CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 50858 of 2017

[Arising out of Order-in-Original No.JOD-EXCUS- 000- COM – 0069 to 0071-16-17 dated 16.02.2017 passed by the Commissioner, Central Excise, Jodhpur]

M/s. Rajasthan Housing Board, **...Appellant**
Jyoti Nagar, Janpath,
Jaipur – 302005
(Rajasthan)

Vs.

Commissioner Central Excise, (Jodhpur), **...Respondent**
117/5, PWD Colony,
Near Riktiya Bharuji Crossing,
Jodhpur (Raj.)

APPEARANCE:

Shri.Agarwal Sanjiv, Chartered Accountant for the Appellant
Shri R.K. Maji, Authorized Representative for the Respondent

Coram: HON'BLE MR. RAJU, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 11.02.2021
DATE OF DECISION : 16.03.2021

FINAL ORDER No. 51143/2021

RACHNA GUPTA

The appellant, in the present appeal, the Rajasthan Housing Board, Jaipur (hear-in-after called as "RHB") is engaged in construction of residential houses from loan sanctioned by HUDCO and other financial institutes and allotting these houses on hire purchase sale and outride sale basis to the consumers against collection of the amounts as follows:-

1. Ancillary service charges to meet out additional overheads levied by HUDCO and other financial institutes.

2. Hire purchase deposits from its consumers Purchasing houses/flats on hire purchase.
3. Interest for flats/houses allotted on hire purchase.
4. Administrative charges on registration of transfer of hire purchase lease.

2. Department alleged that activity of collection of above said charges is covered under definition of Banking and other Financial Services as mentioned under Section 65 (12) of the Finance Act, 1994.

3. In view of these observations / allegations, Department has served the appellants with following three Show Cause Notices for the respective period and the quantum of demand:-

Sl. No.	SCN No.	Period of Demand	Service Tax Demand (Rs.)	Penalties under Section
1.	V(H) Adj.I/ST/155/2011/ 1844 dated 21.10.2011	04/2006 to 03/2011	14,21,85,210/-	Under section 76,77 & 78
2.	V(H) Adj.I/ST/14/ 2013/ 4078 dated 19.03.2013	04/2011 to 03/2012	5,87,42,122/-	Under section 76,77 & 78
3.	V(h)Adj. I/ST/360/ 2013/ 2060 dated 30.09.2013	04/2012 to 03/2013	8,39,00,865/-	Under section 77 & 78
Total			28,48,28,197/-	

4. The appellant replied these notices vide their letter dated 01.03.2012, 07.05.2013 & 06.12.2013 respectively. Three of the notices have been adjudicated vide the Order-in-Original No. JOD-EXCUS- 000- COM – 0069 to 0071-16-17 dated 16.02.2017 thereby confirming the demand as proposed vide said show

cause notices alongwith the proposed interest and the penalties. Being aggrieved, the appellant is before this Tribunal.

5. We have heard Shri Agarwal Sanjiv, learned Counsel for the appellant and Shri R.K. Maji, learned Authorised Representative for the Department.

6. It is submitted on behalf of the appellant that "RHB" has been constituted by Government of Rajasthan under Rajasthan Housing Board Act, 1970 as an instrumentality of State Government to cater to the housing needs of different sectors of society in the state of Rajasthan. The focus of "RHB" is on affordable housing which special emphasis towards economically weaker sections of the society in Cities of Rajasthan. It is further submitted that the principal business of appellant is that of construction and sale of residential accommodation to the public at large.

6.1 The ancillary service charges (ASC) as have been alleged to be taxable under "Banking and other Financial Services", are mentioned to have been received by the appellant being transferred to ASC fund for being used for the construction of Government Primary School, Dispensary, Police Chowki, Fire Station etc. as would be required for over-all development of public facilities in the Township to be created by the appellant in the cities of the Rajasthan. It is submitted that the said fund is not at all the income of the appellant. The Income Tax

assessments for appellant for the relevant years also support that these are not the incomes of the Board, rather are in the nature of liability or deposit. Hence, cannot be held to be liable to service tax, for it not being consideration at all for any of the services.

6.2 Learned Counsel has further impressed upon that the Service Tax liability has wrongly been levied on interest received. It is submitted that the financial transactions where consideration is represented by way of interest or discount are in negative list, section 66D (n), and hence, is not taxable w.e.f. 01.07.2012. For the period prior this date also, interest received is denied to be subject to the service tax, as being specifically excluded under section 67 of Finance Act, 1994. It is submitted that sale of house under Hire Purchase Scheme does not alter the nature of activity, which is primarily sale. Since the sale of house remains to be a non-taxable service, such hire purchase sale can also cannot be covered as taxable. It, is accordingly, submitted that all the amounts, as alleged to be leviable to tax that is ancillary service charges, hire purchase deposit and interest on sale are not taxable, as these amounts are not received in relation to any taxable service rendered.

6.3 Finally, it is submitted that appellant is a Government Undertaking, suppression of facts cannot be alleged against such bodies. Otherwise also, Department has always been co-operated and all requisite information has always been provided

by the appellant to the Department. There arises no question of any suppression or concealment of facts that too, with an intent to evade payment of tax. Once that is the fact, the penalties under section 77 and 78 also cannot be levied. The appellant rather is entitled for the relief given under Section 80 being a reasonable cause present. With these submissions, and that the adjudicating authority below has failed to take into consideration the submissions but has solely relied upon the facts that appellant is a body corporate, the demand has wrongly been confirmed.

6.4 The learned Counsel has relied upon the following case laws:-

1 **CCE, Pune vs. Kesar Petro Product Ltd. reported in 2014 (33) STR 646 (CESTAT, Mumbai)**

2 **CCE vs. N.K. Agencies Pvt. Ltd. reported in 2010 (20) STR 176, Bangalore Tribunal.**

3. SPL Developers Pvt. Ltd. vs. CST, Bangalore reported in 2015 (39) STR 455.

4 **Thermex Ltd. Vs. Commissioner of Central Excise, Pune-I reported in 2007 (8) STR 487.**

The order under challenge is, therefore, prayed to be set aside and appeal is prayed to be allowed.

7. While rebutting these arguments, learned Authorised Representative has impressed upon the definition of "Banking

and other Financial Services", as defined under Section 65 (12) of Finance Act, 1994. It is impressed upon that services provided by a body corporate are duly included in the said definition. Admittedly, "RHB" is a body corporate. Hence, when such body corporate has received an amount as that of ASC, hire purchase and interest, same is nothing but an amount against rendering "Banking and Financial Services". Learned, Authorised Representative has impressed upon the findings in para 5.2 of the Order-in-Original and 2.1.1 thereof. The argument that ASC and hire charges are reflected, as liability in the balance sheet are denied to extend any benefit to the appellant. It is submitted that apparently, appellants were collecting the amount in ASC charges and thereafter were transferring the same to ASC Fund. It is mentioned that original adjudicating authority has rightly confirmed that transfer of any amount to any other head after collection of the said amount does not change the service tax liability, which is based on services rendered and the amount collected for the same and has no meaning in relation to the utilization of the fund thereafter. Learned Authorised Representative has placed reliance upon the findings in para 5.1.5 of the impugned appeal. With these submissions, the correctness in the order under challenge is impressed upon and appeal is prayed to be dismissed.

8. After hearing the parties and perusing the record of the impugned appeal, the moot question to be decided is as to whether services rendered by the appellant are taxable being the

"Banking the Financial Services". To adjudicate foremost we need to look into the definition of "Banking and Financial Service".

Section 65 (12) of Finance Act, 1994, defines "Banking and other Financial Services" as under:-

> ***"Banking and Other Financial Services"*** *means -*
>
> *(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or [commercial concern]*, namely :-*
>
> *(i) financial leasing services including equipment leasing and hire-purchase;*
>
> *Explanation.-For the purposes of this item, "financial leasing" means a lease transaction where-*
>
> *(i) contract for lease is entered into between parties for leasing of a specific asset;*
>
> *(ii) such contract is for use and occupation of the asset by the lessee;*
>
> *(iii) the lease payment is calculated so as to cover the full cost of the asset together with the interest charges; and*
>
> *(iv) the lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment;*
>
> *(ii) Omitted*
>
> *(iii) merchant banking services;*
>
> *(iv) securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing;*
>
> *(v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services* **,**
>
> *(vi) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;*

(vii) provision and transfer of information and data processing; and

(viii) banker to an issue services; and

(ix) other financial services, namely, lending, issue of pay order, demand draft, cheque, letter of credit and bill of exchange, transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults, operation of bank accounts;";

(b) foreign exchange broking and purchase or sale of foreign currency including money changing provided by a foreign exchange broker or and authorised dealer in foreign exchange or an authorised money changer, other than those covered under sub-clause (a);

[Explanation. - For the purposes of this clause, it is hereby declared that "purchase or sale of foreign currency, including money changing" includes purchase or sale of foreign currency, whether or not the consideration for such purchase or sale, as the case may be, is specified separately;]"

9. The Bare perusal makes it clear that for any service to be a "Banking and Financial Service" it has to be rendered by either:

- Banking Company or
- Financial Institute including a non-banking financial company or
- Body Corporate or
- Commercial concern
- Any of these concerns should be rendering any of such service as are mentioned in sub-clauses (a) (i) to (ix) of Section 65 (12) of the Finance Act, as mentioned above.

