

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
SOUTH ZONAL BENCH  
BANGALORE**

Appeal(s) Involved:

**ST/126/2009-DB**

[Arising out of Order-in-Original No. 71/2007 dated  
10/07/2007 passed by Commissioner of Service Tax, Service  
Tax Commissionerate, Bangalore]

**Prestige Estates Projects Pvt Ltd**

The Falcon House, No.1,  
Main Guard Road Cross Road,  
Bangalore-560001

Appellant(s)

**Versus**

**Commissioner Of Central Tax,  
Bangalore North**

No-59, HMT Bhawan  
Ground Floor, Bellary Road  
BANGALORE  
KARNATAKA  
560032

Respondent(s)

**Appearance:**

**V. RAGHURAMAN, Advocate**

#466, 9TH CROSS,  
1ST BLOCK, JAYANAGAR, NEAR MADHAVAN  
PARK,  
BANGALORE  
KARNATAKA  
560011

For the Appellant

**Mr. Pakshirajan, AR**

For the Respondent

Date of Hearing: 29/08/2018

Date of Decision:05/09/2018

**CORAM:**

**HON'BLE SHRI S.S GARG, JUDICIAL MEMBER**

**HON'BLE SHRI P.ANJANI KUMAR, TECHNICAL MEMBER**

**Final Order No.21313/2018**

**Per : P.ANJANI KUMAR**

M/s. Prestige Estates Projects (P) Ltd. (the appellants)  
are real estate developers. They are engaged primarily in

rendering services of development of residential and commercial buildings and also render real estate services. The Department has issued a SCN C.No. IV/16/66/30/2005 dated 27/09/2005 to the appellants alleging that the appellants did not discharge their Service Tax liability on the following services during the period 2000-01 to 2004-05:

- (i) Consultancy in real estate services.
- (ii) Managing projects of M/s. Mckino & M/s. Axa Business.
- (iii) Assignment & transfer income.
- (iv) Assessment & bifurcation fees Khata transfer fees.
- (v) Forfeiture of amounts received.

The SCN was confirmed by the Commissioner, Service Tax Bangalore vide Order No. 24/06 dated 07.07.2006. On an appeal filed by the appellants, the Tribunal has remanded back the case to the Commissioner with a specific direction to analyze the matter within the ambit of definition of 'Real Estate Services' vis-a-vis 'construction of residential and complex services' vide Final Order No. 136/2007 in de novo proceedings. Commissioner has confirmed the demands once again vide OIO No. 71/2007 dated 10.07.2007. Hence, this appeal.

2. The learned counsel for the appellants has submitted that the onus to establish the fact that appellant has rendered real estate agent service, if any, was on the Revenue. In the instant case, the Revenue has simply stated that the services falls under category of 'real estate agent services' without adducing even an iota of evidence to support their contention. Real Estate Agent and Real Estate Consultants Services were introduced from the year 1998 and in terms of Trade notice No. 05/98 dated 14.10.1997, the scope was clarified. It was clarified that only realty services are covered under the said entry and construction activity carried out by developers does not attract Service Tax under the said entry. Assessment and bifurcation fees in respect of Khata transfer, assignment and transfer and forfeiture of deposits are collected by appellants during the course of construction and sale of apartments from the buyers and these cannot be treated as realty services to be covered under the said entry. They relied upon the following case laws:

**(i) CCE. Ludhiana Vs. M/s. Grewal Builder Pvt. Ltd.  
2015 (8) TMI 448 (Tri. Del.).**

**(ii) RIICO Ltd. Vs. CCE, Jaipur 2018 (10) GSTL 92  
(Tri. Del.).**

***(iii) CST Vs. M/s. Ansal Properties and Infrastructure Ltd. 2018 (8) GSTL 58 (Tri. Del.).***

2.1 The learned counsel submitted that the construction service provided by the builder/developer was not liable to Service Tax in terms of Board's Circular No. 151/2/2012-ST dated 10.02.2012. Assignment and transfer fees, Assessment and bifurcation fees in respect of Khata transfer and Forfeiture of deposits are amounts which owe its origin to 'Agreement to Sell' and 'Construction Agreement' which are entered into by appellants for development of residential projects which were not taxable up to 01.07.2010. He relied upon the following case laws:

***(i) Saumya Construction Pvt. Ltd. Vs. CST, Ahmedabad 2016 (46) STR 723 (Tri.-Ahmd.).***

***(ii) CST Vs. Sujal Developers 2013 (31) STR 523 (Guj.).***

***(iii) Commr. of S.T. Vs. Shrinandnagar Co. Op. Housing Society Ltd. 2011 (23) STR 439 (Guj.).***

***(iv) Commr. of C.Ex. Chandigarh Vs. U.B. Construction (P) Ltd. 2013 (32) STR 738 (Tri. Del.).***

**(V) Krishna Homes Vs. CCE, Bhopal 2014 (34) STR 881- CESTAT (Del.).**

**(vi) Alpine Estates Vs. ITO, Hyderabad (ITAT Hyderabad); Extracts of Sec. 80IB of Income Tax Act, 1961.**

2.2 The learned counsel for the appellants further submitted that the 'Agreement to Sell' is a tri-partite agreement and assignment clause, Khata transfer and forfeiture clause is contained in clauses 9,10 and 1(c) respectively of the agreement between the appellants and the buyer and assignment clause and forfeiture clause is contained in clauses 14 and 2(c) respectively. The appellants are responsible for development of schedule property into residential apartments and other developments as contained in agreements and they did not render any service in the nature of 'Real Estate Agent' service falling under Section 65(88) of Finance Act, 1994. A perusal of the agreement would show that the appellant is responsible for development of schedule property in to residential apartment buildings. The entry of 'construction of complex' and 'commercial or industrial construction service was introduced by Finance Act. 2005 w.e.f. 16.06.2005. Accordingly, if at the activity of appellants is to be construed as service it is possible only w.e.f. 16.06.2005. They

relied upon the following case laws:

- (i) Indian National Ship Owners Association Vs. UOI 2009 (14) STR 289 (Bom.).**
- (ii) Standard Chartered Bank case 2015 (40) STR 104 (Tri. LB)- Para 38.**
- (iii) Chennai Telephone Vs. CCE 2004 (169) ELT 222 (Tri. Chennai).**
- (iv) CCE Vs. MRF Ltd. 2005 (179) ELT 472 (Tri. Del.).**

2.3 He further submitted that in view of the clarification contained in CBEC Circular No. 108/02/2009-ST, appellant would not liable to pay Service Tax under the head 'Construction of Complex Services' as they are not rendering any service to customers rather they are selling apartments on which there cannot be any levy of Service Tax. The 'Agreement to Sell' in prospective to buyers is only a contract for sale of immovable property and they itself does not create any interest or change on such property and the title and possession of the said immovable property would get transferred only on execution of 'sale deed' between the parties. Unless the title and possession

are passed on to the customer by the builder, it cannot be alleged that any construction service has been rendered on behalf of such customer as at no point of time there exists a service recipient. The final sale deed that will pass on the title, right and interest to the buyer results in a sale of immovable property which is not chargeable to Service Tax. He relied upon the following case laws:

***(i) Magus Construction Pvt. Ltd. And Anr Vs. UOI and Ors.2008 (11) STR 225 (Gauhati).***

***(ii) CCE Chandigarh Vs. Skynet Builders, Developers, Colonizer 2012 (27) STR 388 (Tri. Del./).***

***(iii) Bairathi Developers Pvt. Ltd. Vs. CCE, Jaipur 2016 (43) STR 455 (Tri. Del.).***

***(iv) Assotech Realty Vs. State of U.P. 2007 (7) STR 129 (All.).***

2.4 The impugned order on 'Assignment and transfer fees' for the period 2000-01 to 2004-05 factually and legally untenable as allegation is leveled without even mentioning under which heading, the amounts were taxable. In the SCN, there is no mention of the specific heading under which the amounts were

taxable reference to Section 67(u) is incorrectly made and w.e.f. 16.07.2007 Section 67(u) was no longer in existence. He relied upon the following case laws:

***(i) RIICO Ltd. Vs. CCE, Jaipur 2018 (10) GSTL 92 (Tri. Del.).***

***(ii) M/s. Ansal Housing & Construction Ltd. CST, New Delhi 2018 (8) GSTL 58 (Tri. Del.).***

***(iii) CST, New Delhi Vs. M/s. Today Homes and Infrastructure 2018 (2) TMI 1413 (Tri. Del.).***

2.5 The learned counsel for the appellants further submitted that Khata transfer is a post transfer/construction activity. This activity is undertaken only after completion of all registration formalities. Therefore, it is submitted that the appellants are not providing any advice, consultancy or technical assistance relating to real estate and the same cannot be considered as taxable services under the heading 'Real Estate Agent Services'. The appellants are also acting as agents of buyers rather are assisting the buyers in Khata transfer on a principal to principal basis and therefore construing appellants as 'real estate agents' under Section 65(88) of Finance Act, 1994 is legally not correct. Moreover, the same is covered by the



construction and sale agreements. He relied upon the following case laws:

**(i) M/s. Ansal Housing & Construction Ltd. CST, New Delhi 2018 (8) GSTL 58 (Tri. Del.).**

**(ii) CST, New Delhi Vs. M/s. Today Homes and Infrastructure 2018 (2) TMI 1413 (Tri. Del.).**

2.6 Coming to the amounts forfeited, he submitted that these are deposits made by purchasers and appellants collected these amounts under the 'Agreement to sale' or 'Construction' and these amounts have no nexus to any taxable services under the 'Real Estate Agent Services'.

2.7 Coming to management of construction projects, the learned counsel stated that the appellants has received certain amounts from customers like M/s. Mckino & M/s. Axa Business towards 'project management fees' and that it was erroneous to construe the same as 'real estate agent services'. In order to get covered under Section 65(88) of Finance Act, 1994 read with Section 65(89), there must be advise, consultancy or technical assistance in relation to management of real estate, which is very much lacking in the instant case. Even assuming that the management of projects of clients is liable to Service Tax under the heading 'commercial or industrial construction services' it is

submitted that such services cannot be alleged to be covered under another heading (i.e. real estate agent) prior to the introduction of 'Construction services'. The activities of actual construction of any building, carried out by builders/developers are not covered under the heading 'Real Estate Agent Services'. Since the appellants have actually undertaken construction activity in management of these projects, it is submitted that these activities are outside purview of Real Estate Agent Services. He relied upon the following case laws:

**(i) CST, Delhi Vs. M/s. Omaxe Ltd. 2018-TIOL-585-CESTAT-DEL.**

**(ii) Ircon International Ltd. Vs. CCE, Mumbai-IV 2006 (1) STR 46 (Tri. Del.).**

**(iii) Lakshmi Automatic Loom Works Ltd. Vs. Commr. of C.Ex., Chennai 2007 (7) STR 435 (Tri. Chennai).**

2.8 The learned counsel also submitted that the computation of Service Tax at the rate of 5% over and above the amount received is legally erroneous as the Service Tax is to be computed on cum-duty price. He relied upon the following case laws:

**(i) CCE Vs. Maruti Udyog Ltd. 2002 (141) ELT 3**

**(SC).**

**(ii) CC.Ex & Cus. Patna Vs. Advantage Media Consultant 2008 (10) STR 449 (Tri.Kol). Affirmed by Apex Court 2009 914) STR J49 (SC).**

**(iii) M/s. Star Satellite Services Vs. CCE, Ludhiana 2015 (8) TMI 452 (Tri. Del).**

2.9 The learned counsel also submitted that the issue is time barred in view of the following cases:

**(i) CCE Vs. Chemphar Drugs & Liniments 1989 (40) ELT 276.**

**(ii) Pushpam Pharmaceuticals Company Vs. CCE 1995 (78) ELT 401.**

**(iii) M/s. S.P. Builders, M/s/ Gejendra Singh Sankhal Vs. CCE, Jaipur 2018 (2) TMI 833 (Tri. Del.).**

**(iv) Uniworth Textiles Ltd. Vs. CCE, Raipur 2013 (288) ELT 161 (SC).**

**(V) K.T. Murukan Vs. Comm. (A)., C.Ex. Cus. & ST., Cochin 2017 (5) GSTL 248 (Ker).**

2.10 It is also submitted that there should be no question of penalty as the appellants are not liable for payment of Service

Tax in view of the following cases:

**(i) *Majestic Mobikes Pvt. Ltd. Vs. CCE 2008 (11) STR 609.***

**(ii) *O.P. Sharma Vs. UOI 2014 (36) STR 1258 (All.).***

**(iii) *M/s. Blue Star Ltd. Vs. CCE, Cus & St, Cochin 2017 (11) TMI 887- (Tri. Blore).***

**(iv) *CCE Vs. Shield Security Services 2007 (5) STR 97 (Tri. Del.).***

**(V) *UOI Vs. Rajasthan Spinning and Weaving Mills, 2009 (238) ELT 003 (SC).***

3. The learned AR has reiterated the findings in the OIO.

4. Heard both sides and perused the records of the case.

5. We find that among the 5 activities undertaken by the appellants, the learned counsel has not contested the levy of Service Tax in respect of consultancy in real estate services. In respect of other services, we find that the issues raised therein are squarely covered by the ratio of various judgments cited supra. On going through the agreement between the appellants as a real estate developers and prospective buyers, we find that the contract is on a principal to principal basis Page 7 of contract provides that:

*The contract in case of breach of the terms and conditions of the Construction Agreement by the Purchaser, resulting in its termination, this Agreement shall also be deemed to have been terminated for default automatically without separate notice, in which even the Sellers/Builder shall be entitled for the liquidated damages of 15% of the sale consideration.*

Similarly Para 9 provides that:

*The purchaser shall not assign/transfer his/her/their interest under this Agreement without the prior written consent of the Sellers/Builder. It is explicitly made clear that Seller/Builder are not obligated to give their consent for any assignment by the Purchaser as this contract is exclusive in nature. It is also agreed that in the event the Sellers/Builder give their consent for assignment of Purchaser's interest in this Agreement, the Assignee/s shall comply with all the terms and conditions which the Purchaser is require to comply and Builder shall be entitled to charge Rs.50/- per sft. Of the Schedule 'C' Apartment as their administrative charges/transfer fee for giving such consent. Further, as this Agreement and the Construction Agreement are co-terminus in nature, the Purchaser shall not be entitled to assign either of these agreements independently without assigning the other Agreement i.e. the Purchaser shall not be entitled to assign his/her/their rights under this agreement*

*without assigning his/her/their rights under the Construction Agreement and vice versa. It is also made clear that the Purchaser will not be able to assign his rights in portions i.e. the Purchaser will have to either assign all his rights under this Agreement or otherwise shall not be entitled to assign his rights at all.*

In view of the above, it is seen that the amounts received by the appellants in respect of 3 activities undertaken by them i.e. 'assignment transfer income', assessment and bifurcation fees, 'Khata transfer fees' and 'forfeiture' amounts find their origin in the agreement with prospect to buyers in which the appellants are developers only and are not workings as real estate agents. Therefore, we find that there is considerable force in the agreement that the activity undertaken by them is not in the capacity of a real estate agent but undertaken as real estate developers. Moreover, we find that during relevant time, the Villas constructed by the appellants were leviable to Sales Tax which was paid by the appellants.

5.1 We find that in the case of Ansal Properties and Infrastructure Ltd. (Supra) held that demand pertaining to consideration received for change of name for flat owners by way of substitution new buyers name with the earlier flat owners is

not chargeable to Service Tax. As the respondent is a real estate developer dealing with the buyers as a principal to principal basis, we also find that the Income Tax Appellate Tribunal Hyderabad, IT in ITA No. 62/Hyd/2016 held that income on account of forfeited amount as a direct nexus of first degree with the business of the assessee. We also find that the Tribunal in the case of RIICO Ltd. cited supra has held that in respect of transfer charges collected by the appellants, they are not getting as real estate agents.

6. Coming to the management of construction of projects, it is seen that the appellants have been supervising the construction projects of M/s. Mckino & M/s. Axa Business Services. The appellants contented that their role was to supervise the construction and if the contractor fails to meet the expectations of their principals to undertake the construction themselves therefore, it is not a mere advice 'consultancy or technical assistance' in respect of 'management of real estate'. Therefore, we find that no Service Tax can be demanded from the appellants on this count under the head 'Real Estate Agent Service' during the relevant period.

7. In view of the above, the impugned order is confirmed to the extent of demand of Service Tax in respect of consultancy

in real estate services and the demands pertaining to other services are set aside along with interest and penalties.

(Order was pronounced  
in Open Court on **05/09/2018**)

**P. ANJANI KUMAR**  
**TECHNICAL MEMBER**

**S.S GARG**  
**JUDICIAL MEMBER**

PK...