Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.249 of 2012

(Arising out of OIO-STC/08/COMMR/AHD/2012 dated 14/02/2012 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD)

Shrinandnagar V Co Operative Housing Society Limited .....Appellant
1st Floor, Sanskrut Building,
Nr Old High Court, Ashram Road, AHMEDABAD, GUJARAT

VERSUS

C.S.T.-Service Tax – Ahmedabad .....Respondent
7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
CENTRAL EXCISE BHAVAN, AMBAWADI,
AHMEDABAD, GUJARAT-380015

APPEARANCE:
Shri Rahul Patel, Chartered Accountant for the Appellant
Shri G. Kirupanandan, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L. MAHAR
Final Order No. A/ 10709 /2023

DATE OF HEARING: 27.02.2023
DATE OF DECISION: 24.03.2023

RAMESH NAIR

The appeal is directed against Order-in-Original No. STC/08/COMMR/AHD/2012 dated 15.02.2012 whereby, the adjudicating authority namely Commissioner, Service Tax, Ahmedabad confirmed the demand of service tax along with interest and penalties under the category of 'Construction of Complex Service'. The adjudicating authority precisely held that the cooperative societies of the members have provided construction of complex service to its members and the same is liable for service tax. The appellant's contention was that the service provided by the cooperative societies to its members being involved mutuality of interest, there is no relationship of service provider and service recipient between cooperative societies and its members therefore, the same is not liable to service tax. Being aggrieved by the Order-in-Original, the appellant filed the present appeal.

02. Shri Rahul Patel, learned Chartered Accountant appearing on behalf of the appellant submits that this issue is no longer under dispute as during the investigation of this very case, the appellant had deposited some amount of service tax for which they had claimed the refund. The said refund was

rejected on merit however, this tribunal vide Order No. A/1346-1361/WZB/AHD/2009 dated 03.07.2009 allowed the refund after considering the merit in detail. Against this tribunal's order, revenue had filed Tax appeal No. 382 of 2010 before the Hon'ble High Court of Gujarat which had been dismissed vide order dated 30.06.2011 on merit. Accordingly, the issue that the service between present cooperative housing society to its members is not liable for service tax. With this legal position, the demand in the present case does not survive hence, the appeal be allowed.

03. Shri G. Kiruanandan, learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

04. We have carefully considered the submissions made by both the sides and perused the record. We find that in the present case, the issue to be decided by us is that whether the construction of complex service provided by appellant SHRINANDNAGAR V CO OPERATIVE HOUSING SOCIETY LIMITED to its members of the society is liable to service tax or otherwise. As submitted by the learned counsel, the appellant during investigation of this very case had deposited some amount of service tax for which they claimed refund. The lower authorities had rejected the claim on merit that the activity of the appellant is liable to service tax. This tribunal in the order dated 30.07.2009 (supra) decided the matter on merit in the appellant's favour holding that the appellant is eligible for refund however, it was remanded only for the examining the aspect of unjust enrichment, the order of the tribunal is reproduced below:-

> *5. I have considered the submission made by both sides. In this case, there is no dispute that co-operative societies have not taken a service of the contractor for construction residential complexes but have chosen to construct complex own their own. Where they have taken a service of the contractor, Society has handed over the land to the contractor and the contractor provides the service to the individual who purchases the residence. In all these cases, the transaction is between the members of the Society and either the Society or developer. According to the circular issued by Board on 1.08.06 cited by the learned advocate in a case where the builder, promoter or 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 gross amount charged for the construction services provided, builder/promoter/developer to the under 'construction of complex' service falling under Section 65(105) (zzzh) of the Finance Act, 1994. If no other person is engaged for construction work builder/promoter/developer and the undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by other person does not arise.*

6. Further, Board had issued clarification on 29.01.01 which is relevant and is reproduced below:

> *"3. The matter has been examined by the Board, Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create an interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self- service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex promoter/builder/developer, with who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax."*

7. I find that in the absence of a contractor hired by Society and nature of the transaction between the parties and in the light of definition of service and its liability for service tax, the transaction in this case cannot be considered taxable. Therefore, all the appeals are allowed. However, the matter is remanded back to the original adjudicating authority in view of the fact that unjust enrichment aspect will have to be examined before granting refund and also for verification of the correctness of the claim.

Against the above tribunal order, the revenue had filed Tax appeal No. 382 of 2010 wherein, the Hon'ble High Court of Gujarat vide order dated 30.06.2011 has passed the following order:-

7. From the record, we find that the impugned judgment of the Tribunal came to be upheld by the Division Bench in case of M/s. Sujal Developers (supra), relevant portion of which, we have already quoted in this order. We notice that in the said case before the Division Bench, it was a developer who was contending that not having provided any services he was not liable to pay any services tax. Only point of difference in this case is that it is a housing society who is putting forth a similar claim on the premise that the contractor who undertakes the construction work, would be liable to pay service tax but the society in turn, cannot be said to have supplied any services to its members. We are of the opinion that the question is substantially covered by the decision of Division Bench; wherein, similar questions were framed and answered against the revenue. Insofar as the explanation relied on by the counsel for the revenue is concerned, the same reads as under:

(e) in sub-clause (zzzh), the following Explanation shall be inserted, namely-

"Explanation. For the purposes of this sub-clause, construction of a complex 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 a person authorized by the builder before the 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."

8. We are not inclined to discuss whether by virtue of such explanation legal situation in factual background arising in present appeal, would or would not be any different. Suffice it to note that the explanation was brought in the statute book long after the taxing event in the present case had arisen.

9. In absence of any indication in the amendment to make it either retrospective or explanation being merely declaratory or clarifiacatory in nature, such statutory change cannot be made applicable to the long past events.

10. In the result, we do not find that any question of law arises. Tax Appeal, is therefore, dismissed.

Order in Civil Application

In view of order passed in main matter, Civil Application for stay does not survive and is disposed of accordingly.

4.1 With the above orders of the tribunal as well as the High Court, the issue on merit that whether the service of construction of complex provided by the appellant's cooperative housing society to its members is eligible to service tax or otherwise has been settled in favour of the appellant. It was informed by the learned counsel that the Hon'ble High Court's judgment (supra) has been accepted by the revenue.

05. In view of the above settled position, the impugned order is not sustainable accordingly, the same is set aside. Appeal is allowed with consequential relief if any, in accordance with law.

(Pronounced in the open court on 24.03.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C.L. MAHAR)
MEMBER (TECHNICAL)

Mehul