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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

SERVICE TAX Appeal No. 12023 of 2014

(Arising out of Order No. SUR-EXCUS-002-COM-107-13-14dated 18.03.2014passed by Commissioner of Central Excise, Custom and Service Tax-Surat-II)

H K Ramani **...Appellant**
Plot No. 1301, Little Hut Chowkdi,
Gidc, ANKLESHWAR, GUJARAT

VERSUS

C.C.E. & S.T.-Surat-II **...Respondent**
NEW C.Ex BUILDING...OPP. GANDHI BAUG,
CHOWK BAZAR, SURAT, GUJARAT-395001

APPEARANCE:
Shri Hardik V Vohra, Advocate appeared for the Appellant
Shri A K Samota, Superintendent (Authorized Representative) for the Respondent

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

Final Order No.__12190/2023

DATE OF HEARING: 22.09.2023
DATE OF DECISION:04.10.2023

RAMESH NAIR

The issue involved is that whether the appellant is liable to pay the service tax on the construction of residential complex in respect of works contact for construction of residential complex under GnnRUM Scheme for Surat Municipal Corporation.

2. Shri Hardik V Vohra, learned counsel on behalf of the appellant, at the outset, submits that the issue is no longer res-integra as this Tribunal has decided in various judgments. He placed reliance on the following judgments:

- D H Patel vide Final Order No. 10853 of 2023 in ST appeal No. 11548 of 2013.
- Rjp Infrastructure Pvt. Ltd. vide Final Order No. 11880 of 2023 dated 05.09.2023 in appeal No. ST/13749/2014.

3. Shri A.K. Samota, learned Superintendent (AR) appearing on behalf of the revenue reiterates the findings of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of records, we find that the works contract service of construction of residential complex for JawaharLal Nehru Urban Renewal Mission (JnRUM) is not liable to service tax being not a commercial in nature. This issue has been considered by this Tribunal in various judgments. One of the judgment of Rjp Infrastructure Private Limited Final Order No. 11880/2023 dated 05.09.2023, this Tribunal considering various earlier judgments held that the service in question is not liable for service tax.

> "The issue involved in the present case is that whether the appellant is liable to pay service tax under the category of Construction of Complex service for the service related to construction of houses under Jawaharlal Nehru National Urban Renewal Mission (JnNURM for short) and for SafaiKamdar to Ahmedabad Municipal Corporation or otherwise.
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> 2. Shri Amal Dave, learned Counsel appearing on behalf of the appellant, at the outset submits that this issue is no longer res-integra as in various judgments it has been held that construction of Complex under the identical schemes is not liable for service tax. He placed reliance on the following judgments:-
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> (a) M/S. Khurana Engineering Limitedvs. Commissioner of Service Tax, Ahmedabad - 2022 (12) TMI 1053 - CESTAT Ahmedabad
> (b) DH Patel vs. C.C.E. & S.T. -Surat-I - 2023 (4) TMI 920 CESTAT Ahmedabad
> (c) M/S. Natvar Construction Co. vs. Commissioner of Central Excise & ST, Surat - 2023 (4) TMI 438 CESTAT Ahmedabad
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> 3. Shri Tara Prakash, Deputy Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.
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> 4. We have carefully considered the submissions made by both the sides and perused the record. We find that in the present appeal the fact is not under dispute that the construction of Complex is made for JnNURM scheme and construction of houses for SafaiKamdarfor the Ahmedabad Municipal Corporation. In these facts, the houses are made under a particular scheme for the poor people for residential purpose and not for other commercial acactivity. The construction activity under the same JnNURM scheme, this Tribunal on same issue passed various judgments as under:-
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> **(a) Khurana Engineering Limited (supra) the Tribunal passed the following order:-**
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> "9. We have heard both sides and perused the appeal records. We are of the considered opinion that the matter requires to be examined in the light of the Section 65(91a) of the Finance Act, 1994 and the explanation thereof which reads as under :
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> "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;
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> (ii) a common area; and
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> (iii) any one or more of facilities or services such as park, lift, parking spaces 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 personaluse as residence by such person.

Explanation : For the removal of doubts, it is hereby declared that for the purposes of this clause. –

(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;”

The perusal of the above definition makes it dear that the complex which is constructed with an intention for personaluse as residence by a person who is directly engaging any other person for designing/planning of layout and the construction of such complexes out of the ambit of such construction and thus from taxability. We draw the support from the case of C.C.E., Aurangabad v. Mall Enterprises - 2016 (41) S.T.R. 119 (Tri.-Mum.) wherein it was held that not only residential complex is designed or laid out by another person are excluded from the definition but also the ones intended for personaluse of such person i.e. the owner of the complex. In another case titled as Nithesh Estates Limited v. C.C.E., Bangalore,2015 (40) S.T.R. 815 wherein it was held that the construction of residential complex for ITC (in that case) intended to provide accommodation built for own employees, activity was covered by definition of personaluse in Explanation to Section 65(91A) of Finance Act, 1994. Hence, the assessee’s activity falls under exclusion of that Section and as such is excluded from levy of Service Tax.

10. In the present case, the quarters/residential complexes were got constructed by the AMC and AUDA for urban poor people for their residential use, the same amounts to “personaluse“. The confirmation of demand qua these services by the Commissioner is therefore not sustainable.

11. We also find that on the identical facts and issue in the matter of Santosh Katiyar Vs. Commissioner of Central Excise, Bhopal – 2017(3)GSTL 203 the Delhi Tribunal held that :-

> “4. From the record, it appears that during the period under consideration, the appellant neither took credit nor paid any Service Tax on the impugned services. The department is of the view that the said services are subject to service tax as per Chapter 5 of the Finance Act, 1994. But the fact remains that Section 65(91)(a) of the Finance Act provides the meaning of complex where the building having more than 12 residential units with the common area.
>
> In the explanation for the removal of doubts, it was declared that for the purposes of this clause :
>
> (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.
>
> In the instant case, the allottee is paying the nominal rent or without consideration.
>
> 5. From the record, it appears that the Notification No. 28/2010-S.T., dated 22nd June, 2010, clarified that the services is provided to JawaharlalNehru National Urban Renewal Mission and Rajiv AwaasYojana are exempted from the clutches of Service Tax. Further, vide F. No. 137/26/206-CX.-4, dated 5th July, 2006, it was clarified that Service Tax would not be leviable

on construction of complexes under question if their lay out does not require approval by an authority under any law for the time being in force. From the letter dated 30-1-2004 issued by the M.P. Urban Development Department, it appears that the said construction was made under "Rajiv Gandhi bastiVikaskaryakram" which was the Central sponsored scheme and the same is exempted from service tax as per Circular No. 125/2010-S.T., dated 30th July, 2010.

5. In the light of above discussion and by considering the facts and circumstances of the case, we are of the view that the M.P Government has constructed the accommodation for the gandibasti people under the Central sponsored scheme which is attempted to clean India as per Prime Minister's mission.

6. When it is so, then we find no merits in the impugned order as no service tax is leviable in the instant case. Hence, the impugned order is set aside. The appellant will get the relief accordingly.

From the above judgment it can be seen that the identical fact is involved in the above judgment and in the case in hand in as much as in both the cases the construction service was provided to Jawaharlal Nehru National Urban Renewal Mission and Rajiv AwaasYojana. On this common fact in the above judgment it was held that the service tax is not leviable to such project. Hence, the ratio of the above judgment is directly applicable in the present case.

12. As per our above discussion and finding which gets support of above cited judgments, the impugned order is clearly not sustainable, hence the same is set aside. The appeal is allowed with consequential relief, if any arise, in accordance with law."

(b) In the caseofDH Patel (supra) the Tribunal passed the following order:-

"4. We have carefully considered the submissions made by both the sides and perused the record. We find that lower authorities have contended that Gujarat State Police Housing Corporation Limited is not a Government of Gujarat organization whereas the same is an independent Company registered under the Company's Act therefore, service provided to Gujarat State Police Housing Corporation is liable to service tax. We find that the Gujarat State Police Housing Corporation Limited is 100% owned by Government of Gujarat under the Ministry of Home Affairs therefore the same was held to be a government organization in various judgments. This very issue pertains to Gujarat State Police Housing Corporation Limited has been considered by this Tribunal in following judgments:-

(a) In the case of Sh. DH Patel and Sh. RN Dobariya vs. CCE, Surat (supra), this Tribunal passed the following order:-

" …. …… 3. The above said amounts are confirmed against the appellant on the ground that they have not discharged the service tax liability for the work undertaken by them for Gujarat State Police Housing Corporation Ltd. (GSPHCL) during the period 2007-2008 to 2011-2012. Adjudicating authority has confirmed the dues on the ground that GSPHCL is Government of Gujarats public purpose vehicle or Company, hence ineligible to avail any exemption granted for any work which is done for or on behalf of Government.

5., 6. …. …..

7. On perusal of the records, we find that the adjudicating authority has confirmed the demands on the appellants on the ground that they are providing services of Commercial or Industrial construction services which are covered under section 65(30 a) of the Finance Act, 1994 as amended and subsequently amended as per section 65.

We find that there is no dispute as to the fact that buildings constructed by the appellant herein are allotted to the police personnel and the personnel working in jail department of the Government of Gujarat, the only point which requires to be considered in this case is whether the appellant herein has rendered services to a personnel who has not occupied the said dwellings. We find that an identical issue in respect of Tamilnadu Police Housing Corporation Ltd. case came up before the Tribunal in the matter of S. Kadirvel (supra). In that stay order, the bench held as under :-

4. After considering the submissions, we have found prima facie case for the appellant inasmuch as it is not in dispute that the houses constructed by the Tamil Nadu Police Housing Corporation Ltd., are owned by the State Government and were allotted to police personnel by the Government. The Police Housing Corporation appears to have worked as an extended arm of the Government. Some of the decisions cited by the learned counsel are apparently supportive of his point that the houses that were constructed should be constructed to be in the personal use of the State Government in this view of the matter, we grant waiver and stay against the impugned demand and connected penalties.

It can be seen that the issue involved in the case in S Kadirvel vs. CCE. Tiruchirapalli as was before the South Zonal Bench, Chennai is the same, hence, respectively following view already taken by the bench, we hold that the appellant has made out a case for the complete waiver of the pre-deposit of the amounts involved. Application for the waiver of pre-deposit of the amounts involved is allowed and recovery thereof stayed till the disposal of appeals."

(b) Similarly in the case of Shri S. Kadirvel vs. CCE & ST, Trichy (supra) which was relied upon in above decision, the Chennai Bench passed the following order:-

> "5.1 The period involved is from 16.06.2005 to 31.08.2007. As rightly argued by the Ld. Counsel for the appellants, demand for the period prior to 11.06.2007 cannot sustain on application of the decision laid down by the Hon'ble Apex Court in the case of Larson & Toubro Ltd. (supra) and requires to be set aside, which we hereby do. 5.2 A small portion of the demand value is after 01.06.2007. TNPHCL engaged the appellant for construction of Police Quarters and the ownership of the houses constructed vested with the Govt. of Tamilnadu which is nothing but an extended arm of the Govt. Section 65 (91) (a) of the Finance Act, 1994 defines residential complex. The said definition excludes personal use. The Tribunal in a similar set of facts had considered the issue and set aside the demand vide Final Order in SIMA Engineering & Constructions (supra). The relevant portion is noticed as under:- "7. Undisputedly, the appellants have entered into an agreement with TNPHCL for providing services in relation to construction of residential complex. However, these are meant for use of police personnel. The said issue was considered by the Tribunal in the case of Nithesh Estates (supra), wherein the Tribunal has observed as under:-
>
> > "7.1 In this case there is no dispute and it clearly emerges that the residential complex was built for M/s. ITC Ltd. and appellant was the main contractor. Appellant had appointed sub-contractors all of whom have paid the tax as required under the law. The question that arises is whether the appellant is liable to pay service tax in respect of the complex built for ITC. From the definition it is quite clear that if the complex is constructed by a person directly engaging any other person for design or planning or layout and such complex is intended for personal use as per the definition, service tax is not attracted. Personal use has been defined as permitting the complex for use as residence by another person on rent or without consideration. In this case what emerges is that ITC intended to provide the

accommodation built to their own employees. Therefore it is covered by the definition of 'personal use' in the explanation. The next question that arises is whether it gets excluded under the circumstances. The circular issued by C.B.E.&C. on 24-5-2010 relied upon by the learned counsel is relevant. Para 3 of this circular which is relevant is reproduced below :

> "3. As per the information provided in your letter and during discussions, the Ministry of Urban Development (GOI) has directly engaged the NBCC for constructing residential complex for Central Government officers. Further, the residential complexes so built are intended for the personal use of the GOI which includes promoting the use of complex as residence by other persons (i.e. the Government officers or the Ministers). As such the GOI is the service receiver and NBCC is providing services directly to the GOI for its personal use. Therefore, as for the instant arrangement between Ministry of Urban Development and NBCC is concerned, the Service Tax is not leviable. It may, however, be pointed out that if the NBCC, being a party to a direct contract with GOI, engages a sub-contractor for carrying out the whole or part of the construction, then the sub-contractor would be liable to pay Service Tax as in that case, NBCC would be the service receiver and the construction would not be for their personal use."

It can be seen that if the land owner enters into a contract with a promoter/builder/developer who himself provided service of design, planning and construction and if the property is used for personal use then such activity would not be subject to service tax. It is quite clear that C.B.E.&C. also has clarified that in cases like this, service tax need not be paid by the builder/developer who has constructed the complex. If the builder/developer constructs the complex himself, there would be no liability of service tax at all. Further in this case it was different totally, the appellant, has engaged subcontractors and therefore rightly all the sub-contractors have paid the service tax. In such a situation in our opinion, there is no liability on the appellant to pay the service tax".

The above definition specifically excludes construction undertaken for personal use and such personal use includes permitting the complex for use as residence by another person. We find that the above exclusion clause covers the construction activity undertaken by the assessee. Following the said decision, we are of the view that the demand after 01.06.2007 also cannot sustain and requires to be set aside, which we hereby do.

