CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL No. 53348 of 2014

(Arising out of Order–in-Appeal No. Jai-EXCUS-001-COM-153-13-14 dated 16.04.2014 passed by COMMISSIONER OF CENTRAL EXCISE-Jaipur)

M/s. Mahima Real Estate Pvt. Ltd. **...Appellant**
F-1, Govind Marg,
Opposite Petrol Pump,
Near Hotel Ramada,
Jaipur-Rajasthan

Versus

Commissioner of Customs,
Central Excise, Jaipur **....Respondent**
NCR Building, Statue Circle,
C-Scheme, Jaipur

APPEARANCE:
Mr. A.K. Prasad & Ms. Surabhi Sinha, Advocates for the Appellant
Mr. Sanjay Jain, Authorised Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/ Decision: **19.08.2019**

FINAL ORDER No.: 51153/2019

JUSTICE DILIP GUPTA

1. The order dated 28 March 2014 passed by the Commissioner confirming the demand of service tax and imposing penalty and interest upon the appellant has been assailed in his appeal.

2. The period involved in the appeal is from 1 April 2007 upto 31 August 2012. The show cause notice dated 22 October 2012 required the appellant to show cause why:

a) Service tax amounting to Rs.1,06,73,865/- (ST Rs. 1,03,63,161/-, Education Cess Rs. 2,07,163/- and SHE Cess Rs. 1,03,441/-) should not be demanded and recovered from them under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994[1] and the amounts of Rs.4,06,022/- and Rs.14,46,510/- already deposited by them should not be appropriated to the Government account.

b) Interest should not be demanded and recovered from them under the provision of section 75 of the Act.

c) Penalty under section 76 of the Act should not be imposed upon them for their failure to pay the service tax, in accordance with the provision of Section 68 of the Act ibid.

d) Penalty under Section 77 of the Act for not declaring the correct taxable value in their ST-3 returns.

e) Penalty under section 78 of the Act should not be imposed upon them for suppressing value of taxable services with intent to evade service tax.

3. The aforesaid amount of Rs.1,06,73,865/- as stated in the show cause notice was for the following three services provided by the appellant:

i) The appellant had not paid service tax amounting to Rs.88,24,333/- during the period 01.04.2007 to 31.08.2012 in respect of Corpus Fund, Escrow Fund and Maintenance Security Deposit obtained from buyers of immovable property, under the category of 'Management, Maintenance or Repair' service under

1. The Act

section 65 (105) (zzg) read with section 65(64) of the Act;

ii) The appellant had not paid service tax of Rs.4,03,022/- during the period 01.07.2010 to 31.08.2012 in respect of late payment charges recovered from prospective buyers of immovable property; and,

iii) The appellants had short paid service tax to the tune of Rs.14,46,510/- during the period 01.07.2011 to 30.09.2012 as the appellant had paid service tax on receipt basis instead of accrual basis.

4. The appellant filed a

to meet the capital expenses for a future date for replacement of items like lift, DG Sets, transformers, security devices, etc. and these funds are to be subsequently transferred to the co-operative society later formed by the members occupying the apartments / flats / properties. It was also stated that the refundable Maintenance Security Deposit was also collected from the flat owners at the time of handing over possession and this amount was also to be transferred to the resident association as and when formed. The appellant therefore, contended that these amount were not towards any specified service and hence were not liable to levy of service tax.

5. In respect of the second issue relating to receipt of the additional amount towards late payment of the monthly installments, it was contended that it was also not liable to levy of service tax as no service was provided.

6. In regard to the third issue relating to payment of service tax on accrual basis with effect from 1 July 2011, the appellant accepted that it had to pay this amount and the short payment was attributed to lack of knowledge about the change in the provisions relating to point of taxation from 1 July 2011. Thus, during the investigation stage itself and prior to the issuance of the show cause notice, the appellant deposited the service tax amount of Rs.14,46,510/- and Rs.4,03,022/- towards interest.

7. The Commissioner, however, did not accept any of the contentions of the appellant raised in reply to the show cause notice and confirmed the demand. The Commissioner also imposed interest and penalty. The order passed by the Commissioner is reproduced below:

