CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
<u>CHENNAI</u>

REGIONAL BENCH – COURT No. I

Service Tax Appeal No. 40549 of 2016

(Arising out of Order-in-Appeal No. 282/2015 (STA-II) dated 28.10.2015 passed by Commissioner of Service Tax (Appeals-II), Newry Towers, 3rd Floor, Plot No. 2054, I Block, II Avenue, Anna Nagar, Chennai – 600 040)

M/s. R.E. Constructions Pvt. Ltd. **...Appellant**
No. 9, Arcot Road,
T. Nagar,
Chennai – 600 017.

Versus

Commissioner of GST and Central Excise **...Respondent**
Chennai II Commissionerate,
Newry Towers, 3rd Floor,
Plot No. 2054, I Block, II Avenue,
Anna Nagar,
Chennai – 600 040.

<u>APPEARANCE:</u>

For the Appellant : Mr. J. Shankarraman, Advocate
For the Respondent : Mr. Harendra Singh Pal, Authorised Representative

<u>CORAM:</u>
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)
HON'BLE MR. AJAYAN T.V., MEMBER (JUDICIAL)

<u>FINAL ORDER No. 40609 / 2025</u>

DATE OF HEARING : 20.03.2025
DATE OF DECISION : 11.06.2025

Per Mr. VASA SESHAGIRI RAO

Brief facts of the appeal are as under: -

1.1 M/s. R.E. Constructions (P) Ltd., Chennai (hereinafter referred to as 'Appellant') is engaged in construction of Residential Complex normally not more than 12 dwelling units. It appears that in one particular project, the Appellant constructed 6 dwelling units for the landowners and remaining 12 dwelling units to be sold to various customers. The Appellant entertained a view that he is eligible for exemption from payment of service tax in terms of CBEC Circular No. 108/02/2009 dated 29.01.2009 wherein it has been clarified that 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.

1.2 Consequent to verification exercise conducted by the Departmental Officers, the Appellant was issued with a Show Cause Notice No. 243/2011 dated 21.04.2011 demanding service tax in respect of Construction of Residential Complex Service during the period from October 2005 to March 2010 invoking larger period. The Appellant assailed the allegations contained in the Show Cause Notice contending that they are eligible for the exemption as per CBEC Circular dated 29.01.2009, and that out of 18 flats constructed, and 6 flats delivered to the 6 ultimate owners and only 12 flats were constructed for outsiders for consideration. It was also submitted that the Adjudicating Authority has not extended the 67% abatement as required and also they had not collected any amount towards service tax from the customers. It appears that that Appellant had filed a Chartered Accountant Certificate to show that the Appellant did not receive any material like Cement, Steel, Bricks from their Customers.

1.3 However, after the due process of adjudication, the Original Adjudicating Authority has confirmed the demand of service tax of Rs.30,32,024/- under Section 73(1) of the Finance Act, 1994 along with interest and also imposed equivalent penalty under Section 78 of the Finance Act, 1994. Further, a penalty of Rs.5,000/- was imposed on the Appellant under Section 77 of the Act *ibid.*

1.4 On an appeal being filed, the Appellate Authority *vide* Order-in-Appeal No. 282/2015 (STA-II) dated 28.10.2015 has upheld the taxability of the residential complex service but directed the Lower Adjudicating Authority to consider the plea of the Appellant for 67% abatement *vide* Notification No. 1/2006-ST and pass an appropriate order after examining the relevant documents which the Appellant was directed to produce. Having not satisfied with the above Appellate Authority's Order, the Appellant come in appeal before this forum.

2.1 The Ld. Advocate Mr. J. Shankarraman arguing for the Appellant has referred to paragraph 7(m) of the Show Cause Notice to show that the Appellant procured the materials required for construction from their end and with the help of hired labourers finished the project. He has drawn our attention to the Chartered Accountant's Certificate to support the fact that the Appellant did not receive any consideration from the owners of the land whether by way of money or materials like cement, steel, wood, flooring materials and bricks and the contract for construction for these flats is a composite contract and it could be falling only under the category of Works Contract. He submits that the classification adopted is erroneous and as such demand raised is not sustainable both prior to and post 01.06.2007.

