CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH - COURT No. III

Service Tax Appeal No.41369 of 2014

(Arising out of Order-in-Original No.06/2014-Commr. dated 25.03.2014 passed by Commissioner of Central Excise, Customs and Service Tax, 6/7, A.T.D. Street, Race Course, Coimbatore – 641 018)

M/s.Vijayadeepa Constructions Private Limited .... **Appellant**
No.15/158-A, Narayana Guru Road,
KTVR Group Hospital Buildings,
Sai Baba Mission,
Coimbatore – 641 011.

VERSUS

The Commissioner of CGST & Central Excise ... **Respondent**
Coimbatore GST Commissionerate
No.6/7, A.T.D. Street, Race Course,
Coimbatore 641 018.

APPEARANCE :

Shri S. Durairaj, Advocate, for the Appellant

Shri M. Ambe, Authorised Representative and
Shri Harendra Singh Pal, Authorized Representative for the Respondent

CORAM :

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

FINAL ORDER No.40536/2024

DATE OF HEARING : 08.05.2024
DATE OF DECISION : 08.05.2024

Per: Ms. Sulekha Beevi. C.S

Brief facts are that the appellants are rendering construction services and are registered with the Department for construction services under the category of construction of Residential Complex Service (RCS, for short) and other services. The intelligence gathered by the department indicated that the appellant had not paid service tax for the period 1.1.2009 onwards in respect of construction of residential complexes services. It was also noted that they had discharged service tax for the period upto 1.1.2009 under construction of residential complex services after availing the abatement. The Department was of the view that the appellant has not paid appropriate service tax for providing construction of Residential Complex Service and that they are liable to pay service tax for the period upto February 2012.

2. Further, the appellant provided construction services for construction of engineering college by M/s.KTVR Siddhammal Charitable Trust. The appellant having provided construction of commercial nature though required to pay service tax for the period upto 2007-08 to 2009-10 for the construction of the commercial complex had not paid service tax. Show cause notice dt. 18.04.2013 was issued to the appellant proposing to demand the differential service ta x along with interest and also for imposing penalty. After due process of law, the original authority confirmed the demand, interest and imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

3.1 The Ld. Counsel Shri S. Durairaj appeared and argued for the appellant. In regard to the demand made in the SCN under Works Contracts Service for the construction of RCS it is submitted by the ld. Counsel that for the period upto 1.7.2010 the appellant is not liable to pay service tax. It is submitted that the appellant has provided service as a builder/promoter/developer of the residential projects and the Board' vide its circular No. 108/02/2009 dt. 29.1.2009 has clarified that a promoter/ developer / builder is not required to pay service tax.

3.2 In the present case, the appellant sold the undivided share (UDS) to the customers and thereafter themselves provided the construction services. The appellant has constructed almost 95 units in the residential complex and only part of the UDS was sold to customers. The construction services provided by the appellant are composite in nature which includes use of materials as well as rendition of services. For the period upto 31.3.2009, the appellant had discharged service tax under category of RCS after availing the abatement.

3.3 With effect from 31.3.2009, the appellant has stopped paying service tax in view of the Board's circular (supra). The department has demanded service tax for the period upto February, 2012. From 1.7.2010, the appellant discharged service tax on the construction of Residential Complex Service after availing abatement. The demand in the present case with respect to residential complex project has been made on the entire amount received by the appellant without granting any abatement. The activity carried out by the appellant being composite in nature, the department ought to have granted abatement for the period w.e.f. 1.7.2010. The appellant has already discharged an amount of Rs.61,95,312/- for the period upto February, 2012, after availing abatement. The differential demand has been raised denying the abatement. As the appellant is not liable to pay service tax upto 1.7.2010 being a promoter/developer, it is prayed that the demand for the period prior to 1.7.2010 may be set aside.

3.4 The appellant has discharged service tax under RCS for the period from 1.7.2010 to 2/2012. The demand at present has been raised alleging that appellant cannot avail abatement. It is submitted that the contracts being composite in nature, the department cannot deny the abatement. It is prayed that the differential demand raised after 1.7.2010 to 2/2012 may be set aside.

