2021-TIOL-680-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA
REGIONAL BENCH - COURT NO. II

Service Tax Appeal No. 76383 of 2016

[Arising out of Order-in-Original No. 26/COMMR/ST-II/KOL/2016-17, Dated: 23.06.2016
Passed by Commissioner of Service Tax-II, Kolkata]

Date of Hearing: 25 August 2021
Date of Decision: 25 August 2021

M/s EDEN REAL ESTATES PVT LTD
(9B, DR. MARTIN LUTHER KING SARANI
3RD FLOOR, WEST WING, KOLKATA-700016

Vs

COMMISSIONER OF SERVICE TAX-II,
KOLKATA

Appellant Rep by: Shri Ankit Kanodia, Adv.
Respondent Rep by: Shri S S Chattopadhyay, Authorized Representative

CORAM: P K Choudhary, Member (J)
Raju, Member (T)

ST
- There are three different issues to be decided - Firstly, as regards the demand of Service Tax on car parking charges collected by appellant from its customers, though Tribunal is not inclined to accept the proposition of appellant that since the car parking is specifically excluded from definition of 'Preferential Location Services' which was also introduced w.e.f. 01/07/2010 and hence the said service cannot be taxed under 'Construction of Residential Apartment Services', the appellant has made out a case on limitation ground as the said service was introduced w.e.f. 01/07/2010 and there was no clarity as to the taxability of such amounts as received by appellant - Hence, appellant was under a bona fide belief that since it was giving Right to use of car parking space, no tax is payable under the category 'Construction Services' - Thus, since the entire demand has been raised by invoking extended period of limitation, the same is set aside.

As regards the demand of Service Tax on 'Club Membership Services', since there was no club in existence during the period of dispute, there cannot be any demand raised on said ground - Also, post the judgment of Supreme Court in ***Calcutta Club*** case ***2019-TIOL- 449-SC-ST-LB***, it is a settled law that there cannot be any Service Tax charged on services between club and its members as the same tantamounts to self service - Hence, the demand under 'Membership of Club or Association Services' also needs to be set aside.

Lastly, as regards the demand of Service Tax on amounts received after 01/07/2010 for 'Construction Services' rendered upto 30/06/2010 and demand notices issued in this regard, lower authority has confirmed the demand by holding that as per the explanation added to clause (zzzh) for 'Construction of Residential Complex Services' w.e.f. 01/07/2010 viz. the essential condition for determining taxability is, whether payment made by buyer to the builder on or after 01/07/2010 and whether payment made before or after issuance of completion certificate by competent authority and since in the case of appellant the completion certificate was not issued when the amounts were received, the same is taxable under the Service Tax net - There is no ambiguity in said explanation as the same only extends the tax net of 'Construction Services' to any amounts received prior to obtaining completion certificate - Said explanation does not and cannot levy tax on amounts collected before

the levy itself came into existence - In this regard Rule 6(1) of the Service tax Rules, 1994 clearly provides that the said amounts cannot be taxed if the service was not taxable when the same was provided - The judgment in case of ***Amit Metaliks Ltd.***
2019-TIOL-3177-CESTAT-KOL is squarely applicable to the present case and hence demand on the 'Construction of Residential Complex Services' is set aside - Further, on limitation also, the department has failed to produce sufficient evidence to satisfy the ingredients for invocation of extended period of limitation and hence, the invocation of extended period of limitation to demand duty cannot be sustained - The entire demand cannot be confirmed both on merits and on limitation: CESTAT

Appeal allowed

Case law Cited:

M/s. Friends Land Developers Vs Commissioner of Central Excise And Service Tax, Ghaziabad [2018-TIOL-3767-CESTAT-ALL] ...Para 3...referred

State of West Bengal Vs Calcutta Club Ltd. [2019-TIOL- 449-SC-ST-LB]...Para 3.1...referred

Amit Metaliks Ltd Versus Commissioner of CGST, Bolpur - 2019-TIOL-3177-CESTAT-KOL...Para 3.2...followed

Kolla Developers & Builders Vs. CCCE & ST, Hyderabad-II Appeal No. ST/1915/2010, Final Order No. A/31197/2018 dated 27/08/2018...Para 3.2...referred

Commissioner OF C. EX. & S.T., Banglore-I Versus Keerthi Estates Pvt. Ltd. - 2019-TIOL-1727-CESTAT-BANG...Para 3.2...referred

FINAL ORDER NO.75631/2021

Per: P K Choudhary:

The present appeal has been filed by the appellant being aggrieved with the Order-in-Original 26/COMMR/ST-II/KOL/2016-17 dated 23.06.2016 passed by the learned Commissioner, whereby he has confirmed the demand of Service Tax on :

a. Recovery of amount pertaining to Car Parking charged by the Appellant from its customers for the period July 2010 to March 2012 involving Service Tax amounting to Rs. 8,60,325/-.

b. Recovery of amounts representing 'Membership of Club or Association Services' for the period April 2008 to June 2010 involving Service Tax amounting to Rs. 14,66,503/-.

c. Advance received by the Appellant from the customers towards construction of residential complex on or after 01/07/2010 for which the services had been provided prior to 01/07/2010 involving Service tax amounting to Rs. 55,31,116/-.

along with interest and imposition of penalty as proposed in the Show Cause Notice.

2. Briefly stated, the facts of the case are that the Appellant is engaged in the business of promoting plush housing and infrastructure projects in West Bengal. One such residential complex being developed by the Appellant was named "Eden City Maheshtala" at New Budge Budge Trunk Road, Maheshtala, 24 Parganas (South) for which the Appellant was registered with the Service Tax authorities. Based on the Service Tax audit of the Appellant for the period 2008-09 to 2012- 13, it was served with the Show Cause Notice dated 23/10/2013 wherein the issues as stated supra were raised. Hence, the present appeal before the Tribunal.

3. Shri Ankit Kanodia, learned Advocate, appeared on behalf of the appellant assessee. He submitted that as regards the first issue of demand of Service Tax on car parking charges collected by the Appellant from its buyers, it was not a Construction Service as the Appellant was only transferring right to use of the car parking to the buyers and the same cannot be treated as Construction Service. He also submitted agreements for sale and registered deed to show that the same was in the nature of right to use and not Construction Services. He also stated that since the preferential location services had specifically excluded car parking from the definition of such service, then the demand of Service Tax under the 'Construction of Residential Complex Service' head cannot be sustained. He also referred to the decision of the Tribunal wherein in a similar case ***M/s. Friends Land Developers Vs Commissioner of Central Excise And Service Tax, Ghaziabad [2018-TIOL-3767-CESTAT-ALL]***
the demand was dropped on the grounds of limitation itself as the levy of Construction Service was introduced w.e.f. 01/07/2010 and since

there was ambiguity in the matter and the CBIC had issued circulars from time to time in this regard and therefore, it cannot be alleged that there was an intention to evade payment of tax. He submitted that the appeal may be allowed both on the above grounds of merit as well as on limitation.

3.1 Next, as regards the demand of Service Tax on 'Club and Association Services' for the period April 2008 to June 2010, it is his submission that the said amounts were in the nature of deposit towards club construction and not any subscription fees for usage of Club Services. He further submitted that during the above period, the club itself was not in existence as the club started operations only from February 2012 and hence the demand under the 'Membership of Club or Association Service' cannot be sustained for want of existence of the Club. He also produced an architect's certificate in support of his submissions. He relied on the judgment of the Hon'ble Supreme Court in the case of ***State of West Bengal Vs Calcutta Club Ltd. [2019-TIOL- 449-SC-ST-LB]***
, wherein it was held that there cannot be any levy of Service Tax between members and the club and the dispute being no longer res integra, the demand can be quashed on the above ground alone.

3.2 Lastly, as regards the demand of Service Tax on amount received from buyers post 01/07/2010 for work done upto 30/06/2010, for which demand letters were issued to the buyers of flats on or before 30/06/2010, he stated that the learned Adjudicating authority has erred in confirming the demand on the incorrect interpretation of the statutory provisions as it is clear that when there was no taxable event in existence when the services were performed, there cannot be any Service Tax demand made only if consideration has been received post the service being made taxable by the government. He referred to Rule 6(1) of the Service Tax Rules w.e.f. 01/04/2005 wherein it was stated as- "Provided further that notwithstanding the time of receipt of payment towards the value of services, no service tax shall be payable for the part or whole of the value of services, which is attributable to services provided during the period when such services were not taxable." It is his submission that since it is not disputed that the services were performed prior to 30/06/2010 and the same has also been confirmed by the architect's certificate in this regard, then the question of any Service Tax liability on the same cannot arise and hence the demand is bad in law. He also relied on the following decisions :

> ***(a) Amit Metaliks Ltd Versus Commissioner of CGST, Bolpur [2020 (41) G.S.T.L. 325 (Tri. - Kolkata)] = 2019-TIOL-3177-CESTAT-KOL***
>
> ***(b) Kolla Developers & Builders Vs. CCCE & ST, Hyderabad-II Appeal No. ST/1915/2010, Final Order No. A/31197/2018 dated 27/08/2018***
>
> ***(c) Commissioner OF C. EX. & S.T., Banglore-I Versus Keerthi Estates Pvt. Ltd. 2019 (26) G.S.T.L. 227 (Tri. - Bang.) = 2019-TIOL-1727-CESTAT-BANG***

3.3 The learned Advocate also vehemently argued on the grounds of limitation as there was no suppression involved in the present case and that the department had mechanically alleged suppression without any substantive evidence in this regard.

4. Shri S.S.Chattopadhyay, learned Authorized Representative for the Respondent Revenue, while supporting the impugned order passed by the learned Commissioner, reiterated the findings made therein.

5. Heard both sides through video conferencing and perused the appeal records.

6. There are three different issues to be decided in the captioned appeal. Each one is taken up separately.

6.1 Firstly, as regards the demand of Service Tax on car parking charges collected by the appellant from its customers, we find that the general terms and conditions sheet as well as the sale deed mentions the said amounts against the Right to use car parking space and not as sale of car parking space. We find that the department has not brought any contrary submission to challenge the above finding that the Appellant has provided right to use towards car parking space and not 'Construction Service' towards the same Right to use. Though we are not inclined to accept the proposition of the Appellant that since the car parking is specifically excluded from the definition of 'Preferential Location Services' which was also introduced w.e.f. 01/07/2010 and hence the said service cannot be taxed under 'Construction of Residential Apartment Services', we find that the Appellant has made out a case on limitation ground as the said service was introduced w.e.f. 01/07/2010 and there was no clarity as to the taxability of such amounts as received by the Appellant. Hence the Appellant was under a bona fide belief that since it was giving Right to use of car parking space, no tax is payable under the category 'Construction Services'. We find that the Tribunal in Friends Land Developers Vs CCE and S.Tax (Supra) held as-

"8. However, we find that demand stands raised and confirmed by invoking longer period of limitation inasmuch as a show cause notice was issued on 24.07.2014 for the period July, 2010 to June, 2012. Apart from the fact that the Lower Authorities have alleged that the appellant did not file the returns and pay the Service Tax, there is otherwise no positive evidence adduced by the Revenue so as to justifiably invoke the longer period of limitation. The Service Tax law, during the relevant period, was still at the nascent stage and was not clear. The Board's Circular referred by the learned Advocate is to the effect that all peripheral activities provided by the builders would not be taxable under the category of "Residential Complex Construction Services". Inasmuch as admittedly the parking area is a separate area from flats sold by the appellant, there can be bona fide belief on the part of the assessee that such parking charges are not includible in the value of the services falling under "Residential Complex Construction Services". There is also no positive evidence indicating any mala fide on part of the appellant. Accordingly, we set aside the order on limitation and allow the appeal on the said ground"

Thus, in the instant case of the Appellant, since the entire demand has been raised by invoking extended period of limitation, the same is set aside.

6.2 Next, as regards the demand of Service Tax on 'Club Membership Services', we find that since there was no club in existence during the period of dispute, there cannot be any demand raised on the said ground. The Architect's Certificate dated 16/08/2016 is testimony to the above fact and there is no contrary evidence produced by the department to dispute the same. Also, post the judgment of the Hon'ble Supreme Court in Calcutta Club case (supra), it is a settled law that there cannot be any Service Tax charged on services between club and its members as the same tantamounts to self service. Hence, we find merit in the submission of the Appellant and accordingly the demand under the 'Membership of Club or Association Services' also needs to be set aside and we do so.

6.3 Lastly, as regards the demand of Service Tax on amounts received after 01/07/2010 for 'Construction Services' rendered upto 30/06/2010 and demand notices issued in this regard, we find that the lower authority has confirmed the demand by holding that as per the explanation added to clause (zzzh) for 'Construction of Residential Complex Services' w.e.f. 01/07/2010 viz.

"Taxable service means any service provided or to be provided to any person, by any other person, in relation to construction of complex; 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 authorised 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 authorised 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"

the essential condition for determining the taxability is (i) whether payment made by the buyer to the builder on or after 01/07/2010 and (ii) whether payment made before or after issuance of completion certificate by the competent authority and since in the case of the Appellant the completion certificate was not issued when the amounts were received, the same is taxable under the Service Tax net.

It is our considered view that there is no ambiguity in the above explanation as the same only extends the tax net of the 'Construction Services' to any amounts received prior to obtaining completion certificate. The above explanation does not and cannot levy tax on amounts collected before the levy itself came into existence. In this regard Rule 6(1) of the Service tax Rules, 1994 clearly provides that the said amounts cannot be taxed if the service was not taxable when the same was provided. We find that the Tribunal in the case of ***Amit Metaliks Ltd***. (Supra) held that as regards taxable event for levy of Service Tax as-

"17…………………We find that these two activities have been rendered prior to introduction of declared service under the statut and therefore, the same cannot be made applicable to the event that as concluded before the introduction of the new levy. This issue has been decided in case of CCE & C v. Schott Glass India Private Limited [2009 (14) S.T.R. 146 (Guj.) = 2009-TIOL-82-HC-AHM-ST and wherein paragraph 4 has held as under;

"4. The Service Tax, which has been imposed by way of Finance Act, 1994 (the Act), levies Service Tax as provided in Section 64(3) of the Act to all taxable services provided on or after commencement of Chapter 97 (sic) (Chapter V) of the Act. Thus, the taxable event is providing all taxable services which has been defined by Section 65(105) of the Act. Similarly, the Rules, which have been incorporated as Chapter 98 (sic) define "person liable for paying the service tax" under Rule 2(d) to mean in clause (iv), in relation to any taxable services provided by a person who is a non-resident or is from outside India, does not have any office in India, the person receiving taxable service in India. The taxable event in relation to Service Tax is admittedly the rendering of taxable service. The said taxable services were rendered between November, 2001 and March, 2002. In the circumstances, merely because the invoice is raised and payment made subsequently viz. after 16-5-2002 the liability cannot be fastened on the recipient of the services as the taxable event had already occurred paste (sic) and raising of invoices and/or making of payment cannot be considered to be a taxable event. Nor is it possible to hold that the provision of Rule 2(1)(d)(iv) of the Rules is retrospectively applicable to services rendered prior to 16-8-2002. Thus, neither the Section nor the Rule even suggest that the taxable event is the raising of an invoice for making of payment. It is well settled in law that a taxing statute has to be read and plain meaning assigned to the provisions without importing any extraneous consideration on a presumption."

18. This issue has also been decided held in case of Vistar Construction Pvt. Ltd. V. Union of India [2013 (31) S.T.R. 129 (Del.)] = 2013-TIOL-73-HC-DEL-ST
, wherein it is held that taxable event is rendition of service and hence the rate of tax applicable would be one on the date on which services were rendered but not on the date when payment is received.

Thus, there is no justification in imposition of service tax liability on the appellant, has been held in the impugned order."

We find that the above judgment is squarely applicable to the facts of the present case and hence we set aside the demand on the 'Construction of Residential Complex Services' as confirmed by the learned Adjudicating authority in entirety.

7. Further, on limitation also, we find that the department has failed to produce sufficient evidence to satisfy the ingredients for invocation of extended period of limitation and hence, we are of the view that the invocation of extended period of limitation to demand duty cannot be sustained in the case at hand.

8. In view of the above discussions and the settled legal judicial precedence and provisions contained in statutes referred to above, the entire demand cannot be confirmed both on merits and on limitation. Thus, the appeal filed by the appellant, is allowed with consequential relief, if any, as per law. The Order of the lower authority is modified to the above extent.

(Operative part of the order was pronounced in the open Court.)

(DISCLAIMER
: Though all efforts have been made to reproduce the order correctly but the access and circulation is subject to the condition that Taxindiaonline are not responsible/liable for any loss or damage caused to anyone due to any mistake/error/omissions.)