(2014) 02 CESTAT CK 0004

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Stay Application No. 467, 521 Of 2012 In Appeal No. 224, 247 Of 2012

?M/s Lakhan & Qureshi Construction Company APPELLANT

Vs

CCE, Jaipur RESPONDENT

Date of Decision : 20-02-2014

Acts Referred:
Finance Act, 1994 — Section 65(105)(ZZZh), 65(30a), 65(91a), 75, 76, 77, 77(2), 78

Citation : (2014) 02 CESTAT CK 0004

Hon'ble Judges : G. Raghuram, J;Rakesh Kumar, Technical Member

Bench : Division Bench

Advocate : Bipin Garg, Amresh Jain

Final Decision : Allowed

Judgement

1. Since both the matters involved common point of dispute and similar facts, the same were heard together and are being disposed of by a common

order.

1.1 The facts leading to these appeals and stay applications are, in brief, as under.

1.2 A show cause notice dated 22/4/10 was issued to M/s Lakhan Qureshi Construction Company, Jaipur [hereinafter referred to as M/s Lakhan] for

demand of service tax amounting to Rs.2,32,69,541/- alongwith interest and also for imposition of penalty on them under Section 76, 77 and 78 of the

Finance Act, 1994. The show cause notice also sought appropriation of an amount of Rs.8,70,216/- already deposited by M/s Lakhan. The show cause

notice alleged that the appellant during the period from 2004-2005 to 2008-2009 have provided the service of construction of residential complex,

commercial and industrial construction service and work contract service on which they had not paid any service tax. The show cause notice was

adjudicated by the Commissioner vide order-in-original No. 51/2011 (ST)-COMMR. Dated 17/10/11 by which the Commissioner confirmed the

service tax demand of Rs. 61,27,811/- alongwith interest thereon and beside this, imposed penalties under Section 76 of the Finance Act, 1994. Though

the operative portion of the order is silent about the balance amount for recovery of which also M/s Lakhan had been show caused, from findings in

para 34 of the impugned order it appears that the rest of the amount whose demand has not been confirmed, pertains to the services which have been

held by him as non-taxable. Against this order of the Commissioner, the appeal No. ST/224 of 2012 has been filed alongwith stay application No.

ST/Stay/467 of 2012.

1.3 The show cause notice dated 02/7/10 was issued to M/s Gyarsi Lal Mohan Lal, 83, Karni Vihar, Ajmer Road, Jaipur (hereinafter referred to as

GLML] for recovery of service tax amounting to Rs.2,62,71,389/- from them alongwith interest thereon under Section 75 of the Finance Act, 1994 and

also for imposition of penalty on them under Section 76, 77 and 78 of the Finance Act, 1994. This show cause notice also proposed imposition of

penalty on Shri Rajendra Sharma, Partner M/s GLML under Section 77 (2) of the Finance Act, 1994. The show cause notice has been issued on the

basis of allegation that M/s GLML had during the period from 2004-205 to 2008-2009 been providing the taxable services of commercial and industrial

construction, construction of residential contract and work contract service on which the service tax had not been paid. This show cause notice was

adjudicated by the Commissioner, Central Excise, Jaipur-I vide order-in-original No. 67/2011(ST)-COMMR. Dated 23/11/11 by which he confirmed

the service tax demand of Rs.70,89,140/- alongwith interest and imposed penalty on the appellant under Section 76 of the Finance Act, 1994. Though

the operative portion of this order is silent about the rest of the amount of service tax demanded in the show cause notice, from the Commissioner's

finding, it appears the rest of the amount which has not been confirmed pertains to the services considered non-taxable by him. Against this order of

the Commissioner, appeal No. ST/247 of 2012 alongwith Stay Application No. ST/Stay/521 of 2012 have been filed.

