CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – I

Service Tax Appeal No.52243 of 2016 [DB]

[Arising out of Order-in-Original No. 17-19/PC/ST/BPL-ST/2016 dated 29 February, 2016 passed by the Principal Commissioner of Customs, Central Excise & Service Tax, Bhopal (M.P.)]

Shri Prakash Wadhwani **...Appellant**
155, Ridge Road,
IDGAH Hills, Bhopal.

VERSUS

Commissioner, Central Excise, Customs and Service Tax, Bhopal **...Respondent**
48, Administrative Area, Arera Hills,
Bhopal.

APPEARANCE:

Shri Sandeep Mukherjee, Chartered Accountant for the Appellant
Shri R.K. Maji, Authorised Representative for the Respondent

Coram: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR.C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 25/02/2020
DATE OF DECISION : 13/03/2020

FINAL ORDER No. 50617/2020

JUSTICE DILIP GUPTA:

This appeal seeks the quashing of the order dated 29 February, 2016 passed by the Principal Commissioner of Customs, Central Excise and Service Tax, Bhopal[1] by which the demand of service tax of Rs.50,73,944/- has been confirmed. Interest and penalty have also been imposed upon the appellant.

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1. the Principal Commissioner

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2. The appellant is engaged in civil construction work for some of the Government Departments. During the period from 1 October, 2007 to 31 March, 2014, the appellant undertook the following works for the Bhopal Development Authority:-

Show Cause Date	**Period**	**Work done**
18.04.2013	01.10.2007 to 31.03.2012	Construction of 489 EWS quarters at Vinayak Nagar, Gondarmau, Bhopal
30.12.2013	01.04.2012 to 31.03.2013	Construction of 489 EWS quarters at Vinayak Nagar, Gondarmau, Bhopal
22.04.2015	01.04.2013 to 31.03.2014	Construction of 489 EWS quarters at Vinayak Nagar, Gondarmau, Bhopal
		Construction of LIG houses at Salaiya Bhopal

3. Three show cause notices were issued to the appellant. The first show cause notice dated 18 April, 2013 was issued for the period 1 October, 2007 to 31 March, 2012. The second show cause notice dated 30 December, 2013 was issued for the period 1 April, 2012 to 31 March, 2013, while the third show cause notice dated 22 April, 2015 was issued for the period 1 April, 2013 to 31 March, 2014. The show cause notices mention that the Appellant is liable to pay service tax under the category of "construction of complex" services as defined under section 65 (30a) of the Finance Act, 1994[2] for construction of the quarters for Bhopal Development Authority.

4. The appellant submitted a detailed reply to the aforesaid show cause notices.

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2. the Finance Act

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5. The Principal Commissioner has confirmed the demand of service tax of Rs.50,73,941/-under "construction of complex" services for the period 1 April, 2012 to 31 March, 2013. Thus, it is clear that the Principal Commissioner has confirmed the demand of service tax only with regard to the work executed for the Bhopal Development Authority for the period 1 April, 2012 to 31 March, 2013 and has discharged the demand made for the other works carried out for the Bhopal Development Authority.

6. Shri Sandeep Mukherjee, learned Chartered Accountant appearing for the appellant has made the following submissions:-

(i) A "residential complex" means a complex comprising a building or buildings, having more than 12 residential units and since the appellant had constructed buildings that did not have more than 12 residential units, no service tax liability could be fastened upon the appellant for construction of 489 EWS quarters at Vinayak Nagar, for the Bhopal Development Authority for the period 1 October, 2007 to 31 March, 2012.

(ii) The Principal Commissioner could not have levied penalty and interest upon the appellant; and

(iii) The extended period of limitation could not have been invoked in the fact and circumstances of the present case.

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7. The learned Authorized Representative of the Department has, however, supported the impugned order and has submitted that no interference is called for in this appeal.

8. The submissions advanced by the learned Chartered Accountant for the appellant and the learned Authorised Representative of the Department have been considered.

9. The dispute in the present appeal relates to the work undertaken by the appellant for the Bhopal Development Authority for construction of 489 EWS quarters at Vinayak Nagar during the period April, 2012 to 31 March, 2013. The demand for the same nature of work for the other periods has, however, been discharged.