10. We observe that the Original Adjudicating Authority has confirmed the demand keeping in view that the service in question has been rendered by the appellant being a body

corporate. The meaning of body corporate stands defined under Section 65 (14) of Finance Act, 1994 as under:-

> *Body corporate shall have the meaning assigned to it in Clause (7) of Section 2 of the Companies Act, 1956 (1 of 1956).*

Para h to clause (7) of section (2) of the Companies Act, 1956 reads as follows:-

> *"body corporate" or "corporation" includes a company incorporated outside India, but does not include – (a) a corporate sole; (b) a co-operative society registered under any law relating to co-operative societies; and (c) any other body corporate (not being a company as defined under this Act) which the Central Government may, by Notification in the official Gazette, specify in this behalf.*

11. It clarifies that the body corporate, which fall in the exclusion clause of the above definition are not relevant for the purpose of Section 65 (12), which defines Banking and other Financial Services. Clause (c) of the above definition excludes such body corporate from the scope of Section 65 (12) of the Finance Act which cannot be defined as company and which are the creature of Government. The appellant is, apparently, constituted under Rajasthan Housing Board Act, 1970. No doubt, Section 4 (2) of the said Act describes "RHB" as a body corporate but this body corporate is definitely not constituted under the Companies Act but by Rajasthan Government to have perpetual succession and a common seal with power to acquire hold and dispose of property both moveable and immovable and to enter into contracts and may by its corporate name sue and

be sued and do all things and acts necessary for the purpose of Rajasthan Housing Board Act.

12. Apparently, the purpose of the Act is to provide for measures to be taken to deal with and satisfy the need of housing accommodation in the State of Rajasthan. The said purpose is sufficient for us to hold that none of the services as mentioned in (i) to (ix) of sub clause (a) to Section 65 (12) of Finance Act, 1994 are intended to be rendered by the appellant. No doubt, the appellant is entering into contracts for hire purchase but the contract is solely with the intent for the sale of the property, as contrary to mere use and occupation of the said property, where the hire purchaser has no option to not to own the property except in case he fail to comply with the payment terms of the contract that "RHB" has reserved the right to cancel the said allotment vide the said contract. From the above discussion we conclude that the basic service rendered by "RHB" is that of "Construction of Residential Houses".

13. We are also of the opinion that "RHB", otherwise also, cannot be called as Banking Company. The definition of Banking company as per Section 65 (11) of Finance Act, 1994. Section 5 (c) of Banking Regulation Act, 1949 clarifies that any company, which is engaged in manufacture of goods or carries own any trade and which accepts deposits of money from the public merely for the purpose of financing its business, as such manufacturer or trader shall not be deem to transit the business

of banking. Once that is true even for a banking company, the appellant, who is not even the body corporate as defined under Section 16 (12) cannot be burdened with the tax liability for rendering "Banking and other Financial Services", when it accepts deposits of money from the public merely for *the purpose of financing the sale of houses being constructed by* it.

14. Definition of Financial Institute as per Section 65(45) of the Finance Act, 1994 should have the meaning as assigned to it in clause (c) of Section 45 - 1 of the Reserve Bank of India Act, 1934.

From sub-clause (iv) thereof it is clear that this definition does not include any institution, which carries on as its principal business,-

(a) xxxxxxxxx

(b) xxxxxxxxx

(c) The purchase, construction or sale of immovable property, so however, that no portion of the income of the institution is derived from the financing of purchase, constructions or sales of immovable property by other persons;

15. Further we observe that when one activity is claimed to fall under two different kinds of taxable services Section 65A(2) of Finance Act, 1994 comes to rescue. Section 65A discusses about classification of taxable services to be

determined according to the terms of sub-clauses of Clause (105) of Section 65. Sub-section (2) thereof reads as follows:-

> "(2) When for any reason, a taxable service is, *prima facie*, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-
>
> (a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;
>
> (b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;
>
> (c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration."

16. The said provision is applicable to the demand of Show Cause Notice dated 11.10.2011 and 19.03.2013.

17. According to this provision and the above discussion, it stands clear that since the basic function of the appellant is to construct the houses and then to sell it either by way of allotment or by way of hire purchase against receiving certain amounts whether in form of ASC charges or hire purchase charges, but the activity is specifically the activity of construction of complexes and as such said amount cannot be made liable to tax for rendering service as that of "Banking and Financial Services". For the period post 1st July, 2012, Section 66 D comes to the rescue of the appellant:

> **"SECTION 66D. Negative list of services.** — The negative list shall comprise of the following services, namely :—
>
> xxxxxxxxxxx
>
> xxxxxxxxxxx

(n) services by way of—

(i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount;

(ii) *inter se* sale or purchase of foreign currency amongst banks or authorised dealers of foreign exchange or amongst banks and such dealers;"

18. Further, it is observed that the ASC charges transferred to ASC fund and hire purchase deposit is apparently not an income of the appellant. These receipts are either refundable or adjustable at a future date since the same could not have been done during the period in question that they were shown as liability in the balance sheet of the appellant. The balance sheet on record when seen with other documents on record makes it clear that the findings in para 5.15 are against the facts of the case and against the said documentary evidence. It is no where denied that the said deposits are being used by the appellant for the construction of Government Primary School, Dispensary, Police Chowki, Fire Station etc. as are required for the overall development of public facilities in the township as created by the appellant.

