

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Service Tax Appeal No. 50993 of 2020

(Arising out of order-in-original No. 17/Commr./ DDN/2020 dt.30.04.2020 passed by the Commissioner, Central Goods & Service Tax, Dehradun).

M/s The Vardhman Developers

7th KM Haridwar Road,
Jwalapur, Haridwar,
Uttarakhand - 249407.

Appellant

VERSUS

**Commissioner, Central Goods and
Service Tax,**

'E' Block, Nehru Colony
Haridwar Road, Dehradun,
Uttarakhand.

Respondent

APPEARANCE:

Sh. Abhinav Kalra, Chartered Accountant for the appellant
Sh. A. Thapliyal, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. C. J. MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. 50170/2022

DATE OF HEARING: 03.09.2021
DATE OF DECISION: 25.02.2022

ANIL CHOUDHARY:

Brief facts of the case are that as per the show cause notice the appellant is engaged in construction and sale of residential house property (Flats). They are registered with the Department under the head 'Construction of residential complex'. Revenue undertook audit for the period October, 2011 to March, 2014. Revenue also undertook investigation and called for the several documents, copy of sale deed executed by the appellant to the buyer of flat, copy of flat buyer agreement, copy of final allotment letter, audited balance sheet alongwith schedule and details for the financial years 2011-12 to 2015-16. The appellant on being asked also

filed copy of individual partywise sales ledger against the sale deeds submitted by them being 39 in number. They also submitted their price list for various categories of apartment like villas, plots, luxury condominiums & duplex apartments.

2. Thereafter, the officers also visited the premises of the appellant on 20.09.2018 and after inspection also issued summons calling for various information and documents like copy of price list, buyers agreement, customer ledger, sale deed, agreement for car parking charges, preferential location charges and club membership charges, upto June, 2017, copy of trial balance, copy of Form-26AS etc. The statement of Sh. K. K. Parashar, who was working as Manager (Accounts) was also recorded under Section 14 of the Excise Act, who inter alia stated that M/s Vardhman Developers is a HUF and filed IT returns and maintains proper books of accounts. When flat is booked and agreement is made with the customer, a customer ledger is opened. The amount received from the customer is credited to his account and debited to the concerned bank. On receipt of complete / final payment from the customer, the sales ledger is credited and customer ledger is debited. The amount received from the customer under the head namely deposit, IFMS charges (Interest Free main charges), External & Internal development charges, are not included in the total cost of the flat shown in the ledger. Further, he also provided copy of balance sheet and sales ledger for the financial year 2013-14 to 2016-17 as well as copy of four buyer agreements and customer ledger details and details regarding number of flats sold during the period under enquiry. The officer also obtained the current price list for the various categories of flats. In the price list there appeared to

be separate charges for covered car parking, power back up, club membership and preferential location charges.

3. Further, in compliance to summons the appellant filed written submissions vide letter dated 27.09.2018, inter alia mentioning – there is no possibility to issue of price list in the real estate sector as the rate of properties depends on many factors like rate of land and materials being used, purchaser capacity, rates offered by competitors and Government policy, etc. They have only one buyer agreement for the flat and where the agreement is cancelled and no sale deed is executed, then the amount is refunded. Further, sale deed covers all the clauses mentioning the buyer agreement. Further, the amount charged separately by them from the buyer, which shown are separately in the sale deed. Sample copy of buyer agreement was also filed.

4. It was categorically mentioned that they do not collect charges for car parking, preferential location or club membership. Hence, there is no separate agreement for these heads or charges. They also provided unitwise sale value mentioning that determination of unit cost is not possible, as all the units are covered in one project and construction is a continuous process. Thus, only the cost of project can be seen from the books of accounts. It was categorically mentioned that they do not sell car parking space, completion certificate was also enclosed. Trial balance for the period April, 2017 to 30th June was also provided alongwith copy of Form 26AS, and the details of flats sold during the financial year 2013-14 till 2016-17.

5. Subsequently, by letter dated 11.10.2018, the appellant further submitted more documents like buyer agreement for financial year 2017-18 floor-wise details of flat sold miscellaneous income ledger, IFMS ledger and also consolidated ledger under three heads-

- (i) Receipts from customer for the financial year 2013-14 to 2017-18.
- (ii) JCW society (customer security) ledger.
- (iii) JCW society (DMA for financial year 2012-13).

They also submitted electrical ledger and ledger of advance from customer for the period under enquiry.

