CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
KOLKATA.
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO. II

Service Tax Appeal No. 284 of 2012

(Arising out of order-in-appeal No.60/PAT/S.Tax/Appeal/2012 dated 28.03.2012 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Patna)

Yogendra Rai **Appellant**
Nand Vihar, New Mithanpura, P.O.-Ramna,
Distt. Muzaffarpur (Bihar)

VERSUS

Commissioner, Customs, Central Excise, & Service Tax, **Respondent**
Central Revenue Building, Birchand Patel Path,
Patna-800 001.

APPEARANCE:

S/Shri P. Das, A. Biswas and B. Sengupta, Advocates for the appellant
Shri Joydeep Chattopadhyay, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. 75657/2021

DATE OF HEARING: 12.02.2021
DATE OF DECISION: 12.10.2021

ANIL CHOUDHARY:

The brief facts as per the show cause notice dated 11.08.2010 are that the appellant is a proprietorship concern engaged in civil construction. During the period 2006-2007 to 2007 -2008, the appellant registered with the Department (w.e.f. 14.08.2009), under the category of "Works Contract Service", which is a taxable service, was found engaged in providing taxable service defined under the category of "construction of residential complex", earlier defined under Section 65(105) (zzzh). It appeared to Revenue that the appellant have evaded payment of service tax to the tune of Rs.11,07,672/- including cess and the same appears to be recoverable with interest. Further, penalty was proposed under Section 77 and 78 of the Act. The show cause notice further states that as per the information received from CERA (Review) vide letter No.CERA/Review/ST/54/09-10 dated 17.06.2009, the appellant was engaged in construction of staff quarters for Power Grid Corporation of India Ltd. at Madhubani, Phulparas and Darbhanga, received gross amount of Rs.2,75,44,600/-, which includes cost of materials. It further appeared that construction of the residential complex service was brought into the Service Tax net and charge were created vide notification no.15/2005-ST w.e.f. 07.06.2005. It further appeared that Works Contract Service has been introduced by the Finance Act, 2007 w.e.f. 1.6.2007, which also includes construction of residential complex. Further, reference was made to Section 65 (30a) of the Finance Act, as substituted w.e.f. 16.06.2005, under which construction of complex means construction of a new residential complex or a part thereof, etc. Accordingly, service tax liability was calculated by allowing abatement of 67% on gross value towards material component and on the balance taxable value, service tax has been calculated. It was further alleged that the appellant have been negligent in making tax compliance and have taken registration belatedly and accordingly, extended period of limitation was also invoked.

2. The appellant contested the show cause notice taking the stand that construction of staff quarters for Power Grid Corporation of India Ltd is not liable to tax, and it was further stated that there was no intention to evade service tax liability. It was further stated that nature of work of constructing staff quarters at best, falls under the category of “construction of residential complex” as defined under Section 65(91a) of the Act. Further, it is stated

that construction of residential complex does not include a complex, which is constructed by a person directly engaging another person for personal use as a residence by such person.

3. In the facts of the present case, as Power Grid Corporation are themselves constructing the staff quarters for use by their staff/workers and hence, the activity does not come under the Tax Net. Reliance was also placed on the Board’s Circular No.B2/8/2004-TRU dated 10.09.2004, which provides as follows:-

> *“Such construction which are for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purpose or profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are use for residential, office purpose 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 and letting them out, such activity would be commercial and builder would be subject to service tax.”*

4. Further, admittedly, the staff quarters have been allotted free of cost by the Power Corporation Grid Corporation to its employees and hence, there is no commercial purpose and there is no liability to service tax.

5. Vide Order-in-Original dated 30.03.2011, the Joint Commissioner recorded a finding that Power Grid Corporation, which have got the staff quarters constructed, have allotted the same free of charges to its employees and hence, these are not occupied for commerce or industry. Further, taking notice of Section 65(91a), it was observed that Power Grid Corporation has got the staff quarters built for themselves. Hence, the service provided by the appellant falls under the category of “construction

of residential complex" as defined under Section 65(30a) read with Section 65(91a) and accordingly, the proposed demand was confirmed along with interest and further penalties of Rs.5,000/- was imposed under Section 77 and Rs.10,83,961/- under Section 78 of the Act.

6. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), who was pleased to dismiss the appeal agreeing with the adjudication order.

7. Being aggrieved, the appellant is before this Tribunal.

8. Reiterating the grounds already taken before the court below, it is further emphasised by the ld. Counsel for the appellant that construction of residential unit(s) for personal use does not come under the purview of "Taxable Service" under Clause (30a) and Clause (91a) of Section 65 of the Act.