2.2 Relying upon the Chennai Tribunal's decision in the case of *Real Value Promoters Pvt. Ltd. Vs. Commissioner of GST and Central Excise, Chennai [2018-TIOL-2867-CESTAT-MAD]*, the Appellant has contended that after introduction of works contract service, the demand under the category of construction services which are composite contracts cannot sustain. He has submitted that the services are composite in nature even in this case and the demand being under Construction of Residential Complex Service / Construction of Commercial or Industrial Construction is hit by the position of law laid down in *Real Value Promoters Pvt. Ltd. supra*.

2.3 He has submitted that similar issue was decided in the case of *Jain Housing & Construction Ltd. Vs. Commissioner of Service Tax, Chennai [2023 (10) CENTAX 170 (Tri.-Mad.)]* which has been upheld by the Hon'ble Supreme Court reported in *2023 (10) CENTAX 171 (SC).*

3. The Ld. Authorised Representative Mr. Harendra Singh Pal representing the Department has affirmed the findings in the impugned order dated 28.10.2015.

4. We have heard both sides and have gone through the written and oral submissions and also evidences available on record including the case laws relied upon.

5. The issues that are to be decided in this appeal are: -

i. Whether the service tax demand raised on the Appellant under Construction of Residential Complex

Service for the period from October 2005 to March 2010 under Section 73(1) of the Finance Act, 1994 is sustainable or not? and,

ii. Whether invoking larger period and imposition of penalties are justified or not?

6. Investigations conducted in the Appellant's case has revealed that they are the promoters of construction of residential flats but have not registered under the service tax law, not charged any service tax from their customers and also have not filed the service tax returns. Neither they had issued / raised any invoices on their clients. The Appellant in respect of the project at Avadanam Papier Road, Choolai, Chennai had constructed flats exceeding 12 dwelling units without payment of service tax under the category of 'Construction of Residential Complex Service'.

7. The Appellant has contended that he is eligible for exemption from payment of service tax in terms of CBEC Circular No. 108/02/2009 dated 29.01.2009 as these flats constructed were given to the ultimate owners and the actual number of flats that have been sold were only 12 dwelling units.

8. The Ld. Counsel for the Appellant has relied upon the decisions rendered in the case of *Real Value Promoters Pvt. Ltd. Vs. Commissioner of GST and Central Excise, Chennai [2018-TIOL-2867-CESTAT-MAD]* and in the case of *Jain Housing & Construction Ltd. Vs. Commissioner of Service Tax, Chennai [2023 (10) CENTAX 170 (Tri.-Mad.)]* which have held that demands raised under Construction or Commercial / Industrial Construction services are not sustainable when the services rendered are composite in nature. It is not disputed that the Appellant has used the materials in the execution of this project as the Appellate Authority has directed the Original Authority to allow 67% abatement in terms of Notification No. 01/2006-ST which clearly indicates the construction of complex service rendered is composite in nature. Further, the Appellant has produced a Certificate from the Chartered Accountant testifying that the contract executed is composite in nature as its customers have not supplied any material like Steel, Cement, *etc.* and also no service tax has been charged or collected from the owners of the flats.

9. The issue as to whether a composite contract involving provision of service as well as transfer of property in goods could be covered under CICS and CCS from the date of introduction of service tax levy on such services was,

being litigated upon which was finally settled by the Hon'ble Supreme Court in the case of *CCE Vs. Larsen & Toubro Ltd. 2015 (39) STR 913 SC.* The Apex Court has observed that in as much as section 67 of the Act, dealing with valuation of taxable services, refers to the gross amount charged for service, the services of CICS and CCS would cover only pure service activities, 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 exemption notifications issued at the discretion of the executive are not sufficient to sustain the levy. The Hon'ble Apex Court has also observed that only with the introduction of WCS as a separate taxable service, statutory mechanism to exclude the value of transfer of property in goods has been prescribed.

