sustain for the reason that the nature of contracts are composite in nature. The dispute with regard to denial of benefit of abatement itself establishes that the contracts are composite in nature which involves both element of supply of goods as well as rendering of services. The decision in the case of Real Value Promoters Pvt. Ltd. (supra) would then apply and the demand therefore cannot sustain. The said decision was applied in the case of Jain Housing and Construction Ltd. (supra). The decision of the Tribunal in the said case was upheld by the Hon'ble Apex Court as reported in (2023) 10 Centax 171 (SC) [05.09.2023]. The relevant part of the order reads as under :

> **"[Order].** - Delay condoned.
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> 2. Mr. N. Venkatraman, learned ASG appearing for the appellant submitted that the issues which arise in these appeals are covered by the judgment of this Court in Total Environment Building Systems Pvt. Ltd. v. Deputy Commissioner of Commercial Taxes and Others [(2022) SCC Online SC 953] and therefore, these appeals may be accordingly disposed.
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> 3. Since the aforesaid judgment applies on all fours to these appeals, the Civil Appeals stand, accordingly, disposed of.

Following the said decisions, we are of the view that the demand of differential service tax under commercial or industrial Construction service denying abatement cannot sustain and requires to be set aside which we hereby do.

24. Similarly, in the case of *M/s. Visanthi and Co. Vs CGST, CE by Final Order No. 40497/2014 dated 12.10.2023,* the Tribunal has set aside the demand raised under Commercial or Industrial Construction

Services by following the decision in the case of Real Value Promoters. The Tribunal observed as under:

8. The Hon'ble Supreme Court in the case of CCE & Customs, Kerala Vs Larsen and Toubro Ltd. – 2015 (39) STR 913 (SC) had analyzed the very same issue and held that the demand under WCS in the nature of composite contract (construction of residential complex service, commercial or industrial construction service, erection, commissioning and installation service) cannot sustain when it involves composite contracts which includes both supply of goods / materials as well as rendering of services.

9. The Tribunal in the case of Real Value Promoters Pvt. Ltd. (supra) had considered the issue as to whether even after 1.6.2007, the levy under CICS or CRC etc. is sustainable when the works executed are composite in nature. The relevant part of the order reads as under :

"7.10 The issue was analyzed by the Hon"ble Apex Court in Larsen & Toubro case (supra) and held that there can be no levy of service tax on composite contracts (involving both service and supply of goods) prior to 1.6.2007. This read together with the budget speech as above would lead to the strong conclusion that composite contracts were brought within the ambit of levy of service tax only with effect from 1.6.2007 by introduction of Section 65(105)(zzzza) i.e. Works Contract Services. As pointed out by the ld. counsels for appellants, there is no change in the definition of CICS/CCS/RCS after 1.6.2007. Therefore only those contracts which were service simpliciter (not involving supply of goods) would be subject to levy of service tax under CICS / CCS / RCS prior to 1.6.2007 and after. Our view is supported by the fact that the method / scheme for discharging service tax on the service portion of composite contract was introduced only in 2007.

....

8. In the light of the discussions, findings and conclusions above and in particular, relying on the ratios of the case laws cited supra, we hold as under:-

a. The services provided by the appellant in respect of the projects executed by them for the period prior to 1.6.2007 being in the nature of composite works contract cannot be brought within the fold of commercial or industrial construction service or construction of complex service in the light of the Hon"ble Supreme Court judgment in Larsen & Toubro (supra) upto 1.6.2007.

b. For the period after 1.6.2007, service tax liability under category of "commercial or industrial construction service" under Section 65(105)(zzzh) ibid, „Construction of Complex Service" under Section 65(105)(zzzq) will continue to be attracted only if the activities are in the nature of services" simpliciter.

c. For activities of construction of new building or civil structure or new residential complex etc. involving indivisible composite contract, such services will require to be exigible to service tax liabilities under „Works Contract Service" as defined under section 65(105)(zzzza) ibid.

d. The show cause notices in all these cases prior to 1.6.2007 and subsequent to that date for the periods in dispute, proposing service tax liability on the impugned services involving composite works contract, under „Commercial or Industrial Construction Service" or „ Construction of Complex" Service, cannot therefore sustain. In respect of any contract which is a composite contract, service tax cannot be demanded under CICS / CCS for the periods also after 1.6.2007 for the periods in dispute in these appeals. For this very reason, the proceedings in all these appeals cannot sustain."

10. The said decision in Real Value Promoters Pvt. Ltd. was applied by the Tribunal in Jain Housing and Construction Ltd. Vs CST - (2023) 10 Centax 170 (Tri-Mad) [24.02.2023] and the demand was set aside. The department filed appeal before the Hon'ble Supreme Court against the order passed by the Tribunal. The Supreme

Court dismissed the appeal filed by the department as reported in (2023) 10 Centax 171 (SC) [05.09.2023].

11. From the discussions made above, we hold that the demand under 'Commercial or Industrial Construction Services' (CICS) cannot sustain and requires to be set aside which we hereby do. The appeal is allowed with consequential relief, if any, as per law.

25. We take note of the fact that the decision of the Tribunal in the case of Real Value Promoters Ltd. (Supra) which has been relied in the case of *M/s. Jain Housing and Construction Ltd.* (Supra) has been affirmed by the Hon'ble Apex Court.

26. After appreciating the facts and evidence placed before us and following the decisions cited (supra), we are of the considered opinion, that the demands raised under construction of Residential Complex Services and Commercial or Industrial Construction Services for the disputed period cannot be sustained and requires to be set aside. The impugned order is set aside. The appeal is allowed with consequential reliefs if any.

(Dictated and pronounced in court)

(VASA SESHAGIRI RAO)
Member (Technical)

(SULEKHA BEEVI C.S.)
Member (Judicial)

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