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

Division Bench

Court – I

Service Tax Appeal No. 3133 of 2012

(Arising out of OIA No.121/2012 dt.06.08.2012 passed by Commissioner of Central Excise, Customs & Service Tax (Appeals-II), Hyderabad)

Asian Builders & Developers
Jain Estate, Park Lane,
Secunderabad – 500 003
......Appellant

VERSUS

Commissioner of Central Tax
Secunderabad - GST
LB Stadium Road, Basheerbagh,
Hyderabad, Telangana – 500 004
......Respondent

Appearance
Ms Radhika Sriranjani, Advocate for the Appellant.
Shri B. Sangameshwar Rao, AR for the Respondent.

Coram:
HON'BLE MR. ANIL CHOUDHARY (JUDICIAL)
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30291/2023

Date of Hearing: 06.09.2023
Date of Decision: 06.09.2023

[Order per: ANIL CHOUDHARY]

Heard the parties. The issue involved in this Appeal is whether demand of service tax under the head “Construction of Residential Complex service” as defined in Sec 65(105)(zzzh) of the Finance Act has been rightly confirmed along with penalty.

2. The brief facts are that the Appellant is a developer and entered into 2 Joint Development Agreements with 2 separate parties (land owners) viz., Amrutha Estates and Ranga Reddy & Sons, for the development of residential complex at Begumpet and Miyapur. The land owners were entitled to 45% and 42.11% of the built up area respectively, as a consideration for land given up by them. The Contracts entered upon by the Appellant are a composite contracts involving supply of material and rendering of services.

3. The Department issued SCN No. C.No.IV/16/289/2009-ST dt.22.10.2010 proposing to levy service tax under ‘Construction of Residential Complex

service' invoking extended period of limitation. The Department proposed to impose service tax on the value of undivided share by the land owners. The Department has calculated the value of land based on the rate fixed by the Government, as guideline value. In other words, the total land used for the development is taken into consideration and the Department has calculated land owner share, applying the percentage of constructed area in terms of the Agreement.

4. The SCN proposed to levy interest and penalty too. The Appellant objected to the proposals on the following grounds:

(i) In a joint Development Agreement, there is no service provider-service recipient relationship, and hence, there is no question of service tax.

(ii) The land owner who received the constructed area, is only the consideration for the land.

(iii) What is being transferred is only the development rights and therefore, there is no service.

(iv) There is no liability as per the Circular No. 108/2009 dt.29.01.2009.

(v) Once there is no liability, there is no question of interest and penalty.

5. The SCN was confirmed by the learned Additional Commissioner vide OIO dated 31.01.2012, relying on the ruling of the Hon'ble Supreme Court in the case of Faqir Chand Gulati vs Uppal Agencies Pvt Ltd [2008 (12) STR 401 (SC)]. Aggrieved, the Appellant preferred Appeal before the Commissioner (Appeals), who was also pleased to dismiss the Appeal, agreeing with the Additional Commissioner's Order, observing that land owner is the consumer and the developer is the service provider and accordingly, the service tax has been rightly imposed.

6. Assailing the Impugned Order, learned Counsel for the Appellant, *inter alia*, urges that in the facts of the present case, there is no service provider-service-recipient relationship, as the land belonging to the land owner, having been jointly developed by the parties, agreeing to share the constructed area in agreed proportion. Further, in view of the Board Circular No. 108/2009 read with Circular No. 151/2012, it has been clarified that builder/developer is not liable to pay service tax for their activities in respect of construction of residential complex prior to 01.07.2010. The Finance Act, 2010 for the first time

brought developers into the ambit of service tax w.e.f. 01.07.2010 by insertion of explanation to Sec 65(105)(zzzh).

7. Learned Counsel also relies on the following rulings:

(a) Krishna Homes vs CCE [2014 (34) STR 881]

(b) Pragati Edifice Pvt Ltd vs CCCE & ST [Final Order No. 31010-31011/2019]

(c) Demand under 'Construction of Complex services' is not tenable: Real Value Promoters Pvt Ltd [Final Order No. 42436-42438/2018 dt.18.09.2018]

(d) URC Construction Ltd [Final Order No. 42037-42038/2016 dt.14.07.2016]

(e) CCE & C, Kerala vs Larsen & Toubro Ltd [2015 (39) STR 913]

(f) Ashoka Developers and Builders Ltd vs CCCE & ST, Hyderabad [2020 (34) GSTL 550 (Tri-Hyd)]

(g) Aditya Homes vs CCE, Hyderabad [2019 (9) TMI 793 (CESTAT-Hyd)

(h) South India Shelters Pvt Ltd vs CCE [Final Order No. 40123-40124/2013]

(i) Jain Housing and Construction Ltd vs CST [Final Order No. 40077-40079/2023]

(j) Vijay Shanthi Builders Ltd vs CST [2018 (9) GSTL 257]

8. Learned Counsel also points out that ruling of the Hon'ble Supreme Court in Faqir Chand Gulati (cited supra) is not applicable, as the same was in respect of a consumer dispute under Consumer Dispute Redressal Act. She also urges that the Board Circular is binding on the Revenue Authorities, and the Courts below have erred in not following the Board Circular.

9. Learned Counsel also urges that as the Appellant have constructed the residential building with materials, it is more appropriately classifiable as 'Works Contract Service' as clarified by Hon'ble Supreme Court in Larsen & Toubro Ltd case. It is further urged that in case of Works Contract, the deemed transfer of goods are subject to Sales Tax/VAT. It is also urged that extended period of limitation is not invokable, as there is no case of fraud, suppression, etc., on the part of the Appellant.

10. Having considered the rival contentions and the facts on record, we find that the issue is no longer *res integra* as clarified by the Board Circular No. 108/2009, read with Circular No. 151/2012, wherein, in view of the amendment brought in the definition of 'Construction of Residential Complex service', whereby explanation was inserted w.e.f. 01.07.2010, and builders were first time brought into the ambit of service tax. Further, it was clarified by the aforementioned Circulars, in view of the Finance Act, 2010 that builder/

developer of residential complex, is not liable to pay service tax for the period prior to 01.07.2010.

11. In view of the aforementioned findings and observations, we allow this Appeal and set aside the Impugned Order. The Appellant shall be entitled to consequential benefits, in accordance with law.

(Dictated and pronounced in the Open Court)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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