9. It is further urged that admittedly, it is the case of composite service (labour plus material) and hence, not taxable prior to 1.6.2007 when the works contract service was brought to tax as per law laid down by the Hon'ble Supreme Court in the case of **CCE Vs. Larsen & Toubro Ltd. – 2015 (39) STR 913.** It is further urged that under Clause (91a) of Section 65 of the Finance Act, "construction of residential complex" excludes a complex, which is constructed by a person directly engaging any other person and the construction is intended for personal use as residence. Further, Explanation (a) further elaborates "personal use" includes permitting the complex for use as residence by another person on rent or without consideration.

10. Further, Explanation (b) provides – residential use means a single house or single apartment intended for use as a place of residence.

11. It is further urged that under the similar facts and circumstances in the appellant's own case, for the subsequent period 2009-2011 vide order-in-appeal No.843-PAT/S.Tax /Appeal-2014 dated 29.09.2014, the Commissioner (Appeals) has been pleased to set aside the demand of service tax by observing as follows:-

> *"Construction of residential complex service covers construction services in respect of residential complexes developed by builders, promoters and developers. Such residential complexes are normally constructed after obtaining approval of the "statutory authority" for their layout. For the purpose of this levy, residential complex means (i) a building or buildings located within a premises (ii) total number of residential units within the said premises are more than twelve (iii) having common area, (iv) having common facilities or services, and (v) layout of the premises has been approved by the appropriate authority. Common area would include roads staircases and other similar areas where residents of the residential complex have easement rights. Further, I find that Section 65(91a) of the Act states specifically that 'residential complex' constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service provider, is not covered under the scope of the service tax and not taxable (para 13.4 of MF(DR) Circular No.B1/6/2005-TRU dated 27.7.2005). Personal use has also been defined in the explanation to include permitting the complex for use as residence by another person on rent or without consideration. From the case records, it is evident that the appellant was engaged by M/s. PGCIL to construct "residential quarters for use" by employees of M/s. PGCIL on rent or without*

> *consideration. Hence, the buildings constructed by the appellant cannot be considered to be 'residential complex' taxable under service tax law. Thus, I find that no service tax liability on this account is attached to the appellant."*

12. It is further urged that extended period of limitation is not invokable as there is no case of deliberate non-compliance or suppression etc. At best, the issue is of interpretation. It is further urged that under the facts and circumstances, the penalty imposed is fit to be set aside. Further, reliance is placed by the appellant on the Division Bench's ruling of this Tribunal in the case of **CCE Vs. Mall Enterprises - 2016 (41) STR 119,** wherein under the fact that assessee had constructed residential quarters for staff of Principal. It was case of Revenue that such construction of staff quarters fall under the residential complex services. In the order-in-original, the demand was dropped and in appeal by the Revenue the grounds taken that the activity does not fall within the ambit of Exclusion Clause under section 65(30) read with Section 65 (91a) was rejected, and appeal dismissed and the same was further upheld by the Tribunal.

13. Further, reliance is placed on the ruling of another Divisional Bench of this Tribunal in the case of **CCE, C & ST Vs. Kasana Builders Pvt. Ltd. – 2019 (24) GSTL 231 (Tribunal- All.),** wherein under the fact the assessee had constructed 32 flats for the staff of Gautam Budh University, which were to be used as staff quarter. Initially, the contract was given to the Greater Noida Industrial Area Development Authority, which was subsequently completed by the respondent-assessee. Treating the activity as covered by the construction of residential complex service, the demand of service tax raised, which was set aside by the Commissioner (Appeals) holding that the use of staff quarters by staff qualifies under the Exclusion

Clause, being for personal use. The reliance placed by the Revenue on clarification dated 24.05.2010 to the effect that if the main contractor gets the construction of residential units through sub-contractor, then the same would be taxable, which was rejected by the Tribunal holding that construction of residential complex for personal use is excluded.

14. Ld. Authorised Representative for Revenue opposing the appeal has relied upon the impugned order. It is further urged that the appellant accepting the classification by Revenue have urged that the activities are not taxable in terms of Exclusion Clause under Section 65(30a) of the Act. It is further urged that the actual owner of the staff quarters constructed by the appellant is 'Bihar State Electricity Board' and Power Grid Corporation had called the tender on behalf of the Bihar Electricity Board. Further, reliance is placed on Master Circular No.96/7/2007 dated 23.08.2007 , which reads as follows:-

> "*In a case where the builder, promoter, developer or any such person builds a residential complex, having more than 12 residential units, by engaging a contractor for construction of the said residential complex, the contractor in his capacity as a taxable service provider (to the builder/promoter/developer/any such person) shall be liable to pay service tax on the gross amount charged for the construction services under 'construction of complex' service [section 65(105)(ZZZH)]".*

Thus, the contention of the appellant that such quarters were for use of employees of the Power Grid Corporation is not tenable as the owner of the quarters is Bihar State Electricity Board.

