IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

The Hon'ble Sri Justice V.RAMASUBRAMANIAN
and
The Hon'ble Sri Justice ABHINAND KUMAR SHAVILI

WRIT PETITION No.13036 of 2017

Between:

M/s.Rajaram Constructions,
D.No.40-25-4, GF 2, Hemalatha Enclave,
Koneru Chennakesava Rao Street,
Patamata Lanka, Vijayawada, Krishna District,
Rep. by its Managing Partner Malineni Venkata
Nagesh

...Petitioner

Vs.

Union of India,
Ministry of Finance,
Department of Revenue,
Rep. by its Sect
Sangareddy, Medak District,
(Now Sangareddy District) and others

.. Respondents

For Petitioners : Ms Shaik Vaheeda Sushma

For Respondents : Mr. T. Vinod Kumar

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVALI

Writ Petition No.13036 of 2017

ORDER: *(per VRS, J)*

The petitioner, who is in the line of construction of buildings and development of properties, has come up with the above writ petition challenging an order of adjudication passed by the Commissioner of Central Excise and Service Tax, determining the service tax payable under the Finance Act, 1994.

2. Heard Mr. T.Vinod Kumar, learned counsel appearing for the petitioner and Mr. M.V.J.K. Kumar, learned Senior Standing Counsel appearing for the respondents.

3. A show cause notice, dated 05.06.2015, was issued on the basis of intelligence gathered by SIV Cell, Vijayawada, to the effect that the petitioner was engaged in the construction of residential complexes pursuant to development agreements entered into with the landlords and that they sold some flats to the prospective buyers before obtaining completion certificate from the appropriate authority.

4. The petitioner sent a reply to the show cause notice raising various objections. Thereafter, an opportunity of personal hearing was granted. After considering the objections raised and the documents submitted, the 2nd respondent passed an Order-in-Original, dated 25.08.2015, determining the service tax payable at Rs.44,14,518/- for the period from 01.04.2010 to 31.03.2015 under the proviso to Section 73 (1) of the Finance Act, 1994. The 2nd respondent also determined the penalty payable under the other provisions of the Act. It is against the said order that the petitioner has come up with the above writ petition.

5. The objections of the petitioner to the impugned order are two fold, namely, (a) that the number of flats constructed by the petitioner in the complexes in question were less than the statutory minimum prescribed, namely, twelve (12) and that therefore, there was no tax liability; and (b) that in any case some of the flats were sold after issue of the completion certificate, making the petitioner not liable to pay service tax in respect of those flats.

6. At least in so far as the first objection of the petitioner is concerned, there appears to be a statement recorded from the Managing Director of the petitioner firm, which finds a place in paragraph – 3 of the impugned order. In paragraph-3 of the impugned order, the adjudicating authority has taken note of the statement made by Sri M. V. Nagesh, Managing Partner of the petitioner, on 26.03.2014 to the effect that the number of flats constructed in each of the three residential complexes were '10'. But unfortunately, no finding of fact was recorded by the adjudicating authority to the effect that the claim made by the Managing Partner of the petitioner was false and that there were actually more than 12 residential flats in the complexes, so as to attract the liability under the relevant provision.

7. Therefore, the impugned order suffers from clear non-application of mind and to a very important criterion which goes to the root of the jurisdiction of the 2nd respondent.

8. In view of the above, the writ petition is allowed, the impugned order is set aside and the matter is remanded back to the 2nd respondent. It is open to the 2nd respondent even to make an inspection or cause an inspection of the complexes constructed by the petitioner to find out the number of flats constructed by them. It is also open to the petitioner to produce additional material to show the

number of flats constructed and also to show the actual date of construction and the actual date of receipt of the completion certificates. Thereafter, the 2nd respondent may pass orders afresh in accordance with law. It is made clear that we have not pronounced any opinion on either of the two points raised by the petitioner as both are questions of fact to be adjudicated by the 2nd respondent.

9. As a sequel thereto, miscellaneous petitions, if any, pending shall stand dismissed. No order as to costs.

V. RAMASUBRAMANIAN, J

ABHINAND KUMAR SHAVILI, J

October 03, 2017

KTL