

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

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL NO. 55701 OF 2014

(Arising out of Order-in-Original No. JAI-EXCUS-001-COM-38-14-15 dated
19.09.2014 passed by Commissioner of Central Excise and Service Tax, Jaipur-I)

M/s Lakhlan & Qureshi Construction Company **Appellant**
(101, Koral Garima-B, 1-546, Chitrakoot Yojana,
Jaipur, Rajasthan)

VERSUS

**Commissioner of Central Excise and
Service Tax, Jaipur-I** **Respondent**
(NCR Building, Statue Circle..C-Scheme-Jaipur,
Rajasthan-302005)

APPEARANCE:

Shri Rupender Singh, Advocates for the Appellant
Shri P. Juneja, Authorized Representative for the Respondent

**CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)**

DATE OF HEARING: 14 October, 2019

Final Order No. 51760/2019

JUSTICE DILIP GUPTA

This Appeal is directed against the order dated 19 September, 2014 passed by the Commissioner, Central Excise, Jaipur-I¹ confirming the demand of Service Tax of Rs. 1,68,83,724/- with penalty under sections 78 and 77 of the Finance Act, 1994².

1. The Commissioner
2. The Act

2. The Appellant is engaged in construction activity and is registered with Service Tax Department for "Commercial or Industrial Construction Service", "Construction of Complex Service" and "Works Contract Service". During the period 2011-12 to 2012-13, the Appellant carried out construction of Lower Income Group, Middle Income Group and Higher Income Group houses for the Rajasthan Housing Board, construction of Alternative Dispute Resolution Centre at Churu, construction of a library building at Rajgarh, construction of canals for the Irrigation Department at Badra and construction of wooden flooring for the stadium at Churu.

3. A show cause notice dated 29/30 May, 2013 was issued by the Commissioner mentioning therein that the Appellant had received taxable services of Rs. 15,68,78,464/- during the period 2011-12 and 2012-13 (upto June, 2012) but had not paid any Service Tax. It was also stated that as the Appellant had suppressed the value of taxable service, the extended period of limitation provided for under the proviso to section 73(1) of the Act would be applicable.

4. The Appellant filed a reply dated 14 July, 2014 to the aforesaid show cause notice mentioning therein that no taxable service had been rendered by the Appellant. In respect of the construction of wooden flooring, ADR centre, library building and canal for irrigation it was stated that no commercial activity had been carried out and in respect of the houses constructed by the Appellant for Rajasthan Housing Board it was stated that it was also not taxable since the Appellant had not constructed a new residential complex or a part thereof. The Appellant also contended that the extended period of limitation could not have been invoked.

5. The Commissioner, however, did not accept the contention of the Appellant that no taxable service had been provided and confirmed the demand of Service Tax. The observations of the Commissioner are as follows-

“

From the 'statement of payment' of the noticee it is observed that they have paid Sales Tax in respect of all the work order, which evidences that all the contracts were executed with material. These facts establish that there was transfer of property involved in the execution of said contract and Sales tax was paid on such property. Hence the conditions mentioned in clause (i) of the explanation to the work contract service were satisfied. The other condition is that the contract should be for the purpose of carrying out any activity defined under para (a) to (e) of sub-clause (ii) of said definition referred to above. In this regard, it is seen that the work carried out by the assessee were covered under para (b) to (d) of sub-clause (ii) of the definition referred above. Therefore, the second condition of the definition is also satisfied.

In view of the above, the correct and specific classification of the works undertaken by the assessee is under "Works Contract Service". It is further observed that the noticee did not provide the work order or the 'G' schedule. Therefore the exact nature of service under each work order cannot be determined. However the construction of library and stadium would be covered under commercial construction unless it is shown to be of non-commercial nature. As regards the construction done for Rajasthan Housing Board it is observed that in most of the cases construction was done for more than 12 residential units.

The Rajasthan Housing Board develops and constructs large residential colonies distinctly known as a scheme or colony and comprises more than twelve residential units over a well delineated area having common facilities. These residential schemes developed by RHB satisfies all the criteria of a residential complex i.e. it has more than 12 residential units, have a common area and more than one facility specified in the definition of a residential complex. Therefore, I hold that they had provided construction of residential complex services.

Therefore I hold that the assessee is liable to pay service tax under 'works contract service' on full rate of service tax. In view of above, the total service tax not paid during the period 2011-12 & 2012-13 (upto June 2012) amounting to Rs. 1,68,83,724/- is recoverable from the assessee under proviso to section 73(1) of the Finance Act, 1994 as discussed above, along-with the interest under section 75 of Finance Act *ibid.* ”

6. The Commissioner also did not accept the contention of the Appellant that the extended period of limitation could not have been invoked as the Appellant had not willfully suppressed any information with a view to evade payment of Service Tax.

7. This Appeal has, accordingly, been filed to assail the order passed by the Commissioner.

8. Shri Rupender Singh, learned Counsel appearing for the Appellant submitted that the Commissioner committed an error in confirming the demand of Service Tax in as much as neither Service Tax could be levied on the construction activity undertaken by the Appellant for construction of the houses for the Rajasthan Housing Board nor could Service Tax be levied on the construction activity carried out by the Appellant for construction of the ADR Centre, library building, canals for the Irrigation Department and wooden flooring at the stadium. In support of his contention learned Counsel placed reliance upon the definition of "Works Contract" under section 65(105) (zzzza) of the Act as also the definition of "residential complex" contained in section 65 (91a) of the Act, and to certain decisions, to which reference shall be made at the appropriate stage.