15. Having considered the rival contentions, we find that admittedly, it is a case of composite contract, as held by the Hon'ble Supreme Court in the case of **Larsen & Toubro Ltd. (supra).** No service tax is chargeable on

composite contracts prior to 1.6.2007 when works contract service was introduced. The Hon'ble Supreme Court also held that such composite contract are classifiable only under the head "Works Contract Service". I further find that under Section 65 (105) (zzzza)(ii)(b), construction of a new building or civil structure or part thereof, primarily for the purpose of commerce or industry and further, clause (c) provides construction of a new residential complex. We further find that Clause 65(91a), which defines, "residential Complex" provides exclusion of construction for personal residential use. Further, under Explanation II to Clause (91a), it is provided that "personal use" includes use as residence by another person on rent or without consideration.

15.1 We further find that in the facts of the present case, the Power Grid Corporation is not the contractor of Bihar State Electricity Board, but as a duly authorised representative of the Bihar State Electricity Board, has invited the tenders for construction. Thus, under the facts and circumstances, there is no existence of main contractor and sub-contractor relationship.

15.2 We further find that Revenue has withdrawn their appeal before the Tribunal against the order-in-appeal in the appellant's own case dated 23.09.2014, whereby the demand for subsequent period was set aside by the Commissioner (Appeals). Thus, the Department have *ipso facto* accepted the subsequent order of the Commissioner (Appeals), whereby demand has been set aside observing staff quarters being for personal use are excluded under the Exclusion Clause of Section 65(91a) of the Act.

15.3 Accordingly, we hold that the activities of construction of staff quarters under dispute is not taxable to service tax under Section 65(30a) read with section (91a) read with Section 65(105)(zzzza) read with Section 65 (105)(zzzh). Further, it is held that extended period of limitation is not attracted in the facts and circumstances. Accordingly, the appeal is allowed and the impugned order is set aside. The appellant is entitled to consequential benefit in accordance with law.

(Pronounced on).

SD/

(Anil Choudhary)
Member (Judicial)

Separate Order

(Sanjiv Srivastava)
Member (Technical)

PER: SANJIV SRIVASTAVA

1.1 Appellants had undertaken works as per the contract awarded by M/s Power Grid Corporation for the construction of Staff Quarters as per letter of award dated 20.01.2005 (for Madhubani Electric Substation), 21.11.2005 (for Darbhanga Electric Substation) and 08.12.2005 (for Phulparas Substation). All these quarters were constructed for the use by the staff of M/s Power Grid Corporation. Alleging that the construction activities undertaken by the appellants were classifiable as "Construction of Residential Complex Services" as defined by the 65 (105) (zzzh) of the Finance Act, 1994 a show cause notice was issued to the appellants demanding service tax stating the gross amounts received by the appellants for providing these taxable services. Appellants contested the show cause notice before the original authority and then in appeal before the Commissioner (Appeals). Aggrieved by the order in appeal appellants have preferred this appeal before us.

1.2 We have heard Shri Abhijit Biswas, Advocate for the Appellants and Shri Joydip Chattopadhyay, Superintendent, Authorized Representative for the revenue.

2.0 The Section 65 (91a) of the Finance Act, 1994 is reproduced below:

"(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;"

3.0 Explaining the scope of the phrase "personal use" as used in this section, C.B.E.&C. on 24-5-2010 issued clarification stating in Para 3 as follows:

"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."***

4.1 The para 3 of the document, issued under Ref: POWERGRID/BIHAR ST/Sub-stn/LOA/49 dated 20.01.2005, issued by M/s Power Grid Corporation of India Limited to the Appellant, bearing "Sub: **Letter of Award for Construction of Quarters and associated Amenities at 132/33 KV sub-station at Madhubani (Package-I) under Group-II associated**

<u>with Bihar Sub transmission System:</u> Specification No.: POWERGRID/BIHAR ST/Sub-stn/3/J", reads as follows:

"3.0 ***Award of Contract and its Scope***

We are pleased to accept your bid for the subject package submitted by vide your proposal read in conjunction with the agreement reached between POWERGRID and you in the Record Notes of Discussion, referred to at para 2.1 herein above, and award you ***a Contract on behalf of Bihar State Electricity Board (BSEB), the owner, for Construction of Quarters and Associated Amenities at 132/33 kV sub-station at Madhubani (Package-)) under Group-II, associated with Bihar Sub-transmission System as per BOQ, specifications & direction of Engineer-in-Charge.***

For the execution of the contract, the contractual actions on the part of the owner shall be performed by POWERGRID for and on behalf of BSEB. Wherever reference to POWERGRID is made in the bidding documents, Letter of Award or any related paper/ documents, it shall be deemed to be "for and on behalf of BSEB".

