(2024) 05 CESTAT CK 0039

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 40925 Of 2013

M/S.Helios Estates Pvt. Ltd — APPELLANT

Vs

Commissioner Of CGST & Central Excise — RESPONDENT

Date of Decision : 30-05-2024

Acts Referred:

Finance Act, 1994 — Section 30(a), 65, 65(91a), 65(105), 65(105)(zzzh)

Citation : (2024) 05 CESTAT CK 0039

Hon'ble Judges : Sulekha Beevi.C.S., Member (J);Vasa Seshagiri Rao, Member (T)

Bench : Division Bench

Advocate : V. Vijay Anand, R. Rajaraman

Final Decision : Allowed

Judgement

Sulekha Beevi.C.S., Member (J)

1. Brief facts are that the appellant is engaged in providing residential, commercial and industrial construction services and is registered with the department. During the course of verification of ST returns filed by the appellant, it was noted that the appellant has paid service tax upto January 2009. However, they did not pay the service tax on the taxable value realized from customers from January 2009 onwards. It appeared that they stopped paying service tax with effect from February 2009 consequent to issuance of CBEC circular No.108/2/2009-ST dt. 29.01.2009. The Department was of the view that the services provided by the appellant being construction of residential complexes falls under 'Works Contract Service' and that the appellant is required to pay service tax for the period from 1.2.2009 to 30.09.2009. Show cause notice was issued to the appellant proposing to demand service tax along with interest and for imposing penalties. After due process of law, the original authority confirmed the demand, interest and imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

2. The Ld. Consultant Shri V. Vijay Anand appeared and argued for the appellant. It is submitted that the appellant is a promoter / developer / builder and is engaged in construction of residential complexes. For this, the appellant after identifying the land and land owner, arranges registration of undivided share of the land for each of the prospective buyer. They entered into separate agreements with prospective flat buyers for construction of flat in the complex and provided for construction on linked payments. After the flats are constructed, the same is handed over to the buyer without any sale deed / agreement. The sale deed is executed only for the undivided share of land and no sale seed is executed for the completed constructed flat. The activity of the appellant is in the nature of promoter / developer and provided services to prospective customers. They received payment from the prospective customers by way of instalments.

3. Board vide Circular No. 108/2/2009-ST dt. 29.01.2009 has clarified that promoter / builder / developer is not liable to pay service tax upto 1.7.2010. The appellant had stopped paying service tax in accordance with the circular and therefore show cause notice issued proposing to demand service tax cannot sustain.

4. The Ld. Consultant adverted to the decision of the Tribunal in the case of Krishna Homes Vs CCE Bhopal - 2015 (34) STR 881 (Tri.-Del) to argue that the demand raised against the promoter / builder / developer for construction of residential complexes was set aside after referring to the Board's circular (supra). The said circular clarified that the builder / promoter / developer is not liable to pay service tax for construction of residential complexes. Ld. Consultant prayed that the appeal may be allowed.

5. Ld. A.R Shri R. Rajaraman appeared for the Department. The findings in the impugned order was reiterated.

6. Heard both sides. The issue that arises for consideration is whether the demand raised under 'Works Contract Service' against the appellant who is promoter / developer for the period prior to 1.7.2010 for construction of residential complexes is sustainable or not.

7. The Board vide its Circular No.108/2/2009-ST dt. 29.01.2009 has clarified that the promoter / builder / developer is not required to pay service tax for the construction of residential complexes. The Board's circular has been considered by the Tribunal in the case of Krishna Homes Vs CCE (supra) wherein it has been held that the demand cannot sustain. The relevant para of the decision reads as under :

"8. Coming first to the question as to whether the activity of M/s. Krishna Homes and M/s. Raj Homes was taxable during the period of dispute or not, by Finance Act, 2005, Clause (zzzh) was introduced into Section 65(105) of Finance Act, 1994, so as to bring within the purview of the term 'taxable service', a service provided or to be provided to any person by any other person "in relation to construction of complex". The expression "construction of complex" was defined in sub-section (30a) of Section 65 and accordingly this expression covered - “(a) construction of a new residential complex or a part thereof or (b) completion of finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or (c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex”. The expression residential complex was defined in Section 65(91a) of the Finance Act, 1994 as 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 any authority under 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”. There is no dispute that the complex constructed by both the assessees in these appeals are covered by the definition of “residential complex” as given in Section 65(91a). There is also no dispute that both the assessees had engaged contractors for construction of the complexes. The dispute in these appeals is as to whether the assessees would be liable to pay Service Tax on the amounts charged by them from their customers with whom they had entered into agreements for construction of the residential units and whose possession was to be handed over on completion of the construction and full payment having been made by the customers. It is seen that on this point, the Tax Research Unit of the Central Board of Excise & Customs, which is a wing of the C.B.E. & C. dealing with legislation work, had vide Circular No. 332/35/2006-TRU, dated 1-8-2006 clarified that in case where a builder, promoter, 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 service provided to the builder/promoter/developer under construction of complex service falling under Section 65(105)(zzzh) of the Finance Act, 1994 and that if no person is engaged by the builder, promoter, developer for construction work who undertakes construction work on his own without engaging the services of any other person than in such cases, in absence of the service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise. W.e.f. 1-7-2010 an explanation was added to Section 65(105)(zzzh) which was as under :-

“Explanation. - For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorized by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer."

Thus, in terms of this explanation, when a builder/promoter/developer got a residential complex constructed for his customers with whom he had individually entered into agreements, in terms of which the prospective customers were required to make payments for the residential units to be constructed in instalments and the possession of the residential units was to be given to the customers on completion of the complex and full payment having been made, the builder/promoter/developer was to be treated as a deemed provider of construction of residential complex service to his customers. Thus, by this explanation, the scope of the Clause (zzzh) of Section 65(105) has been expanded and this amendment by adding an explanation has been held by this Tribunal in the case of CCE, Chandigarh v. U.B. Construction (P) Ltd. (supra) as prospective amendment. In this regard, para 5 of this judgment is reproduced below :-

"5. In Maharashtra Chamber of Housing Industry v. Union of India - 2012 (25) S.T.R. 305 (Bom.), the validity of the 'Explanation' added to Sections 65(105) (zzq) and (zzzh) was challenged on several grounds. The Bombay High Court, also considered the issue whether the explanation was prospective or retrospective in operation and ruled that the explanation inserted by the Finance Act, 2010 brings within the fold of taxable service a construction service provided by the builder to a buyer where there is an intended sale between the parties whether before, during or after construction; that the 'Explanation' was specifically legislated upon to expand the concept of taxable service; that prior to the explanation, the view taken was that since a mere agreement to sell does not create any interest in the property and the title to the property continues to remain with the builder, no service was provided to the buyer; that the service, if any, would be in the nature of a service rendered by the builder to himself; that the explanation expands the scope of the taxable service, provided by builders to buyers pursuant to an intended sale of immovable property before, during or after the construction and therefore the provision is expansive of the existing intent and not clarificatory of the same; and is consequently prospective".

8. The Tribunal in the case of vide Final Order No.40539/2024 dt. 10.05.2024 had occasion recently to consider a similar issue and set aside the demand holding that the promoter / builder / developer is not required to pay service tax prior to 1.7.2010. The Tribunal had also referred to the Explanation added to Section 65 (105) (zzzh) which was introduced w.e.f. 1.7.2010 which stated that the builder / promoter / developer is not liable to pay service tax for construction of residential complex for the period prior to 1.7.2010. Following the said decision, we are of the considered opinion that the demand of service tax cannot sustain. The impugned order is set aside. The appeal is allowed with

consequential reliefs, if any.