CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 1

CROSS Application No.:-ST/CROSS/10093/2021

SERVICE TAX Appeal No. 10884 of 2020-DB

[Arising out of Order-in-Original No AHM-EXCUS-003-COM-015-20-21 dated 16.07.2020 passed by Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD]

Commissioner, CGST & Central Excise, Gandhinagar .... Appellant
2nd Floor, Customs House, Near All India Radio,
Navrangpura, Ahmedabad

VERSUS

Paresh S Patel .... Respondent
3, Vibhuti City Centre Complex, Oppo. Brahmkumari Hall, Himmatnagar, Sabarkantha, Gujarat-383001

APEARANCE :

Shri Neilprakash G Makwana, Superintendent (AR)for the Appellant-Revenue
Shri Jigar Shah, Shri Amber Kumrawat& Ms. Devanshi for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA,MEMBER (TECHNICAL)
HON'BLE DR. AJAYA KRISHNA VISHVESHA, MEMBER (JUDICIAL)

DATE OF HEARING : 09.03.2026
DATE OF DECISION :09.07.2026

FINAL ORDER NO. 10405/2026

MR. SANJIV SRIVASTAVA:

This appeal filed by the Revenue is directed against Order-in-Original No. AHM-EXCUS-003-COM-015-20-21 dated 16.07.2020. Respondent is also filed cross objection commenting on the appeal filed by the revenue. By the impugned order, demand raised against the respondent vide Show Cause Notice dated 14.10.2013 has been dropped along with the proposed penalties.

2.1 Respondent is engaged in providing construction service to various government organizations like Road and Building department, Gujarat State Police Housing Corporation Limited (GSPHCL), Agriculture Produce Market

Committee (APMC), GETCO etc. At the relevant time,the respondents were not registered with service tax department nor they were paying service tax in respect of services provided.

2.2 Information/ intelligence was gathered that respondent was providing service in relation to Construction of Complex service and other services under Works Contract to GSPHCL. An enquiry was initiated and summons dated 13.08.2012 was issued asking them to appear in person on 23.08.2012 and summons dated 11.09.2012 was issued requiring them to appear in person on 20.09.2012 to produce the requisite documents/ details for the last five years.

2.3 The respondent vide letter dated 25.09.2012 & 11.04.2013 provided certain details and documents. Statement of respondent Shri Paresh S. Patel, Proprietor was recorded on 21.10.2013 and he was asked provide relevant explanation in respect of documents and information provided by him.

2.4 On scrutiny of documents, detailed statement of the respondent, the department was of the view that respondent had carried out financial activity in relation to Construction of various residential quarters for GSPHCL and execution of works contract alongwith goods and materials and other constructions work executed for various other service recipients such as APMC and GETCO etc. and VAT / Sales Tax was paid on transfer of property in goods involved in execution of works contract. Details of amount received against these services are detailed below:-

S No	Financial Year	Amount Received towards Construction of (in Rs)		
		Complex	Canal, Road, Bridge, Irrigation etc.	Total
1	2008-09	6,80,91,635/-	14,61,01,160/-	21,41,92,795/-
2	2009-10	6,99,66,377/-	12,85,33,265/-	19,84,99,642/-
3	2010-11	4,43,51,657/-	14,74,26,643/-	19,17,78,300/-
4	2011-12	6,62,50,707/-	13,61,16,511/-	20,23,67,218/-

It was also observed that respondents have shown certain amounts as detailed in table below towards Carting Expenses in their balance sheet incurred in relation to transport expenses for receipt of goods and materials' as under:-

Sr. No.	Year	Carting Expenses in Rs
1	2008-09	34,85,598/-

2	2009-10	66,72,381/-
3	2010-11	57,63,513/-
4	2011-12	38,99,238/-
Total		**1,98,20,730/-**

2.5 After concluding investigation, Revenue was of the view that appellant had short paid service tax on receipts as detailed below:-

S.No.	Period	Receipts (Rs)	Service tax	
			@ %	Payable (Rs.)
1	2008-09	6,05,16,599/-	12.36	74,79,852/-
2	2009-10	6,97,37,388/-	10.30	71,82,951/-
3	2010-11	4,43,51,657/-	10.30	45,68,221/-
4	2011-12	6,62,50,707/-	10.30	68,23,823/-
Total		**24,08,56,351/-**		**2,60,54,847/-**

S N	Period	Expenses (Rs)	Taxable Value @ 25%	Service tax (Reverse Charge)	
				@ %	Payable (Rs.)
1	2008-09	34,85,598/-	8,71,400/-	12.36	1,07,705/-
2	2009-10	66,72,381/-	16,68,095/-	10.30	1,71,814/-
3	2010-11	57,63,513/-	14,40,878/-	10.30	1,48,410/-
3	2011-12	38,99,238/-	9,74,810/-	10.30	1,00,405/-
Total		**1,98,20,730/-**	**49,55,183/-**		**5,28,334/-**

2.6 A Show Cause Notice dated 24.10.2013 was issued to the respondent asking them to show cause as to why:-

(i) Service tax of Rs. 2,60,54,847/- (Rupees Two Crore Sixty Lakhs Fifty Four Thousand Eight Hundred Forty Seven only) towards the taxable service provided in relation to works contract service under sub-clause (zzzza) of clause (105) of section 65 of the Act should not be paid by them under the proviso to sub-section (1) of section 73 of Chapter V of the Act by invoking the larger period of five years;

(ii) service tax of Rs. 5,28,334/- (Rupees Five Lakh Twenty Eight Thousand Three Hundred Thirty Four only) towards the taxable service in relation to goods transport agency service under sub- clause (zzp) of clause (105) of section 65 of the Act read with Notification No. 6/2004-Service Tax dated 31.12.2004 should not be paid by them under the proviso to sub-section (1) of section 73 of Chapter V of the Act;

(iii) interest at the applicable rate should not be paid by them under the provisions of Section 75 of the Act;

(iv) penalty for contravention of the provisions of sub-section (1) of section 68 of the Act should not be imposed upon them in terms of the provisions of section 76 of the Act;

(v) penalty for contravention of the provisions of sub-section (1) of section 69 of the Act read with rule 4 of the Service Tax Rules, 1994 should not be imposed upon them in terms of the provisions of section 77 (1) (a) of the Act;

(vi) penalty for contravention of the provisions of sub-section (1) of section 70 of the Act read with rule 7 of the Service Tax Rules, 1994 and Rule 5(2) ibid should not be imposed upon them in terms of the provisions of section 77 (2) of the Act and also they should not pay to the credit of the Central Government, the specified amount for the period of delay in furnishing the said return in terms of the provisions of Rule 7C of the Service Tax Rules, 1994;

(vii) penalty for reasons narrated above at Para 17 should not be imposed upon him in terms of the provisions of section 77 (1) (e) of the Act; and

(viii) Penalty for the reasons narrated above at Para 18 should not be imposed upon him in terms of the provisions of Section 78 of the Act.

2.7 The Show Cause Notice was adjudicated by the impugned order and the demands made against the respondent were dropped.

2.8 Impugned order has been reviewed by the Committee of Chief Commissioners and appeal has been filed before this Tribunal stating the following grounds:-

(a) the entire proceedings being initiated against the respondents has been vacated without appreciating the legal position existed under works contract services during the relevant period;

(b) The demand involved in the present case is for the period from 2008-09 to 2011-12 in respect of Work Contract service. The benefit of exemption Notification No. 41/2009-ST dated 23.10.2009 and Board Circular No. 128/10/2010-ST dated 24.08.2010 was not available to the appellant for the reason that these are in relation to specific service for which they have been issued and not for the service classified in the category of Works Contract service.

(c) Respondent had provided all construction services to different government/ semi-government and other agencies which will be eligible for exemption from payment of service tax only in respect of construction service of roads, airports, railways, transport terminals, bridges, tunnels and dams which are used primarily for the purposes of other than commerce or industry.

(d) Various decisions relied in the impugned order have not attained finality in the matter and are pending in appeals at various forums.

3.1 We have heard Shri Neilprakash G Makwana, Authorized Representative (AR) for the Revenue and Shri Jigar Shah and Shri Amber Kumrawat, Advocates for the respondent.

3.2 Arguing for the Revenue, Authorized Representative reiterated the grounds taken in the appeal filed by the Revenue. He submitted that the adjudication order which has been passed ignoring the above stated grounds, should be set-aside.

3.3 Learned Counsel for the respondent submitted that

- the services for construction of residential complexes rendered by the Respondent to various Governmental bodies and governmental departments were wrongly classified under the taxable category of 'works contract service' under section 65(105)(zzzza) of the Act. Thus, the Impugned Order has rightly dropped the entire demand of service tax.
- The construction works carried out for APMC are not for the purpose of commerce or industry. Thus, no service tax is leviable under the taxable category of ‘works contract services’.
- The construction activities carried out for GETCO Mehsana were wrongly classified under the taxable category of 'works contract service' under section 65(105)(zzzza) of the Act, thus the impugned order has rightly dropped the entire demand of service tax.
- Without prejudice to the above, there is incorrect computation of demand.

