CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

Service Tax Appeal No. 51904 of 2018

(Arising out of order-in-appeal No. 91/ST/DLH/ 2018 dated 02.05.2018 passed by the Commissioner (Appeals-I), Central Tax, GST & Central Excise, Delhi).

Pulin Kumar, **Appellant**
R/0 616-A, (Royal), Shipra Suncity,
Indirapuram, Ghaziabad (UP)

vs

The Commissioner (Appeals-I), **Respondent**
Central Tax, GST & C.E,
Delhi.

APPEARANCE:

Sh. Anil Sood, Advocate for the appellant
Ms. Tamanna Alam, Authorised Representative for the respondent

Date of Hearing/ Decision: 09.11.2018

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)

Final Order No. 53568/2018

ANIL CHOUDHARY:

The Appellant has filed present appeal against Order-In-Appeal No. 91/ST/DLH/2018 dated 02/05/2018 passed by the Commissioner (Appeals), Central Tax, GST and Central Excise, Delhi rejecting the appeal filed challenging Order-In-Original No. 33/ST/NV/Ref/Div-V/17 dated 30/01/2017 passed by the Assistant Commissioner, Service Tax Division-V, Delhi-I, rejecting the Refund of Service Tax paid on purchasing a ready flat, an immovable property, on payment of composite price to Builder, under section 11 (B)(2)(e) of the Central

Excise Act, 1944 made applicable to Chapter V of Finance Act, 1994 (as amended up to date) amounting to Rs. 2,35,143/-.

2. The Appellant had purchased a flat from M/s. Gaursons Promoters Pvt. Ltd towards allotment of a residential apartment No. 68, Ground Floor, Brahmaputra Tower, Gaur City-2, GH-03, Sector 16C, Greater Noida (West), U.P. vide an Allotment letter dated 01.04.2016 Ref. No. GC-10/68/Mr. Pulin Kumar, on full payment of Rs.54,97,218/-.

3. That the Appellant received a demand letter dated 30.04.2016 regarding the amounts payable in pursuance to the sale of apartment. On the basis of the said demand letter, the Appellant made a payment of Rs.5,69,649/- inclusive of service tax amount of Rs. 19,927/- as a booking amount and Rs. 51,94,761/- as balance amount inclusive of service tax amount of Rs. 2,15,216/- on 13.05.2016.

4. That, the appellant after reading in Newspapers about the judgment passed by the Hon'ble High Court of Delhi in the matter of **Mr. Suresh Kumar Bansal and Mr. Anuj Goyal & Others vs. Union of India [2016 (43) S.T.R. 003 (DEL**) realized that the appellant having purchased a constructed flat, was not liable to pay service tax, as sale of immovable property was excluded from the definition of service itself.

5. That, thereafter, the Appellant filed a refund claim /application in Form-R along with receipt no. REC0008/12660/16-17 dated 13.05.2016 provided by builder M/s Gaursons Promoters Pvt. Ltd.,

along with detailed written submissions supported by the judgement dated 03.08.2016 passed by the Hon'ble High Court of Delhi in the matter of **Mr. Suresh Kumar Bansal and Mr. Anuj Goyal & Others vs. Union of India [2016 (43) S.T.R. 003 (DEL)]**.

6. The Ld. AC without appreciating the facts and documents placed on record, duly supported by legal submissions, mechanically rejected the refund claim. Aggrieved by the said order the Appellant filed Appeal before Ld. Commissioner (Appeals). Despite having placed all the facts on record, the Ld. Commissioner (Appeals), upheld the O-I-O rejecting the Refund of Rs. 2,35,143/-. Being aggrieved the appellant is before this Tribunal.

7. It is submitted that the Appellant purchased constructed apartment by making outright full payment. Since the allotment and sale of apartment is by way of transfer of immovable property, amounts to sale, it cannot be a subject matter of service tax as per the definition of service as provided in Section 65B (44) of Chapter V of the Finance Act.

8. On the bare perusal of the definition, it is clear that to attract levy of Service Tax there must be a service and the following ingredients have to be satisfied:

(i) There must be a taxable service as per Chapter V of the Finance Act, 1994;
(ii) Service provider must be there for rendering of service;
(iii) There must be a receiver of such service;
(iv) There must exist a customer-client relationship between the parties to the transaction; and

(v) There must be a consideration.

9. Appellant urges, it is amply clear from the above definition that the purchase of the ready apartment, sold and transferred to the appellant does not amount to rendition of service. It is a sale of immovable property and thus out of the purview of Service Tax, therefore cannot be taxed. It is further submitted that in the contract of sale between the builder and the appellant, does not satisfy the ingredients of service.

10. The Appellant places reliance on the following judgements in support of above submissions:

(a) Suresh Kumar Bansal & Anuj Goyal & Ors. Vs. Union of India & Ors. [2016 (43) S.T.R 003 (Del)]

> *"37. Undisputedly, the contract between a buyer and a builder/promoter/ developer in development and sale of a complex is a composite one.* ***The arrangement between the buyer and the developer is not for procurement of services simplicitor. As noticed hereinbefore, an agreement between a flat buyer and a builder/developer of a complex – who is developing the complex for sale is, essentially, one of purchase and sale of developed property.*** *But, by a legislative fiction, such agreements, which have been entered into prior to completion of the project and/or construction of a unit, are imputed with a character of a service contract; the works involved in construction of a complex are treated as being carried by the builder on behalf of the buyer. However, indisputably the arrangement between the buyer and the builder is a composite one which involves not only the element of services but also goods in immovable property. Thus, while the legislative competence of the Parliament to tax the element of service involved cannot be disputed but the levy itself would fail, if it does not provide for a mechanism to ascertain the value of the services component which is the subject of the levy. Clearly service tax cannot be levied on the value of undivided share of land acquired by a buyer of a dwelling unit or on the value of goods which are incorporated in the project by a developer.*

55. In view of the above, we negate the challenge to insertion of clause (zzzzu) in Sub-section 105 of Section 65 of the Act. However, we accept the Petitioners contention that no service tax under section 66 of the Act read with Section 65(105) (zzzh) of the Act could be charged in respect of composite contracts such as the ones entered into by the Petitioners with the builder. The impugned explanation to the extent that it seeks to include composite contracts for purchase of units in a complex within the scope of taxable service is set aside."

(b) CG & ST, Delhi-I vs. C.M Bhutani [2018 (5) TMI 783 (CESTAT New Delhi)

4. Levy of service tax on composite contract for construction of complex, defined under Section 65 (105) (zzzh) of the Finance Act, 1994 was the subject matter of dispute before the Hon'ble Delhi High Court. In the case of Suresh Kumar Bansal and ors. vs. Union of India, the Hon'ble Delhi High Court vide judgment dated 03/06/2016 have held that no service tax shall be levied on composite contracts. The relevant paragraph in the said judgment dated 3rd June, 2016 is extracted herein below :-

> *"55. In view of the above, we negate the challenge to insertion of clause (zzzu) in Sub-section 105 of Section 65 of the Act. However, we accept the Petitioners contention that no service tax under Section 66 of the Act read with Section 65 (105) (zzzh) of the Act could be charged in respect of composite contracts such as the ones entered into by the Petitioners with the builder. The impugned explanation to the extent that it seeks to include composite contracts for purchase of units in a complex within the scope of taxable service is set aside".*

5. On perusal of the above judgment delivered by the Hon'ble Delhi High Court, it reveals that composite contract in relation to construction of complex, should not be subjected to levy of service tax on the service defined under Section 65 (105) (zzzh) of the Act. In other words, who so ever provides such service, which is composite in nature, shall not be liable to pay service tax. Claiming of the benefit of the judgment dated 03/06/2016 cannot be denied to the appellant as the same was rendered "in rem" and not "in personem". Therefore, I do not find any infirmity in the impugned order, so far as it set aside the adjudication order and allowed the appeal in favour of the respondent.

(c) Commissioner of Central Excise, Lucknow vs. Eldeco Housing & Industries P. Ltd. [2016 (7) TMI 52 (CESTAT-All.)]

> *"5………………… So far the appeal of the assessees (builder) is concerned, I find that although the assessee is not entitled to refund of Rs. 16,85,956, but it is the customers of the assessee, who purchased flats, are entitled to the refund. It appears, the appellant have filed the details of his customers, with the revenue in the adjudication of the refund proceedings. The assessee also mentioned that the customers are pressing for refund and some of them have also approached various judicial forums, including the Consumer forum. In view of this matter, I set aside the impugned order and remand the issue back to the adjudicating authority, who shall examine the whereabouts of the person's who deposited the service tax to the appellant, for the purchase of flats, and after such verification having been carried out, shall grant refund to the buyers of the flats out of the said amount of ₹16,85,956/-…………...".*

11. Learned Authorised Representative for the Revenue relies on the impugned order.

12. Having considered the rival submissions, I hold that the appellant is not liable to pay service tax as he has purchased the completed flat and not a flat under construction. The authority is directed to refund the service tax paid through the builder. Accordingly, the appeal is allowed. The impugned order is set aside with direction to the authority to refund the amount within 45 days alongwith interest as per rules.

(Operative part of the order was pronounced in open Court).

(Anil Choudhary)
Member (Judicial)

Pant