**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**SOUTH ZONAL BENCH, CHENNAI**

**Appeal Nos. ST/438 to 441/2011**

(Arising out of Orders-in-Original No.1, 3, 4 and 5/2011 (Service Tax) (Denovo) all dated 27.4.2011 passed by the Commissioner of Central Excise, Trichy)

M/s. Sima Engineering Constructions
S. Rajangam
T.M. Saravanan
M/s.Marimuthu Gounder & Sons Appellants

Vs.

CCE, Trichy Respondent

Appearance

Ms. Nandita S.Das, Advocate for the Appellants
Shri R.Subramanian, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **13.04.2018**

Final Order Nos. **41143-41146 / 2018**

**Per Bench**

The issue in all these appeals being the same, they are heard together and are disposed by this common order.

2. The appellant is engaged in execution of works contract. They were engaged by Tamil Nadu Police Housing Corporation Ltd. (TNPHCL) which is a Government of Tamil Nadu company

wherein 100% of the shares are held by Tamil Nadu Government for construction of police quarters. A show cause notice was issued to them proposing to demand service tax under the category of 'Construction of Residential Complex Service' for the period from 16.6.2005 to 31.12.2007. After due process of law, the original authority confirmed the demand, interest and also imposed penalties. Hence these appeals.

3. On behalf of the appellant, ld. counsel Ms. Nandita S.Das submitted that the period involved includes prior to 1.6.2007 as well as after the said date. The issue whether works contract services are liable to levy of service tax prior to 1.6.2007 is settled by the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise Vs. Larsen & Toubro Ltd. – 2015 (39) STR 913 (SC). The Hon'ble Supreme Court in the case of Commissioner of Central Excise Vs. Sobha Developers Ltd. – 2017-TIOL-29 has affirmed the decision in the case of Larsen & Toubro Ltd. which was followed by the Tribunal in the case of URC Construction P. Ltd. Vs. Commissioner of Central Excise – 2017 (50) STR 147. The ld. counsel argued that for the period after 1.6.2007, the levy cannot sustain in terms of the decision in the case of Nitesh Estates Vs. Commissioner of Central Excise – 2015 (40) STR 815. That this Tribunal in the case of Commissioner of Central

Excise Vs. Lanco Tanjore Power Co. Ltd. vide Final Order No. 40792 & 40793/2018 dated 16.3.2018 held that when construction activity is undertaken for personal use, the same is excluded from the definition of residential complex contained in Section 65(91a) of Finance Act, 1994. The appellants were engaged by TNPHCL to construct quarters for police personnel. The contract was awarded vide GO No. 576 dated 8.7.2005 issued by the Government of Tamil Nadu. Since the quarters were constructed for the use of police personnel, the same is outside the purview of definition of construction of residential complex, as it is covered by the *E*xplanation to the said definition. The ownership of the houses constructed vests with the Government of Tamil Nadu who allots houses to police personnel. There is no profit motive involved in these transactions and there is no renting or letting of these quarters for commercial purposes. The land on which the building is built up belongs to the Government of Tamil Nadu and the ownership of the entire property vests with the Government. That therefore, applying the decision in Nithesh Estates (supra), levy of service tax cannot sustain.

4. The ld. AR Shri R.Subramaniam reiterated the findings in the impugned order.

5. Heard both sides.

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

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

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

*As per section 65[(30a) of the Finance Act, 1994, 'construction of complex' means –*

*(a) construction of a new residential complex or a part thereof; or*

*(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or*

*(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;]*

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

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

*(ii) a common area; and*

*(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, <u>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</u>.*

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

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

*(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;"*

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

"7.1 In this case there is no dispute and it clearly emerges that the residential complex was built for M/s. ITC Ltd. and appellant was the main contractor. Appellant had appointed sub-contractors all of whom have paid the tax as required under the law. The question that arises is whether the appellant is liable to pay service tax in respect of the complex built for ITC. From the definition it is quite clear that if the complex is constructed by a person directly engaging any other person for design or planning or layout and such complex is intended for personal use as per the definition, service tax is not attracted. Personal use has been defined as permitting the complex for use as residence by another person on rent or without consideration. In this case what emerges is that ITC intended to provide the accommodation built to their own employees. Therefore it is covered by 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."

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

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

*"Residential complex" means any complex comprising of –*

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

*(ii) a common area; and*

> *(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.*
>
> *Explanation. – For the removal of doubts, it is hereby declared that for the purposes of this clause, –*
>
> *(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;*
>
> *(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;"*
>
> *The above definition specifically excludes construction undertaken for personal use and such personal use includes permitting the complex for use as residence by another person. We find that the above exclusion clause covers the construction activity undertaken by the assessee.*
>
> *8. We have gone through the case law relied upon by the respondents where a similar case has been dealt with by the Tribunal. Following the decision of the Tribunal in Nithesh Estates Ltd. (supra), we find no reason to interfere with the impugned orders which are sustained and the appeals filed by Revenue are rejected."*

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

(Operative portion of the order was pronounced in open court)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

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