CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax No. 52146 of 2016

(Arising out of Order-in-Original No. 22/PC/ST/BPL-ST/2016 dated 29.03.2016 passed by the Principal Commissioner, Customs, Central Excise and Service Tax, Bhopal)

M P Housing and Infrastructure Development Board ...... **Appellant**
Division-VI, E-5, Arera Colony,
Bhopal

VERSUS

The Principal Commissioner, Customs Central Excise and Service Tax, Bhopal ......**Respondent**
New Customs House,
Near IGI Airport, New Delhi

Appearance:
Mr. Sandeep Mukherjee, Chartered Accountant for the Appellant
Mr. Ravi Kapoor, Authorized Representative of the Department

CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

DATE OF HEARING: 02.06.2023

FINAL ORDER NO. 50779/ 2023

JUSTICE DILIP GUPTA

The M P Housing and infrastructure Development Board[1] is aggrieved by the order dated March 29, 2016 passed by the Principal Commissioner that confirms the demand of service tax in respect of five show cause notices.

2. In the present appeal, the issues that have been raised by the appellant are in connection with the first show cause notice

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1. the appellant

dated September 28, 2011 that was issued for the period from April 01, 2006 to March 31, 2011. It has been stated by Shri Sandeep Mukherjee, learned chartered accountant appearing for the appellant that the matter relating to the second, third, fourth and fifth show cause notices are not involved in this appeal.

3. The dispute in the present appeal relates to the demand of service tax under "construction of residential complex" service as defined under section 65(105) (zzzh) of the Finance Act, 1994[2]. It transpires that the demand was made because an Explanation was added to the aforesaid section with effect from July 01, 2010 and it is not in dispute that prior to July 01, 2010, service tax was not leviable on "construction of residential complex" service.

4. In the present appeal, the appellant had been collecting service tax from the purchasers even prior to July 01, 2010 but only when the last installment was paid by them and not when the earlier installments were paid by the purchaser.

5. As the dispute in the present appeal relates to the period prior to July 01, 2010 and also post July 01, 2010, it would be necessary to examine the issue separately.

6. It is not in dispute that prior to July 01, 2010 service tax was not leviable on "construction of residential complex service". This fact has been noticed by the Principal Commissioner in paragraphs 20 to 21 of the impugned order, which paragraphs are reproduced below:

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2. the Finance Act

> "20. Explanation was added to section 65(105)(zzzh), effective from 01.07.2010. The text of the explanation is as under:
>
> > **Explanation.** - For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;
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> 21. After the introduction of this explanation, gross receipts of builders / developers from gross receipts of construction services became taxable. Moreover, the explanation added to the definition was held not to have retrospective effect and therefore, the taxability was on and from 01.07.2010."

7. However, even after noticing this fact, the Principal Commissioner in paragraph 24 holds that since the amount of service tax had been collected by the appellant from the customers, it was bound to pay it to the Department in terms of section 73(A) of the Finance Act. The Principal Commissioner also held that the appellant was liable to pay interest on the said amount in terms of section 73(B) of the Finance Act. The said paragraph is reproduced below:

> "24. Despite the fact that Service Tax on Construction of Residential Complex is applicable only from 01.07.2010 they are liable to pay the same for the prior period also. It is clear that the Notice was required to pay Service Tax as and when they collected the installment from their customer. Since the amount of Service Tax has already been collected by the Notice from their customer they are bound to pay the same to the department in terms of Section 73A of the Act. They are also liable to pay interest on the said amount in terms of Section 73B of the Act."

8. After having so noticed, the Principal Commissioner in paragraph 25 ordered that since the amount of service tax

amounting Rs.5,19,21,270/- for the period April 2006 to March 2011 was not paid by the appellant, it was liable to be recovered from the appellant by invoking the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act with interest and penalty. The said paragraph is reproduced below:

> "25. In view of the facts narrated above the demand of Service Tax amounting to Rs.5,19,24,370/- for the period April 2006 to March 2011 not paid by the Noticee is liable to be recovered under proviso to Section 73(1) of the Act by invoking extended period of limitation read with Section 73A of the Act along with interest under Section 75 read with Section 73B of the Act. The Notice is also liable for penalty under Section 77 and 78 of the Act. The fact is that the Noticee was having full knowledge of law and even after that they resorted to evasion with intent to evade payment of Service Tax and for this reason extended period of limitation is applicable."

9. Learned consultant appearing for the appellant submitted that for the period prior July 01, 201, the appellant was not liable to pay service tax, but since the appellant had collected service tax it had to pay the same in view of the provisions of section 73A of the Finance Act.

10. All that is, therefore, required to be examined in this connection is as to whether any interest was liable to be paid by the appellant in case there was a gap between the collection of the amount and deposit of the amount. The contention is that for this purpose, the matter may be remanded to the Adjudicating Authority.

11. This submission advanced by the learned consultant deserves to be accepted. If there was no liability of service tax prior July 01, 2010, all that is required to be seen is whether there

was any delay in deposit of the amount so as to attract interest. For this period, penalty could not have been imposed as there was no liability to pay service tax.

12. For the period from July 01, 2010, onwards, the situation is different because the appellant is liable to pay service tax. Service tax should have been collected at the time each installment was paid by the purchaser and not when the last installment was paid. The Principal Commissioner has not examined this issue from this perspective and therefore, the matter would have to be remanded to enable him to examine when the liability to pay service tax arose and when service tax was actually deposited by the appellant and whether interest was liable to be paid by the appellant.

13. The penalty, even in this situation, could not have been levied in view of the Division Bench decision of this Tribunal in **Executive Engineer Division V, M.P. Housing and Infrastructure Development Board** vs. **CGST, C.E. & C.C.-Bhopal**[3].

14. Thus, for all the reasons stated above, the matter is remitted to the Principal Commissioner to separately examine the factual position prior to July 01, 2010 and post July 01, 2010 after hearing the appellant in the light of the observations made above. This exercise shall be carried out expeditiously, and preferably within a period of six months from today.

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3. Service Tax Appeal No. 53124 of 2015 decided August 31, 2018

15. The impugned order dated March 29, 2016 so far as it concerns the first show cause notice dated September 28, 2011 shall, therefore, abide by the order to be passed by the Principal Commissioner on remand.

(JUSTICE DILIP GUPTA)
PRESIDENT

(RAJEEV TANDON)
MEMBER (TECHNICAL)

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