IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing/Decision:11.12.2017

Service Tax Appeals Nos.1987 and 2131/2012 (DB)

[Arising out of Order-in-Original No.12/2012 /ST/JPR-II dated 11.04.2012 in Appeal No.ST/1987/2012 and Order-in-Original No.13/2012/ST/JPR-II dated 24.04.2012 in Appeal No.ST/2131/2012 (DB), passed by the Commissioner of Central Excise, Rajasthan]

M/s.S.P. Builders — Appellant
M/s.Gejendra Singh Sankhla

Vs.

CCE, Jaipur — Respondent

Appearance:

Rep. by Shri O.P. Agarwal, Advocate for the appellant.
Rep. by Ms. Neha Garg, DR for the respondent.

Coram: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order Nos. 58595-58596/2017

Per B. Ravichandran:

These two appeals are involving identical issue against the two impugned orders dated 11.04.2012 and 24.04.2012 passed by the Commissioner of Central Excise, Jaipur-II. The appellants are engaged in construction activities. Certain inquiries were conducted against them with reference to their service tax liability under the category of "construction of complex service ". On completion of inquiry, proceedings were initiated against them to demand and recover service tax under the said category. The original authority adjudicated the case. The Original Authority confirmed service tax liability of Rs.2,44,72,251/- and Rs. 1,10,71,204/- on the appellant. He also imposed penalties under Section 76, 77 and 78 of the Finance Act, 1994.

2. Ld. Counsel appearing for the appellant contested the findings and submitted on the following lines:-

(a) The appellants are not liable to service tax under the category of "construction of complex service" as defined under Section 65(91a) read with Section 65(105)(zzzh) of Finance Act, 1994. They have entered into an agreement with Rajasthan Housing Board for construction of either individual houses or G + 3 multiple residential units. These are not liable to service tax as they are not sharing any common facilities.

(b) The constructions were carried out for residential houses for rehabilitation of people of village Kawas which was destroyed due to flood and were not taxable as it nowhere satisfies the definition of complex and are meant for commercially weaker sections.

(c) These constructions are in pursuant to a composite work order involving supply of goods as well as provision of service. They are not liable to service tax prior to 1.6.2007 in view of the Hon'ble Supreme Court's decision in **Larsen and Toubro Ltd. Larsen & Toubro Ltd. - 2015 (39) STR 913 (SC),**

(d) The demands are hit by limitation as construction activities were subjected to various interpretations for tax liability. The appellants have carried out these activities in pursuance of contract with Government Department and there can be no malafide intention not to pay service tax. Accordingly, the demand for extended period and penalties are not sustainable.

3. Ld. AR contesting the arguments stated that the appellants have constructed residential complexes and drew our attention to some of the work orders, wherein

construction of 96 or 48 housing units for EWS have been done by the appellants. He further submitted that the plea of the appellant that these complexes do not have any common facilities is not acceptable. The complexes having such large number residential units with common facilities are covered by tax entry correctly. Regarding application of works contract service, he submitted that the terms of each contract are to be examined and in case they are composite in nature, the ratio of Hon'ble Supreme Court in **Larsen and Toubro Ltd. (supra)** shall apply.

4. We have heard both the sides and perused the appeal records.

5. The first issue for decision is whether or not the appellants have undertaken the taxable activities of construction of complex service. We have perused the impugned orders . Admittedly, the required clarification is not available in the impugned order. Certain inquiries have been made regarding availability of common facilities to apply the tax entry to the activities carried out by the appellant. We note that the appellants constructed individual houses of less than 12 nos. and also G + 3 buildings, having multiple units, in large numbers. They have constructed housing units in such different multi-story buildings numbering 96, 48, etc. It is apparent that such complexes would be having common facilities. However, this requires categorical finding upon perusal of the approved layout by the competent authority as well as the blue print of the layout. This has to be done by the Original Authority for a categorical finding. These documents are not available before us.

