IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. ST/89398/2014

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-36-14-15 dated 4.6.2014 passed by Commissioner of Central Excise (Appeals), Pune-I)

Commissioner of Central Excise, Pune-I **Appellant**

Vs.

Mangal Murti Developers **Respondent**

Appearance:

Shri Dilip Shinde, Assistant Commissioner (AR), for appellant
None for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)
Hon'ble Mr. C.J. Mathew, Member (Technical)

Date of Hearing: 6.3.2018
Date of Decision: 11.4.2018

ORDER No. **A/85960/2018**

Per: Ramesh Nair

The facts of the case are that the respondent is registered with Service Tax Cell, Pune-I Unit, under the category of 'construction of residential complex service, construction of industrial and commercial structures'. During the course of audit, it was found that in addition to sale price of individual dwelling unit, they had charged and received certain amounts from unit holders as maintenance charges of the building under construction till possession of it is handed over to Society. The case of the department is that as per para 6 of Circular No.B1/6/2005-TRU dated 27.6.2005 w.e.f. 16.6.2005, maintenance and management of immovable property (in this case the building under construction till possession is handed over to Society) are provided as per the terms and conditions of the agreement to sale of the property between the dwelling owner and service provider. These activities fall under the ambit of Service Tax and liable for service tax w.e.f. 16.6.2005. Accordingly, the adjudicating authority confirmed the demand of service tax under maintenance and repair service and also imposed penalties. Being aggrieved by the order-in-original, the respondent filed appeal before the Commissioner (Appeals) who allowed the appeal. Therefore, the Revenue is before us.

2. Shri Dilip Shinde, learned Assistant Commissioner (AR) appearing on behalf of the Revenue, submits that the respondent is providing the repair and maintenance service and towards the same, amount is charged from the dwelling unit owner. Therefore, the service is clearly taxable under maintenance or repair service. He placed reliance on the judgment of the Tribunal in the case of *Satya Prakash Builders Pvt. Ltd. vs. CCE, Jaipur-I – 2017 (4) GSTL 393 (Tri.-Del.*).

3. None appeared on behalf of the respondent.

4. On careful consideration of the submissions made by the learned AR, we find that as per the facts of the case, the respondent is collecting repair and maintenance charges under the statutory obligation provided in Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. The respondent is under the obligation of the said Act, collecting the maintenance charges from the dwelling unit owner and transferring it to the actual service provider. This issue has been considered by this Tribunal in various judgments particularly in the case of *Kumar Beheray Rathi vs. CCE, Pune-III – 2013-TIOL-1806-CESTAT-MUM*, wherein the Tribunal has given the following observation:-

> "6. At the outset, we note that Circular and case laws quoted are not relevant to the present issue as services and situations context discussed are totally different. We find that as per the agreement submitted by the appellants, certain amounts were collected from the buyers of the flats as one time deposit on account of the following services :-
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> (a) Towards maintenance and repairs of common areas and facilities.
>
> (b) Wages of watchmen, sweepers etc.
>
> (c) Insurance.
>
> (d) Revenue assessment.
>
> (e) All other taxes, levies, charges and Cess.
>
> (f) Electricity and water charges and deposits in respect of common electrical and water pumps and other installations.
>
> (g) Expenses of and incidental to the management and maintenance of the said Housing Complex.

6.1 From the various activities we find that the appellants are required to make payment relating to Revenue Assessment, insurance, all other taxes, levies, electricity and water charges and deposits in respect of common electrical and water pumps and other installations. In addition they are paying for the maintenance and repair of common areas and facilities, wages of Watchmen, Sweepers etc. and some expenses relating to maintenance of the housing blocks.

6.2 We have also gone through the relevant provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. We find that the Sections 5 and 6 provides as under :-

SECTION 05 : PROMOTER TO MAINTAIN SEPARATE ACCOUNT OF SUMS TAKEN AS ADVANCE OR DEPOSIT AND TO BE TRUSTEE THEREFOR; AND DISBURSE THEM FOR PURPOSES FOR WHICH GIVEN

The promoter shall maintain a separate account in any bank of sums taken, by him, from persons intending to take or who have taken flats, as advance or deposit including any sums so taken towards the share capital for the formation of co-operative society or a company, or towards the outgoings (including ground rent, if any, municipal or other local taxes, taxes on income, water charges, electricity charges, revenue assessment, interest on any mortgage or other encumbrances if any); and he shall hold the said moneys for the purposes for which they were given and shall disburse the moneys for those purposes and shall on demand in writing by an officer appointed…….

SECTION 06 : RESPONSIBILITY FOR PAYMENT OF OUTGOINGS TILL PROPERTY IS TRANSFERRED

A promoter shall, while he is in possession and where he collects from persons who have taken over flats or are to take over flats sums for the payment of outgoings ever thereafter, pay all outgoings (including ground rent, municipal or other local taxes, taxes on income, water charges, electricity charges, revenue assessment, interest on any mortgage or other encumbrances, if any), until he transfers the property to the persons taking over the flats, or to the organisation of any such persons. Where any promoter fails to pay all or any of the outgoings collected by him from the persons who have taken over flats or are to take over flats, before transferring the property to the persons taking over the flats or to the organisation of any such persons, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges (if any) to the authority or person to whom they are payable and to be responsible for any legal proceedings which may be taken therefor by such authority or person.

From the above said sections it is clear that under the Act the appellants are obliged to maintain a separate account in any bank of the deposits taken and use the same amount towards the outgoings. Further Section 6 puts responsibility for payment of outgoings on the appellants till the property is transferred.

6.3 We also note that at the relevant time the provisions of Finance Act are as under :-

"Maintenance or repair" means any service provided by -

(a) any person under a contract or an agreement; or

(b) a manufacturer or any person authorized by him in relation to -

(i) maintenance or repair including reconditioning or restoration, or servicing of any goods or equipment, excluding motor vehicle; or

(ii) maintenance or management of immovable property.

6.4 We also note that the appellants are not in the business of maintenance or repair service or management of immovable property. The appellants cannot be held as provider of maintenance or repair service as they are only paying on behalf of various buyers of flats to various authorities (Municipal Corporation, Revenue authorities etc.) and various service providers (such as security agency, cleaning service providers etc.) and they are not charging anything on their own. The payments are made cost on cost basis and the same is debited from the deposit account. They act only as trustee or as pure agent. When the cooperative society is formed even the deposit account is shifted to Flat Owner's Cooperative Society. We also note that this is a statutory obligation on the appellants in terms of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963.

7. Under these circumstances, we hold that the appellants are not providing the maintenance or repair service to the buyers of the flats. In view of this position, the impugned order is set aside and the appeals are allowed."

5. Following the above judgment, this Tribunal is consistently taking the view that the maintenance charges collected from the flat owner under the obligation as per the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, the same will not be chargeable to tax in the hands of the builder.

As regards the judgment in the case of *Satya Prakash Builders Pvt. Ltd.* (supra) cited by the learned AR, firstly the judgment is not related to Maharashtra and no similar Act was revoked. Moreover, the judgment of this Tribunal in the case of *Kumar Beheray Rathi* was also not considered. Therefore, the ratio of the judgment in the case of *Satya Prakash Builders Pvt. Ltd.* (supra) is not applicable in the present case.

6. Accordingly, the impugned order is upheld. The Revenue's appeal is dismissed.

(Pronounced in court on 11.4.2018)

(C.J. Mathew)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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