6. It appeared to Revenue that the appellant is also collecting one time Preferential Location Charges, Car Parking Charges, Club Membership Charges, Interest Free Maintenance Security charges (IFMS), Internal or External Development Charges, Electrical charges, Power Back up charges etc. from their buyers over and above the basic price of flat. On perusal of ST-3 filed by the party, it is observed that the party has not paid service tax on the consideration received by them from their prospective buyers towards these services.

7. It further appeared that w.e.f. 01.07.2012, the term "Service" is defined under Section 65B (44) means any activity carried out for consideration, includes a declared service. Further, under Section 66E clause (b) it appeared that services specified include construction of complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion certificate by the competent authority.

8. Accordingly, based on the price list it appeared to Revenue that appellant is liable to pay service tax on Preferential Location service, Car parking service, Club Membership service, Security deposit, Interest Free Maintenance Security service (IFMS), Internal or External Development service, Electrical service, Power Back up service etc. provided by the party to their prospective buyers. Revenue also referred to TRU letter D.O.F. No. 334/1/2020-TRU dt. 25.02.2010, where it is observed that the Preferential Location service/ service provided by builder to their buyer, is a taxable service. Accordingly, the Preferential Location service, Car Parking service, Club Membership service, Security deposit, Interest Free Maintenance Security Service (IFMS), Internal or External Development service, Electrical service, Power Back up service, calculated on the sale of number of flats during a particular financial year on the basis of the amount reflected in the price list, thus calculated service tax payable as follows:-

S. No.	Description of service	Service Tax not paid, in Rs.
1	Preferential Location Charges	23556977/-
2	Car Parking Charges	9500700/-
3	Club Membership Charges	3166900/-
4	Interest Free Maintenance Security Charges	1759052/-
5	Security Charges/deposit	144599/-
6	External and Internal Development Charges	5277158/-
7	Power back up	5331460/-
8	Electrical charges	2730298/-
Total		51467144/-

9. It further appeared from the balance sheet that the appellant have received income under the head rental, which appeared

to be taxable under the head 'Renting of Immovable Property' on which tax was not paid. Accordingly, service tax was calculated for the financial year 2013-14 to 2016-17, Rs. 1,57,467/- on the gross receipt of Rs. 10,97,646/-.

10. Further, on the advance received from their buyer(s) as entered in their ledger, it appeared that this amount is also includible in the gross amount chargeable to taxable service, in view of Rule 3 of Point of Taxation Rules, 2011, where it is provided that wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such amount. Further, such amount was considered as an advance as entered in the customer ledger. It appeared that there is short payment of service tax for the period under dispute of Rs.1,39,80,663/-.

11. On perusal of the ST-3 return and price list in respect of flat/ residential complex as submitted, it appeared that appellant has claimed excess abatement on flat-residential complex, having carpet area more than 2000 sq. ft., and cost more than Rs. 1 crore, for the purpose of calculation of tax liability inasmuch as vide Notification No. 26/2012-ST, the rate for calculation of taxable value for the purpose of service tax liability, on construction of residential complex was revised.

12. On the basis of price list of the flats, it was observed that four BHK multi-storeyed duplex was constructed and sold, having area of 2575 sq. ft. and 2710 sq. ft. and their cost is Rs.1,06,25,000/- and Rs. 1,18,42,500/- respectively. Number of such flats are sold during

the period of dispute, hence as per Notification the appellant was required to pay service tax on the 30% of the gross amount received towards the construction of these duplex flats, wherein it appeared that they have taken abatement of 75% from the gross receipt and have paid service tax on 25% of the value only. Thus, appellant have short paid service tax. Accordingly, on such excess amount of abatement service tax was calculated as follows:-

Financial year	Gross receipt as per ST-3 returns, in Rs.	Differential value (5% of gross receipts) on which service tax short paid/ not paid in Rs.	Rate of service tax	Service Tax short paid/ not paid in Rs.
2013-14	20,17,96,759/-	1,00,89,838/-	12.36	12,47,104/-
2014-15	28,51,20,393/-	1,42,56,020/-	12.36	17,62,044/-
2015-16	25,32,23,743/-	1,26,61,187/-	14.5	18,35,872/-
Total				48,45,020/-

13. Accordingly, service tax proposed to be demanded was finally calculated as follows:-

Sl. No.	Description of service	Service tax short paid/ not paid, in Rs.
1	Preferential Location Charges, Car Parking, Club Membership Charges, Interest Free maintenance Security Charges, Security Service, External and Internal Development Charges, Power Back up, Electrical charges.	5,14,67,144/-
2	Renting of Immovable Property	1,57,467/-
3	Short payment of Service Tax on Construction of residential complex.(on advance)	1,39,80,663/-
4	Short payment of Service Tax on Construction of residential complex having carpet area more than 2000 sq. ft. and cost more than Rs. one crore due to excess abatement claimed.	48,45,020/-
Total		7,04,50,294/-

14. Thereafter, show cause notice dated 16.10.2018 was issued invoking extended period of limitation proposing to demand the aforementioned amount for the period 2013-14 to 2016-17 till

30.06.2017 alongwith interest and further penalty was proposed under Section 78(1), Section 70(1), 77(1c) of the Finance Act.

