
(2011) 04 GUJ CK 0032
In the Gujarat High Court
Case No : Tax Appeal No. 1550 of 2010

Commissioner of Service Tax	Vs	APPELLANT
Sujal Developers		RESPONDENT

Date of Decision : 22-04-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 35G
Finance Act, 1994 — Section 65, 65(105)(zzq), 65(105)(zzzh), 65(91a), 83

Citation : (2013) 31 STR 523 : (2011) 46 VST 105

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : Kalpesh N. Shastri, for the Appellant; S.N. Soparkar with Mrs. Swati Soparkar and Ms. Bhoomi M. Thakore, for the Respondent

Final Decision : Dismissed

Judgement

Harsha Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944 (the Act), the appellant, Commissioner of Service Tax, Ahmedabad, has challenged the order dated July 3, 2009, made by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal), proposing to formulate the following two questions: (1) Whether the construction activity being performed/undertaken by M/s. Sujal Developers as a service to M/s. Saket III Co-operative Housing Society and its members, is a taxable activity or not?

(2) Whether the honourable CESTAT has committed error in interpreting the Board's Circular No. 108/2/009-ST dated January 29, 2009 by not distinguishing the case of Sujal Developers from term "developer" mentioned in Board's circular dated January 29, 2009 quoted supra, wherein Sujal Developers have particularly provided construction services to a housing society and no "sale" is involved as such?

The appellant has filed a consolidated appeal in respect of the common order made by the Tribunal in four appeals. In the circumstances, the present appeal is treated to be an appeal filed in respect of the show-cause notice dated January

17, 2007 which culminated into the order-in-original dated December 31, 2007, rejecting the refund claim of Rs. 74,970.

2. The respondent-Sujal Developers, a partnership firm which is engaged in construction activities, entered into an agreement with Saket III Co-operative Housing Society (hereinafter referred to as, "the society") for development of a piece of land owned by the society on April 21, 2005. In relation to development of the said land, the respondent paid service tax in the category of "construction of complex" for various periods. The present appeal pertains to the service tax paid for the period October 1, 2005 to October 31, 2005. Later on the respondent filed a refund claim on January 4, 2007 for Rs. 74,970 for the said period, contending that the services rendered by the petitioner did not amount to construction services in respect of residential complex services under the Finance Act, 1994 (the Act).

3. Pursuant to the refund application, a show-cause notice came to be issued to the claimant/respondent as to why: (A) the entire claim of Rs. 74,970 should not be rejected u/s 11B of the Central Excise Act, 1944 read with relevant provisions and section 83 of the Finance Act, 1994 as the said amount was towards liability of service provided for the category of "construction services" in respect of "residential complex service" as defined u/s 65(105)(zzq) of the Finance Act, 1994; and (B) any amount of service tax if sanctioned as refund should not be deposited in the Consumer Welfare Fund by invoking the provisions of "unjust enrichment" as per section 11B of the Central Excise Act, 1944 read with relevant provisions and section 83 of the Finance Act, 1994. The said show-cause notice culminated into an order in-original dated December 31, 2007, whereby the adjudicating authority rejected the refund claim of Rs. 74,970 filed by the respondent. Being aggrieved, the respondent went in appeal to the Commissioner (Appeals), who vide an order dated October 15, 2008, dismissed the appeal and upheld the order of the adjudicating authority. The respondent carried the matter in second appeal before the Tribunal and succeeded.

4. Mr. K.N. Shastri, learned standing counsel for the appellant submitted that the service tax with reference to services, viz., "construction of complex services" is applicable where there is service provider and service receiver. In the present case, the refund claimant, namely, the respondent is the service provider and the society and its members are the service receivers since the respondent, the society and its members are separate legal entities. It was submitted that the clarification issued by the Board on which reliance had been placed by the respondent, is that no tax is leviable where "sale" is involved, whereas in the instant case, there is no "sale" involved, but the respondent is providing service to the society and its members. Thus, the respondent being the service provider and the society and its members being the service receivers, the respondent had rightly paid the service tax in respect of the services rendered by it. It was submitted that the land in question belongs to the society and that the respondent had not sold the property to the society and its members, but only

rendered construction services on the land of the society as per the agreement. In the instant case, the refund claim filed by the respondent had rightly been rejected by the adjudicating authority, as confirmed by the Commissioner (Appeals), and that the Tribunal was not justified in holding that the transaction in question was not a taxable transaction. It was submitted that in the circumstances, the appeal gives rise to a substantial question of law, as proposed or as may be formulated by the court.

5. Opposing the appeal, Mr. S.N. Soparkar, learned senior advocate appearing for the respondent invited attention to the agreement for development between the society and the respondent, to submit that under the said agreement the respondent had not been engaged as a contractor for constructing residential premises for the society; and that under the said agreement the respondent had been assigned all the rights to develop the said land and sell the residential buildings. Thus, the society has not engaged the respondent-developer for construction work and the developer has undertaken the construction work on its own without engaging the services of any other person. In the circumstances, there is absence of a service provider and a service recipient.

6. Next it submitted that the said agreement makes it clear that the respondent is a developer who is developing the land in question and selling the buildings constructed thereon to the members of the society. The respondent is not a contractor who is executing the work of construction on behalf of the society and its members and as such, it cannot be said that the respondent is rendering any services as contemplated u/s 65(105)(zzq) of the Finance Act, 1994. It was submitted that the respondent not having provided any service, no service tax can be levied on the consideration received by the respondent from the members of the society. The learned counsel further submitted that the respondent was constructing residential complexes/units and allowing the members of the society to occupy and use the said premises, which docs not mean that the respondent had provided construction services to the members of the society. According to the learned counsel, the respondent had never rendered or intended to render any services to the members of the society, instead it was a simple deal of selling immovable properties to the members of the society. Neither the society nor the respondent provided any services to the members including the prospective members of the society.