3.5 In regard to the demand made under Works Contracts Service for construction of Engineering College provided to M/s.KTVR Siddhammal Charitable Trust, the learned counsel submitted that this construction is not for commercial purposes as the building is solely used for running educational institution which is an Engineering College approved by All India Council for Technical Education (AICTE). The Department does not dispute that the building is used solely for education purposes. When the building is used by an educational institution, it cannot be considered to be used for commercial purposes. The Board Circular No.80/10/2004-ST dt. 17.09.2004 at para 13.2 was adverted to by the ld. Counsel. The decisions in the case of *Commissioner of Service Tax Vs S.M. Sai Corporation* - 2016 (42) STR 716 (Tri.-Mumbai) and *Ratan Das Gupta & Co Vs CCE* – 2017 (3) GSTL 247 (Tri.-Delhi) were relied by the learned counsel to submit that when the building is used for educational purposes, the construction of such buildings cannot be said to be commercial construction. For this reason, the demand made under Works Contracts Service alleging that the building is used for commercial purpose cannot sustain. Ld. Counsel prayed that the demand raised in regard to the construction of educational institutions may be set aside.

3.6 Ld. Counsel argued on the ground of limitation also. It is submitted that the appellant had paid the service tax for construction of residential complexes for the period upto 30.3.2009 and had stopped paying service only in accordance with the Board's circular. For the period w.e.f. 1.7.2010, the appellant started paying service tax availing abatement. All these facts would show that the appellant had no intention to suppress facts or evade payment of service tax.

3.7 The appellant had not discharged service tax in respect of the construction of educational building only for the reason that the appellant was under bonafide belief that the said services are exempted from payment of service tax. Further, the Board vide its circular dt. 17.9.2004 as above had clarified that when construction services are provided for educational institutions / buildings used for education purposes is exempt from levy of service tax. The entire figures are taken by the department from the accounts maintained by the appellant. There is no suppression of facts on the part of the appellant and the invocation of extended period therefore cannot sustain. It is prayed that the appeal may be allowed.

4. Ld. A.R Shri M. Ambe and Shri Harendra Singh Pal appeared and argued for the Department. The discussions made by the adjudicating authority in para-24 with regard to the construction of residential complexes was adverted to by the Ld. A.R. It is submitted by Ld. A.R that the appellant had entered into contract for sale of UD share of land to the customers and thereafter constructed the residential complexes. The entire complex was constructed and it was handed over to the customers. The appellant is therefore liable to pay service tax on construction of residential complex buildings for the disputed period.

4.1 In regard to the demand made under WCS for the project of construction of Engineering College, Ld. A.R submitted that the building though used for educational purpose cannot be construed to be of non-commercial nature. The college collects fees from students for imparting education and therefore it is a commercial activity. It is therefore submitted by the Ld. A.R that demand of service tax on construction of Engineering College is legal and proper. The non-payment of service tax would not have come to light but for the verification done by the department. The show cause notice issued invoking the extended period is therefore legal and proper. Ld. A.R prayed that the appeal may be dismissed.

5. Heard both sides.

6. The demand in the SCN is for the period April 2009 to February 2012. The first issue is with regard to the demand made under 'Works Contracts Service' in respect of construction of residential complex. The demand pertains only to a single residential complex. It contains 96 units. It is explained by the adjudicating authority in para 24.12 of

the order that the appellant after conceptualizing the project, arranged for the sale of the undivided share of the land to the prospective purchasers (allottees) subject to the condition that the allottee should allow the flat to be constructed through the builder / promoter, viz. appellant. It is very much clear from the agreement itself that the appellant is a promoter/developer/builder of the residential project. As per circular No.108/02/2009 dated 29.01.2009, the Board has that a builder/promoter/developer is not liable to pay service tax for the period prior to 1.7.2010. The Circular reads as under :

> "3. The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax."

7. The Tribunal in the case of *Krishna Homes Vs CCE, Bhopal* - 2014 (34) ST.R. 881 (Tri.-Del.) had considered the very same issue and held that a promoter/developer/builder is not subject to levy of service tax upto 1.7.2010 in respect of construction of residential complex. Relevant para of the order is reproduced as under :

> **"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."

