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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Appeal No. : ST/686/2008-CU[DB], ST/687/2008-CU[DB], ST/688/2008-CU[DB]

Dated: **09/07/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
C.C.E. KANPUR
117/7, Sarvodaya Nagar, Kanpur 208005.

C.C.E. KANPUR (Appellant)

VS

PRAGATI STRUCTURES PVT. LTD. (Respondent)

507-09

I am directed to transmit herewith a certified copy of Final Order No. **ST/A/[redacted]/2012-CU[DB]** dated **18/06/2012** passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

(Fo - 507-509/12)

Assistant Registrar
CUSTOMS Appeal Branch

Copy To,
1. Respondent
PRAGATI STRUCTURES PVT. LTD.
13/386-D, PRABHU RACHANA, CIVIL
LINES, KANPUR.

2. Advocate(s) / Consultant(s):
Mr. Dharmendra Srivastava, CA
C/O Respondent

3. C.D.R
4. Bar Association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

7. Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

10. LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11. TaxIndiaOnline.com Pvt. Ltd., Unit No. 1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Gaurd File

Assistant Registrar
CUSTOMS Appeal Branch

SOCIETY BUILDERS PVT. LTD.
13/386-D, PRABHU RACHANA, CIVIL
LINES, KANPUR.

PRAGATI STRUCTURES PVT. LTD.
13/386-D, PRABHU RACHANA, CIVIL
LINES, KANPUR.

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III

ST/Appeal Nos.686-688/2008

(Arising out of order in appeal Nos.294, 295,296/Appl/NP/08 dated 30.6.08 passed by the Commissioner of Customs & Central Excise, Kanpur)

Date of Hearing: 18.6.2012

For Approval and signature:

Hon'ble Mrs. Archana Wadhwa, Member Judicial
Hon'ble Mr.Mathew John, Technical Member

1.	Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT(Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) rules, 1982 for publication in any authoritative report or not?	No
3.	Whether their lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	No

CCE, Kanpur — Appellant

Vs

1. M/s Vee Aar Developers Pvt Ltd — Respondent
2. M/s Pragati Structures Pvt Ltd
3. M/s Society Builders Pvt Ltd

Appeared for the Appellant: Shri Amresh Jain, DR
Appeared for the Respondent: Shri Dharmendra Srivstava, C.A.

Coram: **Hon'ble Mrs. Archana Wadhwa, Member(Judicial)**
Hon'ble Shri Mathew John, Member (Technical)

Final ORDER No. ST/A/507-509/12-Cus.

Per Mathew John:

In these proceedings, three appeals filed by Revenue against three different respondents involving the same issue during the period 16.6.05 to 25.3.06 are being considered.

2. The Respondents constructed residential complexes on their land and sold the residential units in such complexes to customers. Before doing the construction activity, they entered into agreement for sale of residential units and also took advances from their prospective customers. They did not pay any service tax on the activity based on the reasoning that the building was being constructed on their own land and hence the activity of construction was for their own benefit and as such, it could not be considered as a service rendered to the prospective customers.

3. Revenue was of the view that such activity was undertaken for the benefit of prospective buyers against the consideration received and the respondent should have paid service tax on such activity under the heading "construction of complex" made taxable under Section 65(105)(zzzh) of Finance Act, 1994. Revenue issued show cause notices for recovery of service tax short paid for the period 16.6.05 to 25.3.06. After due proceeding, the demands were confirmed along with interest and penalty.

4. Aggrieved by the order, the Respondents filed appeal with the Commissioner (Appeals) who upheld the contention of the respondents that in these cases, there was no service that was being rendered by the Respondents to another parties and as such, service tax need not be paid. Aggrieved by the order of the Commissioner (Appeals), the Revenue has filed these appeals.

5. The contention of Revenue is that though the sale of the flats took place after completion, the respondents had taken advances from prospective ~~the respective~~ buyers. Therefore, there was service that was being rendered to the prospective buyers. They rely on the following decisions namely:-

1. Mokha Builders & Promotors Vs CCE
   2008 (10) STR 566 (Trib)

2. M/s Hare Krishna Developers
   2008 (10) STR 341 (AAR)

3. G.S. Promoters Vs UOI
   2011 (21) STR 100 (P&H)

6. Opposing the prayer of the Revenue, the respondents submit that CBEC had clarified in its circular No. 332/35/2006-TRU dated 1.8.06 and No. 19/7/07-ST date 23.8.07 that when flats were constructed on the land belonging to a builder and flats are sold after completion of construction, no service tax will be leviable. It is their contention that the ownership of the property is passed on by a sale deed only after the construction is complete. ~~by a sale deed~~. They pay stamp duty for the entire constructed value of the flats and this situation is different from a situation where undivided rights in a land are registered in the names of prospective buyers and thereafter construction is done for the benefit of land owners.

7. The Counsel relies on the following decision of the High Courts in the matter:-

   i) Magus Construction Pvt Ltd Vs Union of India
      2008 (11) STR 225 (Guj)

   ii) Assotech Realty Pvt Ltd Vs State of UP
      2007 (7) STR 129 (All)

8. The Counsel also submits that the entry in Section 65(105)(zzzh) was amended by Finance Act, 2010 to add an explanation under the entry, to the effect that in case of activity of the nature that is considered in these appeals also will be covered as service. The respondents contest that the explanation causes penal consequence to the respondents and hence cannot be interpreted to have retrospective effect and the explanation can take effect only from 1.7.2010 when the said explanation was added in the said entry. The Counsel relies on the decision of Apex Court in the case of UOI Vs Martin Lottery Agencies 2009 (14) STR 593 (SC). The Counsel submits that since the CBEC had clarified the position that no service tax ~~is~~ was payable, and the

respondents had concluded their contracts with the buyers, relying on such clarification, the demands for service tax now being made are not justified. Therefore, he pleads that the demands may be set aside.

9. We have considered arguments of both sides. We find that the decision of the Punjab & Haryana High Court in the case of G.S. Promotors was about the constitutional validity of explanation added under 65(105)(zzzh). The issue whether the said explanation had retrospective effect was not considered in the said case.

10. In the case of Mokha Builders, the issue before the Tribunal was refund of service tax already collected in such situations. However, it is noted that Tribunal gave a decision in favour of Revenue ~~n~~ on the issue now under consideration.

11. The decision of the Advance Ruling Authority in the case of Hare Krishna Developers is directly on the issue and is in favour of Revenue.

12. But the decision of Gauhati High Court in Magus Constructions Pvt Ltd is also directly on the same issue giving a decision against Revenue. The decision of the Allahabad High Court in the case of Assotech Realty Pvt Ltd is also directly on the issue though in the matter of interpretation of works contract for the purpose of levy of VAT.

13. Thus this is a matter involving conflicting decisions by judicial forums. Following the hierarchy of Courts the decisions of High Courts should prevail over decision of the Tribunal and Advance Ruling Authority. Therefore, we are of the view that during the impugned period, the activity in question could not be considered as service and subjected to service tax. So the appeals filed by Revenue are rejected

(Order dictated and pronounced in the open Court.)

(MATHEW JOHN)
Member (Technical)
MPS*

(ARCHANA WADHWA)
Member (Judicial)