Under this Letter of Award, Owner' shall mean 'Bihar State Electricity Board' (BSEB) and shall include their legal representatives, successors and assigns. 'Employer"/POWERGRID' shall mean Power Grid Corporation of India Ltd and shall include their legal representatives, successors and assigns.

3.1 The scope of work under this package shall include but not be limited to the following: -

You shall perform the work under this contract complete in all respects as per terms & conditions and specifications stipulated in various documents listed in para 1.1, 2.0 read in conjunction with the agreements reached between you and POWERGID in the above Record Notes of Discussions referred to at para 2.1 above, and any amendment(s) to this LOA, to be issued by POWERGRID from time to time and the written direction of Engineer-in-Charge. All other deviations and/or additional conditions, implicit *or explicit, if any in your proposal shall stay withdrawn without any cost implication to POWERGRID.*

3.2 Necessary details & construction drawings as per requirement during the course of execution of the work under this contract shall be furnished to Regional Engineering Deptt. at Patna addressed to Manager(Engg.)-DMS, RE & ST for approval of POWERGRID. Required number of approved Drawings/Blue prints shall be arranged by the contractor and submitted to Regional Engineering Deptt. at Patna as well as the Engineer-in-charge. The work shall be performed and completed by you in accordance therewith.

3.3 All such incidental items/works which are not specifically mentioned in the bid documents and/or your proposal, but are necessary for the successful completion of work shall be deemed to be included in the scope of work under this contract, unless otherwise specifically excluded in the bidding documents or in this award letter & nothing extra shall be paid in executing the same.

4.0 <u>CONTRACT PRICE:</u>

The schedule of items indicating rate & quantity for the purpose of making on account payment is enclosed at Annexure-II. We agree to pay you Rs.1,08,59,504.00 (Rupees one crore eight lakhs fifty nine thousand five hundred and four only). The contract price shall be on "FIRM PRICE' basis and shall remain firm throughout the execution of the contract. The contract price is inclusive of all taxes & duties. Necessary Tax deduction at source shall be made as per relevant tax laws, as applicable from time to time."

4.2 The Letter of Award very categorically and unambiguously, outlines the relationships between the parties. It says that the owner of the residential Quarters and associated Amenities, is Bihar State Electricity Board and not the Power grid Corporation. The claim made by the appellants that these residential quarters have been got constructed by M/s Powergrid Corporation is contrary to the above statement in the letter of award which is legally binding document binding on parties to the contract. The claim made by the appellants, to effect that these residential quarters and amenities, have been got constructed by the M/s Powergrid Corporation for their own use or for letting them out on rent, is not supported by any documentary evidence. Hence the claim made by the appellants that these residential quarters are covered by the exclusion clause of the definition of residential complex as per Section 65 (91a) of the Finance Act, 1994, as it existed then is not substantiated.

5.0 In the present case under consideration the Appellant has not been engaged by Bihar State Electricity Board, the owner of residential quarters as per the letter of award. Undisputedly the appellants have been engaged by M/s Powergrid Corporation for construction of these residential quarters, hence the case of appellants will fall in the category indicated in bold in para 3 of the said clarification. This entire scheme has been considered by the CESTAT, Bangalore in case of Nitesh Estates Ltd. [2016 (40) STR 815 (Tri-Bang)] and after examining these provisions and the Board Clarification, CESTAT has observed as follows:

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 relevant. Para 3 of this circular which is relevant is reproduced below:*

"3. ...."

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."*

6.0 Upholding this decision of the CESTAT, Hon'ble Karnataka High Court held as follows:

*"**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."

7.0 After examining the Letter of Award referred earlier vis a vis the relationship amongst the parties therein, undisputedly Bihar State Electricity Board, is the owner of the residential quarters, and for the construction of the same, they have entered into agreement with M/s Powergrid Corporation. In turn M/s Powergrid Corporation has engaged the Appellants for execution of these works through them. Thus the appellants become sub contractor to the main contractor for construction of these residential quarters for Bihar State Electricity Board. In the case of Nithesh Estate, referred above, the sub contractors viz L & T had discharged the entire tax liability for construction of the residential complex for ITC, for which the main contractor was M/s Nithesh Estates.

8.0 Appellants have relied upon other decisions to support their case. These decisions are taken up for discussion in flowing paragraphs:

- Mall Enterprises [2016 (41) STR 119 (T)]

The facts as have been stated in the decision are reproduced below and are clearly distinguishable from the facts of present case:

3. *The issue involved in this case is regarding the taxability of the services rendered by the respondent assessee. Respondent assessee had constructed residential quarters for staff of New Parli Thermal Power Station and it is the case of the Revenue that such construction of staff quarters could be categorized under Residential Complex Services. A show cause notice was issued alleging non-payment of service tax, and demanding interest thereof and also proposing to impose penalties.*

4. *............*

5. *We find that the first appellate authority while rejecting the appeal filed by the Revenue has recorded the following findings.*

"8. I have carefully gone through the appeal file, documents available on records and submission made during the course of personal hearing. From the records, I find that the appeal has been filed by the appellant against O-I-O No. 12/ST/ADC/2011, dated 31-3-2011 passed by the Additional Commissioner, Central Excise and Customs, Aurangabad. The issue to be decided by me is whether the grounds of appeal submitted in the appeal are sustainable in law. The only ground raised by the appellant for challenging the O-I-O is based on the definition of 'Residential Complex' given in Section 65(91a) of Finance Act, 1994. It is contended that the activity undertaken by the respondent does not fall within the ambit of exclusion clause given in the definition. Therefore, before deciding the appeal the exclusion clause given in the definition needs to be examined. The exclusion clause reads as under:

ð "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."

Thus, it is clear that not only the residential complex designed or laid out by another person are excluded from the definition but also the ones which are intended for personal use of such person i.e. the owner of the complex. Further, the personal use has been clarified as put to use on rent or without any consideration ***. In the instant case the 'New Thermal Power Station, Parli' is the 'such person' and the respondent is 'another person'.*** *I find that the staff quarters constructed by the respondent are not covered under the definition of 'Construction of complex' under Section 65(30a) ibid and therefore the activity does not attract Service tax. Therefore, I find that the adjudicating authority has rightly dropped the show cause notice. The impugned OIO needs no interference. The appeal merits rejection."*

In this case the appellant was engaged by the 'New Thermal Power Station, Parli' who were the owner of the flats, whereas in the case under consideration, the appellant is sub contractor to the main contractor. Hence the facts of these case are clearly distinguishable.

- Kasana Builders Pvt Ltd [2019 (24) GSTL 231 (T)]

In this case tribunal has observed as under:

"**2.** We note that the grounds raised by Revenue is that the Central Board of Excise & Customs through clarification dated 24-5-2010 had clarified that if NBCC constructed residential houses for Central Govt. then the same were not taxable, but if NBCC further awards a contract to sub-contractors, then sub-contractors were liable to pay Service Tax. On careful consideration of the definition of 'residential complex service' we note that flats constructed for personal use are not covered by the definition of residential complex."

The decision of the tribunal do not consider the decision of the Hon'ble High Court of Karnataka in case of Nithesh Estates referred to above and has been rendered stating that "flats constructed for personal use are not covered by the definition of residential complex" is contrary to the express finding recorded by the Hon'ble Karnataka High Court, that residential complex that was constructed by the sub contractor was not covered by the exclusion clause of the definition of Residential Complex. When Hon'ble Karnataka High Court, has not been considered in this decision, then the decision of tribunal is sub silent and cannot be treated as binding precedent.

- BABA Construction Pvt Ltd [2018 (15) GSTL 345 (T)] upheld by the Hon'ble Supreme Court at [2018 (15) GSTL 1120 9SC)]

In this case tribunal has not even decided the issue on the basis of the "personal use", but has rendered the decision on the number of units in the complex. They have recorded the finding that the complex under consideration will not fall within the main definition of residential complex itself. The relevant para of the decision of tribunal is reproduced below:

"8. *Having considered the rival contentions and the facts on record as noticed herein above, we find that the whole show cause notice is unsustainable and the demand as raised is bad and against the provisions of law. we hold that in respect of all the residential units constructed for Ghaziabad authority, for the Ministry of Defense, and under JNNURM, none* *of the constructed blocks have got 12 or more units, attracting levy of service tax under Section 65(105)(zzzh)."*

Since this decision do not decided the issue of *"personal use"* this decision cannot be an authority in the matter under consideration.

- Rajeshwar Builders [2019 (20) GSTL 79 (T)]-

This decision has also not considered the issue of "personal use" but has decided the matter in terms of the main definition of residential complex. The relevant para of the said decision is reproduced below:

*"**6.** We find that to qualify to be a residential complex the building or buildings should have a common area and one or more facilities of services such as park, lift, parking space, community hall, water supply or effluent treatment system, located within a premises. Further perusal of show cause notice indicates that Revenue could not make out a case that there were any such common facilities. We, therefore, hold that the appellant in the instant case did not provide construction of residential complex service. We, therefore, set aside the impugned order and allow the appeal."*

Since this decision does not decide the issue under consideration it cannot be considered an authority on this subject.

