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

Division Bench

Court – I

Service Tax Appeal No. 30115 of 2017

(Arising out of Order-in-Original No.HYD-EXCUS-002-COM-022-16-17 dt.29.09.2016 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II)

Raja Rajeswari Builders

2-2-23/7/A, 102, Surya Towers,
Beside SBH Colony, Bagh Ameberpet,
Hyderabad, Telangana – 500 013 ......**Appellant**

VERSUS

Commissioner of Central Tax,
Secunderabad - GST

Customs Preventive Commissionerate,
D.No. 55-17-3, 2nd Floor, C-14, Road No.2,
Industrial Estate, Vijayawada, AP – 520 007 ......**Respondent**

Appearance

Shri Srinivas Chaturvedula, Advocate for the appellant.
Ms N. Sailaja Kumari, Authorized Representative for the respondent.

Coram:

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER No. A/31108/2020

Date of Hearing: 04.11.2020
Date of Decision: 09.11.2020

[Order per: P.V. SUBBA RAO]

1. This appeal is filed against Order-in-Original No. HYD-EXCUS-002-COM-022-16-17 dt.29.09.2016.

2. Heard both sides and perused the records. The appellant is a builder engaged in construction of residential flats and are registered with service

tax department under construction of residential complex service and commercial use or exploitation of any event service. They entered into joint development agreement with owners of residential plots to construct residential building complexes. As per the agreement the land owner gives the land to the project; the appellant constructions flats on them and gives some flats to the land owner and sells the rest. Thus, there is no cost of land is paid by the appellant to the land owner and the land owner does not pay anything for the flats given by the builder. The builder, of course, receives payment when he sells flats to home buyers and has been paying service tax on such amounts. The appellant has not been paying service tax on the land owner's portion of flats.

3. They had filed a declaration under the Voluntary Compliance Encouragement Scheme (VCES) 2013 for payment of service tax under residential complex services amounting to Rs.15,19,225/- on the land owner's share of the constructed area in the residential projects undertaken by them. The VCES had provision whereby the Commissioner of Central Excise, if he has reasons to believe that the declaration made was substantially false, may serve a notice to the declarant in respect of such declaration. Under this provision, a show cause notice dt.29.12.2014 was served upon the appellant seeking to reject their classification of the service under construction of residential complex service and instead classifying the same under the Works Contract Service and after applying the Works Contract Composition Scheme demanding differential duty both on the proposed payment for land owner's share as well as payment of service tax on the builder's share. After following due process, learned Commissioner, by the impugned order, has confirmed a demand of Rs.88,35,368/- and appropriated an amount of Rs.7,59,613/- paid by the appellant under VCES. He further appropriated an amount of Rs.33,84,623/- paid earlier as Service Tax on the builder's share of the flats.

4. Learned counsel for the appellant submits that now it is settled that no service tax is separately payable on the land owner's share of flats as no amount is received by the appellant. In fact, the entire value of these flats including the services rendered on their construction gets subsumed in the

value of the builder's share of the flats which are sold by the builder. In their case, they have already paid service tax on the builder's share of flats. He relies on the decision of this bench in the case of Vasantha Green Projects [2018 (5) TMI 889 – CESTAT HYDERABAD] and PNR Infra India Pvt Ltd [2018 (12) TMI 1243 – CESTAT HYDERABAD]. In both these orders, it has been held that the value of the builder's share of the flats is the total value of the project and which the service provider receives. This amount includes the value of land, the value of materials and the services rendered. By taxing the builder's share of the flats, in effect, the entire project is getting taxed. No separate service tax needs to be paid again on the land owner's share of the flats for which no consideration is received by the builder in cash. Therefore, he would argue, that in the first place, no service tax is payable by them on the land owner's share of the flats.

5. On the issue of service being allegedly misclassified under Works Contract Service instead of Construction of Complex service, he draws attention of the bench to the letter F.No.332/22/2015-TRU dt.05.09.2016 in which it has been clarified that "Construction of Complex Service" is the appropriate head for classification and not "Works Contract Service". He argued that this direction is binding on the officers and learned Commissioner could not have taken a different view. He further submits that the aforesaid letter also clarifies that in view of the fact that construction of residential complex services involves not only rendering services and transferring goods but also transferring the immovable property in the form of undivided share of land an enhanced abatement of 75% is provided. He would submit that if the enhanced abatement available to them is reckoned the amount of service tax paid by them plus the amount deposited under VCES is more than the amount due from them and the excess amount needs to be refunded to them.

6. He further submits that the valuation of the services in the show cause notice is done as per the Works Contract (Composition Scheme for payment of service tax) Rules, 2007; Rule 3 of which reads as follows:

> *"**Rule 3**:-*
> *(1) Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination of Value) Ru1es, 2006, **the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to two per cent of the gross amount charged for the works contract**."*

7. It is evident from the above that the composition scheme is an option given to the assessee and this can only be resorted to when the assessee opts for it and they have not opted for it. Revenue cannot, on its own, impose this scheme upon them. They are entitled to choose whatever scheme is most beneficial to them.

8. Learned departmental representative reiterates the findings in the impugned order. Insofar as Vasantha Green Projects (supra) is concerned, she would submit that the order of this bench has been appealed against and the appeal is pending before the Hon'ble Supreme Court. On a specific query from the bench, she confirmed that is has not been stayed.

9. Having considered rival submissions, we find that the adjudicating authority must be given an opportunity to examine the case in the light of:

(a) The order of this bench in the case of Vasantha Green Projects (supra) and PNR Infra India Pvt Ltd (supra) with respect to the land owner's share of the flats.

(b) Letter F.No.332/22/2015-TRU dt.05.09.2016 of TRU regarding classification of work undertaken.

(c) Examine if there is any provision in the Works Contract (Composition Scheme for payment of service tax) Rules, 2007 whereby the department can, in the absence of any request from the assessee, impose the composition scheme or calculate the amount of service tax based on it.

10. In view of the above, leaving all issues open, without passing any remarks on the merits of the case, the matter is remanded to the adjudicating authority to examine afresh with reference to the above three points and pass an order after following principles of natural justice.

11. The impugned order is set aside and the appeal is allowed by way of remand to the adjudicating authority.

(Pronounced in the open court on 09.11.2020)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(P. DINESHA)
MEMBER (JUDICIAL)

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