6. In the result, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any."

5. In view of the above decisions, which are directly related to the same service recipient, we are of the considered view that the issue is no longer res-integra. The other judgments cited by the learned Counsel also support their case. Accordingly, the assessee's Appeal No. ST/10464/2015-DB is allowed and Revenue's Appeal No. ST/11498/2016 is dismissed."

05. This issue is no longer res integra in the light of the judgments relied upon by the appellant accordingly, the impugned order is set aside. Appeal is allowed."

(c) In the caseofM/s. Natvar Construction Co. (supra) the Tribunal passed the following order:-

"4. On careful consideration of the submissions made by both the sides and perusal of record, we find that in the present case the demand was raised on the following:-

(a) Construction of residential complex for GSPHCL,

(b) Construction of residential complex service provided to Surat Municipal Corporation under Jawaharlal Nehru National Urban Renewal Mission (JnNRUM)

We find that the issue of levy of service tax on the construction service in respect of above categories have been categorically held as non taxable. Relevant judgments are reproduced below.

(a) In the case of JethanandArjundas& Sons (supra), the Tribunal held as under:

"7. After hearing both sides, we find that the activity of constructing houses for slum people under the government schemes is not taxable under Construction of Complex Services/ Works Contract/ CICS as it is intended for personal use. The issue is no longer res integra as squarely covered by Tribunal decision in the case of CCE & ST vs Ganesh Yadav (Supra). As regards services to SEZ we find that this issue is also covered by the decision of the Tribunal in the case of Reliance Port and Terminals Ltd. Vs CCE & ST (Supra). Regarding construction of stadium we find that identical issue has been decided by the Tribunal in favor of the assessee in the case of B. G. Shirke Construction Technology Put Ltd. Vs CCE (Supra). The construction of Vishwavidyalay for M. P. LaghuUdyog is also for public welfare and not for commercial purpose, hence not taxable in terms of Circular No.80/2004 dt 17.09.2004. In view of above, we set aside the impugned order and allow the appeal in favor of the appellant with consequential relief."

(b) In the case of M/s. Khurana Engineering Limited (supra) this Tribunal passed the following order:

"9. We have heard both sides and perused the appeal records. We are of the considered opinion that the matter requires to be examined in the light of the Section 65(91a) of the Finance Act, 1994 and the explanation thereof which reads as under :

"Residential Complex" has been defined under section 65(91a) of the Finance Act as follows :- "(91a) "residential complex" means any complex comprising of –

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking spaces 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 personaluse as residence by such person.

Explanation : For the removal of doubts, it is hereby declared that for the purposes of this clause. –

(a) "personaluse" 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;"

The perusal of the above definition makes it dear that the complex which is constructed with an intention for personal use as residence by a person who is directly engaging any other person for designing/planning of layout and the construction of such complexes

out of the ambit of such construction and thus from taxability. We draw the support from the case of C.C.E., Aurangabad v. Mall Enterprises - 2016 (41) S.T.R. 119 (Tri.- Mum.) wherein it was held that not only residential complex is designed or laid out by another person are excluded from the definition but also the ones intended for personal use of such person i.e. the owner of the complex. In another case titled as Nithesh Estates Limited v. C.C.E., Bangalore,2015 (40) S.T.R. 815 wherein it was held that the construction of residential complex for ITC (in that case) intended to provide accommodation built for own employees, activity was covered by definition of personal use in Explanation to Section 65(91A) of Finance Act, 1994. Hence, the assessee's activity falls under exclusion of that Section and as such is excluded from levy of Service Tax.

10. In the present case, the quarters/residential complexes were got constructed by the AMC and AUDA for urban poor people for their residential use, the same amounts to "personal use'. The confirmation of demand qua these services by the Commissioner is therefore not sustainable.

11. We also find that on the identical facts and issue in the matter of Santosh Katiyar Vs. Commissioner of Central Excise, Bhopal – 2017(3)GSTL 203 the Delhi Tribunal held that :-

> "4. From the record, it appears that during the period under consideration, the appellant neither took credit nor paid any Service Tax on the impugned services. The department is of the view that the said services are subject to service tax as per Chapter 5 of the Finance Act, 1994. But the fact remains that Section 65(91)(a) of the Finance Act provides the meaning of complex where the building having more than 12 residential units with the common area.
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> In the explanation for the removal of doubts, it was 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.
>
> In the instant case, the allottee is paying the nominal rent or without consideration.
>
> 5. From the record, it appears that the Notification No. 28/2010-S.T., dated 22nd June, 2010, clarified that the services is provided to Jawaharlal Nehru National Urban Renewal Mission and Rajiv AwaasYojana are exempted from the clutches of Service Tax. Further, vide F. No. 137/26/206-CX.-4, dated 5th July, 2006, it was clarified that Service Tax would not be leviable on construction of complexes under question if their lay out does not require approval by an authority under any law for the time being in force. From the letter dated 30-1-2004 issued by the M.P. Urban Development Department, it appears that the said construction was made under "Rajiv Gandhi bastiVikaskaryakram" which was the Central sponsored scheme and the same is exempted from service tax as per Circular No. 125/2010-S.T., dated 30th July, 2010.
>
> 5. In the light of above discussion and by considering the facts and circumstances of the case, we are of the view that the M.P Government has constructed the accommodation for the gandibasti people under the Central sponsored scheme which is attempted to clean India as per Prime Minister's mission.
>
> 6. When it is so, then we find no merits in the impugned order as no service tax is leviable in the instant case. Hence, the