9.0 Appellants have also relied upon the decision of Commissioner (Appeal) in their own case [843/PAT/S.Tax/Appeal/2014 dated 23.07.2014 to support their case. The appeal filed by the revenue against the said decision was withdrawn by the revenue on monetary grounds as per the Litigation Policy of the Government, as per tribunal order No 14/07/2016 [in appeal No ST/&5054/2015] dated 14.07.2016. We do not find any merits in the submissions made in view of the provision of Section 35 R of the Central Excise Act, 1944 which reads as follows:

"SECTION 35R. Appeal not to be filed in certain cases. —

(1) The Central Board of Excise and Customs may, from time to time, issue orders or instructions or directions fixing such monetary limits, as it may deem fit, for the purposes of regulating the filing of appeal, application,

revision or reference by the Central Excise Officer under the provisions of this Chapter.

(2) Where, in pursuance of the orders or instructions or directions, issued under sub-section (1), the Central Excise Officer has not filed an appeal, application, revision or reference against any decision or order passed under the provisions of this Act, it shall not preclude such Central Excise Officer from filing appeal, application, revision or reference in any other case involving the same or similar issues or questions of law.

(3) Notwithstanding the fact that no appeal, application, revision or reference has been filed by the Central Excise Officer pursuant to the orders or instructions or directions issued under sub-section (1), no person, being a party in appeal, application, revision or reference shall contend that the Central Excise Officer has acquiesced in the decision on the disputed issue by not filing appeal, application, revision or reference.

(4) [The Commissioner (Appeals) or the Appellate Tribunal or Court] hearing such appeal, application, revision or reference shall have regard to the circumstances under which appeal, application, revision or reference was not filed by the Central Excise Officer in pursuance of the orders or instructions or directions issued under sub-section (1).

(5) Every order or instruction or direction issued by the Central Board of Excise and Customs on or after the 20th day of October, 2010, but before the date on which the Finance Bill, 2011 receives the assent of the President, fixing monetary limits for filing of appeal, application, revision or reference shall be deemed to have been issued under sub-section (1) and the provisions of sub-sections (2), (3) and (4) shall apply accordingly."

It is also the settled law that an erroneous decision passed by the authority cannot be ground for extending the same to similar cases. Hon'ble Allahabad High Court has in case of Super Cassette [1997 ELT (ALL)] relying upon the Hon'ble Supreme Court decision in case of Jagjeet Singh held as follows:

"…..The mere fact that the CEGAT has accepted the claim for refund in some other cases cannot be a ground for taking the view that the credit taken by

the petitioner was correct and its reversal was illegal and Article 14 cannot be invoked by the petitioner for claiming equality [See Chandigarh Administration v. Jagjeet Singh J.T. 1995 (1) S.C. 445]."

10.0 The appellants have suppressed the information in respect of the actual owner of the residential quarters constructed by them. They have stated that M/s Powergrid Corporation are the owner of residential quarters and have awarded the contract to them for building these residential quarters for their own use, hence they are covered by the exclusion clause to the definition Residential Complex as per Section 65 (91a). The submission made by the appellants is contrary to the letter of award referred earlier. By doing so appellants have intentionally avoided payment of Service Tax due. For the act of suppressing these facts with intention to evade payment of service tax due, extended period of limitation as per Section 73, has been rightly invoked against the appellants. Adjudicating Authority has for invoking extended period held as follows:

"It is also established that noticee did not take registration within thirty days of starting the taxable service as they provided service during the material period 2006-08 and took Service Tax Registration on 14.08.09 in inappropriate category, thus contravened the provisions of Section 69 of Finance Act, 1994.

Further, it is an admitted fact that the noticee did not file the statutory half yearly ST 3 Return and thus willingly suppressed the facts from the department with intent to evade Service Tax. The information regarding the service being provided by the noticee to M/s Powergrid Corporation of India Ltd., Patna by way of building quarters at Madhubani, Phulparas and Darbhanga during the material period 2006-08 for consideration was detected by the Audit Bihar and thus it is established beyond doubt that the noticee are also liable to punitive action under Section 78 ibid. Since the noticee have been held liable to penalty both under Section 76 and 78 supra, as per provision of Section 78 ibid penalty under Section 76 ibid shall not apply."

11.0 Since we have held that appellants have suppressed relevant information with intention to evade payment of tax penalty under Section 78 to is justified as have been held by the Hon'ble Apex Court in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)].

12.0 In the case of Larsen & Toubro Ltd [2015 (39) ELT 913 (SC)], Hon'ble Apex Court has held as follows:

"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 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.*

25. *In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.*

26. *We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.*

27. *In fact, the speech made by the Hon'ble Finance Minister in moving the Bill to tax Composite Indivisible Works Contracts specifically stated :-*

"State Governments levy a tax on the transfer of property in goods involved in the execution of a works contract. The value of services in a works contract should attract service tax. Hence, I propose to levy service tax on services involved in the execution of a works contract. However, I also propose an optional composition scheme under which service tax will be levied at only 2 per cent of the total value of the works contract."

28. *Pursuant to the aforesaid speech, not only was the statute amended and rules framed, but a Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was also notified in which service providers* *could opt to pay service tax at percentages ranging from 2 to 4 of the gross value of the works contract."*

13.0 Following the decision of Larsen and Tubro, supra, tribunal has in the case of URC Construction Pvt Ltd [2017 (50) STR 147 (T-Chennai)] held as follows:

"7. Having heard both sides on this limited issue, we are of the opinion that the resolution of this dispute lies within the narrow compass of taxability as 'works contract service'. We note the contention of learned Counsel that the adjudicating authority had perused the contracts on which the demand was raised in the show cause notice and rendered a clear finding, including on the allegation of abatement availed in Notification No. 15/2004-S.T., dated 10th September, 2004 and Notification No. 01/2006, dated 1st March, 2006; the allowance of abatement is a clear demonstration of ascertainment that supply of goods did form a part of the contract. Therefore, we have no hesitation in accepting the said contracts in dispute to be composite contracts for supply of both goods and services.

8. We note that the findings of the adjudicating authority do accept that supply of goods were involved in the contracts and that he was merely sceptical that VAT liability had been discharged on the goods supplied in the contract; whether VAT liability was discharged on the goods or not is irrelevant in the light of the decision of the Hon'ble Supreme Court in *re Larsen & Toubro and Ors.* We, therefore, have to merely determine the scope of taxability of 'works contract service' rendered before and after 1st June, 2007 under the Finance Act, 1994."

14.0 Both the decisions, rendered in the case of M/s Larsen &Tubro and M/s URC Constructions were not before the concerned authorities for consideration. Since no finding has been rendered by the original and first appellate authority on the applicability of the ratio of these decisions, in the present case the matter needs to be remanded back to the original authority for limited consideration of this argument.

15.1 Thus we allow the appeal filed by the Appellant and remand the matter back to the original authority for reconsideration of matter in light of the Hon'ble Supreme Court in case of Larsen & Tubro and tribunal decision in case of URC Construction referred above for the period in dispute. All other arguments advanced by the appellants challenging the demand both on the merits and limitation are rejected and the scope in remand proceedings is limited to the consideration of the arguments that are made on the basis of these two decisions.

15.2 Since the matter is remanded for a very limited purpose, and the matter is quite old, original authority should pass the order in remand proceedings within three months of the receipt of this order, after allowing opportunity of hearing to the appellants.

(Order pronounced in the open court on ____________)

Sd/

(Sanjiv Srivastava)
Member (Technical)

DIFFERENCE OF OPINION

In view of the difference of opinion between the Ld. Members, the following questions are framed for opinion of the ld. third Member :-

1. Construction of residential complex for personal use is excluded under Explanation II to Section 65(91a) read with Section 65 (30a), 65(105)(zzzza) and 65 (105) (zzzh) and hence not taxable, as held by the ld. Member (Judicial)

OR

- In view of the CBEC Circular dated 24.05.2010 (para -3 of the circular) – where work is done by the sub-contractor, it does not fall under the Exclusion Clause of Section 65 (91a) and hence is taxable, as held by the ld. Member (Technical).

2. In the facts and circumstances, the appellant is not a sub-contractor, as held by the ld. Member (Judicial)

OR

The appellant is a sub-contractor, as held by the ld. Member (Technical)

3. Extended period of limitation is not attracted, as held by the ld. Member (Judicial)

OR

Extended period of limitation is attracted, as held by the ld. Member (Technical).

4. Whether the appeal has been rightly allowed setting aside the impugned order, as held by the ld. Member (Judicial)

OR

Whether the appeal has been rightly allowed by way of remand for re-determination of quantum of duty liability, as held by the ld. Member (Technical).

2. The Registry is directed to put up the appeal record before the Hon'ble President for nomination of learned third Member to consider the aforementioned questions on difference of opinion, for his opinion.