- Respondent is entitled to avail the benefit of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 for determination of taxable value for payment of service tax on works contract services.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 The impugned order has categorically analyzed each of the work orders and contracts vis-a-vis the charges made out in the Show Cause Notice. The relevant extract from the impugned order are reproduced below:

"23.4 In the show cause notice, the demand has been raised under the works contract service for construction activity. The notice mentions in general about the name of the service providers, but now here details of the work contracts, nature of work carried out by the service provider and the contract wise break up has been provided in the show cause notice. During the personal hearing, the Chartered Accountant appearing on behalf of the notice, had submitted the detailed contract wise break up for the different Financial year in tabular form. The same is reproduced below:

2.4 FINANCIAL YEAR WISE LIST.

M/s. Paresh S Patel
Financial Year 2008-09

Sr.No	Project Name	For Whom	Amount	Scope of Work	Comments
1	Construction of Sub Centre in Anand District No. 1 Pratappura.	Project Coordinator PIU-Gandhinagar	285,647	Build. Work	Not for the purpose of commerce or industry
2	Const.T.M.C.Project work A.P.M.C.at Himatnagar	Secretary APMC Himatnagar.	22,894,182	Building and Road Work	Not for the purpose of commerce or industry
3	Const.of Boy's Hostel Building @ Modasa (Vikasati jati)	Executive Engineer R & B Division Himatnagar	3,822,386	Building Work	Not for the purpose of commerce or industry
4	Renovation of CHC Building at Chorivad Dist.Sabarkantha	Project Coordinator PIU-Gandhinagar	608,425	Govt. Office Build. Work	Not for the purpose of commerce or industry
5	CR to Various Road And Building Work	Executive Engineer R & B Division Himatnagar	1,242,761	Govt. Build. And Road Work	Not for the purpose of commerce or industry
6	Const.of "E" Type Staff Quarter (Four unit 2x2) at Modasa For Judicial officer quarter.	Executive Engineer R & B Division Himatnagar	3,382,738	Building Work	Not for the purpose of commerce or industry
7	Const.Blg.Under Centre For Excellence for I.T.I. @ Modasa	Executive Engineer R & B Division Himatnagar	3,880,869	Build. work	Not for the purpose of commerce or industry
8	Constructing Sarkari Kumar Chhatralaya(S.C.) at Modasa	Executive Engineer R & B Division Himatnagar	6,718,532	Build. work	Not for the purpose of commerce or industry
9	Const.of Government Taluka Library @ Bayad	Executive Engineer R & B Division Himatnagar	1,751,777	Build. work	Not for the purpose of commerce or industry
10	Constg.of 5 Nos.Shop,Godown,Canteen Bldg.R.C.C.Roads etc.under TMC Project at APMC Vadali Dist .S.k.	Secretary APMC Vadali	3,514,462	Building and Road Work	Not for the purpose of commerce or industry
11	Construction of New PHC Building With P.M.Room,Garage and Compound Wall in at Chitroda & Chadrali,Choila Dist : Sabarkantha	Project Coordinator PIU-Gandhinagar	2,907,310	Build. work	Not for the purpose of commerce or industry
12	Integrated Development of polo group of temple. frame structure work At-Polo, Ta-Vijaynagar, Dist-Sabarkantha	Director Archeology Ahd.	9,507,510	Renovation and Repairing Work	Not for the purpose of commerce or industry
Total			60,516,599		

FY 2009-10

Sr.No	Project Name	For Whom	Amount	Scope of Work	Comments
1	Construction of Sub Centre in Anand District No. 1 Pratappura.	Project Coordinator PIU-Gandhinagar	160,916	Build. Work	Not for the purpose of commerce or industry
2	Const.T.M.C.Project work A.P.M.C.at Himatnagar	Secretary APMC Himatnagar.	521,927	Building and Road Work	Not for the purpose of commerce or industry

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3	Const.of Boy's Hostel Building @ Modasa (Vikasati jati)	Executive Engineer R & B Division Himatnagar	6,793,822	Building Work	Not for the purpose of commerce or industry
4	CR to Various Road And Building Work	Executive Engineer R & B Division Himatnagar	592,040	Govt. Building and Road Work	Not for the purpose of commerce or industry
5	Const.of "E" Type Staff Quarter (Four unit 2x2) at Modasa For Judicial officer quarter.	Executive Engineer R & B Division Himatnagar	3,175,822	Building Work	Not for the purpose of commerce or industry
6	Const.Centre Excellence Of Building for I.T.I. @ Bhiloda	Executive Engineer R & B Division Himatnagar	9,489,136	Building Work	Not for the purpose of commerce or industry
7	Const.Of Centre Excellence Building for I.T.I. @ Himatnagar	Executive Engineer R & B Division Himatnagar	9,571,655	Building Work	Not for the purpose of commerce or industry
8	RENOVATION OF JORAWAR PALACE AT PALANPUR	Executive Engineer R & B Division Palanpur	7,262,236	Repairing of Building Work	Not for the purpose of commerce or industry
9	Building Work Constructing Auditorium, Library cum coaching centre and internal road for SARAKARI KUMAR CHHATRALAYA (SC) AT MODASA	Executive Engineer R & B Division Himatnagar	5,443,392	Building and Road Work	Not for the purpose of commerce or industry
10	Constg.Community Hall at Khedbrahma	Khedbrahma Nagarpalika	3,334,628	Building Work	Not for the purpose of commerce or industry
11	Const.of Government Taluka Library @ Bayad	Executive Engineer R & B Division Himatnagar	4,577,449	Building Work	Not for the purpose of commerce or industry
12	Constg.of 5 Nos.Shop,Godown,Canteen Bldg.R.C.C.Roads etc.under TMC Project at APMC Vadali Dist .S.k.	Secretary APMC Vadali	587,405	Building and Road Work	Not for the purpose of commerce or industry
13	Construction of New PHC Building With P.M.Room,Garage and Compound Wall in at Chitroda & Chadrali,Choila Dist : Sabarkantha	Project Coordinator PIU-Gandhinagar	1,910,609	Building Work	Not for the purpose of commerce or industry
14	Integrated Development of polo group of temple. frame structure work At-Polo,Ta-Vijaynagar,Dist-Sabarkantha	Director Archeology Ahd.	11,873,227	Renovation and Repairing Work	Not for the purpose of commerce or industry
15	Adition Alteration and Rrepairing of ADM Block in ITI MODASA	Executive Engineer R & B Division Himatnagar	4,443,124	Repairing of Building Work	Not for the purpose of commerce or industry
Total			69,737,388		

FY 2010-11

Sr.No	Project Name	For Whom	Amount	Scope of Work	Comments

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अधीक्षक (समीक्षा)/SUPERINTENDENT(RRA)

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1	Construction of various Infrastructure . Works Under Part No.1 at Market Yard APMC Himatnagar	Secretary APMC Himatnagar.	9,301,396	Building and Road Work	Not for the purpose of commerce or industry
2	Constg.Works for APMC Meghraj Tal : Meghaj Dist : S.K.	APMC MEGHARAJ	15,491,910	Building and Road Work	Not for the purpose of commerce or industry
3	CR to Various Road And Building Work	Executive Engineer R & B Division Himatnagar	1,279,535	Govt. Building and Road Work	Not for the purpose of commerce or industry
4	CONSTRUCTING CSTC BUILDING FOR ITI AT MODASA	Executive Engineer R & B Division Himatnagar	4,440,050	Building Work	Not for the purpose of commerce or industry
5	Construction of Eklavya Model Resi.School Staff Quarters at Shamalaji Tal.Bhiloda	Executive Engineer R & B Division Himatnagar	2,535,589	Building Work	Not for the purpose of commerce or industry
6	Consg.of CR Bldg.Compound Wall,Staff Qtr.Etc.@ 66 KV Akrund Sub Station Tal : Dhasura	GETCO - Mehsana	3,287,098	Building Work	Not for the purpose of commerce or industry
7	Construction of Girls Hostel building in Government Polytechinc Collage at Himatnagar Dist. Sabarkantha	Executive Engineer R & B Division Himatnagar	3,706,385	Building for Girls Hostel	Not for the purpose of commerce or industry
8	Const.Of Centre Excellence Building for I.T.I. @ Himatnagar	Executive Engineer R & B Division Himatnagar	295,522	Building Work	Not for the purpose of commerce or industry
9	Building Work Constructing Auditorium, Library cum coaching centre and internal road for SARAKARI KUMAR CHHATRALAYA (SC) AT MODASA	Executive Engineer R & B Division Himatnagar	2,390,845	Building and Road Work	Not for the purpose of commerce or industry
10	Constg.Community Hall at Khedbrahma	Khedbrahma Nagarpalika	1,623,328	Building Work	Not for the purpose of commerce or industry
			44,351,658		

FY 2011-12

Sr.No	Project Name	For Whom	Amount	Scope of Work	Comments
1	Construction of various Infrastructure Works Under Part No.1 at Market Yard APMC Himatnagar	APMC HIMATNAGAR	27,094,848	Building and Road Work	Not for the purpose of commerce or industry
2	Constg.Works for APMC Meghraj Tal : Meghaj Dist : S.K.	APMC MEGHARAJ	5,442,290	Building and Road Work	Not for the purpose of commerce or industry
3	CR to Various Road And Building Work	Executive Engineer R & B Division Himatnagar	1,945,528	Govt. Building and Road Work	Not for the purpose of commerce or industry
4	Construction of Eklavya Model Resi.School Staff Quarters at Shamalaji Tal.Bhiloda	Executive Engineer R & B Division Himatnagar	10,141,234	Building Work	Not for the purpose of commerce or industry

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अधीक्षक (समीक्षा)/SUPERINTENDENT(RRA)
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CGST & CENTRAL EXCISE, GANDHINAGAR

5	Consg.of CR Bldg.Compound Wall,Staff Qtr.Etc.@ 66 KV Akrund Sub Station Tal : Dhasura	GETCO - Mehsana	4,329,354	Building Work	Not for the purpose of commerce or industry
6	Construction of Girls Hostel building in Government Polytechinc Collage at Himatnagar Dist. Sabarkantha	Executive Engineer R & B Division Himatnagar	6,907,880	Building Work	Not for the purpose of commerce or industry
7	Construction of 132 Dwelling units housing scheme (G.F.+2) for urban poor at Chhapriya area Himatnagar in survey No. 4025 Under IHSDP Project. At : Himatnagar	Chief Officer Himatnagar Nagarpalika Himatnagar	8,259,057	Building Work	Not for the purpose of commerce or industry
8	Constg.Community Hall at Khedbrahma	Khedbrahma Nagarpalika	1,203,153	Building Work	Not for the purpose of commerce or industry
9	Contg.BRGF Resource Center @ taluka Panchayat Vadali	Taluka Devlopment Officer Taluka Panchayat Vadali	927,364	Building Work	Not for the purpose of commerce or industry
	TOTAL		66,250,708		

24.1 While going through the said list, I find that the notice has undertaken the construction activity on behalf of various government agencies, where they have constructed various civil structures including hostels, roads, staff quarters, educational institutes, government library, maintenance of archeological sites etc. Now the question arises whether the same is taxable under the category of work contract service as claimed by the department or an exempted activity as claimed by the taxpayer. Before moving further, it is impertinent to examine the relevant provisions of the law:

26. In the instant matter, the demand has been raised on the construction service in view of the following legal provision of law.

26.1 As per clause (30a) of section 65 of the Act, "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.

and as per clause (91a) of section 65 of the Act, "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, -

(c) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration,

(d) "residential unit" means a single house or a single apartment intended for use as a place of residence.

26.2 As per sub-clause (zzzh) of clause (105) of section 65 of the Act, any service provided or to be provided to any person, by any other person, in relation to construction of complex was a taxable service.

Explanation (inserted w.e.f. 01.07.2010 by s. 76 of the Finance Act, 2010 (14 of 2010) - For the purposes of this sub-clause, construction of a complex which was intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate bụ the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer.

26.3 As per sub-clause (zzzza) of clause (105) of section 65 of the Act, any service 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 is a taxable service

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 purpose 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 purpose 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.

26.4 As per sub-rule (1) of rule 3 of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, as amended a text of which is reproduced as under:

"Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination. of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead

of paying service tax: at the ate specified in section 66 of the Act, by paying an amount equivalent to two per cent (four per cent with effect from 01.03.2008 vide Notification No. 7/2008-Service Tax) of the gross amount charged for the works contract.

As per sub-rule (3) of rule 3 of the said Rules - the provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in-respect of the said work contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said work contract.

26.5 The CBEC vide Circular No. 128/ 10/2010-ST -dated 24. 08. 2010, issued from F. No.,354/141/2010-TRU, clarified at Para 2,,as regards the classification, with effect from 01.06.2007 when new service 'Works Contract' service was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service prior to 01.06.2007. This is because 'works contract describes the nature of the activity more specifically and, therefore, as per the provisions of section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date.

The CBEC further clarified at Para 3, as regards applicability of composition scheme, the material fact would be whether such a contract satisfies rule 3 (3) of the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007. This provision casts an obligation for exercising an option to choose the scheme prior to payment of service tax in respect of a particular works contract. Once such an option is made, it/s applicable for the entire contract and cannot be altered. Therefore, in case a contract where the provisions of service commenced prior to 01.06.2007 and any payment of service tax was made under the respective taxable service before 01.06. 2007, the said condition under rule 3(3) was not satisfied and thus no portion of that contract would be eligible for composition scheme. On the other hand, even if the provision of service commenced before 01.06.2007 but no payment of service tax was made till the taxpayer *opted for the composition scheme after its coming into effect from 01.06.2007, such contracts would be eligible for opting of the composition scheme.*

27.1 Thus, as per the above settled position of law, `construction of complex service is liable to service tax, 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 asperabovereferredin the definition. In other words, if a residential unit is intended for personal use, then it should be excluded from the service tax chargeability. Further, the term "personal use" is defined in the explanation(a) of the said law which includes permitting the complex for use as residence by another person on rent or without consideration. Therefore, in the present case, a limited point of consideration is to determine whether the term "Personal Use" is involved or otherwise.

27.2 As per the facts of the case, I have noted that M/s Paresh S Patel was the proprietary concern of Shri Paresh S Patel, engaged in the activity of providing the construction services to government organization like Road & Building Department, Irrigation Department, Gujarat State Police Housing Corporation Spreading Canal, Commissionerate of Health (Project Implementation Unit) and PMGSY department, Sardar Sarovar Narmada Nigam, GETCO-etc under contract. The said firm was mainly carrying out the construction work of canal, lying of pipeline, constriction of government schools, government office, repairing of residential quarters etc. However, for that purpose they neither obtained the service tax registration nor paid the service tax. Therefore, applying the provision of clause (30a) of Section 65 of the Act and further clause (91a) of Section 65 of the Act, the department has raised the demand. However, while doing so I do not find on record as to whether it involves the term "Personal Use" as stipulated in the said provision of law.

27.3 As per the explanation given by the said firm, they did not obtain service tax registration under the belief that service tax was not leviable on the said services provided to the government organization nor they charged the value of goods separately from their service *receivers. They were provided the land by government authority for the construction of staff quarters and used thereof for staff residential purpose. They were directly engaged in the construction of complex, intended for personal use which, as per explanation (a) to the aforesaid provisions includes permitting the complex for use as residence by another person on rent or without consideration. Thus, it is contended that construction of residential staff quarters is very well covered by the exclusion of definition of "residential complex".*

28.1 I have gone through the relevant provisions of the law and the submissions made by the notice. I find that in the case in hand, the notice have been allotted the land by the government and they have been engaged by the government agency to construct the staff quarters/flats, which are being futher allotted by the government to their staff for residence purpose.Hence, there is no doubt that these quarters are not used for any commercial purposes, but for the personal use by the government department/agency; the construction of these complexes will fall under he exclusion clause and will be outside of the tax net. The same is supported by number of decisions by various judicial forums.

28.2 I find that Ahmedabad Tribunal in case of M/s. Khurana Engineering Ltd. Vs. Commr of C. Ex., Ahmedabad- 2011 (21) S.T.R. 115 (Tri Ahmd.,) has decided the issue of residential complexes constructed on behalf of the government department for the personal use; wherein the appellant was engaged in construction of residential quarters of Income Tax Department and in that Hon'ble Tribunal held as under

> *"3. 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 —

- *(d) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;*
- *(e) "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.*
>
> *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.*

28.3 The said decision was followed by Hon'ble principal Bench, New Delhi in case of Sugandha Construction Limited Vs Commissioner of Central Excise, Bhopal {2019 (9) GSTL 399 (Tri-Del)]. Wherein it was held by the bench:

> *"7. On the first issue, we note that the tax liability of such residential units built for DGMAP, Ministry of Defence, has been clarified by the jurisdictional Commissionerate vide letter dated 10-8-2008 based on the Board's clarification to the effect that construction of complexes for MAP for army personnel is not liable to tax if their layout does not require approval by an authority under any law for the time being in force. This clarification has been issued after a specific reference has been made by the Director (Contracts), DGMAP, Army Headquarters, New Delhi. In view of this fact, we note that such construction activity will get excluded from the tax entry. Further, we also note that the construction is for the Ministry of Defence for use of the army personnel and as such, these are for personal use. In such situation also, it gets excluded from the tax entry. In this connection, we refer to the decision of the Tribunal in Khurana Engineering Ltd. - 2011 (21) S.T.R. 115 (Tribunal-Ahmedabad)."*

28.4 Similarly in the case of P B Tathod Vs Commissioner of Central Excise, Nashik [2015 (39) STR 650 (Tri-Mumbai)], while confronting the issue, it was held by Hon'ble Tribunal Mumbai-

> *"6.1 As far as painting of residential quarters of NTPS are concerned, we agree with the learned counsel that Completion and Finishing Service such as painting are covered under the service of 'Construction of Complex' defined in Section 65(30a). The definition of this service, under Clause 'b', includes completion and finishing services in relation to 'residential complex'. Residential complex defined under Section 65(91a) exclude buildings which are intended for personal use as residence and residence constructed by a person directly engaging any other person and the construction of such complex is entitled for personal use as residence by such person. We find that NTPS have constructed residential quarters for their own purpose i.e. for their own employees. Therefore, this activity is clearly outside the scope of Construction of Complex service and not leviable to service tax."*

28.5 My findings are further strengthened by the decision of Principal Bench, New Delhi in case of Murari Lal Singhal Vs Commissioner of Central Excise, Jaipur {2019 (25) GSTL 45 (Tri-Del)], where the bench has observed as below:

> *"7. Now coming to activities at serial Nos. (c), (d) & (e) above :*
>
> *We observed that the appellant has constructed individual houses for Rajasthan Housing Board, quarters at DCCPP, Dholpur and quarters for officers of RRVUNN. From the work orders executed in this respect it is apparent that these quarters were got constructed by the respective Government Departments for being used for their own employees/officers. The taxable residential complex is defined under Section 65(91A) 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 part, 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;

7.1 The perusal of this 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 complex out of the ambit of such construction and thus from taxability. We draw our 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, it was held that 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.

7.2 In the present case, the quarters/residential complexes were got constructed by the appellant for three different

> *Departments of Government of Rajasthan for being used as accommodation for their own employees, the same amounts to 'personal use'. The confirmation of demand qua these services by the Commissioner is therefore not sustainable, accordingly is set aside."*

28.6 Further while dealing with the taxability on the quarters constructed for the army personal in the case of Baba Constructions Pvt Ltd. V Commissioner of Central Excise Ghaziabad [2018 (15) GSTL 345 (Tri-All)] it was held by Allahabad bench of Hon'ble Tribunal-

> *"6. So far construction of 144 and 72 multistoried residential units in Rajendra Nagar with respect to contract awarded by Ghaziabad Development Authority is concerned, it is submitted that there are only six units in a block constructed. For the purpose of taxation under the classification Construction of Residential Complex Service under Section 65(105)(zzzh), is taxable if 12 or more units are constructed in one single block. This issue is no longer res integra and have been decided by a Coordinate Bench of this Tribunal in the case of Macro Marvel Projects Ltd. v. Commissioner of Service Tax, Chennai reported at 2008 (12) S.T.R. 603 (Tri.-Chennai). Similarly, it is admitted fact that Construction of 581, Dwelling units at Chadimandir for personal use by Army Personnel, is the work allotted by Lieutenant-General, Directorate of Married accommodation project, Army Headquarter, Kashmir House, New Delhi, the same being not of commercial nature neither for sale, but for use of Army personnel, it is urged that the same is not taxable under the provisions of Section 65(105)(zzzh). Further, it is admitted fact in the Order-in-Original that each block contains G+3, that is 4 units and accordingly on this score also the said construction is not taxable under Section 65(105)(zzzh)."*

28.7 The above decision of Tribunal was upheld by the Hon'ble Supreme Court, where the appeal filed by the department was dismissed by the Apex Court-

> *"Delay condoned.*

> *We have heard Learned Counsel for the appellant and perused the record. We do not see any cogent reason to entertain the appeal. The judgment impugned does not warrant any interference.*
>
> *The Civil Appeal is dismissed."*

28.8 In the recent decision in the case of 'Manisha Projects Pvt. Ltd. Vs Commissioner of Central Excise [2019-TIOL-3659-CESTAT-ALL] while dealing with the taxability on the residential quarters constructed for the university staff it was held by the Hon'ble bench-