> "i) I confirm the demand of Service Tax amounting to Rs.1,06,73,865/- against M/s. Mahima Real Estate (P) Ltd. and order for recovery from them under proviso to Sub-section (2) of Section 73 of the Finance Act, 1994. Since Service Tax of amounting to Rs.18,49,532/- has been deposited by them, the same is appropriated towards the above demand in the Government account.
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> ii) I confirm the liability of interest on the amount of Service Tax demand confirmed as (i) above against M/s. Mahima Real Estate (P) Limited, under section 75 of the Finance Act, 1994.
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> iii) I impose a penalty of Rs.1,06,73,865/- upon M/s. Mahima Real Estate (P) Ltd. under section 78 of the Finance Act, 1994. However, benefit of reduced penalty of 25% as per proviso Section 78 ibid, is available to the noticee on service tax demanded and payable upto 7.4.2011 subject to the condition that the subject Service Tax demanded and payable upto 7.4.2011 and the interest payable thereon under Section 75, is paid within thirty days from the date of communication of this order and further subject to the condition that the benefit of reduced penalty (25% of service tax demanded and payable upto 7.4.2011) shall be available if the amount of penalty so determined has also been paid within the period of thirty days from the date of communication of this order.
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> iv) I impose a penalty of Rs.200/- per day during which such failure continues or at the rate of 2% of the amount of service tax due, per month, whichever is higher, till 9.5.2008, subject to maximum of amount outstanding till 9.5.2008 upon M/s. Mahima Real Estate (P) Ltd. under section 76 of the Finance Act, 1994.

v) I impose a penalty of Rs.10,000/- upon M/s. M/s. Mahima Real Estate (P) Ltd. under section 77 / Section 77(2) of the Finance Act, 1994."

8. In regard to the first issue relating to payment of service tax on the amount received from the customers for Corpus Fund / Escrow Fund and Maintenance Security Deposit under the head "management, maintenance or repair" services falling under section 65 (105) (zzg) of the Act, the Commissioner observed as follows:

"**From the above contention of the noticee, I find that the amount so collected from the customers is for provision of service to the buyers of the property and maintenance of common area of the building by the co-operative societies formed later on, hence I have no doubt that the said amounts received by the noticee in the name of Maintenance security, Corpus Fund and Escrow Fund are value of the taxable service namely Management, Maintenance or Repair Services.** The noticee has not submitted any documentary evidence to prove that they have actually transferred the amount to the co-operative societies formed in completed projects nor they have produced any document to show that such amounts are of refundable nature. **Further, I find that there is no condition in the agreements executed with the customers about the use of amount collected in the name of Escrow Fund, Corpus Fund and Maintenance Security and according to point no.13 of agreement executed with the buyers of the Panorama Projects, promoters might use and utilize the maintenance fund towards maintenance of said building till the formation of maintenance society subject to availability of the fund.** The case law cited by the noticee is not applicable in the instant case for the reasons stated above. The noticee has also contended that the benefit of treating the value as cum tax may be granted to them. However, I find that the noticee being registered under service tax law with the department is well versed with the practice of charging service tax from the buyers and they have not produced any evidence to show that the value charges by them was inclusive of service tax or not. As such, I am not inclined to grant the cum tax value benefit to the noticee and hold that they are liable to pay service tax of Rs.88,24,333/- on amount received from their customers for maintenance security, Corpus Fund and Escrow Fund under Management, Maintenance or Repair services falling under Section 65(105)(zzg) of the Finance Act, 1994 for the period from 1.04.2007 to 31.08.2012."

(emphasis supplied)

9. In regard to the second issue regarding payment of an additional amount for the delay in depositing the installment, the Commissioner observed as follows:

"I find that the noticee has charged certain amount from their customers in case they make any kind of default or delay in paying the pre-decides amount on completion of particular stage of construction and has given it the name of interest to avoid the incidence of tax but from the very

> nature of amount charged, it is clear that it is a penalty for late payment of any installment of the value of property. Since the value of the property is taxable under construction of complex classifiable under Section 65(105)(zzg) of the Finance Act, 1994 and Commercial or Industrial construction service classifiable under Section 65(105)(zzg) of the Finance Act, 1994, the amount of penalty received by the noticee in relation to said taxable is also taxable under amount of penalty received by the noticee in relation to said taxable under the said services."

10. The Commissioner, in regard to the third issue relating to payment of service tax on accrual basis directed that it was liable to appropriated since the appellant had deposited the amount.

11. The contention of the appellant that the extended period of limitation could not have been invoked for issuing the show cause notice was not accepted. The Commissioner also imposed penalty under Section 76 and 78 of the Act.

12. Shri A.K. Prasad, learned counsel for the appellant submitted that the Corpus / Escrow Funds is collected from the buyers / occupants of the property to meet the capital expenses on a future date for replacement of items like D-G Sets, transformers, Security device and these funds are subsequently transferred to the co-operative societies. Likewise, the refundable maintenance security from the flat owners collected at the time of handing over of the possession is also required to be transferred to the resident association. Learned counsel submitted that there was no evidence before the Department to conclude that expenditure had actually been incurred by the appellant towards replacement of lifts / DG Sets or transformers before transferring this amount to the society. Thus, according to the learned counsel, no service had been provided and in the absence of any recipient of service, no service tax could be

levied. Learned counsel also submitted that once the funds were transferred to the society, it would be the society that would carry out the work of replacement of lifts / DG Sets or transformers and in that case, the service provider would be the society and not the appellant.

