CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

COURT HALL - I

Service Tax Appeal No.40035 of 2020

(Arising out of Order-in-Appeal No. 274/2019 (CTA – II) dated 25.9.2019 passed by the Commissioner of Central Tax (Appeals – II), Chennai)

M/s. Sandeep N Savani **Appellant**
D.No. M-36/4, 7th Cross Street
Besant Nagar
Chennai – 600 090.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai South Commissionerate
MHU Complex, 692, Anna Salai
Nandanam, Chennai – 600 035.

APPEARANCE:

Shri Sudhir, Chartered Accountant for the Appellant
Shri M. Ambe, DC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40391/2024

Date of Hearing : 02.04.2024
Date of Decision : 08.04.2024

Per P. Dinesha

This appeal is filed by the appellant against Order in Appeal No. 274/2019 (CTA – II) dated 25.9.2019 passed by the Commissioner of Central Tax (Appeals – II), Chennai.

2. Facts that emerge from the impugned order are that there was a development agreement dated 02.05.2008 between the appellant and the developer for

construction of residential complex/apartment, in terms of ₹29,31,752 was paid to the developer towards service tax. Believing that there was no tax liability, the appellant filed a refund application claiming refund of the above service tax paid to the developer, which resulted in the issuance of a show cause notice by the revenue. It appears that thereafter the case was taken up for adjudication and, per Order in Original No. 03/2019 (RF/RB)-Legacy dated 14.6.2019, the adjudicating authority rejected the claim for refund. It was the case of the original authority that the service tax was paid towards works contract service provided by the developer, which was very much in order.

3. Aggrieved by the above order, the appellant preferred an appeal before the first appellate authority and the FAA after hearing the appellant has vide Order in Appeal No. 274/2019 (CTA – II) dated 25.9.2019 rejected the appeal, thereby upholding the order of rejection. In the said order in appeal, the first appellate authority has held that the appellant was only a recipient of service, the construction activity was started by the developer from 31.5.2013, invoice was raised on 24.9.2015 and hence, in terms of point of taxation rules, 2011 the service was provided only after 01.07.2012. The FAA has also noted from the invoice issued by the developer that even the state VAT was also paid and that

the service tax was consequently paid at the applicable rate of service contract. The FAA thus concluded that the claim of the appellant that the construction carried out by the developer would fall under residential complex service since the argument that the number of units were less than 12, did not have any weight.

4. In a nutshell, it is the case of the revenue that plan approval having been obtained on 04.03.2013 and the construction activity having been commenced from 31.06.2013, explanation inserted to tax works contract service with effect from 01.07.2010 was very much applicable to the case of the appellant. It is against this order that the present appeal has been preferred by the taxpayer.

5. Heard learned Shri Sudhir, learned Chartered Accountant for the appellant and Shri M. Ambe, learned Deputy Commissioner (AR) for the respondent.

6. Per contra, Shri M. Ambe, learned Deputy Commissioner (AR) relied on the findings of the lower authorities.

7. We have considered the rival contentions, perused the orders of the lower authorities, we have also gone through the order of the Hyderabad Bench of this Tribunal in Vasantha Green Projects Vs. Commissioner of Central Tax reported in 2018-TIOL-1611-CESTAT-

HYD which was heavily relied upon by the learned Chartered Accountant.

8. After hearing both sides, we find that the only issue to be decided by us is, "whether the rejection of refund application by the revenue is in order?"

9. Facts are not in dispute; the appellant is a land owner, entered into a development agreement with the developer for construction of residential apartment consisting of G + 3 units, of which, two units/flats were allotted to the land owner and the remaining G +1 units to the developer. It is the case of the appellant that the development agreement which is the foundation, was entered into on 02.05.2008, which was much prior to the insertion of the explanation w.e.f. 01.07.2010.

10. The appellant also submitted that their case is supported by Notification No. 36/2010–ST dated 28.06.2010, which specifically exempted the tax liability on the amounts received prior to 01.07.2010 towards any service provided after that date; the Board had also issued a Circular No. 151/2/2012–ST dated 10.2.2012 clarifying that the consideration for the builder / developer is the land/ developmental rights. Further, tax of service of construction is to be determined at the time of receiving consideration itself, in terms of Rule 6 of the Service Tax Rules, 1994 and accordingly, the date of development agreement through which land /

developmental right were given to the developer shall be the date for determining the tax liability, if any, on the alleged construction service. It is their further case that even the definition of Residential complex is not satisfied since only a few, i.e., less than 12 units/flats were constructed and hence, for any levy, it should be a residential complex comprising more than 12 residential units/flats and therefore, there was no liability to service tax. Even otherwise, the development and construction of residential units was intended for personal use and hence, by virtue of clarification of CBEC circular No. 108/2/2009–ST, the construction for personal use would fall within the exclusion portion of the definition of residential complex as defined under section 65(91)(a) of the finance act 1994.

11. Reliance has been placed on a number of Orders of various CESTAT Benches in support. In the case of Ramaniyam Real Estates Pvt. Ltd. Vs. Commissioner of Service Tax, Chennai reported in 2018-TIOL-2560-CESTAT-MAD, Chennai Bench of CESTAT while dealing with a more or less similar issue, has examined the scope and applicability of CBEC Circular No.151/2/2012-ST dated 10.2.2012, provisions of S. 65(105)(zzzh) of the Finance Act, 1994 and also an order of co-ordinate Hyderabad Bench in the case of Vasantha Green Projects (supra) to hold that there was no service tax liability. For

convenience, the relevant portion of the above order is reproduced below: -

> "5.2 In this scenario, we find that there cannot be any tax liability on theappellants for the period prior to 1.7.2010, namely, when the amendments were caused in the relevant provisions relating to the construction of residential complex in the Finance Act, 1994. This is the view as clarified by the CBEC in their Circular No.151/2/2012-ST dt. 10.02.2012. The relevant portion of thecircular is reproduced as under :
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> "2.1 *Tripartite Business Model (Parties in the model :* (i) landowner; (ii) builder or developer; and (iii) contractor who undertakes construction) : Issue involved is regarding the liability to pay service tax on flats/houses agreed to be given by builder/developer to the land owner towards the land / development rights and to other buyers.
>
> *Clarification :* Here two important transactions are identifiable : (a) sale of land by the landowner which is not a taxable service; and (b) construction service provided by the builder/developer. The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers: (a) from landowner: in the form ofland/development rights; and (b) from other buyers: normally in cash.
>
> *(A) Taxability of the construction service :*
>
> (i) For the period prior to 1-7-2010 : construction service provided by the builder/developer will not be taxable, in terms of Board's Circular No. 108/2/2009-S.T., dated 29-1-2009 [2009 (13) S.T.R. C33]."
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> The Circular No.108/2/2009-ST dt. 29.01.2009 which has been reiterated in the aforesaid circular dated 10.02.2012, reads as under :
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> "Circular No. 108/2/2009-S.T., dated 29-1-2009
> F.No. 137/12/2006-CX.4
>
> Government of India
> Ministry of Finance (Department of Revenue)
> Central Board of Excise & Customs, New Delhi
>
> *Subject : Imposition of Service tax on Builders - Regarding.*

Construction of residential complex was brought under service tax w.e.f. 1-6- 2005. Doubts have arisen regarding the applicability of service tax in a case where developer/builder/promoter enters into an agreement, with the ultimate owner for selling a dwelling unit in a residential complex at any stage of construction (or even prior to that) and who makes construction linked payment. The „Construction of Complex" service has been defined under Section 65 (105)(zzzh) of the Finance Act as "any service provided or to be provided to any person, by any other person, in relation to construction of a complex". The „Construction of Complex" includes construction of a „new residential complex". **For this purpose, „residential complex" means any complex of a building or buildings, having more than twelve residential units**. A complex constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex intended for personal use as residence by such person has been excluded from the ambit of service tax.

2. A view has been expressed that once an agreement of sale is entered into with the buyer for a unit in a residential complex, he becomes the owner of theresidential unit and subsequent activity of a builder for construction of residential unit is a service of „construction of residential complex" to the customer and hence service tax would be applicable to it. A contrary view has been expressed arguing that where a buyer makes construction linked paymentafter entering into agreement to sell, the nature of transaction is not a service but that of a sale. Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. Ithas also been argued that even if it is taken that service is provided to the customer, a single residential unit bought by the individual customer would not fall in the definition of „residential complex" as defined for the purposes of levy of service tax and hence construction of it would not attract service tax.

3. The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of „agreement to sell". Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest

in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such saledeed would be in the nature of „self-service" and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of „residential complex". However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.

4. All pending cases may be disposed of accordingly. Any decision by the Advance Ruling Authority in a specific case, which is contrary to the foregoing views, would have limited application to that case only. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned."

5.3 From a combined reading of the provisions of Section 65 (105) (zzzh) of the Act as it was in force during the impugned period and the two Board"s circulars dt. 29.01.2009 and 10.02.2012, we are of the considered opinion that there cannot be any service tax liability in respect of the construction of flats provided by the appellants to the erstwhile 45 flat owners in lieu of their relinquishing their undivided share of land.

5.4 While arriving at these conclusions, we also draw sustenance from the decision of the Tribunal vide Final Order No.A/30559/2018 dated 11.05.2018 in the case of *Vasantha Green Projects Vs CCT Rangareddy GST* [Appeal No.ST/31095/2017], where on an identical issue it was held that the demand is not sustainable. The relevant portion of the order is reproduced as under:

"7. It has to be construed, in the above factual matrix, that constructionof villas for the land owners is a consideration towards the land on whichvillas

> were constructed and offered for sale to prospective customers. It would not be a rocket science to understand that the value which has been arrived at for sale of villas to prospective customers, would include the consideration paid or payable for acquisition of land. It is not a casethat appellant has not discharged the service tax liability on the value received for the villas from prospective customers. In our view, if the consideration towards the acquisition of the land has been included inthe value of the villas sold to prospective customers and appropriate service tax liability has been discharged the same value, it cannot be again made liable to service tax under the premise that sale value of thevillas given to land owners is a consideration on which service tax liability was not discharged. ”
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> 6. In view thereof, the impugned order cannot then be sustained and requires to be set aside, which we hereby do. Appeal is therefore allowed with consequential relief, if any, as per law.”
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> (emphasis applied)

12. Having considered rival contentions and after going through the orders relied upon, we find that there is no dispute that only four residential units / flats were constructed in this case on hand and hence, by virtue of this alone the case of the appellant does not get covered under the definition of residential units since the definition covers any complex of a building or buildings, having more than twelve residential units. Secondly, going by the ruling of the coordinate Hyderabad Bench, we are also of the view that there was no tax liability on the appellant for the impugned flats constructed prior to 01.07.2010, having less than 12 units / flats and hence, the refund claimed by the appellant was very much in order; the revenue has erred in rejecting the valid refund

claim and consequently, the impugned order cannot sustain.

13. Resultantly, we set aside the impugned order and allow the appeal with consequential benefits, if any, as per law.

(Order pronounced in open court on 08.04.2024)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

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