> *"5. Having considered the submissions from both sides and on perusal of record we note that the issue involved in the present appeal is whether the appellant has provided service of construction of residential complex. As per provision of law the ultimate use of the constructed residential unit is having bearing of levy of service tax. The law has very clearly provided that if the residential unit is intended for personal use or it is being used by other persons on rent then such unit is not covered by the definition of residential complex and therefore not eligible to be subjected to levy of service tax under construction of residential complex service. We note that this Tribunal in the case of Khurana Engineering Limited (supra) has observed as follows:-*
>
> > *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.*
>
> *6. We note that in the said case of Khurana Engineering the construction was done by M/s Khurana Engineering and contract was awarded to M/s Khurana Engineering by CPWD and CPWD was engaged by Income Tax department for construction of quarters to be used as residences by the staff. Therefore, the ratio of the decision of this Tribunal in the said case of M/s Khurana Engineering (supra) is squarely applicable in the present case. Further, this being a case of demand, the onus was on revenue to establish that the residential units constructed by the appellant were covered by the definition of residential complex to raise the demand. Revenue has not produced any evidence in the proceedings to establish that the residential units constructed by appellant were not for personal use. The said onus was not discharged by Revenue to establish that the residential units constructed were liable to levy of service tax. We therefore hold that impugned order is not sustainable. We therefore set aside the impugned order and allow the appeal."*

28.9 Similarly, the issue was examined by the Allahabad Bench of Tribunal in case of Construction and Design Service Unit-28 Vs Commissioner of Central Excise Noida [2019-TIOL-210-CESTAT-ALL]; wherein the bench has further defined the word 'personal use' in context of construction of the residential complex-

> *"6. Tribunal in the case of Commissioner of Customs, Central Excise & Service Tax, Allahabad vs. Ganesh Yadav 2017 (6) G.S.T.L. 428 (Tri.-All.) has held that the flats constructed under "Works Contract" for the welfare of weaker section of the society cannot be held to be intended for commerce or industry as such by taking note of the precedent decision, it was held that the activity for construction of houses for economically weaker section under works contract allotted by the Varanasi Development Authority under the scheme of Government of U. P. is neither taxable under "Works Contract Services" nor construction of complex/commercial or industrial construction. It*

> *was further observed that the exclusion clause which provides that construction classifiable under the category of "Residential Complex Service" does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the lay out and the construction of such complex is intended for personal use as residence by such person and personal use have been further explained as including or permitting the complex for use as residence by another person on rent or without consideration. The ratio of the said decision of the Tribunal is fully applicable to the facts of the present case."*

28.10 The issue of taxability in case of staff quarters constructed for the police personal came before Chennai bench of Tribunal in case of Shri S Kadirvel Vs Commissioner of Central Excise and Service Tax Trichy [2018-TIOL-2332-CESTAT-MAD]. While allowing the appeal it was observed by the bench-

> *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 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"

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 5 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.

28.11 Further, the view on non-taxablity on residential complex constructed for personal use is not restricted for the Government or Semi Government organizations. As per the definition of "personal use", even if the service receiver is a private company or industry who *constructs staff quarters for residential purpose for its staff would be covered under the non-taxability clause of the definition of "Residential Complex" This view was clarified in case of M/s Nitesh Estates Ltd. Vs Commr of C Ex Bangalore [2012-TIOL-283-(CES. Bang)] wherein it was held that,*

> *"It is not in dispute that the appellant constructed residential complexes for their clients namely M/s. ITC Ltd. who, in turn, allotted the apartments to their employees for residential use. Considering the terms of the exclusion clause of the definition of "residential complex" ibid, prima facie, the activity undertaken by the appellant would fall within the ambit of this clause. The appellant also seems to have a fairly good case on limitation."*

28.12 The decision of Tribunal was further upheld by the Hon'ble High Court of Karnataka (Commissioner of Central Excise & Service Tax Vs Nitesh Estates Ltd. (2018 (17) GSTL 414 (Kar)]. While dismissing the departmental appeal against the tribunals above order, it was held by the Hon'ble High Court-

> *18. The 'Residential Complex' in question was undertaken to be constructed by the respondent assessee M/s. Nithesh Estates Limited for ITC Limited under the Contract dated 1-4-2006. It is equally undisputed before us that the construction activity in question was in its entirety sub-contracted by M/s. Nithesh Estates Limited to M/s. Larsen and Toubro Limited. There is no material on record or evidence to indicate that any part of construction activity in question was undertaken by the respondent assessee M/s. Nithesh Estates Limited itself. The fact of sub-contract of the entire 'Residential Complex' in question by the respondent assessee M/s. Nithesh Estates Limited to M/s. Larsen and Toubro Limited is not disputed by the Revenue. It is also not disputed that due Service Tax on the payments made to the sub-contractor M/s. L & T Limited stood paid to the Government.*
>
> *19. The Central Board of Excise and Customs (C.B.E. & C.) for the pre-amendment period prior to 1-7-2010 has issued the aforesaid Circular No. 108/2/2009-S.T., dated 29-1-2009*

clarifying this position, that in such cases, where the ultimate owner (M/s. ITC Limited in the present case) enters into a Contract for construction of a 'Residential Complex' with the Promoter/Builder/Developer (M/s. Nithesh Estates Limited in the present case) which itself provides service of Design, Planning and Construction and after such construction, the ultimate owner receives such property for 'Personal use', then such activity would not be subjected to Service Tax, because this case would fall under the 'Exclusion Clause' provided in the definition of 'Residential Complex'.

20. However, in such a situation, if the Service of any person like the Contractor or a similar Service Provider (M/s. Larsen & Toubro Limited in the present case) is received, then such a person (M/s. L & T Limited, in the present case) would be liable to pay the Service Tax.

21. In view of this clear position of law indicated by the C.B.E. & C. itself, we are of the considered opinion that the Revenue cannot be allowed to argue against the legal position rightly explained by the C.B.E. & C. itself which can certainly be invoked and applied by this Court for interpreting the provisions of law on the principles of interpretation of Contemporenea Expositio and the Central Board of Excise and Customs or the highest Administrative body of the respondent Department itself has interpreted the provisions that the construction activities of this nature where Bi-parte or Tri-partite Agreements are entered into is clearly indicated in the said Circular, which clearly and rightly hold the sub-contractors liable to pay the Service Tax as it is the Sub-contractor who actually undertakes the construction activity.

22. In view of the undisputed factual matrix of the present case, that the sub-contractor M/s. Larsen and Toubro Limited has duly discharged the obligations to pay the Service Tax in the present Contract, we are at a loss to understand how the Revenue could again demand the Service Tax from the respondent assessee M/s. Nithesh Estates Limited, the Principal Contractor or the Developer, who did not undertake any construction activity in the present case.

> *23. In our opinion, the Learned Tribunal was perfectly justified and correct in applying the Circular, dated 24-5-2010 also, while holding that if the Government of India Department could be treated as using the 'Residential Complex' in question constructed by NBCC for its 'personal use', how another Corporate body like M/s. ITC Limited in the present case could be denied the benefit of that type of user of 'Residential Complex' to be occupied by its Managerial Staff. The law does not envisage any such distinction among the Private Sector Corporate Entities and the Departments of Government or Government Companies or Undertakings.*
>
> *24. The present case of Revenue, therefore, appears to have emanated on a misconceived audit objection raised by the internal auditors of the Department.*
>
> *25. The Learned Tribunal on the basis of relevant facts and evidence available before it, in our opinion, therefore, has rightly concluded that the respondent assessee was not liable to pay any Service Tax on the 'Residential Complex' constructed through the sub-contractor, M/s. L and T Limited in the present case and such finding of facts recorded by the Learned Tribunal based on relevant material and evidence, in our opinion, does not give rise to any substantial question of law in the present case.*
>
> *26. In view of the aforesaid, all the three proposed substantial questions of law suggested by the Revenue need not be separately answered, as we have come to the conclusion that no substantial question of law would really arise in the present case including the question of extended period of limitation under Section 73(1) of the Finance Act, 1994. When the levy of Service Tax on the respondent Assessee itself is held to be illegal, the question of availability of extended period of limitation for levying such Service Tax does not arise.*

28.13 I would also like to further rely on the decision of Chennai Tribunal rendered in the case of Commissioner of Central Excise Vs

Lanco Tanjore Power Company Limited [2018-TIOL-2138-CESTAT-MAD], where it was held by the bench as below-

> *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 part, 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."*

28.14 Thus, from the aforesaid judicial pronouncements I find that the issue has been settled and the services provided by the noticee of construction of residential staff quarters for various governmental department/agency, is very well covered by the exclusion of definition of "residential complex", as the same have been used for 'personal use'.

29.1 Coming to the further provisions of sub-clause (zzzza) of clause (105) of Section 65 of the act, any service provided or to be provided to any person, by any other person in relation to the execution of a work contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams is a taxable service and its definition has been defined as per (i) and (i) (a) to (e) of the explanation as discussed in Para 24.3 above. However, it is not pointed out on record as to under what clause the instant service was covered. The noticee at their own has defined the said service as per clause (b) of the said provision of law and stated that service tax would be chargeable only if it is for construction of new building or civil structure primarily for the purposes of commerce or industry. I have gone through the contents of the show cause notice, reply filed by the notice and the definition provided in the statue. I find that as the service provided by the noticee pertains to construction activity, the same can be examined under sub clause (b). Hence, applicability of service tax under this category depends on the nature of use of the constructed building or civil structure. If such constructed civil structure or building is used for providing services, primarily for commerce and industry then service tax would be chargeable. Thus, the essence of the definition is that the clause (b) is chargeable to *service tax if it is used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry.*

29.2 While going through the breakup of the contracts provided by the noticee, it appears that the noticee has undertaken the construction activity on behalf of the various government agencies, where they have constructed various civil structures including hostels, roads, educational institutes, government library, maintenance of archeological sites etc. The noticee further contended that the government structures constructed by them were not only used for any commercial purposes, but also these buildings were for civic amenities and used for serving public at large. They further submitted that even though availing benefits from such civic amenities a person might be required to pay a certain token amount of getting the facility from Government; then also such building or structure for providing such civic amenities cannot be termed as for commerce and industry and hence, such construction cannot be subjected to service tax.

29.3 As far as the word commerce and industry is concerned, there is no need to go to dictionary to interpret the word. In general parlance, these words denote to the situation, where certain activity is performed against the consideration and the same is undertaken with the motive of profit. If the activities performed at these civic constructions is compared vis a vis the above definition, the same cannot be put under the umbrella of business or commerce by any stretch. There is another limb of the exclusion clause, which says that the civic structures should be used primary for the commerce and industry. In the context, the word primary becomes more important. It denotes to principal activity or the activity of the chief importance. So, even in some categories certain consideration has been received, the same cannot be treated as used for primarily commerce or business. I have gone through the contents of the show cause notice and I find that nowhere the department has disputec or even analyzed) the fact that the construction services provided by the notice were not meant for the structures used for the commercial purpose.

29.4 The above situation has been examined and analyzed by various courts under the different set of the facts. The crux of the entire dispute whether the works contract service provided to the *government for construction activity of non-commercial buildings will be liable for service tax and whether receipt of certain consideration in such cases will make the structure primarily used for the commerce and industry, has been, the subject scrutiny before various judicial forums.*

29.5 The issue whether recovering certain consideration against the supply of water will be treated as commerce and the liability of payment of service tax against the assessee, was examined by Tribunal Bangalore in the case of Nagarjuna Construction Company Ltd. Vs. Commr of C. Ex. Hyderabad, - 2010 (19) S.T.R. 259 (Tri. - Bang.). Text of relevant finding is reproduced as under:

> *"8.1 The GWSSB was found to be engaged in trading water which was a commercial activity. GWSSB was registered under the Industrial Dispute Act, 1947 and was engaged in an activity which came within the definition of 'industry' as per that Act. The relevant definition reads as follows :*
>
> *"'Industry' means-*
>
> *any systematic activity carried on by Co-operation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution or goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature), whether or not, (any capital has been invested for the purpose of carrying on such activity; or (if) such activity is carried on with a motive to make any gain or profit, and includes*
>
> *(a) any activity of the Dock Labour Board established under Section 5A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1949);*
>
> *(b) any activity relating to the promotion of sales or business or both carried on by an establishment, but does not include*

(1) any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing provisions of this clause) and such other activity is the predominant one.

Explanation : For the purposes of this sub-clause,

"agricultural operation' does not include any activity carried on in a plantation as defined in clause (f) of Section 2 of the Planations Labour Act, 1951 (69 of 1951) or;

(2) Hospitals or dispensaries; or

(3) Educational, scientific, research or training institutions; or

(4) Institutions owned or managed by organizations wholly or substantially engaged in any charitable, social or philanthropic service; or

(5) Khadi or village industries; or

(6) Any activity of the Government relatable to the sovereign' functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space; or

(7) Any domestic service; or

(8) Any activity, being a profession practiced by an individual or body of individuals, if the number of persons employed by the individuals or body of individuals in relation to such profession is less than ten; or

(9) Any activity, being any activity carried on by a co-operative society or a club or any other like body of individuals, if the number of persons employed by the 'cooperative' society, club or other like body of individuals in relation to such activity is less than ten;"

> *9. We find that GWSSB discharges an important duty and responsibility of the Government to provide drinking water to the people residing in its jurisdiction. As per the Gujarat Act, GWSSB is constituted mainly to ensure supply of drinking water and maintenance of sewerage system in the jurisdiction of the said Board. In the coming days water could be a precious commodity traded for profit and supply of water entailing that business would constitute 'industry'. However, production of drinking water to the community in Gram Panchayats and Nagar Panchayats in the State on recovery of user charges at a highly subsidized rate, we find, does not come within the expression 'industry' used in the definition of the taxable entry in question. From the figures of revenue of the Board for the year 2005-06, we find that above 90% of its revenue came from sale of water to local bodies rural population. The revenue was less than 1/3rd of the cost incurred to maintain water supply by the Board. The Board is run by substantial amounts released by the State Government as grant every year. These facts show that the pipelines in question were not laid to facilitate any commercial or industrial activity.*

29.6 A similar view has been taken by Ahmedabad Tribunal in case of M/s. Dinesh Chandra Agarwal Infracon Pvt. Ltd. Vs. Commr of C.Ex., Ahmedabad-2011(21)S.T.R.41(Tri.- Ahmd.), where in the appellant was engaged in Laying of pipeline for supply of water for Gujarat Water Supply and Sewerage Board and Hon'ble Tribunal held asunder:

> *12. Examining the above issue, we refer to Gujarat Act No. 18 of 1979, under which the GWSSB has been constituted. The preamble of the said Act provides that - "An Act to provide for the establishment of a Water Supply and Sewerage Board for the rapid development and proper regulation of water supply and sewerage services in the State of Gujarat."*

> *13. We further take note of the provisions of Section 14 of the said Act which provides Duties and Functions of the Board. The same is extracted below for the sake of easy reference :-*

"14. The duties and functions of the Board shall be as follows, namely :-

(c) to prepare, execute, promote and finance the schemes for supply of water and for sewerage and sewage disposal;

(d) to render all necessary services in regard to water supply and sewerage to the State Government and local bodies and on request to private institutions or individuals also;

(e) to prepare draft State Plans for water supply, sewerage and drainage on the directions of the State Government;

(f) to review and advise on the tariff, taxes, fees and charges of water supply and sewerage systems, in the areas comprised within the sphere of operation of the water supply and sewerage services of the Board and in the areas of the local bodies which have entered into an agreement with the Board;

(g) to assess the requirements of materials and arrange for their procurement and utilization;

(h) to establish State standards for water supply and sewerage services;

(i) to review annually the technically financial, economic and other aspects of water supply and sewerage system every scheme of the Board or the local bodies which have entered into an agreement with the Board;

(j) to establish and maintain a facility to review and apprise the technical, financial, economic and other pertinent aspects of every water supply and sewerage scheme in the state;

(k) to operate, run and maintain any water works and sewerage system, if and when directed by the State Government, on such terms and conditions and for such period as may be specified by the State Government.

(l) to assess the requirements for man-power and training in relation to water supply and sewerage services in the State;

(m) to carry out applied research for efficient discharge of the duties and functions of the Board;

(n) to perform such of the duties and functions, which are being performed by the Gujarat Public Health Engineering Service, as may be specified, from time to time;

(o) to perform and discharge such other duties and functions as are allotted to the Board under other provisions of this Act or as may be entrusted to it by the State Government."

The perusal of the above duties and functions of the Board clearly show that sale of water is not the primary function of the Board. It is also clear that the water purchased by the Board is being distributed to rural and urban areas for the purpose of irrigation and drinking at different rates which are subsidized and even the operating cost also does not stand recovered by them. To setup an establishment for water supply is a part of the duties and functions of the State to provide its citizens with a better living. In these circumstances, it cannot be held that laying of pipelines for the Board is for the purpose of undertaking any commercial activities by the Board, and the appellant would be covered by said services by making him liable to payment of service tax."

29.7 While dealing with the departmental appeal filed in the case of 'Commissioner of Central Excise & CGST. Surat Vs BMS Proiects Privatc limited' (2018 (8) GSTL 13 Guj). it was held by the Hon'ble High Court of Gujarat-

"4. In that context, the Tribunal was of the view that GWSSB discharged an important duty and responsibility of providing drinking water to the people, industries, etc. The Board was constituted mainly to supply drinking water and maintenance of sewerage system. The usage charges recovered by the Board

from Gram Panchayats, Nagar Palikas and Nagar Panchayats are at highly subsidized rates and therefore, cannot be considered as an industry in the sense that the said word is used in the definition of taxable entry. The Board was sustaining on the grants released by the State Government. It was therefore concluded that the pipelines were not laid to facilitate any commercial or industrial activity.

5. We are broadly in agreement with the view of the Tribunal. The Tribunal noted the purpose for which the Board was constituted and its nature of activities. The pipelines constructed were for providing drinking water facilities to the people of the State through different Gram and Taluka Panchayats. Only a small portion of the water was provided to the industries at commercial rates.

6. In the result, no question of law arises. Tax Appeal is dismissed."

29.8 The issue about taxability of projects, having non commercial nature under the works contract service, was examined by the Larger bench of Tribunal at great length in case of Lanco Infratech Limited Vs CC, Hyderabad (2015(38)STR 709 Tri-LB), where it was held-

"In view of the Special (5 Member) Bench decision in the Larsen & Toubro Limited reference, it follows that a works contract is exigible to Service Tax even prior to 1-6-2007. In view of Indian Hume Pipe Co. Limited; and Alstom Projects India Limited it follows that a turnkey/EPC contract is exigible to Service Tax prior to 1-6-2007, under the appropriate taxable service such as ECIC, CICS or COCS. From this position it inexorably follows that clauses (a) to (e) of the definition of WCS in Explanation (ii) thereof are enumerations of taxable services drawn substantially from definitions and integers of existing taxable services such as ECIS, CICS and COCS. From the decision in Indian Hume Pipe Co. Limited and other decisions [referred to in paras 15(i) and (ii) (supra)], it is clear that laying of pipelines/conduits for transmission of water or for disposal of sewerage falls within the ambit of CICS and not ECIS; and where provided to

Government/Government undertakings and for supply of water for irrigation or consumption or for disposal of sewerage, the activity is non-commercial, non-industrial, is covered by the exclusionary clause in the definition of CICS and is not exigible to Service Tax. Since a turnkey/EPC contract would inhere elements of several services, consisting of combination of different services, the service which gives such contract its essential character would be laying of pipelines or conduits. A turnkey/EPC contract for laying of pipeline/conduit should therefore, logically be classified under clause (b), Explanation (ii) of Section 65(105)(zzzza), on and from 1-6-2007 as well. This is the consequence of applying Section 65A(2)(b) of the Act and this position is clarified in Board Circular No. 123/5/2010-TRU, dated 24-5-2010 [considered in detail in sub-para (o) infra].”

29.9 The issue about taxability under works contract service for the construction of various structures for the government including hostels was examined by tribunal Hyderabad in the case of KMV Projects Pvt Ltd. Vs Commissioner of Central Excise & CGST (2019 (27) GSTL 388 Tri-Hyd)", where it was held-

“10. As regards demands raised on the buildings constructed for C-DAC, NFC and APHMHIDC, we find from the hand-outs given today by the Learned Counsel as well as produced before the adjudicating authority, the APHMHIDC has been stated to be engaged in creating infrastructure facilities of accommodation for medical institutions and quarters, and maintenance of hospital buildings, procurement and distribution of drugs, surgical and consumables and equipment and for storage of these items and that the said APHMHIDC is functioning as no profit and no loss basis. The said hand-out also specifically states that it is an enterprise of Govt. of Andhra Pradesh. On perusal of the profile of NFC, it states that it has been established in the year 1971 as a major industrial unit of Department of Atomic Energy, Govt. of India and the complex is responsible for supply of fuel and reactor core components for all the nuclear power reactors operating in India. The said NFC has been clearly indicated as a Unit of Department of Atomic energy, Govt. of India. As regards

the C-DAC, it is indicated in the profile of C-DAC that it is a premium R & D organisation of the Ministry of Electronics and Information Technology (MEIT) for carrying out R&D in IT, electronics, and associated areas. It can be seen from the said profiles of 2-3 units that they are all units of Govt. or local authority of Govt. authorities and cannot be considered as primarily engaged for the purpose of commerce or industry. Learned AR relied upon some balance-sheet of C-DAC to state that they were profit making units to press his argument that they are commercial and industrial purposes. We find that such allegations were not there in the show cause notice and not supported also. We find that the Tribunal in the case of Ratan Das Gupta & Co v. CCE, Jaipur [2017 (3) G.S.T.L. 247 (Tri. - Del.)] and Commissioner of Service Tax v. S.M. Sai Construction [2016 (42) S.T.R. 716 (Tri. - Mum.)] following the Larger Bench decision in the case of Lanco Infratech has categorically recorded that the buildings constructed for non-commercial and non-industrial purposes are not taxable under works contract services. The said ratio squarely applies in favour of appellant for the demand of service tax in the case of buildings constructed for C-DAC, NFC and APHMHIDC, and it has to be held that these buildings constructed by the appellant and the services rendered under works contract services are not taxable pre or post 1-7-2012.

11. As regards the service tax liability on the buildings constructed for ICFAI, we find that the issue is no more res integra as the Tribunal in the case of Vij Construction Pvt. Ltd. v. CCE, New Delhi [2018 (11) G.S.T.L. 169 (Tri. - Del.)] was considering the very same issue of taxability of the services for construction of buildings for ICFAI and in paragraph No. 6 has held that in regard to campus for ICFAI University Dehradun, the buildings are for use of a recognised university for education and the same cannot be considered as commercial buildings. ICFAI University is having pan India presence, operating in various campuses, it has to be considered as an educational institution, as per the ratio of the decision of the Tribunal in the case of Vij

Construction Pvt. Ltd. (supra). Accordingly, the service tax liability on the construction of buildings for ICFAI Bangalore, Jaipur and Hyderabad for the period pre and post 1-7-2012 is unsustainable and liable to be set aside and we do so."

29.10 Similarly, the Principal Bench of Tribunal in case of Ratan Das Gupta & Co Vs Commissioner of Central Excise, Jaipur [2017 (3) GSTL247 (Tri-Del)], held on issue as below:

> ***4.*** *We have heard both the sides and perused the appeal records. For tax liability under "commercial or industrial construction service", the building constructed should be used primarily for commerce or industry. In the present case, we note that the buildings are for educational institutes recognized to provide education in college/school level. This fact is not disputed. The quantum of fee collected cannot be the criteria to decide the commercial or non-commercial nature of a building. The building for college or school, recognized by competent authority to provide education, are to be considered as non-commercial building. We find that the lower authorities heavily relied on the fee structure stating that collection of high fee will make the institute/building as commercial. We are not in agreement with the said proposition. Recognized educational institutions are governed by the concerned Regulatory Authority which includes the terms for fee collection also. In any case, collection of fee for providing education, per se, cannot make the educational institute as a commercial institute or the building as a commercial building. No other issue is raised in this appeal for decision.*

29.11 The issue was further analyzed by the Tribunal Mumbai in case of Commissioner of Service Tax Vs S M Sai Construction [2016 (42) STR 716 (Tri-Mum), where it was held by the bench-

> ***"6.*** *We find that in view of the various documentary evidence and analysis thereof and also considering the observations of the ld. Commissioner (Appeals) on this, there is no doubt that building constructed by the respondent is college building which is carrying out Technical Education and same is approved by*

> *AICTE, Technical and Higher Education Department of Government of Maharashtra. The recipient of the service namely Vidya Prasarak Mandal, undisputedly a charitable trust registered with Bombay Public Trust Act, 1950. Respondent also produced the building plan. With all these facts, it is clear that building constructed by the respondent is not commercial and industrial construction, therefore does not fall under the category of taxable services, as the same is not used for commercial and industry but it is used for providing education. Therefore service tax paid by the respondent is liable to be refunded."*

29.12 I further find the support from the decision of Hon'ble High Court of Rajasthan in case of 'Commissioner of Central excise, Jaipur VsJatan Construction Pvt. Ltd' (2019(24) GSTL 552 Raj), where the court held while dismissing the appeal filed by the revenue-

> ***"5.*** *However, in our considered opinion, the Tribunal clearly observed as under :*
>
> > *"7. Admittedly, in the present case the construction activity of the appellant is with reference to student's hostel and the public hospital. These are non-commercial buildings. Accordingly, these are excluded from tax liability under works contract service."*
>
> ***6.*** *It is thus clear that the hostel which was constructed was a girls hostel and hospital which was need of the Jaipur was constructed. In that view of the matter, it was not commercial building as per the language used and the activities neither fall under commercial activities nor industrial activities, it is purely a social activity where the girls hostel is constructed for girls students in city of Surat and hospital in Jaipur.*
>
> ***7.*** *Thus, we are in complete agreement with the view taken by the Tribunal. No substantial question of law arises in the appeal."*

29.13 While examining the tax liability on the construction services provided to Nashik thermal Power station (NTPS) in case of P.B.Rathod Vs Commissioner of Central excise, Nashik (2015(39) STR 650 Tri-Mumbai), where the bench found that NTPS cannot be treated as *commercial and the activity will not be taxable. The relevant part of the finding is reproduced herewith*

> ***"6.4*** *Service of painting of plant and machinery of NTPS is an activity covered under Commercial or Industrial Construction Service under Section 65(25b). This definition includes services such as painting of buildings, civil structures which are primarily used for commerce or industry. We do not agree with the Commissioner (Appeals) that NTPS is established for profit earning. He has also taken a narrow view of Board's Circular No. 80/10/2004-S.T., dated 17-9-2004 which states that "generally Government buildings or civil constructions are used for residential, office purposes or for providing civic amenities". The Board's circular mentions some Govt. constructions by way of illustration only and is not restrictive. The NTPS may not be doing charity work but at the same time they have to charge for electricity generated so as to able to provide electricity to the public on self-sustaining basis. Therefore, the activity cannot be called commercial in the strict sense of the term. Therefore, we are of the view that service tax is not payable on the painting of NTPS plant."*

29.14 In case of Anand Construction Co. v. CCE 2013 (32) S.T.R. 451 (Tri. - Mumbai) wherein the appellant has constructed hostel for residence of boys / girls who are studying in a medical institute, the Hon'ble Tribunal has held that:

> *"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 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".*
>
> *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."*

29.15 The above view was reaffirmed by the Tribunal in the party's further appeal (2015-TIOL-1 145-CESTAT-MUM)

29.16 My findings are further supported by the Tribunal Delhi decision in case of Jatan Construction Pvt Ltd Vs Commissioner of Central Excise, Jaipur (2018-TIOL-634-CESTAT-Del), where it was observed by the bench-

> *6. We note that the category (e) talks about turnkey projects. Apparently this refers to the nature of execution of a project. Such project may be with reference to any one of the activities mentioned in category (a) to (d). This is the finding recorded by the Tribunal in M/s.Lanco Infratech Ltd. (supra). The Tribunal recorded as below:-*
>
> > *"(ii) Turnkey/EPC project contracts, enumerated in clause (e), Explanation (ii) in Section 65 (105) (zzzza) of the Act is a descriptive and ex abundant cautela drafting methodology. In the light of the decision in Alstom Projects India Ltd., fortified by the Special Bench decision (dated 19.03.2015) in Larsen & Toubro Ltd. reference, a turnkey/EPC contract is taxable prior to 01.06.2007 as well. On and since 01.06.2007, turnkey/EPC contracts*

> *must be classified on the basis of the essential character of the service provided thereby, with the aid of classification guidelines set out in Section 65A (2) of the Act. Consequently, a turnkey/EPC contract must be classified under any of the clauses (a) to (d), Explanation (ii), Section 65 (105) (zzzza). The bundled bouquet of services provided as turnkey/EPC contract, classifiable as Commercial or Industrial Construction Service (CICS) prior to 01.06.2007, would be classifiable under clause (b), Explanation (ii), Section 65 (105) (zzzza) on and from 01.06.2007 and would not be exigible to service tax if the rendition of service thereby is primarily for noncommercial, non-industrial purpose, in view of the exclusionary clause in clause (b) of the definition of WCS."*

7. Admittedly, in the present case the construction activity of the appellant is with reference to student's hostel and the public hospital. These are non-commercial buildings. Accordingly, these are excluded from tax liability under works contract service.

29.17 Similarly, in the case of "Vij Construction Pvt Ltd Vs Commissioner of Central Excise, New Delhi (2018-TIOL-465-CESTAT-Del), while dealing with the similar facts, it was held by the Hon'ble tribunal

"5. Regarding the Headquarter building of National Rifle Association of India, we find that the said association is an official representative of Rifle Sports, which are duly recognized by the Ministry of Youth Affairs and Sports and affiliated to Indian Olympic Association. They are engaged in recognized sports activities and their headquarter is situated in the said building. We are of the considered view that the building cannot be considered as commercial building for service tax purposes.

6. With reference to building in the campus of ICFAI University, Dehardun, it is clear that the said building is for use by a recognized university for education. The same also cannot be considered as commercial building. We note that the impugned original order proceeded to hold these as commercial building

> *only on the basis of fees collected for the activities or participation in Rifle Association as well as by the university. We note that collection of fees for promoting or allowing the person to use the facility by these bodies will not make the building commercial. Considering the nature of occupants' activities carried out in the building, we are of the view that both these activities cannot be considered as resulting in construction of commercial building. Accordingly, we set aside the impugned order and allow the appeal of the appellant."*

29.18 Bombay High Court had examined the liability of payment of service tax on the construction services provided to the government department, at length in case of The Commissioner of Central Excise and Service Tax Vs BJ Shirke Construction Technology Pvt Ltd (2019-TIOL-645-HC-MUM-ST). While dismissing the departmental appeal, it was observed by the Hon`ble Court-

> *"13. There is no dispute that the plot of land on which the stadium is constructed is owned by Government of Maharashtra, The record maintained by the local authorities would indicate that the plot is for public welfare use and not for residential or commercial purpose. The question that arises for consideration is whether. user of the stadium area to the extent of 1/3 rd of the total area for commercial purpose would tantamount to 'commercial or industrial construction service' as defined by Section 65 (25)(b) of the Finance Act, 1994. It is not even the case of the appellant that the stadium is exclusively used for commercial purpose. Relying on materials which indicate that 1/3rd of the area of the stadium can be uitilized for commercial purpose, other than sports, the appellant wants us to arrive at a conclusion that construction is commercial construction service as defined under Section 65(25b) of the Finance Act, 1994. No doubt, various rates are specified for different facilities in the sports complex. As observed earlier, it is not even the case of the appellant that sports complex is exclusively or even primarily used for commercial purpose*
>
> *14. It may be that various rates are specified for different facilities in the sports complex. This by itself is not sufficient to*

establish that the sports complex is exclusively or primarily used for commercial purpose. The agreement itself permits the Committee to use the area to the extent of 1/3rd of the total area for commercial purpose.

15. Let us consider the definition of the term 'commercial or industrial construction service' which is extracted hereinbefore. Clauses (a) to (d) of the definition provides for various types of construction and allied works including glazing, plastering, painting etc, and also repair, alteration, renovation etc on which service tax can be levied. This construction of the allied works ipso facto does not attract the levy of the service tax as further part of the definition would indicate. The said construction, in order to attract service tax, will also have to satisfy the conditions laid down by subsequent part of the definition i.e.

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 or industry, or work intended for commerce or industry..... (emphasis supplied by us)

16. The language employed in the definition clause is clear and unambiguous. The plain meaning as can be understood from the definition clause, more particularly, the clarification contained in clauses (i), (i), (ii) is that the construction ipso facto is not leviable to service tax, but it is only when it is used, or to be used, primarily for "commerce" or "industry" or work intended for "commerce" or "industry" that service tax can be levied. Thus, it is only that construction which is to be used or primarily to be used for commerce that is subject to levy of service tax.

17. In the present facts, we find that dominant user of the sports complex is non-commercial. The definition uses the words "used or to be used primarily for commerce or industry" clearly indicating that the user is to be exclusively for commercial purpose or at least it must be primarily for commercial purpose. The definition leaves us in no manner of doubt that if the predominant user of the "sports stadium" is not commercial, *then the same cannot be subjected to levy of service tax. Thus, in the facts of the present case, though an area to the extent of 1/3rd is used for commercial purpose prescribing separate rates for such user, this by itself is not sufficient to attract service tax*

18. Even the circulars issued by the Board dated 17/09/2004 and 10/02/2012 would indicate that only if such constructions are for commercial purposes, like, local government bodies constructing shops for letting them out, such activities would be commercial and builders would be subjected to service tax. The Director of Sports and Youth Services, Pune in his Affidavit filed before the authorities on earlier occasion has deposed that the stadium will be continued to be used for the non-commercial purposes even after the Commonwealth Youth Games, 2008 are over. The materials on record do not satisfy the test that the stadium is used or used primarily for commercial purpose. It is the stand of the respondent that while pursuing their object of popularizing sports by selecting best available means, they incidentally charge for the usage and the said revenue will not convert the activities into commercial use The stand is reasonable.

19. We therefore do not find this to be a fit case to interfere with the order passed by the CESTAT in exercise of our further Appellate jurisdiction. The order under challenge is neither perverse nor vitiated by an error apparent on the face of the record."

29.19 In view 'of the above, I find that the construction activity provided to the government in regard to the civil structures which are not meant for primary use for commerce and industry, are exempted from the payment of service tax under exclusion clause given under the works contract service. In this regard the government for non-taxability of buildings or civil structures used for non-commercial r government purposes has issued Circular No. 79/9/2004-ST dated 17.09.2004 relevant text of which is reproduced as under:

"Construction services (commercial and industrial buildings or civil structures)

> *13.1 Services provided by a commercial concern in relation to construction, repairs, alteration or restoration of such buildings, civil structures or parts thereof which are used, occupied or engaged for the purposes of commerce and industry are covered under this new levy. In this case the service is essentially provided to a person who gets such constructions etc. done, by a building or civil contractor. Estate builders who construct buildings/ civil structures for themselves (for their own use, renting it out or for selling it subsequently) are not taxable service providers. However, if such real estate owners hire contractor/ contractors, the payment made to such contractor would be subjected to service tax under this head. The tax is limited only in case the service is provided by a commercial concern. Thus, service provided by a laborer engaged directly by the property owner or a contractor who does not have a business establishment would not be subject to service tax.*
>
> *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."*

29.20 From the above, it is crystal clear that any construction of Government building used for residential purposes or of government office purposes, or for providing civic amenities, cducational facilities or infrastructural facilities are non-commercial in nature. FPurther, the *infrastructure facilities which are concerned with welfare activity, for the citizens of this country have been excluded from the liability f service tax. service tax would not be levied on the construction services of such civil structures.*

29.21 Therefore, I find that service tax demand raised for year 2008-09 to 2011-12 under the head of "Works Contract Service" is not sustainable and. consequent to that question of applicability of composition scheme as stipulated in rule 3(3) of Works Contract (Composition Scheme for payment of Service) Rules, 2007) as clarified by Board vide Circular No. 128/10/2010-ST dated 24.08.2010 does not arise."

4.3 Thus we find that though show cause notice had failed to give details contract of the contract the adjudicating authority has taken note of each contract in the impugned order and thereby recorded his findings on the contract and legal position in respect of the services provided as per these contract. In view of the above detailed findings contract-wise, we do not find any merits and are unable to understand what the Revenue intended to state in para 5.37 of the appeal reproduced below:

*"**5.37** It is pertinent to mention here that the above referred instances viz., taxability in respect of the services provided to M/s GETCO and APMC are only indicative and not conclusive. Quite obviously, there may be more such cases. The same could be unearthed only through a detailed scrutiny of the contracts and other documents, as the break up provided by the noticee is insufficient to identify the leviability of service tax. From the scant information provided in the said break up, it would be difficult to clearly distinguish the projects which are developed as a revenue generating measure by the service recipient and entails service tax liability."*

4.4 As regards the correct classification of the service in their appeal, the Revenue has made a general statement vis-a-vis non-classification/ incorrect classification of the service; we do not find any merit in their observation. Further, we find that except for service provided by the Respondent to APMC and GETCO, all other services have been correctly and appropriately classified by the Adjudicating Authority in the impugned order and benefit of exemption as admissible has been allowed.

4.5 In respect of service provided to GETCO, we find that service provided are in relation to transmission and distribution of electricity. These services are exempt from payment of service tax as has already been held by the Tribunal in the case of **Vraj Construction vs. Commissioner of CE&ST, Surat – 2024 (9) TMI 406 – Tri. Ahmd.** In terms of Notification No. 454/2010-ST dated 20.07.2010 and Notification No. 11/2010-ST dated 20.02.2010. For holding so, Ahmedabad Bench has relied upon following decisions :-

(a) M/s. Kedar Constructions - 2014 (11) TMI 336-CESTAT Mumbai

(b) Dhananjay G Kela – 2024 (5) TMI 1278-CESTAT Ahmedabad

(c) NP Patel & Co-2022 (11) TMI 1043-CESTAT Ahmedabad

(d) JS Kataria, Bhumi Construction Proprietor – 2022 (11) TMI 633

Undisputedly the services provided by the respondent to GETCO are identical/ same as the services which are covered by the above decision of tribunal. In view of above, we do not find any merit in the submissions made.

4.6 Now we are left with the demand of service provided to APMC. We find that,though the respondent has relied upon various case laws but we find that this issue has been finally settled by Hon'ble Supreme Court in the case of **Krishi Upaj Mandi Samiti** vs. **Commissioner of C. Ex. & S.T., Alwar** - **2022 (58) G.S.T.L. 129 (S.C.)**. Hon'ble Supreme Court has observed as follows:

> *"7. As per the exemption circular only such activities performed by the sovereign/public authorities under the provisions of law being mandatory and statutory functions and the fee collected for performing such activities is in the nature of a compulsory levy as per the provisions of the relevant statute and it is deposited into the Government Treasury, no service tax is leviable on such activities. In paragraph 3, it is also specifically clarified that if such authority performs a service, which is not in the nature of a statutory activity and the same is undertaken for consideration, then in such cases, service tax would be leviable, if the activity undertaken falls within the ambit of a taxable service. Thus, the language used in the 2006*

circular is clear, unambiguous and is capable of determining a defined meaning.

8. The exemption notification should not be liberally construed and beneficiary must fall within the ambit of the exemption and fulfil the conditions thereof. In case such conditions are not fulfilled, the issue of application of the notification does not arise at all by implication.

8.1 It is settled law that the notification has to be read as a whole. If any of the conditions laid down in the notification is not fulfilled, the party is not entitled to the benefit of that notification. An exception and/or an exempting provision in a taxing statute should be construed strictly and it is not open to the Court to ignore the conditions prescribed in the relevant policy and the exemption notifications issued in that regard.

8.2 The exemption notification should be strictly construed and given a meaning according to legislative intendment. The Statutory provisions providing for exemption have to be interpreted in light of the words employed in them and there cannot be any addition or subtraction from the statutory provisions.

8.3 As per the law laid down by this Court in a catena of decisions, in a taxing statute, it is the plain language of the provision that has to be preferred, where language is plain and is capable of determining a defined meaning. Strict interpretation of the provision is to be accorded to each case on hand. Purposive interpretation can be given only when there is an ambiguity in the statutory provision or it results in absurdity, which is so not found in the present case.

8.4 Now, so far as the submission on behalf of the respondent that in the event of ambiguity in a provision in a fiscal statute, a construction favourable to the assessee should be adopted is concerned, the said principle shall not be applicable to construction of an exemption notification, when it is clear and not ambiguous. Thus, it will be for the assessee to show that he comes within the purview of the notification. Eligibility clause, it is well settled, in relation to exemption notification must be given effect to as per the language and not to expand its scope deviating from its language. Thus, there is a vast difference and *distinction between a charging provision in a fiscal statute and an exemption notification.*

9. In the present case, it is the case on behalf of the appellants that the activity of rent/lease/allotment of shop/land/platform/space is a statutory activity and the Market Committees are performing their statutory duties cast upon them under Section 9 of the Act, 1961 and therefore they are exempted from payment of service tax on such activities.

The aforesaid submission seems to be attractive but has no substance. Section 9(2) is an enabling provision and the words used is "market committee may". It is to be noted that in so far as sub-section (1) of Section 9 is concerned, the word used is "shall". Therefore, wherever the legislature intended that the particular activity is a mandatory statutory, the legislature has used the word "shall". Therefore, when under sub-section (2) of Section 9, the word used is "may", the activities mentioned in Section 9(2)(xvii) cannot be said to be mandatory statutory duty and/or activity. Under Section 9(2), it is not a mandatory statutory duty cast upon the Market Committees to allot/lease/rent the shop/platform/land/space to the traders. Hence, such an activity cannot be said to be a mandatory statutory activity as contended on behalf of the appellants. Even the fees which is collected is not deposited into the Government Treasury. It will go to the Market Committee Fund and will be used by the market committee(s). In the facts of the case on hand, such a fee collected cannot have the characteristics of the statutory levy/statutory fee. Thus, under the Act, 1961, it cannot be said to be a mandatory statutory obligation of the Market Committees to provide shop/land/platform on rent/lease. If the statute mandates that the Market Committees have to provide the land/shop/platform/space on rent/lease then and then only it can be said to be a mandatory statutory obligation otherwise it is only a discretionary function under the statute. If it is discretionary function, then, it cannot be said to be a mandatory statutory obligation/statutory activity. Hence, no exemption to pay service tax can be claimed.

10. The next provision relied upon by the appellants - respective Market Committees is Rule 45 of the Rajasthan Agricultural Produce

Markets Rules, 1963 (hereinafter referred to as "Rules, 1963"), which reads as under :-

> *"45. The Market Committee fund. - All money received by the Market Committee shall be credited to the fund called the Market Committee fund. Except where Government on application by the Market Committee or otherwise shall direct, all money paid into the Market Committee fund shall be credited at least once a week in full into Government treasury or sub-treasury, or a bank duly approved for this purpose by the Director. All balance from the fund shall be kept in such treasury or sub-treasury or bank and it shall not be withdrawn upon except in accordance with these rules."*

10.1 Now, so far as the submission on behalf of the appellants relying upon Rule 45 of the Rules, 1963 that the fees, which is collected shall be deposited with the Government Treasury and therefore also the Market Committees are exempted from payment of service tax is concerned, it is to be noted that on fair reading of Rule 45, the amount of fee so collected on such activities - rent/lease shall not go to the Government. Rule 45 provides how the money received by the Market Committees shall be invested and/or deposited. It provides that all money received by the Market Committee shall be credited to the fund called the Market Committee Fund. It further provides that all money paid into the Market Committee Fund shall be credited once a week in full into Government Treasury or sub-treasury, or a bank duly approved for this purpose by the Director and all balance from the fund shall be kept in such treasury or sub-treasury or bank and it shall not be withdrawn except in accordance with the Rules. Therefore, it does not provide that on deposit of the money received by the Market Committees into the Government Treasury/sub-treasury or a bank duly approved, it ceases to be the Market Committee Fund. It will continue to be the Market Committee Fund. Even it is the case on behalf of the appellants that the fees collected, which will be deposited in the Market Committee Fund will be utilized by the Market Committee for expanding/benefit of the Market Committee etc.

11. Even otherwise, it is to be noted that on and after 1-7-2012, such activities carried out by the Agricultural Produce Market Committees is

> *placed in the Negative List. If the intention of the Revenue was to exempt such activities of the Market Committees from levy of service tax, in that case, there was no necessity for the Revenue subsequently to place such activity of the Market Committees in the Negative List. The fact that, on and after 1-7-2012, such activity by the Market Committees is put in the Negative List, it can safely be said that under the 2006 circular, the Market Committees were not exempted from payment of service tax on such activities. At this stage, it is required to be noted that it is not the case on behalf of the Market Committees that the activity of rent/lease on shop/land/platform as such cannot be said to be service. However, their only submission is that the Market Committees are exempted from levy of service tax on such service/activity as provided under the 2006 circular, which as observed hereinabove has no substance.*

Hon'ble Supreme Court reaffirmed this decision in case of,-

- Agriculture Produce Marketing Committee Gazipur [(2023) 2 Centax 293 (S.C.)]
- Gujarat Industrial Development Corporation [2023 (73) G.S.T.L. 452 (S.C.)]

In the present case we are concerned with the period prior to 01.07.2012. From the perusal of the above decision of the Hon'ble Supreme Court, it is clear that activities undertaken by the APMC/ Krishi Upaj Mandi Samiti are subjected to service tax as they are commercial in nature. The service provided by the respondent, in such case towards construction of shop/ land/ platform/ space which are used by the recipient of service for the purpose of commerce or industry will be subjected to service tax. In view of this settled legal position, we find the services provided by the respondent to APMC will be subjected service tax under the appropriate category of taxable services.

4.7 The respondent has challenged the demand on the ground of limitation also. It is not a case where no reasons have been stated for invoking extended period though the impugned order is silent but the Show Cause Notice has made out a clear case for invocation of extended period. The relevant paragraphs from the said order are reproduced:-

"10. *WHEREAS it also appears that though M/s Paresh S. Patel have been liable to pay the service tax, they have not made any application for registration to the jurisdictional Superintendent of Central Excise, as required under sub-section (1) of section 69 of the Act read with rule 4 of the Service Tax Rules, 1994 and thereby they have contravened the provisions of sub-section (1) of section 69 of the Act read with rule 4 of the Service Tax Rules, 1994.*

11. *WHEREAS it appears that though M/s Paresh S. Patel have been liable to pay service tax, they have not assessed, the tax due on the service provided by them and not furnished any return to the jurisdictional Superintendent of Central Excise, as required under sub-section (1) of section 70 of the Act read with rule 7 of the Service Tax Rules, 1994 and thereby they have contravened the provisions sub-section (1) of section 70 of the Act read with rule 7 of the Service Tax Rules, 1994.*

12. *WHEREAS it appears that though M/s Paresh S. Patel have provided taxable service of execution of works contract to their service recipients, they have neither paid the service tax levied thereon during the year 2008-09 to 2011-12, as required under sub-section (1) of section 68 of the Act nor made any application for registration to the Superintendent of Central Excise, as required under sub-section (1) of section 69 of the Act read with rule 4 of the Service Tax Rules, 1994. M/s Paresh S Patel have also not assessed the tax due on the service provided by them and not furnished any return to the jurisdictional Superintendent of Central Excise, as required under sub-section (1) of section 70 of the Act read with rule 7 of the Service Tax Rules, 1994. M/s Paresh S. Patel have also not brought the facts to the knowledge of the Department that they are engaged in the providing taxable service to the service recipients at the material time and thereby it appears that M/s Paresh S. Patel have suppressed the material facts from the Department that they are engaged in providing taxable services to their service recipients and also contravened the various provisions of Chapter V of the Act and the rules made thereunder, as mentioned supra, with an intent to evade payment of service tax levied thereon.*

> ***13.*** *WHEREAS it appears that M/s Paresh S. Patel have received payment of an amount of Rs. 6,05,16,599/- during the year 2008-09, Rs. 6,97,37,388/-during the year 2009-10, Rs. 4,43,51,657/- during the year 2010-11 and Rs. 6,62,50,707/- during the year 2011-12 from the respective service receivers for providing them the taxable service of construction of complex, other constructions and taxable service of execution of works contract against the work order awarded to them, and have incurred transport expenses of Rs. 1,98,20,730/- during the year 2008-09 to 2011-12 for receipt of goods and materials but they have not paid the service tax levied thereon by suppressing the facts and contravening the various provisions of Chapter V of the Act and the rules made thereunder with an intent to evade payment of service tax.****"***

4.8 Thus, in respect of the demand made on services provided to APMC, we are of the view that Revenue should succeed both on the ground of merit and limitation. However, we are of the considered opinion and also in view of the decision of Hon'ble Supreme Court in the case of Larson & Toubro, the benefit of composition scheme as provided by works contract Composition Payment Rules, 2007 and the cum-tax benefit as per Section 67 would be available to the respondent while computing the service tax demand.

4.9 Now, we left with the demand made in respect of Goods Transport Agency Service in respect of expenses incurred by the respondent. Revenue has in their appeal, not challenged the findings recorded by the adjudicating authority for dropping this demand. On the contrary we find specifically in para 4 of the appeal memo following has been stated:

> *"4. During scrutiny of the impugned order in original, Committee of Chief Commissioner of Central Excise and Service Tax, Ahmedabad Zone and Chief Commissioner of Customs, Gujarat zone is satisfied that the said decision of* ***adjudicating authority to the extent of dropping of demand of service tax amounting to Rs. 2,60,54,847/- along with interest and penalty towards the taxable services provided in relation to work contract services*** *is not legal and proper in view of the following grounds:"*

Since there is no challenge to the dropping of demand of Rs 5,28,334/- towards Goods Transport Agency Service on reverse charge basis, the findings of adjudicating authority have become final and we have not recorded any finding in respect of the same.

4.10 As we are modifying the impugned order by upholding the demand of service tax stated in above paragraphs by invoking the extended period of limitation, penalties under Section 78 also are warranted but need to be computed accordingly.

4.11 Thus, for computing the quantum of demand after taking into account our above observations in para 4.8 in respect of APMC and penalty thereon, the matter is remanded back to the Adjudicating Authority.

4.12 Cross objection filed by the respondent only in the nature of comments on appeal filed by the revenue.

5.1 The appeal filed by the revenue is partly allowed and matter remanded to the Adjudicating Authority for re-computation of demand and penalty under Section 78 as per the observations made in para 4.8, 4.9 and 4.10. Cross objections disposed of accordingly.

5.2 As matter is pertaining to the period 2008-09 to 2011-12 matter should be in remand proceedings be decided within a period of three months.

(Pronounced in the open court on 09.07.2026*)*

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

(DR. AJAYA KRISHNA VISHVESHA)
MEMBER (JUDICIAL)

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