15. The show cause notice was adjudicated on contest and the proposed demand was confirmed vide order-in-original dt. 30.04.2020 alongwith interest and further equal amount of penalty was imposed under Section 78(1). Further, penalty was imposed of Rs. 10,000/- under Section 77 (1)(c). Further, also imposed penalties of Rs.26,000/- for late filing of returns.

16. Learned Counsel for the appellant Sh. Abhinav Kalra, inter alia urges that the demand have been confirmed on vague and flimsy ground by observing that the alleged additional amount collected from the customers would be taxable at full rate of service tax without even classifying and mentioning the category of service under which the same will be taxable.

17. The Commissioner further fails to justify as to how a particular receipt fell under the service head. The Commissioner have erred in relying upon the so-called price list and have computed the tax liability under various heads like PLC, Car Parking, Club Membership charges, IMFC charges, Security deposit, EID Charges, Power Back-up charges, Electrical charges as well as alleged short payment of tax in respect of advances received from the customer. Further, have upheld the charge of excess abatement claim, in terms of the provision of abatement as per Notification No. 26/2012-ST.

17.1 It is further urged that there are no separate charges collected under the aforementioned heads, as alleged by Revenue, which is evident from the books of account maintained in the normal course of business. The appellant charges the basic sale price from its customer which includes the aforementioned charges, which are all bundled in the basic sale price, and on such basic sale price admittedly appellant have paid service tax under the head 'Construction of Complex.'

17.2 It is further urged that the so-called price list was only a marketing document for demonstrating tentative price or break-up of the sale price of the flat. In spite of there being no separate amount collected under the aforementioned heads as is evident from the copy of ledger, and other financial accounts, demonstrated at the time of hearing. It is evident that the Id. Commissioner has erred in raising the demand on the basis of price list, ignoring the books of accounts and Agreement of sale, which reflects the actual transaction between the appellant and their buyer of flats.

17.3 Learned Commissioner have erred in ignoring the return (ST-3) filed by the appellant, and the books of account maintained in the ordinary course of business and have raised illogical and wrong demand based on the so-called price list. The so-called price list is a proforma price list to start the negotiation between the appellant and the buyer of the flats.

17.4 As per Section 67 of the Finance Act, 1994, Service Tax is chargeable on any taxable service with reference to its value, than

such value shall comprise of the gross amount charged by the service provider for such service, provided or to be provided and/or where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money terms with addition of service charges equivalent to the consideration other than money. There is no evidence on record like ledger of customers, invoice/demand note issued by the appellant, any statement of buyer, nor any books of account of the appellant showing collection of any amount from the buyer, over and above the basic sales price as mentioned in the buyer-builder agreement. Thus, the entire demand has been calculated on imaginary receipt by the Department, which is not permissible under law.

17.5 It is further urged that in respect of IFMS charges collected, such amount is collected by the appellant builder as a trustee of the buyers of the flat. Later on, after completion of the building or property such amount is transferred to the managing body of the apartment (RWA) for future repair, maintenance or any emergency expenditure, etc.

17.6 It is further urged that admittedly appellant have paid service tax each year on the amount received from their customers during the period under dispute. Thus, by charging service tax again on the advances received from the customers, on the allegation that the appellant was required to pay service tax as and when advance was received has resulted in double demand of service tax on the same amount, which is fit to be set aside.

17.7 It is further urged that abatement under Notification No. 26/2012-ST as amended, is applicable with respect to the carpet area of the flat, being less than 2000 per sq. ft. or more, and the second criteria being the sale value more than or less than Rs. 1 crore. Higher abatement of 75% is available if both the conditions are met or fulfilled. It is urged that the carpet area of all the flats sold is admittedly less than 2000 sq. ft., although in case of some of the flat the super built area may be more than 2000 sq. ft. (which is not the relevant factor for abatement). Admittedly, no flat has been sold for a value of over Rs. 1 crore. Therefore, the demand on the alleged availment of higher abatement, is fit to be set aside.

17.8 The appellant have also demonstrated in support of the aforementioned submission and proposition, from a copy of 'flats buyer agreement' being an agreement between the appellant and one Sh. Mayank Parasar and Ms. Neha Sharma being agreement dt. 20.08.2014 with respect to sale of flat in Rishav Tower, having super area of less than 1000 sq. ft. wherein the sale consideration have been calculated @ Rs.2087.050 per sq. ft. collected on the super area 994 sq. ft. totalling Rs. 20,74,528/-. Further, additional charges shown as (i) IFMS @ 25/- on behalf of the welfare society (ii) EDC & IDC @ Rs. 75/- or 74,550/- and (iii) Power back up Rs. 40,000/-

17.9 Similarly, learned Counsel also demonstrated buyers agreement dt. 05.06.2017 between appellant and M/s R. K. Saini and Ms. Sangita Singh for sale of flat in Rishav Tower having super area of 1006 sq. ft., wherein the basic sale price is Rs.34,74,400/- with addition of (i) IFMS and (ii) EDC & IDC. It is further urged that the

security deposit or charges includes amount received in trust for making payment to the electricity Department, on behalf of the buyer (such as refundable security deposit) for the electricity connection, contribution towards installation of separate transformer for the building and other incidental expenses. Such amount collected is also refundable at the time of termination of the buyer agreement prior to execution of the final sale deed. It was also urged that the appellant have maintained proper books of account in the normal course of business wherein all the transactions are recorded and have also filed proper returns, as such extended period of limitation is not invokable, there being no case of suppression of facts or any fraud. It was categorically mentioned that appellant have not collected any charges towards PLC, Car parking etc. It was also urged that appellant have not collected power back up charges from the buyer. So far Rental Income is concerned, the appellant was under bonafide belief that service tax is not payable.

17.10. However, the appellant have accepted their tax liability with respect to service tax on rent received. It was also urged that the receipt in the ledger includes amounts which are non taxable in nature like income. It was also urged that delay in filing of return was not intentional but due to non availability of the accountant being on leave, the return could not be prepared in time.

17.11 In the course of hearing before the Court below, in response to query by the Commissioner, the appellant informed that Sh. Umesh Jain is Karta of the HUF. Further, Sh. N. Jain is the son-in-law of Sh. Umesh Jain, and not the member of HUF. In response to

the query - if there is any club or power back up, covered car parking in the project, it was answered that yes there is existence of club, power back up and covered car parking in the project, it was further informed that IFMS charges are @ 25/- per sq. ft.. Further, it was informed that IFMS was included in the buyer agreement. It was also urged that there is evidence of IFMS in a project being handed over to the welfare society or RWA. It was further informed that whatever power back up charges are collected, the same is reflected in the buyer agreement and the amount reflected in the price list is not relevant. It was also stated that there is evidence of collection of electrical charges on behalf of electrical department or towards security deposit etc. for obtaining electrical connection on behalf of the buyer of the flat. Accordingly, prays for allowing the appeal.

18. Learned Authorised Representative appearing for the Revenue relies on the impugned order.

19. Having considered the rival contentions and after examining the records as well as the RUDs/ copy of which is filed by the appellant, we decide the issue involved as follows:-

We take notice that service tax law was revamped w.e.f. 01.07.2012 by bringing in various changes. We also take notice of the TRU/CBEC letter dt. 20.02.2010 regarding the scope of valuation of taxable amount in respect of residential complex service, which was introduced in the year, 2010. With effect from 01.07.2012, Section 66F have been added to the Finance Act, which deals with classification of service in case of bundled services. Section 66 F (1) provides that - unless otherwise specified, reference to a service (hereinafter referred

to as main service) shall not include – reference to a service which is used for providing main service. Further, where a service is capable of differential treatment for any purposes based on its description, the most specific description shall be preferred over a general description. Further, sub section 3 provides - the taxability of a bundled service shall be determined, if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service, which give such bundle its essential character. Section 66F shall prevail over any clarification etc. given by the CBEC/ TRU, prior to 01.07.2012.

20. From the facts on record and on perusal of the RUDs, we find that although the appellant may have prepared a price list showing preferential location charges, car parking charges etc. separately, but it is evident from the buyer-agreements (sample buyer agreement produced at the time of hearing), that the appellant have charged the negotiated sales price per sq. ft. and in addition have charged IFMS and EDC/IDC per sq. ft. basis. In addition, there is power back up charges in some of the cases. Evidently, we find that Revenue have calculated preferential location charges, IFMS charges, EDC/IDC, power back up charges based on the price list. We find that there is no such mention in the buyer agreement, nor there is any amount collected towards such heads in the books of accounts maintained by the appellant, as is evident from their balance sheet/ P&L account/ trial balance. Thus, we hold that service tax is not payable on such hypothetical calculation, there being no actual consideration towards these, which is an admitted fact. We hold that service tax levied in this manner based on the price list is wrong, when there is no actual

receipt of consideration under these heads. Accordingly, we set aside the demand as follows:-

