IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH, NEW DELHI

Date of Hearing/Decision: 17.07.2017

Service Tax Appeal No. 60192-60195 of 2013

[Arising out of Order-in-Appeals No. 130(ST)/RPR-I/2013 for Appeal No. ST/60192/2013-ST[DB], Order-in-Appeal No. ST/60193/2013-ST[DB] for Appeal No. ST/60193/2013-ST[DB], Order-in-Appeal Bo. 132(ST)/RPR-I/2013 for Appeal No. ST/60194/2013-ST[DB], Order-in-Appeal No. 133-ST-RPR-I-2013 for Appeal No. ST/60195/2013, all dated 05.08.2013 passed by the Commissioner (Appeals), Commissioner of Customs & Central Excise, Raipur]

Chhatisgarh Housing Board — Appellant

Vs.

C.C.E. & S.T. – Raipur — Respondent

Appearance:

None for the Appellant
Shri Sanjay Jain, AR for the Respondent

Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. B. Ravichandran, Member (Technical)

Per B. Ravichandran:

These 4 appeals are on a common dispute and are accordingly taken up together for disposal. The brief facts of the case are that the appellants are engaged in construction and civil works. They are registered with the department to discharge Service Tax under the taxable category of construction of complex services. The appellant is established by the State Government under Chattisgarh Housing Board Act 1972. The appellants discharge Service Tax for the taxable services provided during the period July 2010 to December 2012. They have paid the amount under protest and later filed claims for refund. The original authority

examined these claims and rejected the same as not admissible. On further appeal, the Commissioner appeals vide the impugned orders upheld original orders and rejected the appeals. Aggrieved by these orders, the appellant preferred the present appeals.

2. The learned council appearing on behalf of the appellant submitted on the following grounds:

a) There is no demand for confirmation of Service Tax liability in terms of section 73 of the Finance Act, 1994. The present proceedings are with reference to claims filed by the appellant for refund of Service Tax which are not liable to be paid by the appellants. As such the tax liability cannot be subject matter of the refund proceedings.

b) The appellants are organization created by an act of legislature. They are performing the functions statutorily mandated by the law. Relying on the clarification of CBEC dated 23.08.07, it is submitted that activities assigned to and performed by the sovereign/public authorities are under the provisions of any law or statutory duties. Such activities are purely in public interest and are undertaken as mandatory and statutory functions. These are not services provided for consideration and are accordingly not to be taxed.

c) The appellant cannot be called as a builder. They are not undertaking any commercial activity. They operate on “no profit, no loss” basis.

d) Houses constructed by the appellant are individual residential units not liable to Service Tax. Reliance was placed on the decision of Tribunal in Macro Marvel Projects Ltd. 2008(12) STR 603 (Tribunal Chennai).

e) Refund claims cannot be denied on procedural lapses. Relying on various decided cases, it is submitted that substantial benefit of the refund claimed cannot be denied on certain minor procedural lapses. The appellants had provided full particulars of tax payment.

f) The appellant cannot be put to Service Tax liability as the actual construction work was carried out by the contractors, to whom work orders were issued. These contractors have discharged Service Tax which was reimbursed, based on challans furnished by the contractors. When the taxable service has already suffered tax and the same has been reimbursed by the appellants as service receivers, there can be no tax liability on the appellant.

g) There is no undue enrichment in the present case as the appellants have borne tax liability fully. The Service Tax amount was paid under protest and all documents have been submitted in support of the client.

3. The learned AR submitted that there is no exemption available to the appellant for construction of residential complex. Though, the appellants were created through an act of legislature, the services rendered by them are liable to tax, as the activities cannot be considered as sovereign/statutorily mandated duty.

Further, the amount collected for such services is not in the form of a statutory fee to be credited to the Government. Regarding the construction of individual houses, it is submitted that when a residential complex, consisting of many houses, share common facilities, the same is covered by the tax entry. Admittedly, the appellants have collected Service Tax from the buyers of the residential units, and the claims are hit by principle of unjust enrichment.

4. We have heard both the sides and perused the appellant's records.

5. In our opinion, one important issue has been raised by the appellant which was not duly considered by the lower authorities for a finding. The appellants claimed that they have not undertaken any construction activity of residential units. The entire work of construction is entrusted to the contractors through tender process. The appellants neither have infrastructure, nor the work force required for construction activities. They were collecting only certain supervision/contingency charges from the allottees of the houses. The land and construction cost is recovered from the allottees on cost basis. The appellants are not adding any value to the construction work done by the contractors. One of the important pleas made by the appellant is that the contractors, who actually undertake the construction work duly discharged the Service Tax liability as per law and the appellant reimbursed the amount of Service Tax deposited by the contractors, based on the Service Tax challans furnished by the contractors. Based on these assertions, the appellant claimed that no Service Tax liability can be fixed on the appellant again as they have not provided any construction services.

6. In principle, we are in agreement with the preposition made by the appellants. If the construction activity is in effect carried out by the contractors in terms of an agreement with the appellants, it will be the contractors who will be considered as service providers. The appellant will be service recipient. The appellants monitor the construction and managed the allotment and sale of these constructed houses. In our opinion, this by itself does not make the appellant as a provider of construction service. This aspect has not been examined by the lawyer authorities. We find substantial force in the plea of the appellant on this ground. As such, we find it fit and proper to set aside the impugned orders and remand the matter to the original authority fir a fresh decision. The original authority should examine the above legal issue after verifying the facts like contract details and payment of Service Tax for the construction activity by the contractors before taking a fresh decision. The appellant shall be provided adequate opportunity to submit all document and evidences in support of the above assertions. In case it is established by supporting evidence that the construction activities were in fact carried out by the contractors and such contractors have discharged applicable Service Tax on such work, there can be no liability to Service Tax on the appellant for the same work.

7. On the question of unjust enrichment, we note that the appellants admitted to have collected Service Tax from the allottees of houses and retained the same. However, there submission is that they have shown these amounts in their books of account as “refundable to an allottee”. We note that the legal provisions for unjust enrichment are to be applied to the present case and the decision has to be arrived

by the original authority as to whether the appellant has discharged his obligations in this regard. Prima facie, we note that if the appellant collected the case and kept with them, the bar of unjust enrichment will apply. As stipulated in the legal provisions of section 11B of the Central Excise Act 1944 made applicable to Service Tax, the question of unjust enrichment may also be examined afresh by the original authority.

8. In view of the above discussion and analysis, we set aside the impugned order and remand the matter to the original authority for a fresh decision. Appeals are allowed by way of remand.

[Pronounced in Court on 21.12.2017]

(Justice (Dr.) Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

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