

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

**PRINCIPAL BENCH - COURT NO. II
Service Tax Appeal No. 51211 of 2022 (SM)**

(Arising out of Order-in-Appeal No. 371 (SM)/ST/JPR/2021 dated 13.12.2021 passed by the Commissioner (Appeals) of CGST & Central Excise, Jaipur.)

M/s Krishnakunj Developers Pvt Ltd

Appellant

516, 5th Floor, Alankar Plaza
Central Spine Vidhyadhar Nagar
Jaipur-302023

VERSUS

**Commissioner, Central Excise &
CGST-Jaipur I**

Respondent

NCRB Statue Circle,
Jaipur 302005

APPEARANCE:

Mr. Mohit Gohlyan, Chartered Accountant for the Appellant
Shri Ishwar Charan, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 51068 / 2022

Date of Hearing: 10.11.2022

Date of Decision: 10.11.2022

ANIL CHOUDHARY:

Heard the parties.

2. The issue in this appeal is whether on the refund granted is unjust enrichment applies or not.

3. The brief facts of the case are as follows:-

3.1 The appellant is a builder /developer who constructs dwelling Unit/Apartment for sale. The appellant is registered with the

department for providing service under the head construction of residential complex service, man power supply service and works contract service, etc. Audit objection was raised vide IAR No. 855/16-17 dated 15/06/2017 that the appellant have not paid service tax on the amount received from the buyers of the flat/units towards society membership fee, the details of which are as follows:

S.No.	Period	Society Membership Fees received
1	01.10.2015 to 14.11.2015	1,17,000
2	15.11.2015 to 31.05.2016	6,98,700
3	01.06.2016 to 31.03.2017	12,79,050
	Total	20,94,750

3.2 Service tax was calculated at Rs. 3,09,548/-. The appellant did not agree to the audit objection and informed their disagreement in writing. Subsequently, the appellant deposited on 31/10/2017, amount of service tax Rs. 2,69,685/- on cum tax basis+ interest Rs. 51,670/-. Thereafter, revenue issued show cause notice dated 18/05/2018, for demanding the service tax with interest as calculated by it, with proposal to appropriate the amounts already deposited by the appellant. Further, penalty was also proposed under Section 76. The appellant also filed refund claim on 12/10/2018 demanding refund of the amounts deposited, claiming that the demand as per audit objection is not tenable, as such amount was collected as the trustee of the flats/unit buyers, which is to be passed on to the RWA or society of flat owners once it is constituted. Revenue also issued SCN dated 24/12/2018 for denial of refund claim. Both the SCN were adjudicated by separate OIO, confirming the demand alongwith interest and rejecting the refund claim. In appeals preferred by the appellant, the

commissioner (appeals) vide common OIA dated 25/11/2019 allowed both the appeals observing that no taxable service have been provided, nor the amount is collected is towards any taxable service, rather the amount is collected as a trustee from the buyers.

5. Consequent to allowing of the appeals, the appellant approached the department and vide OIO dated 11/05/2020, the Assistant Commissioner granted the refund for an amount of Rs. 3,21,354/- (2,69,685+51,670). As regards the Unjust Enrichment, it was observed as follows:

“I find that Unjust Enrichment is not applicable in the instant case as the claimant has given undertaking dated 11.05.2020 that they had not collected any service tax from their customers against which refund is being sought & they had deposited such amount out of their own funds. ‘Maintenance Membership fees’ received from the members has also been transferred to the Secretary, Krishna Enclave maintenance Society. On perusal of the balance sheet for the FY 2017-18, and Profit and Loss account, it has been noticed they have shown expenditure on account of Service Tax of Rs. 3,65,731/-i.e. in Profit and loss account under the head of ‘Expenses-IV (f) Administrative and other expenses’. As such it is proved that they have not collected any service tax from their customers.”

7. Subsequently, the Order-in-Original was reviewed by the Jurisdictional Commissioner and vide review order dated 07/08/2020, it was observed that the finding of the Assistant Commissioner as regards, unjust enrichment is not proper and accordingly appeal was preferred before the Commissioner (appeals).

8. The Commissioner (appeals) vide impugned Order-in-Appeal dated 16/12/2021, observed that assessee have shown the amount deposited as expenditure in the profit and loss account under the head 'administrative and other expenses'. As such, it is proved that they have not collected any service tax from their customers. Further, observed that burden of duty can also be passed by booking the amount as expenditure in profit and loss account, by dipping into its profits. Further observed that assessee has not shown amount as receiveable. Accordingly, it was held that the refund under dispute has not passed the test of unjust enrichment.

9. Being aggrieved appellant is before this Tribunal. Learned Counsel for the appellant urges that the Commissioner (Appeals) have erred in holding that the test of unjust enrichment has not been cleared. He further states that the assessee had two options, either to capitalise the amount of tax and interest deposited, and show it in the balance sheet as amount paid and refundable. Alternatively, they could debit the said amount to the profit and loss account. In both the cases, the burden of tax has been borne by the appellant and not by anybody else. Although the Commissioner (Appeals) have observed that the burden of tax has been passed on, as the appellant have debited the amount as expenditure, but have failed to identify as to whom the burden has been passed on. Accordingly, he prays for allowing the appeal with consequential benefits.

10. Learned AR for revenue relies on the impugned order.

11. Having considered the rival contentions, I hold that that in the facts and circumstances, the appellant have not passed on the burden

of tax to any third person or to the buyer of the flats. In the facts and circumstance, it is the appellant who has borne the burden of tax. It does not make any difference whether the amount is debited in the profit and loss account or it is shown as amount receiveable on the asset side in the balance sheet, in either case the burden falls on the appellant-assessee only.

12. In view of my finding and observations, I hold that the appellant has passed the test of unjust enrichment. Accordingly, the appeal is allowed and the impugned order is set aside. The appellant is entitled to consequential benefits, if any.

(Dictated and pronounced in open Court)

Anil Choudhary
Member(Judicial)

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