(2006) 03 MP CK 0039

In the Madhya Pradesh High Court

Case No : Writ Petition No. 3862 of 2006

Mahakaushal Builders Welfare Association — APPELLANT

Vs

Supdt. of Cus. and C. Ex. — RESPONDENT

Date of Decision : 14-03-2006

Acts Referred:

Citation : (2006) 03 MP CK 0039

Hon'ble Judges : A.K. Patnaik, C.J;Ajit Singh, J

Bench : Division Bench

Advocate : Summit Nema, for the Appellant; S.A. Dharmadhikari, Learned Counsel, for the Respondent

Judgement

A.K. Patnaik, C.J.—Heard Mr. Summit Nema, learned Counsel for the petitioners and Mr. S.A. Dharmadhikari, learned Counsel for Respondent.

2. The Petitioner No. 1 is an Association of Builders of Mahakaushal area and in this writ petition they have challenged the circular dated 16.2.2006 issued by the Director General of the Directorate of Service Tax, Mumbai to all authorities of Service Tax Act on the subject "Collection of Service Tax under construction of Complex services/commercial or Industrial Construction services".

3. Mr. Summit Nema, learned Counsel for the petitioner submits that a reading of the impugned circular would show that Service Tax is sought to be collected from the builders who are not actually providing service of construction of flats/ building but are in fact owners of the flats/building which they are constructing. He submitted that it is only in a case where the ownership of flat/building is of someone else that builder, can be said to be providing service of construction of flat/building and not otherwise. He argued that a reading of other impugned circular would show that reliance has been placed on the decision of Supreme Court in K. Raheja Development Corporation Vs. State of Karnataka, for levying service tax on builders for construction of flat/fulding. He submitted that the said decision of Supreme Court is on the definition of "works contract" for the purpose

of levy tax under the Sales Tax Act and has nothing to do with imposition of Service Tax on builders.

4. Mr. S.A. Dharmadhikari, learned Counsel for the respondents, on the other hand submitted that the law laid down by the Supreme Court in Raheja Development Corporation v. State of Karnataka (supra), though deals with the definition of "Works Contract" under the Karnataka Sales Tax Act, would also apply equally to decide the issue whether Service Tax can be imposed on builders for construction of flat/building.

5. We are for the considered opinion that this writ petition is premature as no assessment has yet been made against the petitioners making them liable for payment of service tax and no demands of Service Tax have been served on the petitioners. We are also told that only a show cause notice has been issued to the members of the petitioner Association. If the members of the petitioner Association are of the view that no service tax is payable for the activities undertaken by builders for construction of flat/building, they can file reply before the competent authority indicating clearly as to why their activities do not attract service tax. In case, the members of the petitioner Association take a stand in their replies that activities undertaken by them do not attract service tax, the Assessing authority will consider the said reply as well as the facts and the agreement between the builders and their prospective customers and decide the question of their liability for service tax strictly in accordance with the provisions of Finance Act, 1994 as amended by Finance Act, 2005 and any other law relating to service tax notwithstanding anything to the contrary in the impugned circular. This is because if the petitioners are not liable to pay tax, tinder the law relating to service tax, the impugned circular cannot create liability for payment of service tax.

In case, the petitioner will be aggrieved by the assessment or recovery that is made, it is open for the petitioners to move the appropriate forum including this Court for relief.

