IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/88991/2014

[Arising out of Order-in-Original No: 10/ST/2014/C dated 23rd June 2014 passed by the Commissioner of Central Excise & Customs, Nagpur.]

For approval and signature:

Hon'ble Shri S K Mohanty, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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Shewalkar Developers Ltd … ***Appellant***

versus

Commissioner of Customs, Central Excise & Service Tax Nagpur ***…Respondent***

Appearance:

Shri HG Dharmadhikari, Advocate for appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri S K Mohanty, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 16/08/2018
Date of decision: 18/12/2018

ORDER NO: A/88153 / 2018

Per: C J Mathew

This appeal lies against order-in-original no. 10/ST/2014/C dated 23rd June 2014 of Commissioner of Central Excise & Customs, Nagpur which has confirmed tax liability of ₹ 63,12,180/-, after allowing abatement of 67%, as provider of 'commercial or industrial construction service' in the Shewalkar Garden project, along with interest under section 75 of Finance Act, 1994 while imposing penalty under section 76, 77 and 78 of Finance Act, 1994. At the same time, demand of ₹ 1,16,57,399/- pertaining to other schemes of the appellant were dropped as the projects had been entirely completed before the service was made taxable with effect from 10th September 2004.

2. It is the contention by Learned Counsel for appellant that the remaining project also had been completed prior to imposition of tax on the said service. For this, particular reference is invited to

> *'I observed from the above said chart that the Noticee is not liable for payment of any Service Tax, as they are the Builders/Developers, who get the Commercial, or Residential Complex constructed for themselves. The construction work covered in show cause notice, pertains to schemes, which were fully constructed and ready for possession and mostly sold even prior to introduction of service tax under Commercial and Industrial Construction Service. It is only after completion of the construction and full payment of the agreed sum, Sale Deed is executed. By way of insertion of clause in definition in the Finance Act, 2010 w.e.f. 01.07.2010, Service Tax is made applicable to Builders and Developers/Promoters. Therefore, prior to that, they were not liable to service tax.'*

in the impugned order which, according to us, pertains only to the other projects as it is clear from the Table that the residential portion was completed only after the imposition of service tax on the said service. It is contended by the Learned Counsel for appellant that the adjudicating authority had confirmed the demands on the ground that the developer, not being title-holder, was not entitled to the retrospective effective granted by circular no. 151/2/2012-ST dated 10th February 2012 of Central Board of Excise & Customs and by placing reliance on the decision of the Tribunal in *Harihar Infrastructure Development Corporation v. Commissioner of Central Excise, Nagpur [2014 (36) STR 440 (Tri.Mumbai)]*. This, according him, is contrary to the factual matrix in which the agreement between the landlord and the appellant makes it abundantly clear that the land

was transferred and vested in the latter. It is also further contended that the sale deeds indicate the completion and handing over of these flats even prior to 16th June 2005 which should have entitled them to the claim of non-taxation.

3. Learned Authorised Representative placed reliance on circular no. 354/311/2015-TRU dated 20th January 2016 of Central Board of Excise & Customs indicating the manner in which the valuation of flats for levy of service tax is required to be undertaken. According to him, the crucial aspect for tax determination is whether an outright sale did occur and if such sale had not occurred, then escapement from tax should not be the consequence.

4. Having considered the rival submissions, we find that the dispute is now limited to a single project, *viz.*, 'Shewalkar Garden' and, that too, only on the residential portion of the complex in which the submission shows the completion and handing over to have occurred after the taxable service incorporated in Finance Act, 1994. It is clear from the proceedings that the nature of ownership of the land is not relevant and that taxability arises from any kind of agreement which does not involve outright sale that, admittedly, the present agreement is not. It, however, remains to be ascertained if the claim of the appellant to have completed the process of handing over before the date of applicability of the tax is allowable. The records do

not point us in that direction. To ascertain the veracity of the claim that the construction was completed and possession handed over before the incorporation of liability to tax, we set aside the impugned order and remand the matter back to the original authority to verify the claims of the appellant.

5. Appeal is disposed off in the above terms.

(Pronounced in Court on 18/12/2018)

(S K Mohanty)
Member (Judicial)

(C J Mathew)
Member (Technical)

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