7. Inviting attention to the impugned order of the Tribunal and more particularly to the clarification issued by the Board on January 29, 2001, it was pointed out that the Board had clarified that 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 itself create an interest in or charge on such property. The property remains under the ownership of the seller and 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 services provided by such seller in connection with the construction of residential complex till the execution of such sale deed, would be in the nature of "self-service" and consequently, would not attract service tax. The learned counsel submitted that in the present case, under the terms of the development agreement, the respondent was entitled to retain the full amount of collection received from the members after due payment of cost of land. In the circumstances, the respondent was developing the land and constructing residential buildings thereon which were being sold to the members by the respondent and as such, the service rendered by the respondent was in the nature of self-service and consequently, the same would not attract service tax. It was submitted that the impugned order of the Tribunal being just, legal and proper and in consonance with the statutory provisions as well as the clarification issued by the Board, does not warrant interference and as such the appeal deserves to be dismissed.

8. Sub-section (105) of section 65 of the Finance Act, 1994 defines "'taxable service" to mean any service enumerated thereunder. The taxable service as provided under clause (zzzh) thereof is "to any person, by any other person, in relation to construction of complex".

9. Section 65(91a) of the Finance Act, 1994 which defines "residential complex", reads as under:

(91a) "residential complex" means any complex comprising of-- (i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation.--For the removal of doubts, it is hereby declared that for the purposes of this clause,--

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;

10. Vide Circular F. No. 332/35/206/TRU dated August 1, 2006, the Board has issued various clarifications as regards legal position in respect of service tax. In respect of the issue as to whether service tax is applicable to a builder, promoter or developer, who builds a residential complex with the services of his own staff

and employing direct labour or petty labour contractors whose total bill does not increase 4 lacs in one P/Y, it has been clarified that in a case where the builder, promoter or developer builds a residential complex, having more than 12 residential units, by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay service tax on the gross amount charged for the construction services provided, to the builder/promoter/developer under "construction of complex" service falling u/s 65(105)(zzzh) of the Finance Act, 1994. It has been further clarified that if no other person is engaged for construction work and the builder/promoter/developer undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise. The Board, in the clarification dated January 29, 2001, which has also been reproduced by the Tribunal in the impugned order, has clarified that "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 itself create an 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 sale deed 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 situation, 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."

11. It may be noted that the Tribunal has passed a common order in appeals filed by two co-operative societies and the respondent who is a developer. In the consolidated order, the Tribunal has, upon appreciation of the evidence on record found that there is no dispute that the co-operative societies have not taken services of the contractor for construction of residential complex, but have chosen to construct complexes on their own. Where they have taken the service of the contractor, the society has handed over the land to the contractor and the contractor provides the service to the individual who purchases the residence. In all these cases, the transaction is between the members of the society and either the society or the developer. The Tribunal has referred to the circular issued by the Board on August 1, 2006 as well as clarification dated January 29, 2001 and

found that in absence of a contractor hired by the society and nature of the transaction between the parties and in the light of definition of "service" and its liability for service tax, the transaction in the present case cannot be considered taxable. The Tribunal, accordingly, allowed the appeal and remanded the matter to the original adjudicating authority in view of the fact that the aspect of unjust enrichment would have to be examined before granting refund and also for verification of the correctness of the claim.

12. From the statutory provisions, circulars as well as clarifications issued by the Board referred to hereinabove, it appears that for being chargeable to tax u/s 65(105)(zzzh) of the Act is that the person concerned should render service to another person in relation to construction of complex. Thus the basic requirement for falling within the ambit of the said provision is that there has to be a service provider and a service receiver. In the present case as noticed earlier, the land on which the residential complex has been constructed belongs to the society. The society has entered into a development agreement with the respondent. Under the agreement between the society and the respondent-developer, the work of construction and development of the housing project has been entrusted to the respondent. The respondent-developer has agreed to develop the said land by attending to construction and development work and to complete the scheme duly and diligently on the terms and conditions contained in the agreement. Under the agreement, the developer is required to carry out every act necessary to complete construction and development of the project directly or indirectly, which includes preparation and approval of plans, getting the buildings constructed directly or by sub-contracting and/or purchase of material, hiring labour, arrangement of finance, marketing and advertising the project, enrol members, collect money, etc. The respondent is permitted to use the property in question for the purposes mentioned in the agreement. The respondent is entitled to construct and/or arrange to construct the building as per the plan and specifications prepared by the architects. Thus, as per the agreement, the respondent-developer is entitled to make construction on the land in question, enrol members as well as collect amounts towards the units allotted to such members. The finances for the purpose of development are to be arranged by the respondent-developer. In the circumstances, from the development agreement, it does not appear that the respondent-developer is a contractor who is executing the construction work on behalf of the society. Here, the developer is using its own finances and developing the land in question and selling the property constructed thereon to the members of the society. Thus, in the light of the clarification issued by the Board, viz., when 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, in such a case, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed, would be in the nature of "self-service" and consequently, would not attract service tax.

13. In the facts of the present case, there is nothing to indicate that the respondent has been hired as a contractor by the society so as to bring the activities of the respondent within the ambit of taxable services as contemplated u/s 65(105)(zzzh) of the Act. In the absence of there being any service provider and service recipient in relation to the transaction in question, the Tribunal was justified in holding that the transaction in this case cannot be considered as taxable. In view of the foregoing discussion, it is not possible to state that the impugned order of the Tribunal gives rise to any question of law, as proposed or otherwise, much less a substantial question of law. The appeal is, accordingly, dismissed.