10. Section 65 (30a) of the Finance Act deals with 'construction of complex' and is defined as follows:-

65 (30a) - "construction of complex" means –

(a) Construction of a new residential complex or a part thereof; or

(b) Completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

(c) Repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;

11. The taxable service under section 65 (105) (zzzh) of the Finance Act means any service provided or to be provided to any person, by any other person, in relation to construction of complex;

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12. "Residential Complex" has been defined under section 65(91a) of the Finance Act as follows:-

> **"(91a)** "residential complex" means any complex comprising of-
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> (i) a building or buildings, having more than twelve residential units;
>
> (ii) a common area; and
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> (iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.
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> **Explanation**: For the removal of doubts, it is hereby declared that for the purposes of this clause.-
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> (a) " personal use" includes permitting the complex for use as residence by another person on rent or without consideration;
>
> (b) "residential unit" means a single house or a single apartment intended for use as a place of residence;"

13. The definition of a "residential complex" leaves no manner of doubt that it would be a complex comprising of a building or buildings, having more than twelve residential units. In other words a complex may have a building having more than twelve residential units or a complex may have more than one building each having more than twelve residential units. Independent buildings having twelve or less than twelve residential units would not be covered by the definition of "residential complex". In the present case, the appellant had constructed independent buildings having one residential unit only. Thus, even if the appellant had constructed more than 12 independent buildings, the nature of activity would not be "construction of complex" and, therefore, the service tax could be levied.

14. In this connection reliance can be placed on a Division Bench judgment of the Principal Bench of the Tribunal in **Macro Marvel**

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Projects Ltd. v/s Commissioner of Service Tax, Chennai [3] wherein the demand of Service Tax was for the period 16 June, 2005 to November, 2005 under "construction of complex" service under section 65(30a) of the Act. The Bench examined the scope of "construction of complex" and the meaning of 'residential complex' under section 65(91a) of the Act and observed as follows:-

> " It is abundantly clear from the above provisions that construction of residential complex having not more than 12 residential units is not sought to be taxed under the Finance Act, 1994. For the levy, it should be a residential complex comprising more than 12 residential units. **Admittedly, in the present case, the appellants constructed individual residential houses, each being a residential unit, which fact is also clear from the photographs shown to us. In any case, it appears, the law makers did not want construction of individual residential units to be subject to levy of service tax.** Unfortunately, this aspect was ignored by the lower authorities and hence the demand of service tax. In this view of the matter, we are also not impressed with the plea made by the appellants that, from 1-6-2007, an activity of the one in question might be covered by the definition of 'works contract' in terms of the Explanation to section 65 (105)(zzzza) of the Finance Act, 1994 as amended. 'According to this Explanation, 'construction of a new residential complex or a part thereof' stands included within the scope of 'works contract'. But, here again, the definition of "residential complex" given under section 65(91a) of the Act has to be looked at. By no stretch of imagination can it be said that individual residential units were intended to be considered as a "residential complex or a part thereof."
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> **(emphasis supplied)**

15. The Civil Appeal filed by the Department to assail the aforesaid order of the Tribunal was dismissed by the Supreme Court on 7 July, 2009.

16. The aforesaid decision of the Tribunal in **Macro Marvel Projects** was subsequently followed by the Tribunal in **A.S. Sikarwar vs. Commissioner of Central Excise, Indore**[4] and the relevant portion of the order is quoted below:-

> "**In this case, the Appellants have undertaken construction work of 15 residential houses under a contract with M.P. Housing**

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3. 2008 (12) STR 603 (Tri.-Chennai)

4. 2012 (28) STR 479 (Tri. – Del.)

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Board. The Revenue was of the view that the Appellants should have paid service tax on the activity under the entry 65(105)(zzzh) for taxing 'construction of complex' as defined under Section 65(91a) of Finance Act, 1994. **The submission of the appellant is that the entry covers only such building where each of the building has got more than 12 residential units. They have built 15 independent houses and not a complex and hence their activity was not taxable under the entry 65(105)(zzzh) which adopts definition in Section 65(91a)**. He relied upon the decision of the Tribunal in the case of *Macro Marvel Projects Ltd.* v. *CST, Chennai* - 2008 (12) S.T.R. 603 (Tri.-Chennai).

2. The Authorised Representative appearing for the Revenue submits that the explanation under Section 65(91a) of Finance Act, 1994 gives definition of "residential unit" to mean "a house or single apartment intended for use as a place of residence". Even if the residential units are separate, it will be covered by the definition, according to him.

3. The A.R. further submits that the decision in the case of *Macro Marvel Projects Ltd.* was with reference to the entry for works contract under Sections 65(105)(zzzza) of Finance Act, 1994 whereas the present case is in respect of construction of residential complex under entry 65(105)(zzzb). He also points out that the Tribunal in para-2 of the order has observed as under :-

> "These observations of ours with reference to 'works contract' have been occasioned by certain specific grounds of this appeal and the same are not intended to be a binding precedent for the future."

