

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench
Court - I

APPEAL No. ST/380/2009

*(Arising out of **Order-in-Revision** (Adjudication Order) No. 18/2008 (ST) (PNR),
dated 19.12.2008 passed by CCCE&ST, Tirupati)*

SRI RAM SIR CONSTRUCTIONS .. APPELLANT

Vs.

CCE, C&ST, Tirupathi .. RESPONDENT

Appearance

None for the Appellant.

Shri B. Guna Ranjan, Superintendent/AR for the Respondent.

Coram:

Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 31.12.2018
Date of Decision: 31.12.2018

FINAL ORDER No. A/31631/2018

[Order per: Mr. P. VENKATA SUBBA RAO)

1. When this matter was called out, none appeared on behalf of the appellant despite notice nor is there any application seeking for adjournment. As the appeal is of 2009, we proceed to decide the matter on merits even in the absence of any representation.

2. Heard Ld. DR and perused the records.

3. The appellants herein were registered with Central Excise Department for service tax under the category of "*Construction of complex (residential) service*". After registration, they paid service tax for the period January 2006 to March 2006 and also filed half yearly ST-3 returns for the half year ending 31.03.2006. Thereafter, the department investigated the appellant and collected information from the District Registrar, Stamps & Registration Department, Government of Andhra Pradesh, Cuddapah. On investigation, it was noticed that the appellant had constructed 39 flats to service recipients and had received an amount of Rs.1,55,60,500/- from them and had not discharged the service tax liability on such receipts. Accordingly a show cause notice was issued to the appellant demanding service tax of Rs. 4,25,434/- plus Education Cess of Rs. 8,509/- from them along with interest. It was also proposed to impose penalties under sections 76, 77 & 78 of the Finance Act, 1994. After following due process, the lower authority passed an order confirming the service tax liability of Rs.3,73,680/- and Education Cess of Rs. 7,474/-. As the appellant had already paid these amounts, the same were appropriated in the Order-in-Original. He also demanded interest on this amount and since the same has been already paid by the appellant, it was appropriated towards the same. Exercising the powers under section 80, the Asst. Commissioner refrained from imposing any penalties. The amount of tax calculated was by the Asst. Commissioner after taking into account the fact that the appellant had not collected service tax from their customers and therefore

taking the amount which the appellant had received as cum tax amount and further allowing abatement of 67% in terms of Notification No. 1/2006-ST, dated 01.03.2006.

4. This order of the Asst. Commissioner was revised by the Commissioner of Customs & Central Excise, Tirupati, under section 74 of the Finance Act, 1994. By this order, the Commissioner declined to accept the amounts received by the assessee as cum service tax amounts and thereby enhanced the demand of service tax and Education Cess to Rs.4,33,943/- and appropriated the amount already paid by the appellant towards this amount. Consequently, the Commissioner also enhanced the amount of interest as per the revised amount confirmed. Further, he imposed a penalty equivalent to the service tax amount demanded (Rs. 4,33,943/-) under section 78 of the Finance Act, 1994 and further imposed a penalty of Rs. 5,000/- under section 77 of the Finance Act, 1994.

5. The present appeal is filed by the appellant against the Order-in-Revision of the Commissioner. Relief claimed by the appellant in this appeal is to set aside the entire amount of service tax demanded along with interest as well as penalties. In their appeal, the appellant claimed that they were not liable to pay service tax at all because in their case they have paid for the entire construction of flats with their own money and thereafter sold the flats to their customers. Thus, there was only sale to the customers and the service which they rendered was only a self service which cannot be

charged to service tax as has been clarified in the CBEC Circular No. 108/2/2009-ST, dt. 29.01.2009.

6. Ld. DR reiterates the findings of the impugned order. However, on a specific query from the Bench as to whether the appellant had, in fact, constructed all the flats with their own money and thereafter sold them to their customers, Ld. DR said that there is nothing on record to clarify either way. We also find it so.

7. We have considered the arguments in the appeal as well as by Ld. DR and perused the records. Service Tax is leviable only when the service is rendered by one person to another for a consideration. If the appellant had, in fact, constructed all the flats with their own money and thereafter sold these flats to their customers, then evidently no service has been rendered and no service tax is payable. On the other hand, if the appellant had collected the amounts from their customers in instalments for construction of flats and thereafter constructed the flats for them, then service would have been rendered to their customers and service tax liability occurs. In the absence of any details, we are unable to make this determination. These facts will be evident only in the records of the original adjudicating authority who investigated the case. We, therefore, find that it is a fit case to be remanded back to the original adjudicating authority to consider the submission of the appellant in their appeal before this Tribunal that they had constructed the flats with their own money and only thereafter

sold them to their customers and therefore were exempted from payment of service tax in terms of CBEC circular dated 29.01.2009 (supra).

8. In view of the above, without passing any remarks on the merits of the case and leaving all issues open, we remit the matter back to the original authority to consider this claim of the appellant and after following principles of natural justice, pass an order.

9. Appeal is disposed of by way of remand to the original authority.

(Operative portion of the order pronounced in open court on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)