CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 87498 of 2018

(Arising out of Order-in-Appeal No. NA/GST A-III/MUM/390/17-18 dated 31.01.2018 passed by the Commissioner of GST & CX (Appeals-III), Mumbai.)

M/s Man Infraprojects Ltd. ....Appellant
Man House, 102, S.V. Road,
Vile Parle (W), Mumbai – 400 056

VERSUS

Commissioner of CGST, Mumbai West ....Respondent
Mahavir Jain Vidyalaya, Juhu Lane,
Andheri (West), Mumbai,
Maharashtra – 400 058

APPERANCE:

Shri Mahesh Raichandani, Advocate for the Appellant
Shri Onil Shivadikar, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85936/2020

Date of Hearing: 20.102020
Date of Decision: 09.12.2020

Rejection of refund claim on Service Tax paid for construction of residential complex before 30.06.2012 on the ground that appellant failed to establish that it comprised of less than 12 residential units so as to be covered under exemption clause is assailed in this appeal.

2. Factual back-drop of the case, in a nutshell is, that appellant sought for refund of Rs.45,13,475/- for the period between October, 2011 and March, 2012 for the service category of "construction of complex service - residential complex" classifiable under Section 65 (91a) of the Finance Act, 1994 but was issued with deficiency memo and show-cause notice on several grounds that were ultimately adjudicated by the Assistant Commissioner of Service Tax, Division – IV, Mumbai-II, resulting in rejection of its refund claim vide Order-in-Original No. ST-II/Div.IV/164-R/2012 dated 30.11.2012. In the appeal before the Commissioner (Appeals), the said order was confirmed on the ground that appellant failed to establish construction of less than 12 residential units through documentary evidence that gave it exemption from such payment but not on the grounds raised in the show-cause notice. Hence the appeal.

3. In the memo of appeal and during the course of hearing learned Counsel for the appellant Mr. Mahesh Raichandani submitted that sufficient documents had been placed on record before the Commissioner (Appeals), which had been acknowledged in his order at para 8, that would establish that the residential complex consisted of 9 residential units only. He brought attention of this Bench to the portion of BMC approval plan concerning description of parking area (page no. 9 of the second file) wherein it has been clearly mentioned

that total number of units were 9 (in parking plan portion), apart from architect certificate at page 30 and occupation certificate at page 6. He further submitted that concerning the allegation of unjust enrichment and other grounds raised in the show-cause notice, learned Commissioner (Appeals) had given his clear observation in para 6 of the Order-in-Appeal after verification of case record and by accepting written submissions made by the appellant to the effect that appellant had deposited Service Tax in respect of such advance receipt under protest and had not charged Service Tax from the customers for selling Bandra unit and therefore the order passed by the Commissioner (Appeals) that documents were insufficient to establish that the complex indeed had less than 12 residential units could not be substantiated was erroneous and required to be set aside.

4. In response to such submissions, learned Authorised Representative for the respondent-department Mr. Onil Shivadikar, Assistant Commissioner has submitted orally and through his subsequently filed written submissions that ground plan submitted by the appellant was incomplete and admission of appellant in the refund claim application that he received Service Tax in advance from prospective customers would disentitle the appellant to get the claimed refund besides the fact that in view of CESTAT judgement in the case of *Nukay Nufit Nakshtra Vs. Commissioner of Central Excise, Pune-III* reported in *2015-TIOL-607-CESTAT-MUM,* that pending enquiry if the appellant discharged the service tax liability, no refund

is admissible. He also supported the findings of the Commissioner (Appeals) that documents produced by the appellant were inadequate to establish the number of units that comprised the residential complex. Additionally he had drawn attention of the Bench to the fact that occupation certificate was not produced before the original authority, for which order passed by the Commissioner (Appeals) confirming the Order-in-Original needs no interference.

5. I have pursued the case record. There are primarily three issues:

(i) Non-establishment of number of units by the appellant that was cited as the main ground in the Order-in-Appeal was not a ground in the show-cause notice;

(ii) Commissioner (Appeals) had not dealt with the issue of 'unjust enrichment'; and

(iii) Appellant since agreed to discharge the tax liability during investigation is not entitled for such refund.

6. In respect of the issue in point number (i) I am of the considered view that meeting the requirement of law, which is the paramount consideration for establishment of tax liability, need not necessarily be made a ground in the show-cause notice since everyone is presumed to know the law/rules governing the affair of the State. Concerning unjust enrichment which is shown in the Order-in-Original as one of the grounds of rejection is found to have been adequately dealt by the learned Commissioner (Appeals) who,

after going through the case record, had noted that customers were not charged Service Tax for Bandra unit. And the third point which is raised by the learned respondent-department with reference to CESTAT's own decision, though was pronounced in a different fact and circumstances, is also hit by Rule 10 of the CESTAT Procedure Rule, 1982 as has not been argued during the hearing of the petition. Therefore, the only aspect that is required to be dealt in this appeal is the establishment of construction of less than 12 units by the appellant in the disputed complex. On this aspect, it is required to reproduce relevant portion of the order passed by the Commissioner (Appeals) at para 8 of the Order-in-Appeal which reads:

> *"The appellants have produced voluminous documents in this regard viz. agreement copy of customer, title certificate, Commencement certificate, Occupation certificate, copy of letter towards submission under protest and paid challan copy, Service Tax returns, Architect certificate and BMC approved plan. However from all these documents, there is no way of knowing whether the complex consists of only 9 residential units. The approved plan shows that there are 13 floors with two refuge floors. It has not specified the number of flats in each floor or whether there is any other wing in the same complex. In absence of such information, it is not feasible to arrive at a conclusive finding that the complex indeed had less than 12 residential units and that the appellants have rightly claimed refund."*

From the above findings, it can be inferred that because of availability of 13 floors, learned Commissioner (Appeals) had failed to reach at a conclusion that the complex had less than 12 residential units to admit refund as the said was not taxable. However, going by the Architect certificate at annexure 3, floor plan referred above and the full occupation certificate issued by the Executive Engineer (building proposal) of the Municipal Corporation of Greater Mumbai dated 02.08.2013 would clearly indicate that the complex comprised of 9 residential units, taking each duplex to be counted as one unit. Therefore, the appellant is entitled to get the refund sought for. Hence the order.

ORDER

7. The appeal is allowed and the order passed by the Commissioner of GST & CX (Appeals-III), Mumbai *vide* Order-in-Appeal No. NA/GST A-III/MUM/390/17-18 dated 31.01.2018 is hereby set aside. Respondent-department is directed to refund Rs.45,13,475/- with applicable interest as per Section 11AA of the Central Excise Act, 1994 within 3 months of receipt of this order.

(Order pronounced in the open court on 09.12.2020)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad