

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

SERVICE TAX Appeal No. 12016 of 2014 – DB

[ST/CROSS/15360/2014]

(Arising out of OIO-SUR-EXCUS-001-COM-088-13-14 dated 31/01/2014 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Commissioner of C.E. & S.T.-Surat-i**Appellant**

New Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat- 395001

VERSUS

Tirupati Construction**Respondent**

A-104, Sai Residency, Beside Ashish Restaurant,
Near Gajera Circle, Katargam, Amroli Road,
Surat, Gujarat

With

SERVICE TAX Appeal No. 12017 of 2014 – DB

[ST/CROSS/15361/2014]

(Arising out of OIO-SUR-EXCUS-001-COM-085-13-14 dated 31/01/2014 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Commissioner of C.E. & S.T.-Surat-i**Appellant**

New Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat- 395001

VERSUS

A M Bhandari**Respondent**

Situated At 202, Rajhans Point,
Varachha Road,
Surat, Gujarat

APPEARANCE:

Shri Tara Prakash, Deputy Commissioner (AR) for the Appellant
Shri Brijesh N Limbachia, Advocate for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

Final Order No. 11540-11541/2024

DATE OF HEARING: 13.03.2024
DATE OF DECISION: 12.07.2024

RAMESH NAIR

The present appeals are filed by the Revenue department against the Order in Original No. SUR-EXCUS-001-COM-088-13-14 dated 31.01.2014

and SUR-EXCUS-001-COM-085-13-14 dated 31.01.2014 wherein the proceeding for demand of Service tax has been dropped by Ld. Commissioner.

1.1 The brief facts leading to the present disputes are that M/s Tirupati Construction and M/s A.M. Bhanderi the Respondents have carried out the construction work for M/s. Gujarat State Police Housing Corporation Ltd., Construction of residential buildings under Low Income Group Schemes, Construction of residential quarters under the JNNURM scheme for Surat Municipal Corporation, Surat Urban Development Authority, Airport Authority of India, Western Railway etc. during the period in dispute i.e. 2007-08 to 2011-12 but not registered with Service tax department. An inquiry was initiated against the respondents, and required documents were called for and resumed under summons.

1.2 On completion of the investigations, it appeared that the respondents have not paid Service tax on Construction of Residential quarters for M/s GSPHCL; construction of residential quarters under JnNURM Scheme for SMC and construction of residential quarters under LIG Scheme for Surat Urban Development Authority (SUDA), on the plea that the construction services provided by them to the government organization were not taxable. However, investigation conducted and the evidences gathered during such investigation revealed that the residential complex constructed by them for the aforesaid three service recipients were not for their personal use, and it appeared that the same was taxable under 'Construction of Complex' under 'Works Contract Services'. Accordingly, respondents were issued show cause notices proposing Service tax demand alongwith interest and penalty. In adjudication, Ld. Commissioner vide impugned orders dropped the demand. Being aggrieved, revenue is in appeal.

2. Shri Tara Prakash, Ld. Deputy Commissioner (AR) appearing on behalf of revenue reiterated the grounds of appeals. He submits that the Ld. Commissioner has held that Construction Services provided by the respondents to M/s Gujarat State Police Housing Corporation Ltd., M/s Surat Municipal Corporation and M/s Surat Urban Development Authority is not leviable to Service tax, on the basis that service recipients are

Government bodies and complex was built by these agencies are meant for self use and for non-commercial purpose. However the said conclusion drawn by the Ld. Commissioner is erroneous. In the present case M/s GSPHCL, being party to direct contract with Gujarat Government (Police and Jail Department), engaged the respondent as a sub-contractor, for carrying out the whole construction, hence the services provided by the respondent to M/s GSPHCL satisfy the definition of 'Construction of Complex and residential complex ' under Section 65(30a) and 65 (91a) respectively of the Act and are taxable services.

2.1 He also submits that conclusion drawn by the Ld. Commissioner is also erroneous, in as much as, although admittedly SMC is a Government body, the complex got built by SMC were not meant for self use as has been concluded by the Ld. Commissioner. But Such complex were meant to be sold/distributed on allotment basis for residential purpose to urban poor after payment of sums ranging from Rs. 25,000/- to Rs. 35,000/- per flat with instalment facilities. These facts as revealed by the SMC have not been disputed by the respondent in their defence.

2.2 He further submits that similarly, the conclusion drawn by the Ld. Commissioner is also erroneous, in as much as, although admittedly SUDA is a Government body, the Complex got built by SUDA were not meant for self use as has been concluded by the Ld. Commissioner. It is evident that on enquiry the Executive Engineer, Surat Urban Development Authority (SUDA) vide their letter dtd. 08.03.2013 informed that the LIG houses constructed by the various contractors for SUDA are not given to the employee/staff of SUDA. The LIG quarters constructed for SUDA is allotted to Low Income Group. It is clear that such complex were not meant for self-use of the employee of SUDA.

2.3 He argued that the conclusion drawn by the Ld. Commissioner that complex got built by these agencies was used for non-commercial purpose is also erroneous, in as much as, admittedly such residential dwelling were not distributed to urban poor/Low Income Group, free of charges, but allotted only payment of specified amount with instalment facilities, though may be at subsidized rates.

2.4 He also submits that the reliance placed by the Commissioner on the decisions of Hon'ble CESTAT in the case of M/s Khurana Engineering Ltd. Vs. CCE, Ahmedabad reported vide 2011(21)STR 115 (Tri. Ahmedabad) is misplaced and not applicable to facts of the present case. Moreover the said decision has not been accepted by the department, but has been appealed against before the Hon'ble High court of Gujarat.

3. Shri Brijesh N Limbachia, Learned Counsel appearing on behalf of the respondents supported the finding of the Ld. Commissioner. He placed reliance on the following judgements:-

- (i) M/s Sima Engg. Construction Vs. CCE Trichy - 2010 TIOL 1734 (CESTAT -Mad)
- (ii) Nitesh Estated Ltd. Vs. CCE, Bangalore -2012 TIOL 283 (CESTAT Bang.)
- (iii) Commissioner of Central Excise, Belgaum Vs. Mysore Kirloskar Ltd. -2008(226)ELT 161 (SC)
- (iv) CST Bangalore Vs. Motor World and others 2012 TIOL 418 (HC-KAR-ST)
- (v) CCE Vs. PSL -2013(3)STR 570 (T)
- (vi) Secretary Town Hall Committee Vs. Commissioner - 2007 (8) STR 170
- (vii) Binlas Duplux Ltd. Vs. CCE -2007(7)STR 561.
- (viii) M/s. D H Patel -2023 (4) TMI 920 - CESTAT Ahmedabad,
- (ix) Riddhi Siddhi Construction -2023 (5) TMI 340 - CESTAT Ahmedabad.
- (x) M/s. R N Dobariya - 2023 (2) TMI 779 - CESTAT Ahmedabad.

4. We have carefully considered the submissions made by both sides and perused the records.

4.1 We find that the issue to be decided in this matter is whether the Construction Services provided by the respondents to M/s Gujarat State Police Housing Corporation Ltd. (GSPHCL), M/s Surat Municipal Corporation (SMC) and M/s Surat Urban Development Authority (SUDA) are liable to service tax. Before deciding the issue it is necessary to go through the relevant works orders issued by GSPHCL, SMC and SUDA to respondents.

4.2 We find that work orders for construction of residential complexes at Surat were issued by GSPHCL. Further, respondents have also constructed residential complexes for SMC against work orders issued under Jawaharlal Nehru National Urban Renewal Mission (JnNURM) scheme. From the scrutiny of the work orders issued by SUDA we find that the respondent also constructed residential complex for SUDA under Low Income Group Scheme. It is seen that the definition of the "Works Contract Service" and "Construction of Residential Complex 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)*

"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;"*

4.3 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 on rent or without consideration. We find that the above exclusion clause covers the construction activity undertaken by the respondents. Clearly, 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 or planning of the layout and the construction of such complex is intended for personal use as residence by such persons." We also noticed that this expression has been interpreted by Tribunal in the case of *Sima Engineering-2018 (5) TMI 405* (Tri.-Chennai), wherein after examining the conclusion is 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 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 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."

4.4 Similar view has also been taken in the case of *Khurana Engineering - 2011 (21) S.T.R. 115* (Tri.)/2010 (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 the definition 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) Completion and 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."

4.5 We find that on the similar issue in the matter of DH patel Vs. CCE 2023(4)TMI 920 –CESTAT (Ahm,) the Tribunal also held that GSPHCL is 100% owned by Government of Gujarat under the Ministry of Home Affairs therefore the same qualifies to be government organization and consequently the entire demand as confirmed in the impugned order becomes liable to be dropped.

4.6 We also find that Government Authorities means a Board or an authority or any established with 90% or more participation by way of equity or control by Govt., and setup by an act of the parliament or state legislature to carryout any function entrusted to a Municipality under article 243W of constitution of India. In the present matter works orders clearly shown that respondents has provided the construction services to GSPHCL, SMC & SUDA and status of these organisations are Government Bodies. Thus, we are in complete agreement with the view taken by the Ld. Commissioner that construction works undertaken on behalf of the Government for non-commercial purpose are outside the purview of the Service tax.

4.7 In view of the fact that on records, we have held that service provided by the respondents are to be treated as service provided to Govt. and end use of the residential complex by Govt. is covered by the definition "Personal Use" in the explanation to definition of residential complex service and not leviable to Service tax.

5. Therefore in view of the settled legal position as discussed above, we find no merit in the present appeals of the department. Hence, we uphold the Orders-in-Original and dismiss the appeals. Cross Objections also stand disposed of.

(Pronounced in the open court on 12.07.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)