CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. I

SERVICE TAX APPEAL NO. 51416 OF 2014

(Arising out of Order-in-Appeal No. 154(VC)ST/JPR-1/2013 dated 24 October, 2013 passed by the Commissioner (Appeals), Central Excise & Customs, Jaipur-I)

M/s Onkar Lal Saini ....**Appellant**
Susper Bazar, Jaisinghpura Khor
Ramgarh Road
JAIPUR – 302 014

Versus

Commissioner of Customs, Central Excise & Service Tax ......**Respondent**
C-Scheme
JAIPUR

APPEARANCE:

Shri Bipin Garg & Ms. Kainat, Advocates for the Appellant
Shri Harshvardhan, Authorised Representative of the Respondent

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51134/2022

Date of Hearing/Decision : November 23, 2022

JUSTICE DILIP GUPTA :

This appeal is directed against the order dated October 24, 2013 passed by the Commissioner (Appeals), Central Excise, Jaipur-I[1], by which the appeal filed by M/s Onkar Lal Saini[2] to

1 the Commissioner (Appeals)
2 the appellant

assail the order dated December 31, 2010 passed by the Additional Commissioner of Central Excise, Jaipur-I, has been dismissed. The Additional Commissioner, by the aforesaid order dated December 31, 2010, had confirmed the demand of service tax under the proviso to section 73(1) of the Finance Act, 1994[3] with penalty and interest.

2. The appellant, as contractor, constructed residential buildings in terms of the work order given by the Rajasthan Housing Board, Jaipur[4]. According to the appellant, the work order was for building independent residential buildings on behalf of the Housing Board and each house that was constructed was an independent residential unit having independent approach with separate water and electric connection. A show cause notice dated March 18, 2010 was issued to the appellant for the period 2005-06 to 2008-09 requiring the appellant to show cause as to why service tax should not be recovered as the appellant had not paid service tax on 'construction of complex' service as required under section 65(30a) of the Finance Act. The appellant filed reply contending that the construction of a single residential unit would not fall under the category of 'construction of complex' defined under section 65(30a) of the Finance Act and in any case liability prior to June 01, 2007 could not have been fastened upon the appellant as the service rendered by the appellant would be in

3 the Finance Act

4 the Housing Board

relation to execution of 'works contract', which was made taxable for the first time w.e.f June 01, 2007. The Additional Commissioner did not accept the contention raised by the appellant in reply to the show cause notice that construction of a single independent unit would not fall under the category of 'construction of complex' service. The Additional Commissioner also repelled the contention of the appellant that no service tax could be levied as it was a 'works contract'. The appeal filed by the appellant before the Commissioner (Appeals) was also dismissed. The Commissioner (Appeals) held that the Additional Commissioner committed no illegality in holding that the service provided by the appellant would be covered under the category of 'construction of complex' service. The Commissioner (Appeals) also repelled the contention of the appellant that service tax could not be levied prior to June 01, 2007.

3. Shri Bipin Garg, learned counsel appearing for the appellant submitted that from a perusal of the contract executed with the Housing Board, it would be apparent that it was a 'works contract' which would be taxable under section 76(105)(zzzza) of the Finance Act with effect from June 01, 2007 only and even for the period post June 01, 2007 service tax could not have been confirmed under the 'construction of complex' service. Learned counsel also submitted that, even otherwise, the construction carried out by the appellant would not fall under the definition of 'construction of complex' service.

4. Shri Harshvardhan, learned authorized representative of the Department, however, supported the impugned order and submitted that it does not call for any interference in this appeal.

5. The submissions advanced by the learned counsel for the appellant and the learned authorized representative of the Department have been considered.

6. In regard to the first submission advanced by the learned counsel for the appellant, it is seen that neither the adjudicating authority nor the Commissioner (Appeals) has doubted that the contract was 'works contract'. The Commissioner (Appeals) has, however, held that the 'construction of complex' service, which was earlier taxable under section 65(105)(zzzh) of the Finance Act, would be taxable under section 65(105)(zzzza) of the Finance Act with effect from June 01, 2007.

7. The first issue that arises for consideration is whether Service Tax could have been levied before June 01, 2007 on composite contracts involving supply of goods/materials during execution of civil constructions. The Supreme Court in **Commissioner of Central Excise, Kerala vs Larsen & Toubro**[5] noticed that it is only w.e.f June 01, 2007 that Section 65(105)(zzzza) of the Act was introduced to cover composite

5 2015 (39) STR 913 (SC)

works contract and so service rendered in a works contract cannot be covered under any other category of service prior to June 01, 2007. The relevant portion of the judgment is reproduced below :

> "15. A reading of this judgment, on which counsel for the assessees heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting therefrom charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub-paras (f), (g) and (h). Under each of these paras, a bifurcation has to be made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor's accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost, expenses and profit as would be attributable in the works contract to the transfer of property in goods in such contract. This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in the execution of the works contract. **This not having been done by the**

Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts.

xxxxx xxxxx xxxxxxx

24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very 21 ST/59109/13 language of Section 65(105) which defines —taxable service as —any service provided . **All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.”**

(emphasis supplied)

8. In view of the law laid down by the Supreme Court in **Larsen & Toubro**, the Commissioner (Appeals) fell in error in observing that prior to June 01, 2007 a composite works contract can be subjected to levy of service tax under ‘construction of complex’ service.

9. Following the said decision of the Supreme Court in **Larsen & Toubro**, a Division Bench of the Tribunal in **Emaar MGF Construction Private Limited vs Commissioner of Central Excise**[6] also observed:

> "23. It is, therefore, clear from the aforesaid judgment of the Supreme Court in Larsen & Toubro that a Composite Works Contract cannot be taxed under CCS under Section 65(105) (zzzh) as the scope is limited to cover contract of service simplicitor only.
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> 24. What is also important to note is that the definition of CCS in Section 65(105)(zzzh) remained the same even after 01 June, 2007 when Works Contract Service was introduced. In the absence of any change in the definition of CCS, the judgment of the Supreme Court in Larsen & Toubro will apply to a period after 01 June, 2007 also."

10. The position, therefore, that emerges is that prior to June 01, 2007, service tax could not be levied on a composite works contract involving supply of goods/materials for execution of Civil Construction. Thus, levy of service tax for a service provided prior to June 01, 2007 under 'construction of complex' service cannot be sustained.

11. For the period after June 01, 2007 demands could not have been confirmed under 'construction of complex' service since it would be taxable only under 'works contract'.

12. The alternate submission advanced by learned counsel for the appellant that the work undertaken by the appellant for the

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6 **2019 (5) TMI 1135-CESTAT, New Delhi**

Housing Board would not be covered under 'construction of complex' service, also deserves to be accepted.

13. Section 65 (30a) of the Finance Act deals with 'construction of complex' and is defined as follows:-

65 (30a)- "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;

14. The taxable service under section 65 (105) (zzzh) of the Finance Act means any service provided or to be provided to any person, by any other person, in relation to construction of complex.

15. "Residential Complex" has been defined under section 65(91a) of the Finance Act as follows:-

"(91a) "residential complex" means any complex comprising of-

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

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

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

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

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

16. The definition of a 'residential complex' leaves no manner of doubt that it would be a complex comprising of a building or buildings, having more than twelve residential units. In other words a complex may have a building having more than twelve residential units or a complex may have more than one building each having more than twelve residential units. Independent buildings having twelve or less than twelve residential units would not be covered by the definition of 'residential complex'. In the present case, the appellant had constructed independent buildings having one residential unit only. Thus, even if the appellant had constructed more than 12 independent buildings, the nature of activity would not be 'construction of complex' and, therefore, the service tax could be levied.

17. In this connection, reliance can be placed on a Division Bench judgment of the Principal Bench of the Tribunal in **Macro Marvel Projects Ltd. v/s Commissioner of Service Tax, Chennai**[7] wherein the demand of service tax was for the period

7. **2008 (12) STR 603 (Tri.-Chennai)**

June 16, 2005 to November, 2005 under ‘construction of complex’ service under section 65(30a) of the Act. The Bench examined the scope of ‘construction of complex’ and the meaning of ‘residential complex’ under section 65(91a) of the Act and observed as follows:-

> “It is abundantly clear from the above provisions that construction of residential complex having not more than 12 residential units is not sought to be taxed under the Finance Act, 1994. For the levy, it should be a residential complex comprising more than 12 residential units. **Admittedly, in the present case, the appellants constructed individual residential houses, each being a residential unit, which fact is also clear from the photographs shown to us. In any case, it appears, the law makers did not want construction of individual residential units to be subject to levy of service tax.** Unfortunately, this aspect was ignored by the lower authorities and hence the demand of service tax. In this view of the matter, we are also not impressed with the plea made by the appellants that, from 1-6-2007, an activity of the one in question might be covered by the definition of ‘works contract’ in terms of the Explanation to section 65 (105)(zzzza) of the Finance Act, 1994 as amended. ‘According to this Explanation, ’construction of a new residential complex or a part thereof’ stands included within the scope of ‘works contract’. But, here again, the definition of “residential complex” given under section 65(91a) of the Act has to be looked at. By no stretch of imagination can it be said that individual residential units were intended to be considered as a “residential complex or a part thereof.”
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> **(emphasis supplied)**

18. The Civil Appeal filed by the Department to assail the aforesaid order of the Tribunal was dismissed by the Supreme Court on July 07, 2009.

19. The aforesaid decision of the Tribunal in **Macro Marvel Projects** was subsequently followed by the Tribunal in **A.S.**

Sikarwar vs. Commissioner of Central Excise, Indore[8] and the relevant portion of the order is quoted below:-

> "**In this case, the Appellants have undertaken construction work of 15 residential houses under a contract with M.P. Housing Board**. The Revenue was of the view that the Appellants should have paid service tax on the activity under the entry 65(105)(zzzh) for taxing 'construction of complex' as defined under Section 65(91a) of Finance Act, 1994. **The submission of the appellant is that the entry covers only such building where each of the building has got more than 12 residential units. They have built 15 independent houses and not a complex and hence their activity was not taxable under the entry 65(105)(zzzh) which adopts definition in Section 65(91a)**. He relied upon the decision of the Tribunal in the case of *Macro Marvel Projects Ltd.* v. *CST, Chennai* - 2008 (12) S.T.R. 603 (Tri.-Chennai).
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> **2.** The Authorised Representative appearing for the Revenue submits that the explanation under Section 65(91a) of Finance Act, 1994 gives definition of "residential unit" to mean "a house or single apartment intended for use as a place of residence". Even if the residential units are separate, it will be covered by the definition, according to him.
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> **3.** The A.R. further submits that the decision in the case of *Macro Marvel Projects Ltd.* was with reference to the entry for works contract under Sections 65(105)(zzzza) of Finance Act, 1994 whereas the present case is in respect of construction of residential complex under entry 65(105)(zzzb). He also points out that the Tribunal in para-2 of the order has observed as under :-
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> > "These observations of ours with reference to 'works contract' have been occasioned by certain specific grounds of this appeal and the same are not intended to be a binding precedent for the future."
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> **4.** We have considered arguments on both sides. We find that the definition of residential complex as per Section 65(91a) of Finance Act, 1994 is applicable for both the entries under Section 65(105)(zzzh) for levy of tax on construction of residential complex as also for entry under Section 65(105)(zzzza) for works contract. Therefore, there cannot be an argument that the expression 'residential complex' has to be interpreted in one manner for works contract and in a different manner for levy of tax on construction of a residential complex.
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> **5.** We further note that Revenue being aggrieved by the decision of the Tribunal in the said matter had filed appeal

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8. **2012 (28) STR 479 (Tri. – Del.)**

> with the Hon'ble Supreme Court and the Hon'ble Supreme Court has dismissed the appeal filed as reported at 2012 (25) S.T.R. J514 (S.C.). **So we consider that this matter is no longer *res integra* and service tax can be demanded under 65(105)(zzzh) only if the building concerned has more than 12 residential units in the building and such levy will not apply in cases where in one compound has many buildings, each having not more than 12 residential units**. Therefore, we set aside the impugned order and allow the appeal."
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> **[emphasis supplied]**

20. It also needs to be noticed that the same view was expressed by a Division Bench of this Tribunal in **M/s Lakhlan & Qureshi Construction Company vs. Commissioner of Central Excise and Service Tax, Jaipur-1**[9].

21. The Principal Commissioner has, however, distinguished the decision of the Tribunal in **Mecro Marble** for the reason that the scheme developed by the Housing Board normally has more than 12 residential units along with common area with a common approach road. According to the Commissioner (Appeals), if there are more than 12 independent houses having some common facilities, it would qualify to be a residential complex and liable to service tax. This reasoning is contrary to the view expressed by the Tribunal.

22. Thus, levy of service tax on the appellant under 'construction of complex' service cannot be sustained.

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9 . Service Tax Appeal No.55701 of 2014 decided on 14 October, 2019

23. The impugned order dated October 24, 2013 passed by the Commissioner (Appeals), therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Dictated & pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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