

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

**PRINCIPAL BENCH**

**SERVICE TAX APPEAL NO. 51458 OF 2018**

(Arising out of Order-in-Appeal No. 78-81/CKJ/ST/UDR/2018 dated 16.02.2018 passed by the Commissioner (Appeals), Udaipur)

**M/s. P.S. Builders, Jodhpur**

**...Appellant**

Versus

**Commissioner of Central Excise,  
Jodhpur**

**...Respondent**

**WITH**

**SERVICE TAX APPEAL NO. 51484 OF 2018**

(Arising out of Order-in-Appeal No. 78-81/CKJ/ST/UDR/2018 dated 16.02.2018 passed by the Commissioner (Appeals), Udaipur)

**M/s. Gajendra Singh Sankhla,  
Jodhpur**

**...Appellant**

Versus

**Commissioner of Central Excise,  
Jodhpur**

**...Respondent**

**WITH**

**SERVICE TAX APPEAL NO. 51485 OF 2018**

(Arising out of Order-in-Appeal No. 78-81/CKJ/ST/UDR/2018 dated 16.02.2018 passed by the Commissioner (Appeals), Udaipur)

**M/s. Jeet Construction Company,  
Jodhpur**

**...Appellant**

Versus

**Commissioner of Central Excise,  
Jodhpur**

**...Respondent**

**AND**

**SERVICE TAX APPEAL NO. 51486 OF 2018**

(Arising out of Order-in-Appeal No. 78-81/CKJ/ST/UDR/2018 dated 16.02.2018 passed by the Commissioner (Appeals), Udaipur)

**M/s. I.P. Singh Construction Co.,  
Jodhpur**

**...Appellant**

Versus

**Commissioner of Central Excise,  
Jodhpur**

**...Respondent**

**APPEARANCE:**

Shri O.P. Aggarwal, Chartered Accountant for the appellant.

Shri Rajeev Kapoor, 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: 04.07.2023**

**FINAL ORDER NO's. 50859-50862/2023**

**JUSTICE DILIP GUPTA:**

These four appeals seek the quashing of the order dated 16.02.2016 passed by the Commissioner (Appeals) by which the appeals have been dismissed and the orders denying the refund to the appellant have been upheld.

2. The issue involved in all the aforesaid four service tax appeals relates to refund of service tax which the appellant claims was deposited by mistake for construction of individual/independent residential houses during the period from 2012-13 to 2014-15.

3. The details of the period involved, the orders passed and the amount of refund rejected are contained in the following chart:

<b>S. No.</b>	<b>Appeal No.</b>	<b>Period of dispute</b>	<b>Amount of Refund</b>
1.	ST/51458/2018	2014-15	ST 743963/- Interest 16589/-
2.	ST/51484/2018	2012-13 & 2013-14	ST 116336/-
3.	ST/51485/2018	2012-13 & 2013-14	ST 1160560/-
4.	ST/51486/2018	2013-14	ST 403850/-

4. The refunds claimed by the appellant were rejected for the reason that service tax was payable to prior 01.07.2012 and had not been exempted w.e.f. 01.07.2012 and that they were also hit by unjust enrichment. Except Service Tax Appeal No. 51458 of 2018, it was also held that the refund was barred by limitation.

5. The appellant claims that it had constructed individual/independent residential houses (stand alone house) as per the work orders given by the Rajasthan House Board<sup>1</sup> ; the Residential Engineer of the Board certified that the houses that were constructed were individual residences having independent approach and entry with separate electricity and water connection; and the appellant had deposited service tax on such constructed houses by mistake and the Board had also deposited 50% of service tax on reverse charge mechanism in terms of the Notification dated 20.06.2012.

6. According to the appellant, as the tax was deposited by mistake since the construction of individual/independent residential houses was not taxable prior to 01.07.2012 and was exempted under the Notification dated 20.06.2012.

---

**1. the Board**

7. The finding recorded by the Commissioner (Appeals) to reject the claim of appellant is as follows:

"6.6. In view of the above, it is clear that on or after 1.7.2012, the residential houses constructed in a cluster for housing board either horizontally or vertically are taxable and even there was no requirement of common facilities. Accordingly, I hold that the appellants were liable to pay service tax in respect of residential houses constructed by them in cluster in a particular area allotted & developed by the housing board for residential colony and therefore, refund of the service tax paid in respect of such houses is not admissible to them.

6.7. It is also fact that works orders awarded by the Rajasthan Housing Board were subject to service tax as per service tax law. However, the work orders were inclusive of service tax and RHB has deducted the amount of service tax to be paid under reverse charge mechanism from the contractor's bill and the appellants had paid their own liability. Thus, the amount quoted in the contracts by the appellants were inclusive of service tax, hence, the appellant has passed on the component of the service tax to the service receiver i.e. Rajasthan Housing Board. Hence, in any case, they are not eligible for refund of the said amount towards service tax paid by them as well as paid by the service receiver. Moreover, the cenvat credit of WCS services is admissible to the service receiver and therefore, RHB may have taken the cenvat credit and utilized the same for their output services. Thus, I hold that the refund is not admissible on this ground also."

8. Shri O.P. Aggarwal, learned Chartered Accountant appearing for the appellant submitted that the issue as to whether service tax was leviable has been decided by this Tribunal in **Service Tax Appeal No. 50298 of 2016** decided on 27.09.2022 and this decision also held that the refund would not be hit by unjust enrichment.

9. Shri Ravi Kapoor, learned authorized representative appearing for the Department, however supported the impugned order and submitted that it does not call for any interference.

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

11. To appreciate the submissions, it would be useful to first examine the position regarding levy of service tax as it existed prior to 01.07.2012.

12. The appellant had constructed residential houses for the Housing Board. Section 65(105)(zzzh) of the Finance Act, 1994<sup>2</sup> provides that 'taxable service' means "any services provided or to be provided to any person, by any other person in relation to construction of complex".

13. '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."

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

---

**2. the Finance Act**

**“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;”

15. 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.

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”.

17. 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.

18. This submission, for the reasons stated above, deserves to be accepted. In this connection reliance can be placed on a Division Bench judgment of the Tribunal in **Macro Marvel Projects Ltd. vs. Commissioner of Service Tax, Chennai**<sup>3</sup> 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 the observations are 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

---

3. **2008 (12) STR 603 (Tri.-Chennai)**

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)**

19. 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 01.06.2007 and held that in this case also the definition of a new `residential complex' given in section 65(91a) of the 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 07.07.2009.

20. 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- I<sup>4</sup>**.

21. A Division Bench of the Tribunal in **Beriwal Constructions Co. vs. Commissioner Of C. Ex. & S.T., Agra<sup>5</sup>** also examined the position both prior to 01.07.2012 and post 01.07.2012 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**

---

4. Service Tax Appeal No. 55701 of 2014 decided on 14.10.2019  
5. 2017 (5) G.S.T.L. 198 (Tri. - All.)

**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)**

22. A Division Bench of the Tribunal in **Shri A.S. Sikarwar vs. CCE, Indore**<sup>6</sup> 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 on 01.08.2013<sup>7</sup>. The observations are as follows:

---

6. **Service Tax Appeal No. 871 of 2011 decided on 20.04.2012**  
7. **Union of India vs. Shri A.S. Sikarwar**

"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)**

23. It is true that w.e.f. 01.07.2012 "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.

24. 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.

25. The Commissioner (Appeals) was also not justified in holding that the refund was hit by the principles 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 **Commr. Of Cus., C. Ex. & S.T. vs. Indian Farmers Fertilizers Coop. Ltd.**<sup>8</sup> 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 20.06.2012, 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.

26. The Commissioner (Appeals) also observed that the CENVAT credit for works contract services was admissible to the service receiver and, therefore, the Board **may** have taken the CENVAT credit and utilized the same for output services. It is for this reason also that refund was found to be not admissible.

27. In the first instance, this was not a ground taken in the show cause notice and secondly, the Commissioner (Appeals) observed that the appellant **may** have taken the CENVAT credit and utilized the same

---

8. 2014 (35) S.T.R. 492 (All.)

for output services. The inference is based on conjectures and not on facts. The Commissioner (Appeals) could not have denied the refund on this account.

28. Thus, for all the reasons stated above, the order dated 16.02.2018 cannot be sustained and is set aside. All the four Service Tax Appeals are, accordingly, allowed.

(Order pronounced in the open court)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(HEMAMBIKA R. PRIYA)**  
**MEMBER (TECHNICAL)**

Shreya