impugned order is set aside. The appellant will get the relief accordingly.

From the above judgment it can be seen that the identical fact is involved in the above judgment and in the case in hand in as much as in both the cases the construction service was provided to Jawaharlal Nehru National Urban Renewal Mission and Rajiv AwaasYojana. On this common fact in the above judgment it was held that the service tax is not leviable to such project. Hence, the ratio of the above judgment is directly applicable in the present case.

12. As per our above discussion and finding which gets support of above cited judgments, the impugned order is clearly not sustainable, hence the same is set aside. The appeal is allowed with consequential relief, if any arise, in accordance with law."

5. As regards the service provided by the appellant to GSPHCL, the issue has been considered in the following judgments.

(a) In the case of M/s. Sima Engineering Constructions, S. Rajangam, T.M. Saravanan, M/s. MarimuthuGounder& Sons (supra), the Tribunal held as under:-

"6. The issue is whether construction of quarters for police personnel would fall within the taxable service of construction of complex service under section 65(30a) r/w section 65(105)(zzzh) of Finance Act, 1994. The details of the period involved in these appeal is furnished by appellant as given in the table below:

Appeal No.	Appellant	Period Involved
ST/438/2011	Sima Engineering Constructions	16.6.2005 to 31.3.2007
ST/439/2011	S.Rajangam	16.6.2005 to 30.9.2007
ST/440/2011	T.M. Saravanan	1.4.2006 to 31.3.2007
ST/441/2011	MarimuthuGounder& Sons	16.6.2005 to 31.12.2007

Thus, it can be seen that part of the demand is for the period prior to 1.6.2007. By applying the decision in the case of Larsen & Toubro – 2015 (39) STR 913, we hold that the demand for the period prior to 1.6.207 is not sustainable and requires to be set aside, which we hereby do. For the period after 1.6.2007, the ld. counsel has arguedthat the decision in the case of Nithesh Estates (supra) would apply. The definition of residential complex is reproduced as under:-

As per section 65*(30a) of the Finance Act, 1994, '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;]

As per Section 65(91a) of the Finance Act, 1994 'residential complex' means any complex comprising of –

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(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.

Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

(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;"

7. Undisputedly, the appellants have entered into an agreement with TNPHCL for providing services in relation to construction of residential complex. However, these are meant for use of police personnel. The said issue was considered by the Tribunal in the case of Nithesh Estates (supra), wherein the Tribunal has observed as under:-

"7.1 In this case there is no dispute and it clearly emerges that the residential complex was built for M/s. ITC Ltd. and appellant was the main contractor. Appellant had appointed sub-contractors all of whom have paid the tax as required under the law. The question that arises is whether the appellant is liable to pay service tax in respect of the complex built for ITC. From the definition it is quite clear that if the complex is constructed by a person directly engaging any other person for design or planning or layout and such complex is intended for personal use as per the definition, service tax is not attracted. Personal use has been defined as permitting the complex for use as residence by another person on rent or without consideration. In this case what emerges is that ITC intended to provide the accommodation built to their own employees. Therefore it is covered by thedefinition of 'personal use' in the explanation. The next question that arises is whether it gets excluded under the circumstances. The circular issued by C.B.E.&C. on 24-5-2010 relied upon by the learned counsel is relavant. Para 3 of this circular which is relevant is reproduced below :

"3. As per the information provided in your letter and during discussions, the Ministry of Urban Development (GOI) has directly engaged the NBCC for constructing residential complex for Central Government officers. Further, the residential complexes so built are intended for the personal use of the GOI which includes promoting the use of complex as residence by other persons (i.e. the Government officers or the Ministers). As such the GOI is the service receiver and NBCC is providing services directly to the GOI for its personal use. Therefore, as for the instant arrangement between Ministry of Urban Development and NBCC is concerned, the Service Tax is not leviable. It may, however, be pointed out that if the NBCC, being a party to a direct contract with GOI, engages a sub-contractor for carrying out the whole or part of the construction, then the sub-contractor would be liable to pay Service Tax as in that case, NBCC would be the service receiver and the construction would not be for their personal use."

It can be seen that if the land owner enters into a contract with a promoter/builder/developer who himself provided service of design, planning and construction and if the property is used for personal use then such activity would not be subject to service tax. It is quite clear that C.B.E.&C. also has clarified that in cases like this, service tax need not be paid by the builder/developer who has constructed the complex. If the builder/developer

constructs the complex himself, there would be no liability of service tax at all. Further in this case it was different totally, the appellant, has engaged sub- contractors and therefore rightly all the sub-contractors have paid the service tax. In such a situation in our opinion, there is no liability on the appellant to pay the service tax."

8. The said decision was followed by the Tribunal in the case of LancoTanjore Power Co. Ltd. (supra) wherein the Tribunal discussed as under:-

"7. Construction of residential complex activity was carried out by the assessee for M/s. Lanco. It is submitted that such residential units were constructed for use as quarters of the employees of M/s. Lanco. It is evident from the facts of the case that M/s.Lanco has engaged the assessee with the specific purpose of construction of such residential units which are meant for personal use of the employees of M/s. Lanco. We extract below the statutory definition of section 65(91a) of the Finance Act, 1994:-

"Residential complex" means any complex comprising of –

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(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.

Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

(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;"

The above definition specifically excludes construction undertaken for personal use and such personal use includes permitting the complex for use as residence by another person. We find that the above exclusion clause covers the construction activity undertaken by the assessee.

8. We have gone through the case law relied upon by the respondents where a similar case has been dealt with by the Tribunal. Following the decision of the Tribunal in Nithesh Estates Ltd. (supra), we find no reason to interfere with the impugned orders which are sustained and the appeals filed by Revenue are rejected."

9. Following the said decisions, the facts being identical, we hold that the levy of service tax cannot sustain. The impugned orders are set aside and the appeals are allowed with consequential reliefs, if any."

(b) In the case of C R Patel (supra), this bench of Tribunal passed the following order:-

"4. We have considered rival submissions. We find that so far as the period prior to 01.06.2007 is concerned it is not in doubt that the demand has been made in the category of "works contract service". The works contract service was not taxable prior to 01.06.2007 has held by Hon'ble Apex Court in the case of Larsen & Toubro Ltd

(Supra) , consequently the demand for the period 01.06.2007 made under the category of the "works contract service is set aside.

4.1 So far as the period after 01.06.2007 is concern it is seen that the definition of the above "works contract service" reads as under:

> "Works contract", for the purposes of section 65(105)(zzzza), means a contract wherein,- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and (ii) such contract is for the purposes of carrying out,— (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or (c) construction of a new residential complex or a part thereof; or (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects; (Explanation to Section 65 (105) (zzzza) of Finance Act, 1994)

4.2 The definition of residential complex excludes from the levy of Service Tax "complex which is constructed by a person directly engaging any other person for designing orplanning of the lay out and the construction of such complex is intended for personal use as residence by such persons." This expression has been interpreted by Tribunal in the case of Sima Engineering2018 (5) TMI 405 (Tri.-Chennai), wherein after examining this conclusion para 7 & 8 as follows:

> "7. Undisputedly, the appellants have entered into an agreement with TNPHCL for providing services in relation to construction of residential complex. However, these are meant for use of police personnel. The said issue was considered by the Tribunal in the case of Nithesh Estates (supra), wherein the Tribunal has observed as under:-
>
> "7.1 In this case there is no dispute and it clearly emerges that the residential complex was built for M/s. ITC Ltd. and appellant was the main contractor. Appellant had appointed subcontractors all of whom have paid the tax as required under the law.
>
> The questionthat arises is whether the appellant is liable to pay service tax in respect of the complex built for ITC. From the definition it is quite clear that if the complex is constructed by a person directly engaging any other person for design or planning or layout and such complex is intended for personal use as per the definition, service tax is not attracted. Personal use has been defined as permitting the complex for use as residence by another person on rent or without consideration. In this case what emerges is that ITC intended to provide the accommodation built to their own employees. Therefore it is covered by the definition of 'personal use' in the explanation. The next question that arises is whether it gets excluded under the circumstances. The circular issued by C.B.E.&C. on 24-5-2010 relied upon by the learned counsel is relavant. Para 3 of this circular which is relevant is reproduced below :
>
> "3. As per the information provided in your letter and during discussions, the Ministry of Urban Development (GOI) has directly engaged the NBCC for constructing residential complex for Central Government officers. Further, the residential complexes so built are intended for the personal use of the GOI

which includes promoting the use of complex as residence by other persons (i.e. the Government officers or the Ministers). As such the GOI is the service receiver and NBCC is providing services directly to the GOI for its personal use. Therefore, as for the instant arrangement between Ministry of Urban Development and NBCC is concerned, the Service Tax is not leviable. It may, however, be pointed out that if the NBCC, being a party to a direct contract with GOI, engages a sub-contractor for carrying out the whole or part of the construction, then the sub-contractor would be liable to pay Service Tax as in that case, NBCC would be the service receiver and the construction would not be for their personal use."

