CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing/decision: 02.01.2018

S. T. Appeal No. 251 of 2012
(Arising out of order in original No. 14/AKM/CST(Adj.)/2011 dated 18.10.2011 passed by the Commissioner, CST, New Delhi).

CST, Delhi Appellant

Vs.

M/s Omaxe Limited Respondent

Appearance:

Sh. Sanjay Jain, AR for the Revenue
Sh. Manish Gaur, Advocate for the Respondent

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order No. 50017/2018

Per: **B. Ravichandran**:

The Revenue is in appeal against the order in original No. 14/AKM/CST(Adj.)/2011 dated 18.10.2011 passed by the Commissioner, CST, New Delhi.

2. Brief facts of the case are that the respondent –assessee are engaged in the business of real estate development. They entered into an agreement with M/s R.P.S. Associates on 13.03.2004. The agreement envisaged the usage of expertise of the respondent-assessee with reference to the project developed by M/s RPS Associates. Both the parties have responsibilities and obligation in terms of the said agreement. In pursuance of the agreement a joint account was also opened in which all the proceeds for the project development and

installed to various customers were credited. The appellant received their consideration, which is 8% of the gross amount credited in the said joint account. The Revenue entertained a view that the appellants were providing taxable service under the category of "Management or Business Consultant" in terms of Section 65(65) read with Section 65(105)(r) of the Finance Act, 1994. Further, tax liability was also sought to be confirmed on the appellant under the category of Real Estate Agent service for the consideration received by them to effect the change of name of allottees/ buyer of the property in the project developed by the appellant.

3. Proceedings initiated against the respondent –assessee concluded in the impugned order. The Original Authority accepting the submissions of the respondent –assessee dropped the demand for service tax on both the counts. Aggrieved by the impugned order, the Revenue filed the present appeal.

4. Ld. AR appearing for the Revenue elaborating the grounds of appeal submitted that the respondent –assessee has expertise in real estate business. They are having experience and technology in developing and setting up residential colony and commercial building. They have reputation and experience in the said line of business. The agreement stipulates that they will be engaged in marketing, booking and selling the residential units developed and constructed by M/s RPS Associates. The arrangement in terms of the agreement will indicate that the respondent –assessee is acting in their capacity as expert in real estate promotion and the services for which they received consideration should be liable to tax under "Management or Business

Consultant" service. He further contended that the Original Authority erred in appreciating the terms of agreement and wrongly concluded that this is a joint business venture and shared income cannot be subjected to tax as there is no service provider in the arrangement. Ld. AR further contested that the method of receipt of consideration should not affect the tax liability of the appellant. On the second issue, he submitted that the respondent-assessee, admittedly received certain amount from the allottee of the unit in the project for transferring the name in favour of the third party. Such activity is rightly taxed under "Real Estate Agent" service as the respondent acted as an agent in the said arrangement. He relied on the decision of the Tribunal in the case of ***Ajay Enterprises Pvt. Limited – 2016-TIOL-580-CESTAT-Delhi*** which was upheld by the Hon'ble Supreme Court.

5. Ld. Counsel appearing for the respondent –assessee contested the appeal filed by Revenue by stating that there is no legal or factual basis for appeal. He submitted that the terms of the agreement are very clear and they are business partners in the development of the designated project. They have never offered any consultancy in management or business of M/s RPS Associates. The agreement nowhere refers to the respondent –assessee as a consultant or adviser to M/s RPS Associates. They are in the business of promoting, marketing the project developed and constructed by M/s RPS Associates. For this activity they received consideration as part of gross receipt credited to the joint account. In this business arrangement they are parties for profit or loss. There is no advisory or consultancy role for the respondent in such business arrangement. On the second issue, he relied on

the decision of the Tribunal in ***CST vs. Ansal Properties & Infrastructure Ltd. -2017-TIOL-3154-CESTAT-DEL*** which distinguished the decision in ***Ajay Enterprises Pvt. Ltd.*** (supra).

6. We have heard both the sides and perused appeal record.

7. On the first point regarding the tax liability of the respondent –assessee as management consultant, we note that the terms of agreement are elaborate and clear. We have perused the same. The role of the respondent in the business arrangement in terms of the agreement has been brought out to the effect that they will be using their expertise and experience to market/ canvass and obtain bookings from various customers. They will undertake exhibition, publicity aimed at promotion of the project developed by M/s RPS Associates. For these activities they received consideration as percentage of gross receipt in the development of the project.

8. On a careful consideration of the terms of the agreement, we are unable to discern any element of advise or consultancy involved. The respondent – assessee has not provided any advice or consultancy with reference to organisation of M/s RPS Associates or business of M/s RPS Associates. No such role can be inferred from the agreement. We also note that it is essentially a joint business arrangement in which the amount is shared based on the gross receipt. Accordingly, we are in agreement with the finding recorded by the original authority.

9. On the second issue, we note, dealing with the identical set of facts in Ansal Properties & Infrastructure Ltd., the Tribunal observed as below:-

> "10. *The Revenue contended that the respondent received certain considerations for change of name of the owners of the flats, by way of substitution of the name by new buyer in place of earlier owner of the flat, was in relation to sale or purchase of such property and accordingly liable to service tax. To levy service tax first of all the provider of service should be a real estate agent and second while acting as such agent the person concerned should have provided service in relation to sale, purchase, leasing or renting of real estate. There is nothing in the show cause notice or the relied upon documents to show that the respondent acted in a capacity of "real estate agent" between the earlier owner and the new buyer of the flat. The changes made in the records of the respondent are not causative factors for such sale or purchase. We are in agreement with this observation of the Original Authority. In RIICO-2017-TIOL-1725-CESTAT-DEL, the Tribunal held that the transfer charges received by the appellant for permitting the transfer of allotted land from one person to another cannot be taxed as real estate agent service because they were custodians of land and were dealing with the allottee on principal to principal basis, not as an agent of either party. We note that the reliance place by Revenue on Ajay Enterprises Pvt. Ltd. vs. CST, Delhi -2016 (42) STR 471 (Tri. Del.) – 2016-TIOL-580-CESTAT-DEL is not appropriate. In the said case it was admitted that the appellant was a real estate agent registered with the Department. Here in the present case the respondent is a real estate developer selling their constructed flats. They are dealing with the buyers, old or new, on principal to principal basis. Accordingly, we are in agreement with the impugned order that no service tax liability can be confirmed against the respondent under the category*".

9. In view of the above discussion and analysis, we find no merit in the appeal filed by the Revenue. Accordingly, the same is dismissed.

(Dictated and pronounced in the open Court).

(Justice (Dr.) Satish Chandra) President	(B. Ravichandran) Member (Technical)

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