CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 348 of 2012

[Arising out of Order-in-Original/Appeal No 105-106-2012-STC-KANPAZHAKAN-COMMR-A--AHD dated 27.03.2012 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD]

J P Infrastructure Pvt Ltd **.... Appellant**

Iscon House, Opp C G Road,
AHMEDABAD, GUJARAT-380007

VERSUS

Commissioner of Central Excise & ST, Ahmedabad **.... Respondent**

7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat-380015

APPEARANCE :

Shri Bishan R. Shah, Chartered Accountant for the Appellant
Shri G. Kirupanandan, Superintendent (AR)for the Revenue.

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

DATE OF HEARING : 04.10.2022
DATE OF DECISION: 12.12.2022

FINAL ORDER NO. A/12177 / 2022

RAMESH NAIR :

This appeal is directed against Order-In-Appeal No. 105 to 106/2012-(STC)/K.ANPAZHAKAN/Commr.(A)/Ahd. Dated 23.03.2012 passed by the Commissioner (Appeals), Ahmedabad.

2. The relevant facts that arise for consideration are that intelligence gathered revealed that appellant is engaged in the business of providing real estate agent services for which they were not registered with service tax department and not paying service tax. Accordingly a search was carried out at the premises of appellant and statement of Shri Jayesh Talakshibhai Kotak, Director of appellant's company was recorded. During the course of scrutiny of development agreements, balance sheet and other documents pertaining to the three commercial construction projects i.e. (i) Iscon Mega Mall at Ahmedabad (ii) Iscon Mall at Surat (iii) Iscon Mega Mall at Rajkot and

accounts ledger, it was found that the Appellant was having individual Development Agreements with the Land owners/ construction companies. As per the development agreements, the developers/advisors are responsible for advertisement and marketing of the said commercial projects for inviting purchasers/buyers; advice the owner companies on appointment of the contractors; purchase of raw materials and commercial viability of the project. For the aforesaid services provided by the Appellant's company, they were entitled for remuneration at the rate minimum of 2.5% of the total construction cost for the services rendered during the scheme on yearly basis or as mutually agreed from time to time. Statement of land owner companies also recorded during the investigation. Investigation reveal that Appellant has received total amount of Rs. 3,39,33,531/- as development charges @2.5% of the total construction cost from the land owner/ construction companies. After coming to conclusion that the appellant herein had not discharged the Service Tax liability for the amounts received by them, show cause notice dated 08.02.2010 was issued to the appellant by the department proposing the demand of service tax totally amounting to Rs. 41,94,185 /- along with interest and penalties. The allegations in the show cause notice were confirmed vide the Order-In-Original 18.10.2011 in which entire demand of service tax was upheld along with interest. However, the adjudicating authority did not impose penalty under Section 76 and 78 of the Finance Act. Aggrieved by the order, the appellant and revenue both filed the appeals before the Commissioner (Appeals), who vide impugned Order-in-Appeal rejected the appeal of appellant and allow the appeal of revenue. Aggrieved by the impugned order-in-appeal, the present appeal has been filed.

3. Shri Bishan R. Shah, learned Chartered Accountant appearing on behalf of the appellant submits that the actual service rendered by the appellant are that of developer of commercial construction and not limited/restricted to that of an advisor, service rendered by the appellant cannot be classified under the category of "Real Estate Agent" but it is a developer services.

4. He also submits that as per Circular No. 108/02/2009-ST dated 29.01.2009 and Circular No. 151/2/2012-ST dated 10.02/2012, the service provided by the Appellant till the execution of the sale deed would be in the

nature of "self service" and would not attract service tax. He placed reliance on the following decisions.

(i) Commissioner of Service tax vs. Shrinandnagar-IV Co. Op. Housing Society Ltd. – 2011-23-STR 439 (Guj.)

(ii) Magus Construction Pvt. Ltd. vs. Union of India – WP(C)/2615/06 dated 15.05.2008.

5. He further submits that Show cause Notice is issued on 08.02.2010 by the department whereas the issue involved is in knowledge of department since 09.01.2007. The period involved in SCN is 2007-08. Remaining amount of tax is also paid by the appellant on 17.03.2008 and 17.04.2008. It is evident that the activities undertaken by the appellant are in the knowledge of department. As per the provisions of Section 73(1), the SCN is required to be issued within one year from the knowledge to the department. In the present matter SCN was issued after completion of more than 2 years. Hence, SCN is time barred.

6. Without prejudice, he also submits that appellant paid service tax of Rs. 41,94,185/- along with interest of Rs. 2,83,277/- before issue of show cause notice. In view of CBEC letter No. 137/167/2006-CX.4 dated 03.10.2007, SCN cannot be issued when the service tax along with interest paid prior to issue of SCN.

7. He also argued that the appellant has not collected service tax from the service receivers and therefore provisions of Section 67 will be applicable and benefit of cum tax value is admissible and therefore taxable value is required to be recomputed. He placed reliance on the following decisions.

(i) Maruti Udyog 2002(141)ELT 003 (SC)
(ii) Rampur Engineering 2006(5)STR 386

8. As regard the imposition of penalty he submits that where service tax and interest have been paid before issuance of show cause notice, penalty under Section 76 and 78 is not leviable. Further, if penalty under Section 78 is imposed, separate penalty under Section 76 is not imposable.

9. Shri G. Kirupanandan, learned Superintendent, Authorised Representative of the Department has, however, supported the impugned order and contended that the demands were correctly confirmed by the Adjudicating authority and the appeal needs to be rejected.

10. We have heard both the sides and perused the records. The issue to be decided by us in this case is:-

Whether the appellant is liable to discharge Service Tax liability under the category of real estate agent services for the amount received by them as development charges?

11. We find that as per revenue service was sought to be taxed under the category of "real estate agent's service" in terms of Section 65(88) and 65(89) of the Finance Act, 1994. The statutory provision of the tax entry are as below : -

Section 65(88) and 65(89) of the Act, 1994, defines the "real estate agent" and "real estate consultant" as under:-

> ***(88)*** *"real estate agent" means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant;*
>
> ***(89)*** *"real estate consultant" means a person who renders in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management, of real estate;*

Section 65(105)(v) defines taxable service in relation to 'Real Estate Agent' as under :

> *"**taxable service**" means any service provided or to be provided to any person, by a* real estate agent *in relation to* real estate *and the term 'service provider' shall be construed accordingly".*

The Revenue contended that the Appellant received development charges @2.5% of the construction cost from land owners, was in relation to services provided as "Real Estate Agent's and accordingly liable to service tax. However, we find that to levy service tax first of all the provider of service

should be a real estate agent and second while acting as agent the person concerned should have provided service in relation to sale, purchase, leasing or renting of real estate. There is nothing in the show cause notice or the relied upon documents to show that the Appellant acted in a capacity of "real estate agent" whereas agreement show that appellant acted as developer of projects. From the plain reading of above said definition of real estate agent and real estate consultant, it is seen that to get covered under the said definition, it has to be brought on record that the person has rendered directly or indirectly any services. It is seen from the records that appellant has received Development Charges and not any consultancy charges. The said facts are not denied or disputed by the adjudicating authority. It is to be seen on this factual matrix as to whether there was any service rendered by the appellant in the category of real estate agent for receiving development charges. It is common knowledge that the real estate agent transacts the business of sale or purchase of the property, leasing or renting of the property and gets an amount as a commission. Though the definition of real estate consultant talks about evaluation, construction, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management of real estate, it has to borne out of the record that such services are rendered. As already stated hereinabove that the appellant herein has not rendered any of the services.

12. We also have gone through the relevant contracts/ agreements and find that in development agreement with M/s Chimanlal Properties Pvt. Ltd. appellant is referred to as Developer and M/s Chimanlal Properties Pvt. Ltd. is referred to as owner. The clause 19 of the said agreement provides as under :

> ***"19.*** *The Developer shall be entitled to the profit for the services rendered by it on the total cost of the scheme whichever profit earn by the owner on yearly basis or as mutually agreed between Developer and owner from time to time in writing."*

It is clear that the amount received by the appellant as development charges which are nothing but in the form of profit, which will not get covered under the category of real estate agent services.

13. Similarly, in development agreement entered with M/s Aryan Arcade Ltd. by the Appellant, M/s Aryan Arcade is referred to as owner and Appellant is referred to as Developer. Further on going through the development agreement with M/s Divya Arcade Pvt. Ltd., we find that all the agreements clearly have shown the activity of appellant as project developer and not as real estate agent. The activity carried out by the appellant would, therefore, not fall under 'Real Estate Agent's Service'. Further, whether a service falls under a particular category or not will depend upon the nature of the service being provided and the legal interpretation of the documents, like contracts, agreements etc. entered by the service provider with their customers. A service will not become a particular service merely on the acceptance of the service provider.

14. We find that identical issue, in the case of Safal Construction Pvt. Limited (Appeal No. ST/445/2012) has been decided by this Tribunal vide order No.A/11755/ 2022 dated 28.11.2022. The relevant portion of the order is reproduced below:-

> "4. We have carefully considered the submissions made by both the sides and perused the record. We find that in the present case the Revenue has demanded service tax on the consideration received by the appellant against the co-development agreement between the appellant, M/s. Safal Infrastructure Pvt. Limited (now known as M/s. Safal Realty Pvt. Limited) and M/s. Pegasus Commercial Co-op Society Limited. The department contended that the appellant's activity is the Support of Business of the joint venture therefore, the appellant have provided Business Support Service. In this regard it is necessary to go through the relevant clauses of the co-development agreement dated 01.11.2006:-
>
> > (A) SIPL has entered into an Agreement obtaining exclusive rights of development, construction and sale of the units to be constructed on the land being survey No. 1296/1, 1296/2 and 1298/1 which is more particularly described and mentioned in the schedule hereunder written [hereinafter referred to as the 'said land'] owned by the Pegasus Commercial Co. Op. Society Ltd.
> >
> > (B) SIPL has incurred some expenses on project. However, looking to the size of the project and involvement of work and time, it found that it was not possible for it to handle the scheme alone by itself. At the same time, SIPL has less experience of marketing, liasoning etc. with the Government departments and follow up with the sanctioning authorities, etc.
> >
> > (C) SIPL established contact with SCPL which is in the line of development and construction since many years and requested to combine with it as co-developers to develop the said land and complete the scheme on the said land.
> > (D) SCPL gave its consent and decided to develop the said land jointly. The parties hereto finalized the terms & conditions to which they are desirous of

recording into writing by executing this Co-development Agreement being these present:-

NOW THIS SUPPLEMENTARY AGREEMENT WITNESSETH AND IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. The parties of the First Part and Second Part hereto as co-developers have agreed to carry out the joint development of the scheme on the said land by contributing their expertise, financial resources, manpower, etc.

2. The parties hereby specifically agree that this agreement for joint development shall not constitute partnership between the parties hereto and neither shall be agent of any body.

3. The party of the First Part and Third Part hereby assure the Party of the Second Part that the titles of the said land are clear, marketable and free from doubt and the said land is free from encumbrances or charge.

4. The Party of the First Part hereby assures the party of the Second Part that it will deploy the necessary funds from its own resources or by borrowings from the financial institutions to complete the construction work allocated to it under this Agreement, as early as possible. The party of the First Part shall be entitled to utilize the fund arranged by it against mortgage of the said land.

5. It has been specifically agreed between the parties hereto that all works other than allocated to the Party of the First Part will be done by the party of the Second part.