8. This view was followed by the Tribunal in the case of *CC, CE & Service Tax, Visakhapatnam-I Vs Pragati Edifice Pvt. Ltd.* as reported in 2019 (31) G.S.T.L 241 (Tri.-Hyderabad). After taking into consideration the circular issued by the Board as well as the decision cited supra, we are of the view that the appellant is not liable to pay service tax under 'Works Contracts Service' for construction of residential complex as builder/developer/promoter for the period upto 1.7.2010.

9. For the period w.e.f. 1.7.2010, the appellant is liable to pay service tax under the construction of residential complexes. The appellant has discharged service tax after 1.7.2010 till February 2012. However, the demand has been raised in the SCN denying the abatement claimed by the appellant. It is not disputed that the appellant has used materials as well as services for construction of the residential complex. The adjudicating authority has erroneously held that even if the materials are used for execution of works contract service, such materials are also leviable to service tax under the definition of WCS. The discussions by the adjudicating authority are

in para 23 of the impugned order. We find this discussion to be erroneous and against the provisions of law. We hold that the discussions and the finding of adjudicating authority that the appellant is not eligible for abatement in respect of works contract service is not legal and proper and cannot be sustained. The appellant has paid a sum of Rs.32,15,158/- after 1.7.2010 upto February 2012 as disclosed in ST-3 returns.

10. In the case of *Heavy Engineering Corporation Ltd. VS CCGST* - 2023 (8) Centax 287 (Tri.-Calcutta), the issue as to whether the appellant is entitled for abatement benefit of Notification No.1/2006-ST dt. 1.3.2006 for the period post-1.6.2007 was considered. The appellant therein was discharging service tax on 33% of the gross value in respect of WCS. The Tribunal held that the appellant is eligible for 67% abatement of the gross value in regard to consideration received for WCS. The said decision was upheld by the Hon'ble Apex Court vide its judgement in Civil Appeal Nos.4244-4245/2023 decided on 06.07.2023.

11. Following the decisions cited supra, we hold that the demand under 'Works Contract Service' for the disputed period on construction of RCS denying abatement cannot sustain and requires to be set aside which we hereby do. The amount of Rs.32,15,158/- paid by appellant is not disturbed.

12. The second issue is with regard to demand under 'Works Contracts Service' provided for construction of Engineering College to M/s.KTVR Siddhammal Charitable Trust. The department does not dispute that the building has been used solely for the purpose of Engineering College. So also, the said college is recognized by the AICTE. The appellant has relied upon CBEC Circular No.80/10/2004-ST dt. 17.09.2010 wherein the Board has clarified in para 13.2 as under :

> "13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is 'used, or to be used' for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax."

13. It is explained by the Board in the aforesaid circular that, when the building is solely used for educational purposes, the levy of service tax is not attracted. We, therefore, find that the building having been used for educational purpose and being non-commercial purpose, the said construction activity cannot be subject to levy of service tax during the disputed period.

14. The Ld. Counsel has argued on the ground of limitation also. It has to be noted that the entire demand has been raised on the basis of figures taken from the accounts maintained by the appellant. There is no evidence of positive act of suppression of facts with intent to evade payment of service tax established against the appellant. Further, the appellant has been paying the service tax on RCS upto 2009 and had stopped paying service only in accordance to the clarification made by Board's circular. Thereafter, with effect from 1.7.2010 the appellant started paying service tax again. The Appellant had not discharged service tax with regard to the building constructed for Engineering College on the bonafide belief that the building being solely used for educational purpose would not fall within the levy of service tax liability, as clarified by the Board circular (supra).

15. Taking note of these aspects into consideration, we are of the view that the invocation of extended period is not legal and proper. The issue of limitation is also answered in favour of the appellant.

16. In the result, the appeal is allowed with consequential relief, if any. We make it clear that the payment made by appellant from 1.7.2010 upto February 2012 to the tune of Rs.32,15,158/- is undisturbed.

(Order dictated and pronounced in the open court)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

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

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