13. In the instant case, as noted above, the Commissioner without any evidence to substantiate that the aforesaid amount before it is transferred to the society was actually utilized by the appellant for providing any service, the amount so collected from the buyers would not result in provision of any service. There is also no allegation in the show cause notice that the aforesaid amount before it is transferred to the society was actually utilized by the appellant for replacement of lifts / generators or the transformers. In the absence of any specific finding that the amount before it is transferred to the society had actually been utilized, no service tax could have been levied as the appellant in such a case would not be providing any service.

14. In **Vijay Shanthi Builders Ltd. Vs. CCE Chennai**[2], the Tribunal examined the demand made under Management, Maintenance or repair service on the Corpus Fund collected by the appellant therein and observed that the demand of service tax on such deposit under the category of management, maintenance or repair service is unsustainable. It was, only to

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2. 2018 (9) GSTL 257 (Tri-Chennai)

ascertain whether these funds had been used, that the matter was remanded. The observations are as follows:

> **"10. The second issue is with regard to the demand made under maintenance and repair services on the corpus fund collected by the appellants.** It is submitted by the learned counsel that this is only a deposit and not received as charges for any services rendered. According to appellant, it is a deposit made by the allotee and in the event of their failure to pay the maintenance charges, the unpaid amount would be set off against the said deposit. In the impugned order, it is observed that, at any point of time, even if appellant pays service tax on this fund, and if the corpus fund is refunded/transferred, suitable adjustment in tax liability can be made. **It is therefore clear that the corpus fund, even according to the department is not collected for rendering any service of maintenance. It is in the form of a deposit. We, therefore, are of the opinion that the demand of service tax on such deposit under the category of Management, Maintenance and Repair Service is unsustainable. However, this fact needs verification as to how the corpus fund has been put into use.** It is also the case of the appellant that an amount of Rs. 13,04,280/- shown in Annexure A5 has not been collected by the appellant, during the relevant time as the project was not completed. That the department has levied the service tax basing upon the amount stated in the agreement. From the records, it is not clear as to whether the department has raised the demand merely basing on agreement and even though appellant has not collected it. This aspect also requires verification.
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> 11. An amount of Rs. 9,87,216/- collected as maintenance charges towards the project 'Courtyard' is admitted by the appellant and the same is not contested by them.
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> 12. From the above discussions, we hold that the demand of service tax on the category of construction of residential complex upto 31-7-2007 is not sustainable and therefore set aside. The demand in respect of corpus collected whether only a deposit or not and whether can be subject to service tax under Management, Maintenance and Repair Service is required to be verified. Similarly, the amount of Rs. 13,04,280/- in respect of 'Rain Tree Project', whether was collected by the appellant or not has to be verified. For the last two issues, (corpus fund) and (Rain Tree Project), the matter is remanded to the adjudicating authority who shall verify the facts and reconsider these issues."
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> **(emphasis supplied)**

15. In the present case also we consider it appropriate to remand the matter for a consideration as to whether the Corpus Fund / Escrow Fund before transfer of the said fund to the society was utilized by the appellant for replacement of any of the items for it is only in such a situation that it could be levied to service tax.

16. In regard to the maintenance and security amount, the contention of the learned counsel for the appellant is that it is distinct from "maintenance charges" and since the refundable maintenance security deposit is ultimately transferred by the appellant to the resident co-operative society, it cannot be said that the maintenance security deposit is towards any service. The maintenance security deposit is to cover an exigency when the owner of the house does not pay the maintenance charges after the society is formed. It has, therefore, to be ascertained whether this amount before it is transferred to the society has been utilized. This aspect of the matter, therefore, also needs to be examined on remand.

17. Shri Sanjay Jain, learned Authorized Representative of the Department, however, placed reliance upon the decision of the Tribunal in **Satya Prakash Builders Pvt. Ltd. Vs. CCE Jaipur** [3]. This decision would be of no help to the respondent for the simple reason that there is no finding in the said decision that the maintenance of the residential complex by the appellant therein was out of the two funds namely Corpus Fund or Escrow Fund.