4. We have considered arguments on both sides. We find that the definition of residential complex as per Section 65(91a) of Finance Act, 1994 is applicable for both the entries under Section 65(105)(zzzh) for levy of tax on construction of residential complex as also for entry under Section 65(105)(zzzza) for works contract. Therefore, there cannot be an argument that the expression 'residential complex' has to be interpreted in one manner for works contract and in a different manner for levy of tax on construction of a residential complex.

5. We further note that Revenue being aggrieved by the decision of the Tribunal in the said matter had filed appeal with the Hon'ble Supreme Court and the Hon'ble Supreme Court has dismissed the appeal filed as reported at 2012 (25) S.T.R. J514 (S.C.). **So we consider that this matter is no longer *res integra* and service tax can be demanded under 65(105)(zzzh) only if the building concerned has more than 12 residential units in the building and such levy will not apply in cases where in one compound has many buildings, each having not more than 12 residential units**. Therefore, we set aside the impugned order and allow the appeal."

[emphasis supplied]

17. It also needs to be noticed that the same view was expressed by a Division Bench of this Tribunal in **M/s.Lakhlan & Qureshi Construction Company vs. Commissioner of Central Excise and Service Tax, Jaipur-1**[5].

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5 . Service Tax Appeal No.55701 of 2014 decided on 14 October, 2019

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18. The Principal Commissioner has, however, not accepted the contention of the appellant and the aforesaid decisions have been distinguished. The relevant portions of the order of the Principal Commissioner are reproduced below:-

> "34. In the cases mentioned at Sl. No.2, 3 and 4 the Noticee has done construction of Duplex Houses at Riviera Towne and Amrawat Khurd. In this regard the contention of the Noticee is that the work done under these contracts is constructions of independent houses. Service tax on the same cannot be demanded and collected as per the definition of Residential Complex defined under Section 65 (91a). The work doen by them is that of construction of buildings that do not have more than 12 residential units. Each building constructed by them contains only 1 residential unit. Under such circumstances, this construction is not construction of a "Residential Complex" since the condition given in para (i) is nto fulfilled. Again in this regard the Noticee relied on the decision of Macro Marvel reported in 2008 (12) S.T.R. 603 (Tri. – Chennai), further affirmed by the Honourable Apex Court in 2012 (25) S.T.R. J154 (S.C.) and A.S. Sikarwar reported in 2012 (28) S.T.R. 479 (Tri. – Del.).
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> 35. Here it is important to note that the case laws quoted by the Noticees are not applicable in their case in as much as they have done construction of houses development work in complex having more than 12 residential units, common community hall, common parking area, and common part which clearly satisfy the definition of residential complex in Section 65 (91a) of Finance Act, 1994 and service of construction of complex defined in Sections 65 (30a) and 65 (105)(zzzh) ibid – Impugned service clearly covered under construction of complex service liable to service tax – sections 65(91a), 65(30a) and65 (105)/(zzzh) of Finance Act, 1994."
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> 36. This view is also supported by the decision of CESTAT, Delhi in the case of Madhukar Mittal versus Commissioner of Central Excise, Panchkula reported in 2015(40) S.T.R. 969 (Tri.- Del.) wherein it has been held –
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> > "**5.** In view of above discussion, the judgments in the case of *Macro Mavel Projects Ltd.* v. *CST, Chennai* (supra) and *A.S. Sikarwar* v. *CCE, Indore* (supra) are not applicable to the facts of the present case because in those cases individual residential houses were constructed which did not satisfy the definition of residential complex reproduced above. Thus, we hold that impugned service clearly gets covered under construction of complex service liable to service tax."
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> > **[Emphasis supplied].**

19. It is not possible to accept the reasoning given by the Principal Commissioner for the simple reason that in the present case also the

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appellant has not constructed a residential complex having more than 12 residential units. It has constructed independent buildings having one residential unit. Reliance placed by the Principal Commissioner on the decision of the Tribunal in **Madhukar Mittal vs. Commissioner of Central Excise, Panchkula**[6] is, therefore, misplaced. The decisions of the Tribunal in **Macro Marvel Project** and **A.S. Sikarwar** clearly apply to the facts of the present case.

20. The definition of "construction of complex" and a "residential complex" continue to remain the same after 1 July, 2012 and, therefore, service tax liability could not have been fastened even after 1 July, 2012 under "construction of complex".

21. The levy of service tax on the appellant under 'construction of complex service' is, therefore, not justified and, cannot be sustained.

22. Thus, for all the reasons stated above, the order confirming the demand of service tax under "construction of complex services" is set aside. The appeal is, accordingly, allowed.

[Order pronounced in the open Court on **13 March, 2020**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Anita

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6. 2015 (40) STR 969 (Tri-Del.)

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