9. Shri P. Juneja, learned Authorized Representative of the Department has, however, supported the impugned order and has contended that the demand of Service Tax is justified. In support of his contention learned Authorized Representative of the Department placed reliance upon the decision of the Principal Bench of the Tribunal at Delhi in **Madhukar Mittal v/s Commissioner of Central Excise, Panchkula**³.

10. The submissions advanced by the learned Counsel for the Appellant as also the learned Authorized Representative of the Department have been considered.

11. A perusal of the impugned order indicates that demand of Service Tax has been confirmed under "works contract". It will, therefore, be appropriate to refer to the definition of "works contract".

3. 2015(40) STR 969 (Tri.-Del)

Section 65(105)(zzzza) was inserted by the Finance Act, 2007 w.e.f. 1 June, 2007. It is as follows:-

“65(105)(zzzza)

taxable service means any services provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation.—For the purposes of this sub-clause, "works contract" 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;”

12. “Residential Complex” has been defined under section 65(91a)

of the 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 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;"

13. A perusal of the details of the turnover indicate that out of amount of Rs. 15.70 Crores received by the Appellant, an amount of Rs. 2.04 Crores was received by the Appellant for construction of the wooden flooring, ADR Centre, library building and canals for Irrigation Department, while the balance amount of Rs. 13.66 Crores was received by the Appellant towards the construction of the houses for the Rajasthan Housing Board.

14. It will, therefore, be appropriate to first examine whether the amount received by the Appellant for construction of the houses for the Rajasthan Housing Board would attract payment of Service Tax under category of "Works Contract". For this purpose it would be relevant to refer to the definition of "works contract". As noticed above, Explanation to section 65(105)(zzzza) of the Act defines a works contract to mean a contract wherein-

- (i) transfer of property in goods involved in the execution of such contract is liable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out an activity stipulated in (a) or (b) or (c) or (d) or (e).

15. In regard to the construction of the houses for the Rajasthan Housing Board, the Commissioner has placed reliance upon the definition of works contract under (c) which is for "construction of new residential complex or a part thereof".

16. A "residential complex" has been defined in section 65(105) (91a) of the Act to mean 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 an 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, does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and construction of such complex is intended for personal use as respondents by such person.

17. A "residential unit" has also been defined in Explanation (b) to mean a single house or a single apartment intended for use as a place of residence.

18. 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"

19. The contention of the Appellant is that independent residential houses were built, each having a separate entry with separate electricity and water connection and a single building did not have more than twelve residential units. It is for this reason that the

Appellant contends that the houses constructed by it for the Rajasthan Housing Board will not be covered by the definition of a "residential complex" and, therefore, would not be taxable under "works contract" as the contract executed with the Rajasthan Housing Board was not for construction of a new residential complex or the part thereof.

20. This submission, for the reasons stated above, deserves to be accepted. In this connection reliance can be placed on a Division Bench judgment of the Principal Bench of the Tribunal in **Macro Marvel Projects Ltd. v/s Commissioner of Service Tax, Chennai**⁴ 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" where again it meant, amongst others, repair, alternative, renovation or restoration of a residential complex. The Bench examined the meaning of a 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."

(emphasis supplied)

4. 2008 (12) STR 603 (Tri.-Chennai)

21. It needs to be noticed that the Bench also examined whether 'construction of a new residential complex or a part thereof' would be covered within the meaning of a 'works contract, after 1 June, 2007 and held that in this case also the definition of a new "residential complex" given in section 65(91a) of the Act was required to be looked.

22. 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.

23. The Commissioner has, however, without examining this aspect has made a general statement that it is a common knowledge that the Rajasthan Housing Board constructs large residential complexes comprising more than twelve residential units over a well delineated area having common facilities. The photographs enclosed with the Appeal clearly demonstrate that the houses that have been constructed by the Rajasthan Housing Board are either single storey or double stories with separate entry. The decision in **Madhukar Mittal**, relied upon by the learned Authorized Representative for the Department does not help the Department because a finding was recorded that a building had more than twelve residential units.

24. Thus, it is not possible to sustain the confirmation of demand in regard to the amount received by the Appellant under contracts for construction of houses for the Rajasthan Housing Board.

25. The confirmation of demand for construction of ADR Centre, library building, canals for irrigation and wooden flooring at the stadium undertaken by the Awas Vikas Parsihad under works contract cannot also be sustained. Though the impugned order does not specify

whether the activity would be covered by (b) or (c) or (d) since all that has been stated is that the works carried out by the Appellant would be covered under (b) to (d), but unless the Department is able to establish that the construction was for the purpose of commerce and industry, Service Tax could not have been levied under 'works contract'. The Department did not specify nor has any positive finding been recorded in the impugned order that the construction activity was for the purpose of commerce and industry. The confirmation of demand under this head for the aforesaid three construction activity cannot also be confirmed.

26. Thus, for all the reasons stated above, the impugned order Dated 19 September, 2014 passed by the Commissioner cannot be sustained. It is, accordingly, set aside and the Appeal is allowed.

(Dictated and pronounced in the open court)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(BIJAY KUMAR)
MEMBER (TECHNICAL)**

Rekha