10. The effect of the above decision is that CICS and CCS, as defined under clauses (zzq) and (zzzh), respectively, of sub section (105) of the section 65 would cover only pure service contracts, without any transfer of property in goods.

11. In various decisions the importance of classification of services has been laid down and it has been held that once the show cause notice proposes demand of

service tax under a particular category of taxable service, the adjudicating / appellate authorities cannot travel beyond the scope of allegations in the show cause notice and confirm the demand under a different category of taxable service as the assesse was not at all put on notice on the new category of taxable service. These decisions were based on various decisions of higher appellate forums, where it has been held that the show cause notice is the foundation of allegations and the adjudication should be limited to the allegations contained in such a notice. Further, as per Section 65 A of the Act, classification of service shall be based on the specific entries and the more specific description has to be preferred. In this connection, he had invited attention to CBEC's Circular 128/10/2010 Dt. 24.08.2010.

12. Further, if show cause notices are issued demanding service tax under CICS / CCS, on composite contracts, involving transfer of property in goods, for the period post 01.06.2007, the said demands of service tax cannot be sustained, as these services would cover only pure service activities, as held by the Hon'ble Supreme Court in Larsen & Toubro (supra). At the stage of adjudication or appeal proceedings, the demand cannot be confirmed under WCS, when the show cause notice raises the demand on CICS/CCS. Such an attempt would amount to travelling

beyond the scope of the show cause notice, which is not permissible.

13. Though the definition of WCS incorporates the definitions of CICS / CCS into it, the scope of coverage of these services is distinct. While the definition of CICS / CCS would cover such construction activities without involving any transfer of property in goods (Example:- Where all materials required for the construction are supplied by the service recipient and the service provider is engaged only for provision of construction service) such a construction is service simplicitor and whereas a composite construction activity would fall only under WCS.

14. The Ld. Counsel had also argued that the demands of service tax under CICS / CCS, for the period post 01.06.2007 in case of composite contracts are not at all sustainable and liable to be set aside.

15. The Tribunal Chennai in the case of *Real Value Promoters Pvt. Ltd. Vs. Commissioner of GST and Central Excise, Chennai [2018-TIOL-2867-CESTAT-MAD]* has held as follows: -

"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."*

16. Similarly, in the case of *Jain Housing & Construction Ltd. Vs. Commissioner of Service Tax, Chennai [2023 (10) CENTAX 170 (Tri.-Mad.)]*, the Tribunal has held that service tax was not payable on composite work contract services of development of residential complex prior to 01.06.2007 and also demand of service tax for the period post 01.06.2007 was also set aside for having been issued under inapplicable head. The above decision has been confirmed by the Hon'ble Supreme Court in the case of *Commissioner of Service Tax Vs. Jain Housing and Construciton Ltd. [2023 (10) CENTAX 171 (SC)]*. In the present appeal, it is not disputed that the Appellant has used all the materials like cement, steel, wood and bricks for construction of residential complex service which is composite in nature. The period of the service rendered was from October 2005 to March 2010. The ratio of above decisions is applicable on all fours to the present case.

17. In view of the above, the demand raised in the impugned Order-in-Appeal No. 282/2015 (STA-II) dated 28.10.2015 passed by the Commissioner of Service Tax is not sustainable. No need to discuss about justifiability for

invoking larger period as the Appellant succeeds on merits. As such, penalties imposed are also set aside. Ordered accordingly.

18. Thus, the appeal is allowed with consequential relief, if any, as per the law.

(Order pronounced in open court on 11.06.2025)

Sd/-
(AJAYAN T.V.)
MEMBER (JUDICIAL)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

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