6. To facilitate early implementation of the scheme and for mutual convenience, functional division between the parties hereto are made and agreed as under-

6.2 FUNCTIONS OF THE PARTY OF THE SECOND PART: (SCPL)

A. It will obtain all licenses, approvals, permissions, consents, no objections certificates, etc, as may be necessary or required according to the laws legally applicable in connection with undertaking and implementing the proposed scheme.
B. It will look after and take care of all the legal procedural aspects including getting the plans modified, to meet the requirements laid down by the competent authorities, etc.
C. If required it will get amended plans for the said land for joint development of the scheme through Architects, Structural engineers or other consultants and will do necessary follow up work for getting the plans sanctioned.
D. It will look after the activities of advertisements and marketing of the scheme.
E. Reference is also drawn to para '5' herein above regarding the residuary work to be handled by the party of the Second Part. It has been specifically agreed by and between the parties hereto that all expenses in carrying out the development and construction and completion of the scheme shall be borne and paid by the Party of the First part, save and except which the Party of the Second Part has expressly agreed to. …

12. In consideration of contributing the expertise and experience agreed to be contributed by the parties of the First part and Second Part hereto entitlement from the project, after deduction of expenses relating to building construction from the gross income offered in Profit and Loss Account shall be as under:

Party of the First Part - 75%
Party of the Second part - 25%

Total: - 100%

13. The parties of the First and Second Part hereto are hereby individually authorized to collect the sale proceeds from prospective purchasers and shall not be obliged to deposit the sale proceeds recovered from the prospective purchasers by them in common pool or joint bank account, if maintained, but retain with them against their own outgoings.

14. Although functional division has been made for the reasons already given and clarified above, the party of the Second Part shall as often a possible visit and observe the progress of the scheme on site, an actively contribute and cooperate in all respects with the party of the First Part in solving all difficulties and hurdles in the implementation the scheme."

5. From the above extract of the agreement it is clear that the appellant is not an agent and providing service to anyone else whereas the appellant (SCPL) is an active party to the joint venture with M/s. Safal Infrastructure 6 Service Tax Appeal No. 445 of 2012-DB Pvt. Limited and M/s. Pegasus Commercial Co-op Society Limited. The consideration is also on the basis of the profit of joint venture. In this fact, the appellant (SCPL) is not providing any service to any other person and the appellant was assigned the work in the capacity of co-developer and not an agent. Therefore, it cannot be said that appellant have provided Business Support Service to any other person. In this regard the Hon'ble Supreme Court in the case of UOI vs. Mahindra & Mahindra Limited (supra) held that ordinarily the Court should proceed on the basis that apparent tenor of agreement reflects the real state of affairs. Though it is open to Revenue to allege and prove that apparent is not real. In the present case also, if strictly go through the above agreement, it is nowhere mentioned that appellant is a service provider to some service recipient. As per the agreement, all the parties to co-development agreement have been assigned to their respective jobs and all have performed in favor of the joint venture in which again all the three parties are participants. Therefore, it is clear that the appellant have not provided any service to the joint venture.

6. Learned Counsel also strongly argued that the demand is time-barred. In this regard we find that appellant have not carried out activities clandestinely as the same were as per the co-development agreement and was on principal to principal basis. The case was made out on the observation of audit from various records of the appellant and all the transactions were admittedly recorded in the books of accounts. In this fact, the suppression of fact or any malafide to evade payment of service tax is not established. Therefore, in our considered view, demand of service tax is hit by limitation also.

7. As per our above discussion and findings, the impugned order is not sustainable hence, the same is set-aside to the extent it confirms demand of service tax, interest and penalties. The appeal is allowed with consequential relief."

15. In view of the above, we agree with the learned advocate that the services being provided by the appellant were not 'Real Estate Agent' service so as to confirm service tax on the same. We accordingly set aside the impugned order on merits and allow the appeal with consequential relief, if any.

(Pronounced in the open court on 12.12.2022 *)*

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

KL