It can be seen that if the land owner enters into a contract with a promoter/builder/developer who himself provided service of design, planning and construction and if the property is used for personal use then such activity would not be subject to service tax. It is quite clear that C.B.E.&C. also has clarified that in cases like this, service tax need not be paid by the builder/developer who has constructed the complex. If the builder/developer constructs the complex himself, there would be no liability of service tax at all. Further in this case it was different totally, the appellant, has engaged sub- contractors and therefore rightly all the sub-contractors have paid the service tax. In such a situation in our opinion, there is no liability on the appellant to pay the service tax."

4.3 The said decision was followed by the Tribunal in the case of LancoTanjore Power Co. Ltd. (supra) wherein the Tribunal discussed as under:-

"7. Construction of residential complex activity was carried out by the assessee for M/s. Lanco. It is submitted that such residential units were constructed for use as quarters of the employees of M/s. Lanco. It is evident from the facts of the case that M/s.Lanco has engaged the assessee with the specific purpose of construction of such residential units which are meant for personal use of the employees of M/s. Lanco. We extract below the statutory definition of section 65(91a) of the Finance Act, 1994:-

"Residential complex" means any complex comprising of —

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(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.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause,—

(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;"

The above definition specifically excludes construction undertakenfor personal use and such personal use includes permitting the complex for use as residence by another person.

We find that the above exclusion clause covers the construction activity undertaken by the assessee.

8. We have gone through the case law relied upon by the respondents where a similar case has been dealt with by the Tribunal. Following the decision of the Tribunal in Nithesh Estates Ltd. (supra), we find no reason to interfere with the impugned orders which are sustained and the appeals filed by Revenue are rejected."

4.4 Similar view has also been taken in the case of Khurana Engineering2010 (11) TMI 81 CESTAT –Ahmd, wherein following has been observed:

"2. Learned advocate on behalf of the appellants, first of all submitted that the service was provided by the appellant to Govt. of India for providing the same as residential accommodation for the employees of the Income Tax department. He drew our attention to the definition of the construction of complex services given under the clause (30a) of Section 65 to submit that personal use, according to the definition includes permitting the complex for use as residence by another person on rent or without consideration. In view of the definition of 'Personal Use' in thedefinition of 'Construction of Complex' services, the services provided by the appellant is covered by exclusion, which provides that definition of service does not include the 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. In this case, the Govt. of India provides 80 flats to Income Tax department on rent and therefore, it is excluded from the definition of construction services. He also relies upon the reply given by the Central Board of Customs and Excise to National Building Construction Corporation Limited (NBCC), vide Letter No. F. No. 332/16/2010-TRU., dated 24-5-2010, in support of this contention. On the other hand, learned DR submits that it is not correct to say that service has been provided to Govt. of India directly. He submits that the land is owned by Income Tax department and Income Tax department has requested the CPWD to construct the quarters for them and funds have been made available to CPWD by Ministry of Finance for this purpose. CPWD in reality has acted as a bridge between Income tax department and the contractor and after the residential complex is constructed, the same was handed over by CPWD to Income tax department and therefore, in terms of the clarification issued by the Board also, the appellant would be liable to pay service tax. He drew our attention to the letter relied upon by the learned advocate and submitted that in that letter, it has been clarified by the Board that if NBCC were to construct residential accommodation and handover to Govt. of India, there would be no liability to service tax. However, if NBCC were to entrust the work to sub-contractor and such sub-contractor constructed the residential complex and handed over to NBCC who in turn handed over the same to Govt. of India, service tax would be leviable. He drew our attention to the observation of learned Commissioner in his order wherein he has also held that this is not a case where residence is for personal use of a person and is not covered by the explanation given under clause (30a). We have considered this submission. We find ourselves in agreement that the contention of the learned advocate that service has been provided by the appellant to Govt. of India in this case and CPWD and Income Tax department cannot be treated as separate entities just because service has been provided to CPWD who in turn handed over the same to Income Tax department. Further, learned advocate also drew our attention to the notice issued by the CPWD inviting tenders. The tender starts with words "Tenders are invited on behalf of the President of India". Further, we also find that the guarantee executed by the contractor and agreement entered by the contractor have been accepted by CPWD for and on behalf of the President of India. Learned DR also fairly admitted that he has not got any clarification from the