19. In view of the above discussion, we hold that the appellant is neither such a body corporate as is required for Section 65 (12) of Finance Act, 1994 nor the funds as that of ASC charges and hire purchase charges are the income of the appellant, who is held to be engaged in rendering construction services as contrary to Banking and Financial Services.

20. In the case of **CCE, Pune vs. Kesar Petro Product Ltd. reported in 2014 (33) STR 646,** wherein it was held that where a number of services were rendered by the assessee, then for the purpose of classification, the principle service which gives the essential character to the service has to be considered.

21. The Tribunal, Mumbai had followed an earlier decision of Karnataka High Court in the case of **CCE vs. N.K. Agencies Pvt. Ltd. reported in 2010 (20) STR 176, Bangalore Tribunal** also in the case of **SPL Developers Pvt. Ltd. vs. CST, Bangalore reported in 2015 (39) STR 455** has held that classification has to be on analysis of characteristic of service, analysed in terms of Provisions of Finance Act considered in the light of guidance in Section 65 A of Finance Act, 1994 and not as per the Adjudicating Authority or assessee.

22. Now coming to the other income as that of interest as alleged in the impugned show cause notices, we take recourse of Service Tax (Determination of Value) Rules, 2006, though applicable for the period w.e.f. 18.04.2006 to 01.07.2012., we observe that as per Rule 6 (2) thereof the value of taxable service has not to include interest on loans and on delayed payments of any consideration for provision of services or sale of property whether movable or immovable. The hire purchase deposits for the property which cannot be defined as goods are also out of the scope of taxable value as far as the interest thereupon is concern.

23. Otherwise also we have already held that whatever interest amount received by the appellant is confined to the activity with respect to the own products of the appellant i.e. the construction raised by them for being sold, that too, in welfare of economically weaker sections.

We place our reliance upon the decision of CESTAT, Mumbai in the case of **Thermex Ltd. Vs. Commissioner of Central Excise, Pune reported in 2007 (8) STR 487** wherein it has been held that activity confined to own products and appellant being not professional in leasing business for any other product. Thus, interest on loan has not to form the part of value of taxable service.

24. In view of the entire above discussion, we are of the opinion that Adjudicating Authority has confirmed the demand by merely presuming the appellant to be a body corporate, rendering no other taxable service than "Banking and other Financial Service". The said finding is apparently wrong in view of the discussion above. The demand is, therefore, held to have been wrongly confirmed under "Banking and Financial Services" when otherwise the service rendered by the appellant is that of "Construction of Complexes".

25. We also observe that the findings of the Adjudicating Authority below and also the allegations of three of the

impugned show cause notices are contradictory to an earlier show cause notice bearing No.ST/206/2012/1944 dated 03.10.2012 for the period 01.07.2010 to 31.12.2011. The ACS fund received by the appellant during that period was alleged to be assessed under construction of complex services.

26. Coming to the allegations of suppression of facts, we are of the opinion that there has to be a positive act of suppression apparent on part of the appellant along with an apparent intention to evade the payment of tax and there has to be a wilful misstatement as was held by Tribunal, Mumbai in the case of **Centre for Development of Advance Computering vs. CCE Mumbai - 2016 (41) STR 2008**. The Adjudicating Authority below is observed to have failed to show any such positive act. Admittedly, the appellants were submitting their returns regularly. No question of suppression otherwise is possible. Department has failed to reflect any wilful misstatement. Appellant, admittedly, is an instrumentality of State Government. There cannot be an intent to evade the payment of tax. We rely upon the decision of Delhi Tribunal in the case of **Centre for Entrepreneurship Development vs. CCE, Bhopal – 2014 (34) STR 373** wherein it was held that when an Institute run by a State Government and associated in implementation of various welfare schemes of the Government, the allegations of suppression of facts or wilful misstatement can be nothing but absurd.

27. In view of above discussion, the Department is not allowed to invoke the extended period of limitation and the adjudication imposing penalties upon the appellant is also held to be apparently wrong.

28. In view of the entire above discussion, we hereby set aside the Order-in-Original. Consequent thereto, the Appeal stands allowed. The consequential benefits, if any, to follow.

[Pronounced in the open Court on 16.03.2021]

(RAJU)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita