

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. 1

Service Tax Appeal No. 52953 of 2016

(Arising out of Order-in-Appeal No. 291-293/AK/ST/JPR/2016 dated 28.07.2016 passed by the Commissioner of Central Excise, Jodhpur)

M/s Quality Builders & Contractor **Appellant**

VERSUS

Commissioner of Central Excise, Jaipur-II **Respondent**

AND

Service Tax Appeal No. 52954 of 2016

(Arising out of Order-in-Appeal No. 291-293/AK/ST/JPR/2016 dated 28.07.2016 passed by the Commissioner of Central Excise, Jodhpur)

M/s Quality Builders & Contractor **Appellant**

VERSUS

Commissioner of Central Excise, Jaipur-II **Respondent**

Appearance

Shri Om P. Agarwal, Chartered Accountant – for the Appellant.

Dr. Radhe Tallo, Authorized Representative – for the Respondent.

CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION : 26/04/2023

Final Order Nos. 50588-50589/2023

Justice Dilip Gupta

M/s Quality Builders & Contractor¹ has filed this appeal to assail the order dated July 28, 2016 passed by the Commissioner (Appeals), Jaipur, by which the orders passed by the adjudicating

¹ the appellant

authority on September 09, 2014 and July 17, 2015 rejecting the refund claim filed by the appellant have been upheld.

2. The period involved in Service Tax Appeal No. 52953 of 2016 is from October 01, 2013 to December 31, 2013 and in Service Tax Appeal No. 52954 of 2016 is from April 01, 2014 to June 30, 2014. The issue involved in this appeal is as to whether the appellant is entitled to claim refund of the service tax deposited by the appellant on construction of individual/independent residential houses and whether the refund is hit by the principle of unjust enrichment.

3. The appellant constructed individual/independent residential houses as per the work order given by the Rajasthan Housing Board². The appellant has stated that the Resident Engineer of the Housing Board gave a certificate that the houses constructed as per the work orders issued by the Housing Board are independent residential houses having independent approach and entry with separate electricity and water connections. According to the appellant, service tax was deposited by the appellant on such constructed houses by mistake and even the Housing Board deposited 50% of the service tax under reverse charge mechanism. The appellant claimed refund of the service tax deposited by the appellant as also the Housing Board since the Housing Board had awarded the contract in favour of the appellant for a gross amount, inclusive of all taxes and 50% of the service tax paid by the Housing Board was deducted from the amount

² the Housing Board

payable to the appellant by the Housing Board. The appellant further claims that construction of the individual/independent residential houses was not subject to levy of service tax prior to July 01, 2012 and even after July 01, 2012 it was exempted under the Exemption Notification dated June 20, 2012.

4. The Commissioner (Appeals) denied the refund of service tax and the relevant portion of the order is re-produced below:

" I find that the appellant has contended that the work done by them is not taxable as the houses constructed by them are not part of any building or buildings having more than one residential units. I have gone through the definition of 'residential complex' prior to and after 1.07.2012. I find that prior to 1.07.2012 'Residential Complex' as per section (91a) 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. However, from 1.07.2012 "residential complex" means any complex comprising of a building or buildings, having more than one single residential unit. Further, Notification No. 25/2012-ST dated 20.6.2012 exempts a single residential unit otherwise than as a part of a residential complex. I find that vide work order no. RE/2012-13/1923 dated 23.01.2013 the appellant has been awarded work for construction of HIG 12 Nos. at Manpura Scheme, Abu Road and vide work order No. 501 dated 29.04.2014, the appellant has been awarded work for construction of MIG A-42 Nos. (SFS) Houses at Akara Bhatta, Abu Road. Thus I find that in the same premises of Manpura and Akara Bhatta of Abu Road more than one house has been constructed and thus I find from these work orders that more than one residential houses have been constructed in the same area and premises and the houses are part of residential complex and therefore are liable to service tax. It is, therefore, Rajasthan Housing Board has clearly mentioned in the Work Order (dated 29.4.14) that "This work order shall be subject to service

tax as per service tax law since the work order is inclusive of service tax, RHB shall deduct its share of service tax liability from the contractor bill and contractor will pay its own liability to the excise department". In case the work orders were only for construction of a single residential unit otherwise than as a part of a residential complex than no such clause would have been mentioned in the work order by Rajasthan Housing Board. Furthermore, the appellant has not submitted crucial documents like photographs and drawing and design of the houses constructed by the appellant under these work orders to prove that the houses are single residential unit which are not part of residential complex. The case law cited in defence by the appellant do not come to their rescue as the appellant has failed to prove that they had constructed single residential unit which are not part of a residential complex. Accordingly, I hold that the amount received by the appellant for the work of construction of houses under the two work orders are taxable."

5. The Commissioner (Appeals) also held that the claim of refund would be hit by unjust enrichment also and the relevant portion is reproduced below:

"I find that the appellant has contended that they have borne the incidence of tax and the same has not been collected by them from any other person. I find that it is clear from the work order that the work orders are inclusive of service tax. The doctrine of unjust enrichment is a just and salutary doctrine. It prevents collection of duty from both the ends. Therefore, following the ratio of judgments of the Hon'ble Supreme Court and Tribunal cited supra, I hold that claims are hit by the clause of unjust enrichment."

6. Shri O.P. Agarwal, learned Chartered Accountant appearing for the appellant has submitted that the appellant is entitled to exemption under the Exemption Notification dated June 20, 2012 since individual/independent houses were constructed by the appellant and levy of service tax is exempted under the said Exemption Notification. In support of this contention, learned Chartered Accountant placed reliance upon the decision of the Division Bench of the Tribunal in **Beriwal Constructions Co. vs**

Commissioner of Central Excise & Service Tax-II, Agra³.

Learned Chartered Accountant also submitted that refund can be claimed by any person who has borne the incidence of tax and in support of this contention he has placed reliance upon the judgment of the Allahabad High Court in **Commissioner of Customs, Central Excise & Service Tax vs Indian Farmers Fertilizers Coop. Ltd.⁴**

7. Dr. Radhe Tallo, learned Authorized Representative appearing for the Department has, however, supported the impugned order and submitted that the appellant was not entitled to claim benefit of the Exemption Notification dated June 20, 2012

8. The submissions advanced by the learned Chartered Accountant appearing for the appellant and the learned Authorized Representative appearing for the Department have been considered.

9. To appreciate the submissions, it would be useful to first examine the position regarding levy of service tax as it existed prior to July 01, 2012.

10. The appellant had constructed residential houses for the Housing Board. Section 65(105)(zzzh) of the Finance Act, 1994⁵ provides that 'taxable service' means "any service provided or to be provided to any person, by any other person in relation to construction of complex".

3 2017 (5) GSTL 198 (Tri-All.)
 4 2014 (35) STR 492 (All.)
 5 the Finance Act

11. 'Construction of complex' has been defined in section 65(30a) of the Finance Act as follows :

"Section 65(30a) - "Construction of Complex"

"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 application or fittings and other similar services; or
- (c) Repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;"

12. A 'residential complex' has been defined in section 65(91a) of the Finance Act as follows :

"Residential Complex - Section 65(91a)

'Residential Complex' means any complex comprising of -

- (i) a building or buildings, having more than 12 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 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 the clause,

- (a) "Personal use" includes permitting the complex for the use a 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;"

13. It is seen that a 'residential complex' has been defined to mean any complex comprising of a building or buildings, having more than twelve residential units; and a 'residential unit' has also been defined in Explanation (b) to mean a single house or a single apartment intended for use as a place of residence.

14. 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"

15. The contention of the appellant is that independent residential houses were built, each having a separate entry with separate electricity and water connection and a single building did not have more than twelve residential units. It is for this reason that the appellant contends that the houses constructed by it for the Rajasthan Housing Board will not be covered by the definition of a "residential complex" and, therefore, would not be taxable as the contract executed with the Housing Board was not in relation to construction of a complex.

16. This submission, for the reasons stated above, deserves to be accepted. In this connection reliance can be placed on a Division Bench decision of the Tribunal in **Macro Marvel Projects**

Ltd. v/s Commissioner of Service Tax, Chennai⁶ wherein the demand of service tax was for the period 16 June, 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 a 'residential complex' under section 65(91a) of the Finance 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."**

(emphasis supplied)

17. It needs to be noticed that the Bench also examined whether 'construction of a new residential complex or a part thereof' would be covered within the meaning of a 'works contract', after 1 June, 2007 and held that in this case also the definition of a new 'residential complex' given in section 65(91a) of the Finance Act was required to be looked. The Civil Appeal filed by the

Department to assail the aforesaid order of the Tribunal was dismissed by the Supreme Court on 7 July, 2009.

18. This is what was also observed by a Division Bench of the Tribunal in **M/s Lakhlan & Qureshi Construction Company vs Commissioner of Central Excise and Service Tax, Jaipur-I⁷**.

19. A Division Bench of the Tribunal in **Beriwal Constructions Co.** also examined the position both prior to July 01, 2012 and post July 01, 2012 and observed as follows :

"6. Having considered the rival contentions and the admitted facts that the appellant have constructed individual units or row houses we find that it is evident from the aforementioned provisions both for the period prior to 1 July, 2012 and subsequent to that date, that construction of residential complex having not more than 12 residential units per building or block prior to 1 July, 2012 and two or more units after 1 July, 2012 is not sought to be taxed under the provisions of the Finance Act/Service Tax provisions. For the levy, it should be registered complex comprising more than 12 units prior to 1 July, 2012 and more than one residential unit in a complex from 1 July, 2012. Admittedly in the present case, the appellant constructed individual residential houses, each block, being a residential unit which is an admitted fact. In any case, it appears that the legislature did not want to tax construction of individual residential units to the levy of service tax. We find that the learned Commissioner have erred in considering the approved plan for construction of more than 12 individual units on a large plot of land as a residential complex which we find is wrong and misconceived. Accordingly, we find that the show cause notice is not maintainable. Accordingly, we allow this appeal and set aside the impugned order. The appellant shall be entitled for consequential benefits in accordance with law."

(emphasis supplied)

20. A Division Bench of the Tribunal in **Shri A.S. Sikarwar vs CCE, Indore**⁸ also observed that service tax can be demanded only if the building concerned has more than 12 residential units in the building and such levy will not apply in cases where one compound has many buildings, each having not more than 12 residential units. This decision of the Tribunal was also assailed before the Madhya Pradesh High Court. Central Excise Appeal No. 31 of 2012 was dismissed by the High Court on 01.08.2013⁹. The observations are as follows :

"It is not disputed by the learned counsel for the appellant that the respondent had performed the work of the house construction of 15 HIG at Laxmi Nagar, Ujjain in the financial year 2004-05 to 2006-07. He submitted that the activity of the respondent is liable for Service Tax under the services of "Construction of Complex Services" as defined under Section 65 of the Finance Act, 1994. It is also not disputed by the learned counsel for the appellant that the Service tax has been paid by the M.P Housing Board.

The sole contention of the learned counsel for the appellant is that the respondent has built more than 12 residential units in a complex and, therefore, they are liable to pay Service tax.

In the case of **Macro Marvel Projects Ltd.** (supra), this question has been considered by the Tribunal and the learned Tribunal very categorically stated that as per Clause (91a) of Section 65 of the Act, that construction of residential complex having not more than 12 residential units is not to be taxed under the Finance Act, 1994. For the levy, it should be a residential complex comprising more than 12 residential houses. **Admittedly in the present case, the respondent constructed 15 independent HIG Houses, each being a residential unit.**

In view of the aforesaid, we are of the view that the learned Tribunal has not committed any legal error in allowing the appeal of the respondent. The decision of **Macro Marvel Projects Ltd.** (supra) has been affirmed by the Hon'ble Apex Court."

(emphasis supplied)

8 Service Tax Appeal No. 871/2011 decided on 20.04.2012
9 Union of India vs Shri A.S. Sikarwar

21. It is true that w.e.f July 01, 2012 'construction of complex' is a declared service, but the Exemption Notification exempts services by way of construction, erection, commissioning or installation of original works pertaining to a single residential unit otherwise than as a part of a residential complex have been exempted.

22. In this view of the matter, the Commissioner (Appeals) was not justified in holding that the appellant would not be entitled to the benefit of the Exemption Notification.

23. The Commissioner (Appeals) was also not justified in holding that the refund was hit by the principle of unjust enrichment. As per the work orders, service tax was to be borne by the appellant and the Commissioner (Appeals) has also found, as a fact, that the contract awarded by the Housing Board to the appellant mentions that service tax shall be borne by the contractor. The Allahabad High Court in **Indian Farmers Fertilizers Coop. Ltd.** held that a refund can be claimed by a person who has borne the incidence of tax. Even in accordance with the Exemption Notification dated June 20, 2012, 50% of the tax to be deposited by the Housing Board under the reverse charge mechanism was deducted by the Housing Board from the amount payable to the appellant. The Commissioner (Appeals) was, therefore, not justified in rejecting the refund claim of the appellant on the ground of unjust enrichment.

24. The order dated July 28, 2016 passed by the Commissioner (Appeals), therefore, cannot be sustained and is set

aside. Thus, Service Tax Appeal No. 52953 of 2016 and Service Tax Appeal No. 52954 of 2016 deserve to be allowed and are allowed. The appellant would be entitled to refund of the amount with interest at the applicable rate.

(Dictated & pronounced in the open Court)

(Justice Dilip Gupta)
President

(Hemambika R. Priya)
Member (Technical)

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