1	Preferential Location charges	2,35,56,977/-
2	Car parking charges	95,00,700/-
3	Club Membership charges	31,66,900/-
4	Interest Free Maintenance Security charges	17,59,052/-
5	Security Charges - separate ledger	1,44,599/-
6	External and Internal Development charges	52,77,158/-
7	Power back up charges	53,31,460/-

21. So far security charges are concerned, we find that this is actually interest free maintenance security charges collected from the prospective buyer of the flat, which are separately shown in the builder buyer agreement and the sale deed, and appellant have maintained separate ledger relating to such collection customer-wise. Such charges are collected by the appellant / builder as a trustee of the flat buyers and such total amount of a project of a building, is handed over to the maintenance committee or RWA at the time of handing over the maintenance alongwith accrued interest etc. if any. Accordingly, we hold that the appellant is not liable to pay service tax on such receipts which are not part of consideration towards any service. Accordingly, we set aside the demand of Rs. 1,44,599/-.

22. So far the electrical charges collected by the appellant, we find that such amount have been maintained in a separate ledger called electrical ledger. The appellant have explained that such charges are collected on behalf of the customer or buyer of the flat, as the trustee, for getting electrical connection in the name of the buyer of the flat from the electrical supply company, for which connection

charges, and security deposit have to be given for obtaining the connection. Thus, we find that such amount is not collected towards providing any service by the appellant. The amount collected is as a pure agent for disbursing the expenses and amount of security deposit for obtaining the electrical connection in flat buyer's name. Accordingly, we hold the appellant is not liable to pay service tax on the electrical charges. Thus, the demand of Rs. 27,30,298/- is set aside.

23. So far the amount of rental income is concerned, we find that the appellant have received rent both for renting of residential flat as well as for commercial space. The appellant have admitted the liability under this head. However, as stated that they are not paying service tax on the rent received from renting of residential flat. As the appellant has not given the break-up of the rent received from residential flats and commercial space, we confirm demand under this head of Rs. 1,57,467/-. It is further evident from the record that the appellant has not collected any service tax on this account.

24. So far the demand with respect to short payment of tax in respect of advance received from the customer for buying the flats, we find that the appellant has paid the service tax on the full consideration received at the time of finalisation of the sale or execution of sale deed, on the total consideration received. However, in view of the tax liability which arises on the event of receipt of advance consideration, there is only case of deferment in deposit of tax. Thus, we hold that the appellant is only liable for interest on the delay deposit of tax in respect of advance received, in accordance with law.

25. So far the allegation of short payment on account of alleged excess abatement claim as per Notification No. 26/2012-ST, we find that the appellant have submitted before the Commissioner that they have not sold any flat having carpet area in excess of 2000 sq. ft. and they have also produced Chartered Engineer certificate in this regard. The Commissioner have confirmed the demand observing that appellant ledger shows that with respect to Flat No. 6116 purchased by Ms. Ramita Uthara and Mr. Amit Uthara, IFMS have been collected @ Rs.25/- per sq. ft. on an area of 2575 sq. ft. There is similar observation also on Flat No. 4114 purchased by Sh. Jayesh Khandelwal and Flat No. 2114 purchased by Sh. Anupam Kumar. However, from perusal of the purchase deed and other documents produced before us, we find that the purchase agreement and the sale deed mentions the area sold as super area in sq. ft, and not the carpet area. Whereas the rate of abatement under the said notification is based on two criteria (i) carpet area not more than 2000 sq. ft. and (ii) sale consideration not more than Rs. 1 crore. We find that the submissions of the appellant in this regard that they have not sold any flat in excess of 2000 sq. ft. as supported by Chartered Engineer certificate, have not been found to be untrue or false. Thus, evidently the Commissioner have erred in considering the super area as carpet area and have drawn erroneous conclusion. In view of our finding, we set aside the demand under this head of Rs. 48,45,020/-. We further take notice that carpet area is the area on which carpet may be spread within a house. Whereas built up area or super area includes also the space occupied by the walls and may also include loading by the builder towards profit or other amenities provided or to be provided.

26. Accordingly, the appeal is allowed. The impugned order is modified as observed in the aforementioned paragraphs. We set aside all the penalties imposed. The appellant is entitled to consequential benefits in accordance with law.

(Pronounced on 25.02.2022).

(Anil Choudhary)
Member (Judicial)

(C. J. Mathew)
Member (Technical)

Pant