

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

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.13939 of 2013

(Arising out of OIA-VAD-EXCUS-002-APP-442-13-14 dated 14/10/2013 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I(Appeal))

Riddhi Siddhi Construction

.....Appellant

E/20, Sanstruti Tenaments,
Vadodara, Gujarat

VERSUS

C.C.E. & S.T.-VADODARA-II

.....Respondent

1st Floor... Room No.101,
New Central Excise Building,
Vadodara, Gujarat-390023

WITH

- i. Service Tax Appeal No. 10115 of 2016 (Riddhi Siddhi Construction)**
- ii. Service Tax Appeal No. 10851 of 2016 (Riddhi Siddhi Construction)**
- iii. Service Tax Appeal No. 11922 of 2017 (Riddhi Siddhi Construction)**

(Arising out of OIA-VAD-EXCUS-001-APP-357-15-16 dated 26/11/2015 passed by Commissioner of Central Excise and Service Tax-VADODARA-I(Appeal))

(Arising out of OIA-VAD-EXCUS-001-APP-502-15-16 dated 01/02/2016 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

(Arising out of OIA-VAD-EXCUS-001-APP-83-17-18 dated 08/05/2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

APPEARANCE:

Shri A.X.S. Jiwan, Consultant for the Appellant

Shri Tara Prakash, Deputy Commissioner (AR) for the Respondent

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

Final Order No. A/ 11114-11117/2023

DATE OF HEARING: 16.02.2023
DATE OF DECISION: 03.05.2023

C L MAHAR

The above mentioned four appeals are being taken up together for decision as the issue involved in all the four appeals is same. The details with regard to above mentioned four appeals are as given below:-

Sr. No.	Appeal No.	Order-In-Appeal No.	Period of dispute	Amount
01.	ST/13939/2013	VAD-EXCUS-002-APP-442-13-14 dated 14.10.2013	2006-07 to 2010-2011	Rs. 32,06,928/-
02.	ST/10115/2016	VAD-EXCUS-001-APP-357-15-16 dated 26.11.2015	April-2012 to June-2012	Rs.1,83,814/-
03.	ST/10851/2016	VAD-EXCUS-001-APP-502-215-16 dated 01.02.2016	July-2012 to March-2013 and April-2013 to March-2014	Rs.5,52,604/-
04.	ST/11922/2017	VAD-EXCUS-001-APP-83-17-18 dated 08.05.2017	2014-15	Rs.33,31,304/-

With regard to the above mentioned four appeals, it has been the contention of the department that the appellant are engaged in providing taxable service under the category of 'Commercial or Industrial Construction Service' as defined under Section 65 (105)(zzq) of Finance Act, 1994. The assessee is registered with the Service Tax department under Service Tax Code No. ABZPT0719PSD002. It is the contention of the department that the appellants have been providing Commercial or Industrial Construction Service however, they have not paid service tax. The SCNs have been adjudicated by the above mentioned Orders-in-Original and the Commissioner (Appeals) in the above mentioned orders have confirmed the charges as confirmed in the Order-in-Original.

02. The learned advocate appearing on behalf of the appellant have vehemently argued that the service which have been performed by the appellant are primarily renovation, completion or finishing of civil structures which are pre-dominantly meant for use of Vadodara Mahanagar Seva Sadan as well as for Maharaja Sayajirao University and Gujarat State Police Housing Corporation Ltd. construction, renovation of the Police training hostel. It has been contended that barring a miniscule amount for construction, renovation and reconstruction work, the entire work undertaken by the appellant are for the institutions or organizations which

are primarily not engaged in any commercial or business activity therefore, it has been submitted that the appellant had carried out the Civil work of the repair, renovation of Government Buildings which were non-commercial and non-industrial buildings and the department has not adduced any evidence to prove that the building of which construction activity has been undertaken by the appellant were used for Commercial or Industrial purpose.

2.1 It has also been an argument of the learned advocate that the taxable value in all the above appeals have been taken on the basis of the balance sheet and on the basis of form 26 AS of Income Tax without any independent investigations and without verifying the appellant's record and the department has not even bothered to prove that the taxable service has been performed against the amount of the income shown in the books of account of the appellant.