1.4 Earlier the Tribunal vide ex-parte stay order No. ST/S/961 of 2012 dated

07/9/12 and No. ST/S/977 of 2012 dated 07 /09/12 had directed the pre-

deposit of Rs. 40,00,000/- within a period of four weeks from M/s GLML and pre-deposit of Rs. 30,00,000/- within a period of four weeks from M/s

Lakhan and compliance in both the cases was to be reported on 07/11/2012, and since the appellant did not comply with the order of pre-deposit, their

appeals were dismissed for non-compliance. Subsequently, miscellaneous applications were filed by both the appellants, and the dismissal orders were

recalled on 20/12/2013. Accordingly, the appeals as well as stay applications have been restored and have been listed for hearing. Though, today these

matters were listed for hearing of the stay applications, after hearing the same for sometime, the Bench was of the view, the same can be taken up

for final disposal. Accordingly, with the consent of both the sides, the matters were heard for final disposal.

2. Heard both the sides.

3. Shri Bipin Garg, Advocate, the learned Counsel for the appellants, pleaded that in both the cases, the appellant had constructed individual

independent houses for Rajasthan Housing Board, that construction of such houses is not covered by the construction of complex service as defined

under Section 65 (105) (ZZZh) readwith Section 65 (30a) and 65 (91a) of the Finance Act, 1994 and in this regard judgments of the Tribunal in the

cases of Macro Marvel Projects Ltd. vs. CST, Chenna ireported in 2008 (12) S.T.R, 603 (Tri. - Chennai) and Vinod Kumar Goyal vs.

CCE, Jaipur - I reported in 2011 (23) S.T.R. 30 (Tri. - Del.) had been cited but the Commissioner did not give any finding on this issue, that the

judgment of the Tribunal in the case of Macro Marvel Projects Ltd. vs. CST, Chennai (supra)has been affirmed by the Apex Court vide

judgment reported in 2012 (25) S.T.R. J154 (S.C.) by which the Apex Court had dismissed the civil appeal filed by the Government against the

Tribunal's judgment and that in view of this, the impugned orders are not sustainable.

4. Shri Amresh Jain, the learned DR, defended the impugned orders by reiterating the findings of the Commissioner. He, however, conceded that in

both the cases, though the appellant's plea regarding construction of individual houses and the judgments of the Tribunal in the case of Macro Marvel

Projects Ltd. vs. CST, Chennai (supra) and Vinod Kumar Goyal vs. CCE, Jaipur - I (supra)had been taken note of by the Commissioner, he

neither examined this plea nor has given any finding in respect of the same.

5. We have considered the submissions from both the sides and perused the records.

6. The main plea of the appellant is that the residential units constructed by them were individual independent houses for Rajasthan Housing Board and

the same were not covered by the definition of 'residential complex' as given in Section 65 (91a) of the Finance Act, 1994 and, hence, the services

provided by the appellant was not taxable under Section 65 (105) (ZZZh) of the Finance Act, 1994 readwith Section 65 (30a) and Section 65 (91a) ibid

and in this regard the appellant had cited the judgments of the Tribunal in the case of Macro Marvel Projects Ltd. vs. CST, Chennai (supra)and

Vinod Kumar Goyal vs. CCE, Jaipur - I (supra,) and as mentioned above, the judgment of the Tribunal in the case of Macro Marvel Projects

Ltd. vs. CST, Chennai (supra) has been affirmed by the Apex Court as civil appeal filed by the Government against this order has been dismissed

and, hence, the same has become a binding precedent. However, we find that on this point there is absolutely no finding of the Commissioner. The

Commissioner has not given any finding on the place of the appellants as to whether the houses constructed by them were independent houses not

covered by the definition of residential complex as given in Section 65 (91a) of the Finance Act, 1994, and whether the judgments of the Tribunal in

the case of Macro Marvel Projects Ltd. vs. CST, Chennai (supra)and Vinod Kumar Goyal vs. CCE, Jaipur - I (supra)are applicable to the

facts of this case. In view of this, the impugned orders are set aside and the matters are remanded to Commissioner for denovo adjudication after

considering the please of the appellants that the residential units constructed by them were individual independent houses not covered by the definition

of 'residential complex' as given in Section 65 (91a) of the Finance Act, 1994, in view of the judgments of the Tribunal, as mentioned above. The

appeals as well as stay applications stand disposed of, as above.

(Operative part of the order pronounced in the open court.)