6. The appellants shall furnish the required approved layout plan and other supporting evidence to examine the applicability of the tax entry for the said construction activities. In this connection, we note that in similar set of facts,

involving construction of Rajasthan Housing Board, the Tribunal examined the similar set of facts and observed as under:-

> "3. We note that the contracts executed by the appellants in relation to construction of residential complex were subjected to Service Tax under 'Construction of Complex Service' prior to 01.06.2007 and under 'Works Contract Services' after 01.06.2007. Admittedly, these contracts are of composite nature, involving supply of materials as well as provision of service. In terms of the decision of Hon'ble Supreme Court in the case of Larsen and Turbo Ltd. – 2015 (39) S.T.R. 913 (S.C.), such composite contracts are liable to Service Tax only w.e.f. 01.06.2007, under the category of "Works Contract Services". Further, we also note that the original authority confirmed the Service Tax liability under Residential Complex Service / Works Contract Service on the ground that the appellants constructed residential units having common area and facility in the colony, in terms of agreement with Rajasthan Housing Board. This aspect is being contested by the appellant. A perusal of the impugned order indicates that the original authority examined the general scope of the term "Residential Complex" and inferred that generally housing colonies built by State Housing Boards will have large common area, common approach, water supply, park, community centre and many other common facilities. We find that the original authority also distinguished the decision of the Tribunal in Macro Marvel Projects Ltd. – 2008 (12) S.T.R. 603 (Tri – Chennai). The observation of the original authority is that when there are common facilities, the appellants are liable to tax, even for individual houses. We find that the factual details relevant to the present case have not been brought out with supporting evidence. Without inferring the fact regarding applicability of the tax entry in the present case, it is necessary to examine as to whether the residential complex, having individual houses, is in fact, having common areas as mentioned in the statutory definition. This can be verified from the approved layout and other supporting documents. In the absence of specific finding in this regard, it will not be correct to conclude on a particular tax entry.
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> 4. In view of the above discussion and analysis, we find that the impugned order as it stands with reference to tax liability of the appellant for construction of residential complex, is not sustainable. Accordingly, that portion of the finding is set aside and the matter is remanded back to the original authority for a fresh decision, keeping in view the law laid down in the Hon'ble Supreme Court in the case of Larsen and Turbo Ltd. (supra) as well as regarding factual details for construction of residential complex with specific reference to

> availability of common facilities within the approved layout, in terms of statutory definition to the work executed by the appellant. The appellant shall be provided adequate opportunity to place their side of the case, before a fresh decision is taken by the original authority. The appeal is allowed to this extent, by way of remand."

7. We note that the Original Authority has to examine the applicability of the tax entry for construction of complex service/works contract service. On perusal of the factual details in the contract as well as the approved layouts, availability of common facilities etc as required by the tax entry is to be examined. It is clear that in case of composite works contract, the tax liability will arise only after 1.6.2007.

8. Regarding service tax liability confirmed on construction of road as well as construction of drainage system, water supply, we note a categorical finding that these are part of residential complex is required in order to hold the appellants liable to service tax. The appellants strongly pleaded that these road construction /water supply work are not part of any residential complex service. Further, we note that if these activities are independent of any residential complex or constructed in already existed residential complex, the same will not be categorized under "construction of complex service". These aspects require factual finding by the Original Authority. These particulars required for factual findings are not before us.

9. Regarding limitation and imposition of penalties, we find considerable force in the submissions made by the appellants. Admittedly, in the case of construction activities, there has been a substantial litigation on the applicability of the various tax entries. In case of composite works contract, the position got clarified only after the decision of the Hon'ble Supreme Court in the case of **Larsen & Toubro Ltd. (supra).** Considering the facts and circumstances of the case as discussed

above, we note that the case against the appellant has to be restricted to the normal period and there can be no penalty for such tax liability.

10. With above observation, the impugned orders are set aside. The matter is remanded back to the Original Authority for a fresh decision in line with the observations made as above. The appeals are allowed by way of remand.

[Order dictated & pronounced in open court]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.