department as to whether there is any evidence to show that CPWD and Income Tax departments are separate entities and have to be treated as separate entities. It is well known that various departments of Govt., of India act on behalf of the President of India and therefore, it cannot be said that CPWD can be equated with NBCC which is a Public Sector under taking. It is also well settled that Public Sector undertakings are not considered as Govt., departments and also cannot be considered as "STATE". Further, learned DR also could not show whether there was any agreement between Income tax department and CPWD for the purpose of construction of residential complex. Invariably when two parties are independent entities, there would be an agreement. Absence of any agreement between CPWD and Income tax department also supports the case of the learned advocate. Further, since on behalf of the President of India contractors are entered into, agreements are entered into and bonds are accepted, Govt. of India is treated as "Person". Therefore, we are unable to agree with the learned Commissioner when he says that the exclusion clause in the definition cannot be applied to the Govt. of India. For ready reference, definition of Construction of Complex Services is reproduced :- (a) Construction of a new residential complex or a part thereof; or (b) Completionand finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall preparing, 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] The definition of residential complex service has been given under clause (91a) of Section 65 as under; "Residential complex" means any complex comprising of- (i) a building or buildings, having more than twelve residential units; (ii) a common area; and (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. Explanation - For the removal of doubts, it is hereby declared that for the purposes of this clause —

(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."] We have already explained the submission of learned advocate in brief and as explained by him in this case, residential complex constructed by the appellant is meant for use by the Income Tax department to provide the same on rent to the employees and therefore, it is clearly covered by the explanation given for "Personal use" in the definition. In this case the CPWD has engaged the appellant for construction of residential complex for giving it on rent to the employees of Income Tax department and therefore this service cannot be included in the definition of residential complex services. It is basically the case of one department taking the help of another department to get the work done basically because of specialization of that department in preparing documents and get the work executed.

3. We also find alternative submissions made by the learned advocate are to be sustained. The first alternative submission made was that the show cause notice was issued on 4-10-2007 whereas, the service tax was payable for the period from 16-6-2005 to 30-7-2007 and therefore, a portion of the demand is time barred. Even if a view is taken that CPWD is to be treated as separate entity, in our opinion appellant would be justified to

> entertain a belief that CPWD and Income Tax department are to be treated as part of the Govt. of India and therefore, services provide by him would not be liable to service tax. Further, as submitted by the appellant in his submission, the agreement also provides that in case of liability of any tax, the service receiver is liable to pay. In these circumstances, the appellants had no reason to resort to suppression or mis-declaration of the facts to avoid payment of service tax since if the service tax was liable, as per the contract, CPWD was liable to pay service tax. Under these circumstances, invocation of extended time limit cannot be justified in this case. Therefore, penalties imposed under various sections of Finance Act, 1994 also cannot be upheld.
>
> 4. Another alternative submission made by the learned advocate was that the contract between the appellant and the CPWD was a works contract and VAT has been paid treating the same as works contract and therefore, no service tax was liable to be paid for the period prior to 1-6-2007. He has cited several decisions in support of this contention. However, we find that the decision of the Tribunal in the case of Cemex Engineers v. Commissioner of Service Tax Cochin - 2010 (17)S.T.R. 534 (Tri. - Bang.) is relevant. In this case, the Tribunal had considered the definition of residential complex services and works contract services and had come to the conclusion that in view of the fact that construction of new residential complex was included in the definition of works contract, the construction of residential complex on the basis of works contract, cannot be leviable to service tax prior to 1-6-2007. In view of the fact that this decision is applicable to the facts of the present case, this would also go in favour of the appellants. 5. Further, in view of the fact that on merits, we have held that service provided by the appellant is to be treated as service provided to Govt. of India directly and end use of the residential complex by Govt. of India is covered by the definition "Personal Use" in the explanation to definition of residential complex service, the other aspects need not be considered. In view of the discussion above, the impugned order cannot be sustained and accordingly the same is set-aside. Appeal is allowed with consequential relief to the appellant."
>
> 5. Relying on the aforesaid decision, we hold that the use of the residential complex by (GSPHCL) is excluded from the definition of residential Complex as "intended for personal use as residence by such persons". In view of above, we do not find any merit in the order, the order is set aside and appeal is allowed."
>
> 6. In view of the above judgments, in respect of construction service provided to the service recipient M/s. GSPHCL and Surat Municipal Corporation under Jawaharlal Nehru National Urban Renewal Mission are non-taxable. Following the above decisions, we are of the view that demand in the present case is not sustainable. The impugned order is set-aside and the appeal is allowed."

5. From the above decisions it can be seen that the construction of Complex under the same scheme has been considered by this Tribunal and viewed that such construction of Complex is not liable to service tax. Therefore, following the above decisions of this Tribunal, in the present case also the impugned order is not sustainable hence the same is set-aside. The appeal is allowed."

The similar issue has been considered in the case of cited judgment of DH Patel (supra).

Considering the above decisionsby this Tribunal, it is settled that construction of residential complex under GnRUM Scheme is not liable to

service tax. Accordingly, the demand in the present case is not sustainable. Hence, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on **04.10.2023**)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha