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

MISC. ORDER No. 23566 / 2014

Application(s) Involved:

ST/Stay/26496/2013 in ST/26165/2013-DB

Modi Ventures
5-4-187/3&4, 2nd Floor, M.G. Road,
Secunderabad - 500 003
Andhra Pradesh

Appellant(s)

Versus

Commissioner of Central Excise,
Customs and Service Tax
Hyderabad-I
Kendriya Shulk Bhavan,
L.B Stadium Road, Basheerbagh,
Hyderabad - 500 004
Andhra Pradesh

Respondent(s)

Appearance:

Mr. Rajesh Kumar, CA
Hiregange & Associates
#1010, 1st floor (Above Corp. Bank)
26th Main, 4th T Block, Jayanagar,
Bangalore - 560 041
Karnataka

For the Appellants

Mr. Sunil B. Gabhawalla, CA
B-12, "La Bella", Azad Lane, Andheri
(East), Mumbai - 400 069

Mr. A.K. Nigam, AR

For the Respondent

CORAM:

HON'BLE SHRI B.S.V. MURTHY, TECHNICAL MEMBER
HON'BLE SHRI S.K. MOHANTY, JUDICIAL MEMBER

Date of Hearing: 26/06/2014

Date of Decision: 26/06/2014

Order Per: B.S.V. MURTHY

The brief synopsis submitted by the appellants explains the issue

1.1. The appellants are engaged in the activity of sale of under construction flats. They have undertaken a single residential project consisting of 506 residential units by the name "Gulmohar Gardens". The project is undertaken in two phases as per details on Page 6 of the Paper Book.

1.2. The appellants enter into an Agreement for Sale with prospective buyers. After completion of construction, the appellants enter into a Sale Deed. However, in cases where the buyer intends to obtain bank loan, the appellants enter into two co-terminus agreements (one for Sale of Undivided Interest in Land and another for Construction. The process flow is summarized on Page 14 of the Paper Book.

1.3. Initially, the appellants registered themselves under the category of "Construction of Complex Services" and discharged service tax. However, based on Circular 108/2/2009-ST dated 29.01.2009 they discontinued the payment of service tax on the belief that the tax is not payable.

1.4. In the above context, a Show Cause Notice dated 24.10.2011 was issued whereby it was alleged that:

a. The benefit of Circular 108/2/2009-ST dated 29.01.2009 is not available.

b. The services provided under the Construction Agreement should be classified as "Works Contract Services" for the period from 01.06.2007 to 31.12.2010.

c. Neither the benefits of composition scheme nor the deduction for material value under Rule 2A are available.

d. The extended period of limitation can be invoked since there was misinterpretation of the Circular.

1.5. Thereafter an Order-in-Original dated 17.01.2013 was passed confirming the following:

a. Demand of service tax amounting to Rs. 1,38,13,576/-
b. Interest at applicable rates.
c. Penalty under Section 78 amounting to Rs. 1,38,13,576/-

1.6. The brief synopsis of the legal issues is summarized below in the tabular format.

Sr.	Issue	Allegations in SCN	Observations in OIO	Appellant's Submissions
1.	Benefit of Personal Use as clarified by Circular 108	Since the whole complex is not constructed for a single person, the benefit of exclusion is not available (Para 6, Page 205)	Exclusion on account of personal use is not available for individual residential unit within a residential complex (Para 16.1, Page 139) Relied upon LCS City Makers' Case (Para 16.1, Page 140) Distinguished various decisions on the grounds that they are either interim orders or remanded cases (Para 16.1, Page 140)	Reading the Circular in entirety clearly suggests that the transaction is excluded. LCS City Makers is distinguishable on facts since the allotment of flats was to a landowner who intended for further sale (Para 11.4 of the judgment is relevant)
2.	Composition Scheme	Since the venture was started in 2006, the benefit of composition scheme cannot be extended	Entire Complex is one singular works contracts and residential unit is a part of works contract. Since	Each contract constitutes an independent works contract Out of 508 units, only 290 units are taxed. This shows the conflict in the

		Page 208)	discharged before 01.06.2007, benefit of composition scheme cannot be extended (Para 16.4, Page 145)	the Order
3.	Deduction on account of materials (Rule 2A)	Not furnished details of materials consumed (Para 9, Page 209)	Mere statement of consumption of materials produced without supporting documentary evidence. Not specified that the consumption pertains to the impugned project (Para 16.5, Page 146)	Detailed CA Certificate produced (Page 419) Appellant has only one project – accepted fact in OIO (Page 126) Absolute denial of material deduction not in order
4.	Extended period of limitation	Misinterpreted Circular & definition of Works Contract Service with intention to evade payment of service tax (Para 10, Page 209)	There is no ambiguity in law and no interpretation is required (Para 17.1, Page 146)	Various Clarifications and Decisions suggest otherwise Voluntarily paid tax before the Circular. Extensive correspondence after the Circular.

108 has been extended to the assessee. If the said benefit is granted, the entire demand fails.

1.8. Even if the transactions are considered as taxable, but one of the alternative arguments is accepted, the demand will reduce drastically and the amount already paid is more than the reduced demand as can be seen from the following table:

Description	Reduced Demand	Tax Already Paid (Page 285)
Benefit of Composition Scheme extended (Page 659)	33,77,102	47,73,858
Benefit of Reduction in Material Value extended (Page 658)	42,65,728	47,73,858
Extended Period held as not invocable (Page 213)	39,07,584	47,73,858

1.9. The appellants therefore pray that the demand be stayed in entirety till the time of the final hearing of the appeal.

2. Learned AR on the other hand would rely upon the decisions in the case of *Golden Ventures Vs. CST, Chennai [2013 (32) S.T.R. 748 (Tri.-Chennai)]* and *LCS City Makers Pvt. Ltd. Vs. CST, Chennai [2013 (30) S.T.R. 33 (Tri.-Chennai)]* to submit that the demand is sustainable. However we take note of the fact that the decision in the case of *Krishna Homes Vs. CCE, Bhopal [2014 (34) S.T.R. 881 (Tri. - Del.)]* rendered by this Tribunal has taken a view that construction and sale of individual residential flat with undivided share of land at a time or under separate agreements for equitable share of land or for construction of flat would not be covered by the service of Construction of Residential Complex prior to 01.07.2010. Moreover the Board Circulars issued during the relevant time as submitted by the appellants are also in favour of the appellants. Besides the above we also take note of the fact that appellant has paid an amount of Rs. 47,73,858/- before issue of show-cause notice and if the calculation adopted by the appellant is accepted according to the appellant entire amount has been

their favour and also in view of the decisions of this Tribunal considered by us above, we consider that appellant has made a *prima facie* case for complete waiver. Accordingly the requirement of pre-deposit is waived and stay against recovery is granted.

(Operative portion of the order has been pronounced
in open court on 26.06.2014)

(S.K. MOHANTY)
JUDICIAL MEMBER

(B.S.V. MURTHY)
TECHNICAL MEMBER

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