The learned Advocate has also referred to Section 65(25b) definition of service which provides as follows:-

"(a).....

(b).....

(c).....

(d) *Repair, alternation renovation or restoration of or similar services in relation of building or civil structure, pipeline of conduit, which is-*

(i) *Used or to be used, primarily for, or*

(ii) *Occupied or to be occupied primarily with' or*

(iii) *Engaged or to be engaged primarily in,Commerce of industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.*"

2.2 He has pointed out that on plain reading of the above definition it infers that construction activity of the nature of the Commercial or Industrial Construction has to be used or occupied primarily for commerce or industry. The organisation for which the construction work undertaken by the appellant are educational institution or administrative/police organization which are not doing any commercial or industrial activity and therefore, it can be concluded that the activity of the construction by the appellant were not meant for any commercial of industrial organization or establishment. The learned advocate has relied upon board Circular No. 80/10/2004-ST dated 17.09.2004. The abstract of which is given below:-

13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is 'used, or to be used' for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax.

03. We have also heard the learned Department representative who reiterated the finding given in the Order-In-Original and has also mentioned that the matter is no longer res-integra as the issue has already been settled by this tribunal in various judgments.

04. We have heard both the sides and have analyzed all the data which is their with the Orders-In-Original and we are of the view that most of the repair, renovation, construction work undertaken by the appellant is primarily for Vadodara Municipal Seva Sadan, M.S. University and for police department. We feel that these organisations are in no way concerned with any Commercial or Industrial activity and therefore, the activity undertaken by the appellant will fall under the exclusion clause of the definition for the Commercial or Industrial Construction Service. It has also been noticed that the matter is no longer res-integra as the matter has already been decided in catena of decisions, some of them are as follows:-

- KHURANA ENGINEERING LTD. VIDE FINAL ORDER NO. A/1882/WZB/AHD/2010 DATED 26.11.2010
- ANAND CONSTRUCTION CO.- VIDE ORDER NO.S/1288/2012/CSTB/C-I DATED 26.09.2012
- RAJ ENGINEERING WORKS VIDE ORDER NO. A/228/13/SMB/C-IV DATED 10.05.2013
- SHRI D.H.PATEL & SHRI R.N. DOBARIYA VIDE ORDER NO. M/13462-13463/WZB/AHD/2013 DATED 26.07.2013
- B. G. SHIRKE CONSTRUCTION VIDE ORDER NO.A/1375/13/CSTB/C-1 DATED 13.06.2013

This tribunal in the case Shri D.H.Patel & Shri R.N. Dobariya VERSUS CCE & ST, SURAT decided on 26.07.2013 has held as follows:-

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.

Similarly, in the case of Anand Construction Co. the tribunal held as follows:

6. Considering the fact that building is constructed as hostel for the residence of students studying in medical institute and there is no allegation that the building is being used for any other purpose. In that set of facts, the Board Circular No. 80/10/2004-S.T., dated 10-9-2004 is applicable to the facts of this case which clarified as under :-

"The levability of Service Tax would depend primarily upon whether the building or civil structure is 'used or to be used' for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable being, non-commercial in nature. Generally, Government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally Government constructions would not be taxable. However, if such constructions are for commercial purposes like local Government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to Service Tax".

From the above circular, we find that appellant are not liable to pay Service Tax. Accordingly, we set aside the impugned order and allow the appeal with consequential relief if any.

The tribunal in the case of KHURANA ENGINEERING LTD. (supra) held as follows:-

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.

05. In view of the above, since the facts of the matter are similar to the decisions mentioned above, we are of the view that the service provided by the appellant are to establishments and organizations which are of non commercial or non industrial nature and therefore, the construction, renovation, repair work undertaken by them fall under the exclusion of the definition of 'Commercial or Industrial Construction Service' hence, we hold that the appellants are not liable to pay any service tax on such activity. However, we find that they have also done some work for commercial organizations in some of the Financial years however, the value of such work in our view is within the threshold limit of the exemption and therefore, the same also does not fall under the category of the service tax levy and therefore, we hold that no service tax is leviable.

06. Accordingly, we hold that impugned Order-In-Appeals are without any merit and therefore, we set aside the same and appeals are allowed.

(Pronounced in the open court on 03.05.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Mehul