

(2015) 01 MAD CK 0019

In the Madras High Court

Case No : Civil Misc. Appeal No. 3470 of 2014 and M.P. No. 1 of 2014

Southern Properties & Promoters

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 23-01-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35

Finance Act, 1994 — Section 65, 65(105)(zzzh), 65(105)(zzzza), 73(1), 73(2)

Citation : (2015) 52 GST 413 : (2015) 40 STR 892

Hon'ble Judges : R. Sudhakar and R. Karupiah, JJ.

Bench : Division Bench

Advocate : S. Durairaj, for the Appellant; A.P. Srinivas, Standing Counsel, for the Respondent

Judgement

R. Sudhakar, J.—This Civil Miscellaneous Appeal is filed by the assessee as against the Misc. Order No. 41761 of 2014, dated 16.10.2014 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai raising the following substantial questions of law:

"1. Whether pre-deposit can be ordered under Section 35 of the Central Excise Act, 1944 by bypassing the provisions of Section 67(1)(i), Section 67(1)(ii) and Rule 2A(i)(b) of the Service Tax (Determination of Value) Rules, 2006, which is also the method prescribed by the Hon"ble Supreme Court?

2. Whether pre-deposit can be ordered under Section 35 of the Central Excise Act, 1944 by relying on a rule, which the Government itself has accepted that it is an inadvertent rule, which is against the statutory provisions and subsequently amended the said rule?"

The brief facts of the case are as follows:

"The appellant is providing taxable service under the category of "Construction of Residential Complex Service". They entered into a joint venture agreement with a land owner for construction of 72 flats in three blocks, viz., 24 flats in each

block. The appellant, by virtue of the joint venture agreement, owned 48 flats and the land owner owned the remaining 24 flats as his share equivalent to the land. It is not in dispute that the appellant paid service tax on the sale of 48 flats to independent third parties after claiming the benefit of abatement as provided under Notification No. 1/2006-ST , dated 01.03.2006. But they failed to pay service tax on the cost of 24 flats alleged to be the share of the land owner and the reason stated by the appellant was that they had not received any amount from the land owner for the construction of the flats allotted to them. Hence, show cause notice was issued on 11.02.2011 demanding service tax of Rs. 27,19,581/- in terms of proviso to Section 73(1) of the Finance Act, 1994; interest in terms of Section 75 of the Finance Act, 1994 and penalty under Sections 76 and 78 of the Finance Act, 1994."

2. In response to the show cause notice issued, the appellant filed a reply stating that since they did not pay any amount to the land owner towards the land cost, they had not paid service tax for the flats held by the land owner. The appellant further submitted that they had paid the service tax in respect of the flats sold to third parties and they had not suppressed the land owner's share. Hence, they requested to drop the proceedings.

3. After analysing the reply filed by the appellant and after affording personal hearing to the appellant, the Adjudicating Authority adjudicated the case and came to hold that the classification of the service provided by them was not in dispute. In so holding the Adjudicating Authority further held as follows:

"I observe that it is the "SPP" who provided the service of construction of flats by virtue of entering into a "JVA". As per Section 65(105)(zzzh) of the Act, taxable service means "any service provided or to be provided to any person in relation to construction of complex". The phrase "any service" in relation to construction of residential complex service is wide enough to cover all services including construction service."

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(f) Further, in the finance act, 2010 communicated vide Board's DOF No. 334/1/2010-TRU, dated 26/02/2010, in order to achieve the legislative intent and bring in parity in tax treatment, an Explanation to sub-clause to Section 65(105)(zzzh) of the Act had been inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after completion of construction (including its certification by local authorities), the activity of construction would be deemed to be a taxable service provided by the builder or promoter or developer to be the prospective buyer and the service tax would be charged accordingly. The above Explanation to sub-clause to Section 65(105)(zzzh) of the Act has applicability from the date of existence of the Section and hence is having retrospective effect from 16/06/2005. Therefore, I observe that all the earlier Board's Circulars are to be read with the above Explanation."

(Emphasis Supplied)

4. Accordingly, the Adjudicating Authority, overruling the objections made by the appellant, confirmed the demand made in the show cause notice, which reads as follows:

"(i) The extended period has been rightly invoked for demand on the subject service tax under the proviso to Section 73(1) of the Finance Act 1994;

(ii) I confirm the demand for payment of an amount of Rs. 27,19,581/- (Rupees twenty seven lakhs nineteen thousand five hundred and eight one only) (Service Tax: Rs. 26,40,370/- + Edu. Cess; Rs. 52,807/- + SHE Cess: Rs. 26,404/-) from M/s. Southern Properties & Promoters, Coimbatore - 28 under Section 73(2) of the Finance Act 1994 read with the proviso to Sections 73(1) *ibid*;

(iii) I also confirm the demand of appropriate interest as applicable from them on the above demand under Section 75 *ibid*;

(iv) I also impose a penalty of Rs. 27,19,581/- (Rupees twenty seven lakhs nineteen thousand five hundred and eight one only) on the under Section 78 *ibid*;

(v) I refrain from imposing penalty under Section 76 of the Finance Act 1994 for the reasons mentioned in para 7.3(a) above;"

5. Aggrieved by the said order of the Adjudicating Authority, the appellant preferred an appeal before the Commissioner (Appeals), who upheld the order of the Adjudicating Authority, thereby dismissed the appeal filed by the appellant.

6. As against the said order of the Commissioner (Appeals), the appellant preferred further appeal before the Tribunal along with an application for waiver of pre-deposit.

7. The contention of appellant before the Tribunal was that the appellant had not received any consideration in the form of money in respect of 24 flats handed over to the land owner and therefore tax should be demanded on the basis of the cost of land.

8. Before the Tribunal, the plea of the Department was that the value of taxable service should be equivalent to the gross amount charged by the appellant to provide construction of the similar 48 flats. For better clarity, the contention of the Department before the Tribunal is extracted hereunder:

"3. On the other hand, the Ld. AR on behalf of the Revenue reiterates the findings of the Commissioner (Appeals). He drew the attention of the Bench to Rule 3 of the Service Tax (Determination of Value) Rules, 2006. He submits that the value of such taxable service shall be equivalent to the gross amount charged by the applicant to provide construction of the similar 48 flats. He relied upon the decision of the Tribunal in the case of Prince Foundation Ltd. v. CST Chennai - , 2014 (33) STR 448 (Tri. - Chen.) , where stay was granted partially."

9. After hearing both sides, the Tribunal on a consideration of Rule 3 of the Service Tax (Determination of Value) Rules, 2006, which provides the manner of determination of value in respect of taxable service, namely, the service defined under Section 65(105)(zzzh) of the Finance Act, 1994 came to hold that the value of taxable service should be equivalent to the gross amount charged by the service provider to provide similar service to any other person, that is to say, the value of taxable service rendered in relation to the flats sold to independent persons. Accordingly, the Tribunal held that the appellant has failed to make out a prima facie case for waiver of pre- deposit of entire amount of duty along with interest and penalty and directed to make a pre-deposit of Rs. 12.00 lakhs.

10. Aggrieved by such order of pre-deposit, the appellant is before this Court raising the above-mentioned substantial questions of law.

11. Learned counsel appearing for the appellant submitted that appellant would be entitled to the benefit of Notification No. 29/2007-ST, dated 22.05.2007, since the said Notification relates to the taxable service relatable to Section 65(105) (zzzza) of the Finance Act, 1994 whereas, the Adjudicating Authority classified the taxable service rendered by the appellant under Section 65(105)(zzzh) of the Finance Act, 1994. Hence, the order of the Tribunal has to be set aside.

12. Per contra, learned Standing Counsel appearing for the Revenue supporting the order of the Tribunal submitted that the services rendered by the appellant falls under Section 65(105)(zzzh) of Finance Act, which was not disputed by the appellant before the Adjudicating Authority. Section 65(105)(zzzza) of the Finance Act relates to works contract. He further submitted that though the residential units constructed by the appellant were shared between the land owner and the appellant, the payment of service tax is vested with the appellant only, since the appellant had rendered the service as service provider or developer of the project. Hence, the services rendered by the appellant fall under the category of "Construction of Residential Complex Service", defined under Section 65(105)(zzzh) of the Finance Act, 1994.

13. Heard learned counsel appearing for the appellant and learned standing counsel appearing for the Department and perused the materials placed before this Court.

14. Before going into the merits of the case, it is necessary to look into the provision to decide the issue raised in this appeal.

15. Section 65(105)(zzzh) of Finance Act, 1994 defines "taxable service", which reads as follows:

"65 (105) "taxable service" means any service provided or to be provided --

(a)** ** *

(zzzh) to any person, by any other person, in relation to construction of complex"

16. Learned counsel appearing for the appellant submitted that Section 65(105)

(zzzza) of the Finance Act will apply to the case and not 65(105)(zzzh) of the Finance Act, 1994. Section 65(105)(zzzza) of the Finance Act, 1994 reads as follows:

"65 (105) "taxable service" means any service provided or to be provided --

(a)** ** **

(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams."

17. From a reading of the above-said provisions, it is clear that Section 65(105) (zzzh) of the Finance Act, 1994 relates to construction of complex, whereas Section 65(105)(zzzza) of the Finance Act, 1994 relates to works contract. It is not in dispute that the appellant is engaged in the promotion and construction of residential complexes and not engaged in works contract. It is relevant to note that the plea now taken by the learned counsel appearing for the appellant that the appellant is entitled to the benefit of Notification No. 29 of 2007 dated 22nd May, 2007 has not been taken by the appellant either before the Adjudicating Authority or before the Commissioner (Appeals).

18. Prima facie, we are not inclined to entertain this appeal, in view of the specific admission by the appellant before the Adjudicating Authority that the services rendered by the appellant would fall under Section 65(105)(zzzh) of the Finance Act, 1994. Notification No. 29 of 2007 dated 22nd May, 2007 relates to taxable service falling under Section 65(105)(zzzza) of the Finance Act, 1994. Even otherwise, the language of Section 65(105)(zzzh) and the nature of the services provided by the appellant is construction of flat to the land owner and the transfer of land is only for the purpose of providing such taxable service, we fail to understand as to how the appellant would say that there is no liability to pay service tax in respect of 24 flats handed over to the land owner after rendering taxable service as defined under Section 65(105)(zzzh) of the Finance, 1994. If there is no monetary consideration in the transaction, then Section 65 of the Finance Act, 1994 provides for various methods for valuation. Hence, it is for the appellant to establish that his plea that the value of the land should be taken into consideration is a matter for the Tribunal to decide on merits at the time of hearing of the appeal.

19. At the first blush, we are not inclined to accept the plea of the Department that the case in respect of valuation, it may fall under Rule 2 or 3 of Valuation Rules and the amendment made in the year 2012. We are not inclined to go into the effect of amendment as pleaded by the Standing Counsel and we are not inclined to make any observation as that would influence the mind of the Tribunal as to the applicability of such Rule on the merits of the case. We find that the Tribunal is justified in ordering pre- deposit of Rs. 12.00 lakhs as against the demand of Rs. 27.00 lakhs in an admitted case of the appellant providing taxable service, more so, in a case where the appellant failed to pay service tax in

respect of even the admitted tax. We find no reason to entertain this appeal. Accordingly, we find no question of law much less any substantial question of law arises for consideration in this appeal. Accordingly, this Civil Miscellaneous Appeal stands dismissed. No costs. Consequently, M.P. No. 1 of 2014 is also dismissed.