18. The second aspect is regarding the confirmation of service tax by the Commissioner on late payment charges.

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3. 2017 (4) GSTL 393 (Tri-Del)

19. Learned Counsel for the appellant submitted that late payment charges are not towards any service provided and, therefore, cannot be subjected to levy of service tax. In this

connection learned counsel place reliance upon a Circular dated 3 August 2011 issued by the Central Board of Excise and Customs, New Delhi. Learned Counsel also submitted that late payment charges cannot be included in gross value charged as was held by the Supreme Court in **Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd.**[4]

20. Learned Authorized Representative for the Department submitted that there is no error in the finding recorded by the learned Commissioner and that late payment are in the nature of a penalty and so, have necessarily to be included in the gross value.

21. We find considerable force in the submission advanced by the learned counsel for the appellant. Any additional amount collected towards delay in making the payment of the installments cannot be subjected to levy of service tax. This position stands clarified by the Circular dated 3 August 2011 issued by the Central Board of Excise and Customs New Delhi. The said circular is reproduced below:

> "**Subject: Clarification regarding Service Tax on delayed payment charges collected by the service provider in respect of Stock Broker's services - Regarding.**
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> Representations have been received seeking clarification regarding leviability of Service Tax on the additional amount that is collected towards the delay in making payment to the stock brokers by their customers (delayed payment charges) in respect of Stock Broker's services.
> 2. The matter has been examined. Clarifications issued by the Board in the past on similar issues are summed up below:

4. 2018 (10) GSTL 401 (SC)

> (i) Circular No. 96/7/2007 [2007 (7) S.T.R. C69] at Para 002.01 clarifies that an amount collected for delayed payment of a telephone bill is not to be treated as consideration charged for provision of telecom service and therefore, does not form a part of the value of taxable service.

> (ii) Circular No. 121/02/2010-S.T., dated 26-4-2010 [2010 (18) S.T.R. C27] clarifies that detention charges in respect of detained containers are not in respect of service provided on behalf of client (under BAS) nor is it on account of infrastructure support services (under BSS). Such charges can at best be called as 'penal rent' for retaining the containers beyond the predetermined period. Therefore, the amount collected as 'detention charges' is not chargeable to Service Tax.
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> **2.1 In a similar manner, delayed payment charges received by the stock brokers are not includible in taxable value as the same are not the charges for providing taxable services. Such charges are on account of delay in making payments by the service recipient to the service provider and are in the nature of a penal charge for not making the payment within stipulated time. Such amounts are not includible in the taxable value for charging Service Tax. This principle will also apply to other service providers.**
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> 3. However, Section 67 of the Finance Act, 1994 provides that Service Tax is chargeable on taxable value which shall be the 'gross amount charged' by the service provider. Therefore, if in the account statement/invoice/bill, etc. issued by the service provider, only the gross amount is shown without indicating the delayed payment charges separately, the Service Tax would be payable on the entire amount. Delayed payment charges would not be includible in 'gross value charged', only if these charges are shown separately in the account statement/invoice/bill, etc."

(emphasis supplied)

22. The Commissioner was therefore, not justified in confirming the demand.

23. The appellant in regard to third allegation relating to short payment of service tax during the period 1 July 2011 to 30 September 2012 on account of payment made on receipt basis instead of accrual basis had actually deposited the amount prior to the issuance of the show cause notice and that is why the amount has also been appropriated in the impugned order.

24. The only aspect that needs to be examined in regard to this issue is about the penalty that has been imposed by the Commissioner.

25. The learned Counsel for the appellant submitted that there was no deliberate attempt on part of the appellant not to

make payments of service tax since the appellant had been making the payments on receipt basis instead of accrual basis.

26. The contention of the appellant appears to be justified as it was only with effect from 1 July 2011 that the system of payment of service tax was changed from receipt basis to accrual basis. This amount was also deposited by the appellant before the issuance of the show cause notice. In such circumstances no penalty should have been imposed in view of the provision of section 80 of the Act.

27. It would, therefore, not be necessary to examine the contention of the learned counsel for the appellant relating to invocation of extended period of limitation since the entire demand made in the impugned order is not justified.

28. Thus, for all the reasons stated above, the impugned order dated 28 March 2014 cannot be sustained and is set aside. The matter is remanded to the Commissioner only to examine whether the appellant had actually utilized any of the amount deposited by the buyers / occupants of the constructed property towards Corpus Funds / Escrow Fund / Maintenance Security deposit before transferring the amount to the Society, because it is only in such a situation that service tax would be levied on the amount so spent. This exercise shall be completed by the Commissioner within a period of three months after calling upon the appellant to submit necessary documents to substantiate its case that no amount from the aforesaid three heads was spent by the appellant before transferring to the Society. The appeal is allowed to the extent indicated above.

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

Bhanu