# IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
## CHENNAI

REGIONAL BENCH – COURT NO. I

**Service Tax Appeal No. 40297 of 2013**

**AND**

**Service Tax Appeal No. 40298 of 2013**

(Arising out of common Order-in-Original Nos. 115 & 116/2012 dated 30.09.2012 passed by the Commissioner of Service Tax, Newry Towers, 2054-1, II Avenue, Anna Nagar, Chennai – 600 040)

**M/s. South India Shelters Private Limited** **: Appellant**
No. 14, Gulmohar Avenue,
Velacherry, Guindy,
Chennai – 600 032

**VERSUS**

**The Commissioner of Central Excise** **: Respondent**
Newry Towers, No. 2054-II, 2nd Avenue,
13th Main Road, Anna Nagar,
Chennai – 600 040

**APPEARANCE:**

Smt. Radhika Chandrasekhar, Learned Advocate for the Appellant

Shri R. Rajaraman, Learned Assistant Commissioner for the Respondent

**CORAM:**

**HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)**
**HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER NOs. 40123-40124 / 2023**

DATE OF HEARING: 24.02.2023

DATE OF DECISION: 07.03.2023

**Order : [Per Hon'ble Mr. M. Ajit Kumar]**

These are appeals filed by M/s. South India Shelters Pvt. Ltd., Chennai against the Order-in-Original Nos. 115 & 116/2012 dated 30.09.2012 passed by the Commissioner of Service Tax, Chennai.

2. The allegations against the assessee are that they were engaged in the construction of residential complexes, which became taxable on 16.06.2005, but they have taken registration with the Department only during June 2008. They have also not filed periodical ST-3 returns.

3. It appeared to Revenue that the assessee did not pay appropriate Service Tax on the construction activity, under the classification 'Construction of Residential Complex Service'. Hence Notices were issued to them vide Show Cause Notice No. 122/2011 dated 04.04.2011 demanding Service Tax of Rs. 2,64,33,866/- for the period from May 2006 to September 2009 and a follow up Show Cause Notice No. 143/2011 dated 06.04.2011 was issued demanding Service Tax of Rs.72,66,757/- for the period from October 2009 to June 2010, under the provisions of the Finance Act, 1994. Both notices were decided jointly by the impugned order.

4. We have heard Smt. Radhika Chandrasekhar, Learned Advocate on behalf of the appellant and Shri R. Rajaraman, Learned Authorized Representative (A.R.) on behalf of the Revenue.

5.1 The Learned Advocate for the appellant has stated that the Department has issued two Show Cause Notices: (i) Show Cause Notice dated 04.04.2011 proposing to levy Service Tax under the category of 'Construction of Residential Complex Service' for the periods from May 2006 to September 2009 in respect of project namely, SIS Danube and under the category of 'Works Contract' for the period from March 2008 to September 2009 in respect of project namely, SIS Safaa and (ii) Notice dated 06.04.2011 proposing to levy Service Tax under the category of 'Works Contract' on SIS Safa for the period from October 2009 to June 2010.

5.2 She has contended that a developer of residential complex is not liable to pay Service Tax for the period prior to 01.07.2010; as per the Central Board of Excise and

Customs (C.B.E.C.) Circular No. 108/02/2009-S.T. dated 29.01.2009, construction services provided by the builder/developer will not be taxable for the period prior to 01.07.2010.

5.3 She further stated that the demand for the period from May 2006 to September 2009 is barred by limitation since the Show Cause Notice is dated 04.04.2011 and none of the ingredients set out in the proviso to Section 73(1) of the Finance Act, 1994 have been met. They have also been filing ST-3 returns and paying Service Tax wherever it was legally applicable.

5.4 She has placed reliance on the following decisions in their favour: -

*(i) M/s. Real Value Promoters Pvt. Ltd. v. Commissioner of G.S.T. and Central Excise, Chennai & ors. [Final Order Nos. 42436-42438 of 2018 dated 18.09.2018 – CESTAT, Chennai].*

*(ii) M/s. Vijay Shanthi Builders Ltd. v. Commissioner of Service Tax, Chennai [2018 (9) G.S.T.L. 257 (Tri. – Chennai)];*

*(iii) M/s. Golden Ventures v. Commissioner of C.E. & S.T., Chennai [Final Order No. 41938 of 2018 dated 02.07.2018 – CESTAT, Chennai]*

*(iv) Commissioner of C.Ex. & S.T., Bangalore-I v. M/s. Keerthi Estates Pvt. Ltd. [2019 (26) G.S.T.L. 227 (Tri. – Bang.)]*

*(v) M/s. Creations v. Commissioner of Service Tax, Chennai [2019 (22) G.S.T.L. 367 (Tri. – Chennai)]*

*(vi) Commissioner of Customs, Central Excise & Service Tax, Visakhapatnam-I v. M/s. Pragati Edifice Pvt. Ltd. & anor. [Final Order No. A/31010-31011/2019 dated 18.09.2019 – CESTAT, Hyderabad]*

6. Shri R Rajaraman Learned AR appearing for Revenue, has stated that the appellant has entered into two agreements with their customers. One for sale of undivided share of land the other for the construction of flat/ apartment. A sale deed is later entered into only or the undivided share of land and no sale deed is executed for the completely constructed flat. The stamp duty was paid only on the cost of undivided share of land and not on the complete constructed apartment. Thus the appellant undertakes construction service to their clients. Section 65(105)(zzzh) of the Act specifies construction of complex service as taxable service from 16/06/2005. Just because Contract Service was brought under the service tax levy from 01/06/2007 does not mean that such services provided by the assessee was not taxable prior to 01/06/2007. He reiterated the other points stated in the impugned order.

7. It's Revenue's case that the appellant has entered into two agreements with their customers. One for sale of undivided share of land the other for the construction of flat / apartment. A sale deed is later entered into only for the undivided share of land and no sale deed is executed for the completely constructed flat. The stamp duty was paid only on the cost of undivided share of land and not on the complete constructed apartment. Thus the appellant undertakes construction service to their clients. We find that an element of service is present in the agreements is not disputed. The issue is whether the appellant has rendered pure service to his clients which would make the service taxable under 'Construction of Residential Complex Service' as done by the impugned order. We find that the issue relating to the demand of Service Tax on construction of residential complexes by entering into joint development agreement with the owners of land, under 'Construction of Residential Complex Service', was examined by this Bench in the case of *M/s. Real Value Promoters Pvt. Ltd. (supra)*.

Paragraphs 3.5 and 3.6 of the said Order are reproduced below:-

> *"3.5 The issue as to whether a composite contract involving provision of service as well as transfer of property in goods could be covered under CICS and CCS from the date of introduction of service tax levy on such services was, being litigated upon which was finally settled by the Hon'ble Supreme Court in the case of CCE Vs. Larsen & Toubro Ltd. 2015 (39) STR 913 SC. The Apex Court has observed that in as much as section 67 of the Act, dealing with valuation of taxable services, refers to the gross amount charged for service, the services of CICS and CCS would cover only pure service activities, as any contrary view would imply that the Union Government can levy service tax on the gross amount, including the value of transfer of property in goods also, which is constitutionally impermissible. The exemption notifications issued at the discretion of the executive are not sufficient to sustain the levy. The Hon'ble Apex Court has also observed that only with the introduction of WCS as a separate taxable service, statutory mechanism to exclude the value of transfer of property in goods has been prescribed.*
>
> *3.6 The effect of the above decision is that CICS and CCS, as defined under clauses (zzq) and (zzzh), respectively, of sub section (105) of the section 65 would cover only pure service contracts, without any transfer of property in goods."*

The co-ordinate Bench, in its order, after considering the Hon'ble Supreme Court's judgment in the case of *CCE vs. Larsen & Toubro (supra)*, have held that composite works contracts cannot be brought within the fold of commercial or 'industrial construction service' or 'construction of complex service' up to 01/06/2007 i.e. till the 'works contract service' was brought under the fold of service tax levy, and allowed the appeals with consequential benefit. The Hon'ble Supreme Court in the Larsen and Toubro judgment had held that 'construction services' under section 65(105)(zzq) and 'construction of complex

services' under section 65(105)(zzzh) among others, would refer to service contracts simpliciter and not to composite work contracts. Such composite work contracts will not have constitutional validity and would not be liable to service tax levy prior to 01/06/2007. The said judgment of the Apex Court also makes it clear that an agreement for the construction of residential complex which is not a pure service and involves a provision of service as well as transfer of property in goods would be leviable to service tax only after the introduction of works contract service. This being so the demand for duty on the services rendered by the appellant, who is a developer, under the composite contract agreement post 01/07/2007 under the category of 'construction of residential complex service' and not as a service of 'works contract' must also fail. The show cause notice which is the foundation of allegations the appellant had to meet before the Lower Authority was for 'construction of residential complex service' category and cannot now be altered to change the charge. The liability of a builder/developer/promoter to pay service tax at all on the construction of residential complex for his customers during the period covered by the impugned order will be examined separately below.

8. The demand period in the impugned order covers the period from May 2006 to June 2010, ie under the category of 'Construction of Residential Complex Service' for the periods from May 2006 to September 2009 in respect of project namely, SIS Danube and under the category of 'Works Contract' for the period from March 2008 to September 2009 in respect of project namely, SIS Safaa and another Notice dated 06.04.2011 proposing to levy Service Tax under the category of Works Contract for SIS Safaa for the period from October 2009 to June 2010. The issue of levy of service tax under 'Construction of Residential Complex Service' pre and post 01/06/2007 has already been discussed above and held against Revenue and in favour of the appellant, hence levy in the impugned

order under 'works contract' from March 2008 to June 2010, alone needs to be examined now.

9. Works Contract Service came under Service Tax levy with the introduction of section 65(105)(zzzza) in the Finance Act 1994 from 01/06/2007. The period covered under the demand for works contract as per the impugned order is post 01/06/2007 and hence the service rendered by the appellant is prima facie eligible for the levy of service tax. We however find that the co-ordinate Delhi Bench of the Tribunal in the case of *Krishna Homes vs Commissioner of Central Excise, Bhopal 2014 (34) STR 881 (Tri.-Del.)* has examined the liability of a builder/developer/promoter to pay service tax on the construction of residential complex for its customers. The Tribunal has taken notice of C.B.E.C. Circular No. 332/35/2006-TRU dated 01/08/2006 wherein it was clarified that where a builder/developer/promoter builds a residential complex engaging a contractor, the contractor shall be liable to pay service tax on the gross amount charged under construction of complex service and if no person is engaged by the builder/developer/promoter and who undertakes construction work on his own, the question of providing taxable service to any person by any other person does not arise and it would be in the nature of self service. The Tribunal held that it was only on 01/07/2010 that an explanation was added to section 65(105)(zzzh) where by a builder/developer/promoter who got a residential complex constructed for his customer with whom he had individually entered into agreements, was to be treated as a deemed provider of construction of residential complex to his customers. Since the period where duty has been demanded in the impugned order is prior to 01/07/2010, no liability for paying tax either under 'construction of complex service' or 'works contract' would lie on the builder/developer/promoter during the period covered by the impugned order.

10. Since the issue on merits has been decided in favour of the appellant, we are not passing any orders on the other issues raised by the appellant.

11. In the light of the above, the impugned order is set aside and the appeals are allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on **07.03.2023**)

Sd/-
**(P. DINESHA)**
MEMBER (JUDICIAL)

Sd/-
**(M. AJIT KUMAR)**
MEMBER (TECHNICAL)

Sdd