Sd/

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(**SANJIV SRIVASTAVA**)
Member (TECHNICAL)

<u>Per Rachna Gupta</u>

Arguments with respect to the issues due to difference of opinion among the Hon'ble Members of the bench who decided the impugned matter, have been heard. Issue wise findings are as follows:

Issue No. 1

> **Construction of residential complex for personal use is excluded under Explanation II to Section 65(91a) read with Section 65(30a), 65(105)(zzzza) and 65(105)(zzzh) and hence not taxable, as held by the learned Member (Judicial)**

OR

> **In view of the CBEC Circular dated 24.05.2010 (para 3 of the circular) – where work is done by the sub-contractor, it does not fall under the Exclusion Clause of Section 65 (91a) and hence is taxable, as held by the learned Member (Technical).**

2. On this issue it is submitted on behalf of the appellant that the residential complex services have been provided by the appellant to Power Grid Corporation India Ltd. (hereinafter referred as PGCIL) for construction of its staff quarters at Madhubani, Phulparas and Darbanga. It is submitted that M/s. PGCIL is a Government authority, hence is exempted from the

tax liability. Section 30A read with subsection (91 a) of section 65 of Finance Act has been impressed upon. Learned Counsel has also impressed upon Board's circular dated 10.9.2004 and 17.9.2004 which clarifies that the Government building or civil construction for residence/office purpose or for providing the general Government Accommodation would not be taxable except in case the government is using the said building for Commercial purpose. It is submitted that since the service provided for construction was for the purpose of residence of the staff of Government authority i.e. M/s. PGCIL and not for any commercial purpose, there can be no tax liability upon the service provider i.e. the appellant. The service tax is alleged to have wrongly been demanded and to have wrongly been confirmed. Learned Counsel submitted that from Show Cause Notice, there is apparent admission that the appellant was engaged for construction of staff quarters for PGCIL. With respect to the issue of sub-contractor, it is submitted that once the government construction is exempted from tax liability, Government construction meant for personal use / residential use meant for houses other than Commercial or Industrial use, is exempted from the payment of tax merely because the construction has been got done by contractor or sub-contractor, it will not change the nature of activity from non-commercial to commercial. Once it comes out that Government has taken up the project which is not commercial in nature, payment made by the Government, the service recipient would not come under tax net. Learned Counsel has laid emphasis on the following decisions:

i) **Mittal Construction vs CCE & ST, Jaipur I**
2018) GSTL-334 (T)];

ii) **M/s. Saptashree Construction vs. CCE &CC & ST**
[2018(3) TMI-862].

With these submissions, findings rendered by Hon'ble Member (Judicial) have been impressed upon.

3. To rebut the submissions learned Departmental Representative has relied upon the definition of residential complex as is given under Section 65

(91a) of Finance Act to impress upon that service provider should have been directly appointed. But the apparent fact of the present case is that service recipient in the present matter is Bihar State Electricity Board (hereinafter referred as BSEB). The appellant had been engaged not by BSEB but by M/s. PGCIL. It is also submitted that M/s. PGCIL is not a Government authority, it is rather a corporation. Hence, the service provider shall not be exempted from the tax liability. Learned Departmental Representative further submitted that the above fact is also sufficient to hold that the appellant is the sub- contractor, and since the sub contractor has provided the services to a non-government body, he is actually liable to discharge the service tax liability. Circular dated 24.5.2010 has been impressed upon. With these submissions, findings rendered by Hon'ble Member (Technical) have been impressed upon.

4. To adjudicate this issue foremost reference to the legal provisions defining the impugned service of construction of complex/ residential complex and those providing taxability of these services need to be looked into:

5. Section 65(30a) of the Finance Act, 1994 define 'construction of complex' as under:

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.

6. Section to 65(91a) of the Act defines Residential Complex as under:

"Section 65(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". "

7. Apparently and admittedly, the nature of construction in the present case is that of staff quarters. Therefore, more precise definition will be as given under section 65(91a), Finance Act. Bare perusal makes it clear that construction of residential complex, should have more than 12 residential units with common area and facilities in the same premises. Sub-clause (iii) of this section contains the exclusion clause by virtue of which the service rendered for construction of residential complex is exempted from the tax liability provided it meets the following criteria:

(i) Residential complex is constructed by a person;

(ii) Who has directly engaged another person for designing or planning of the layout and its construction;

(iii) The complex is intended for personal use as residence by such person.

The Explanation (a) to this clause clarifies that when constructed property is used as residence even by another person on rent or without consideration, it shall be considered as personal use by "such person" as mentioned in above clause (iii) of section 65(91a).

The Explanation (b) clarifies that a residential unit means a single house or a single apartment intended for use as a place of residence.

8. Applying this legal position to the facts of the present case, it is observed from the show cause notice itself that the appellant was observed to have been engaged in providing construction of the residential complex service to M/s. PGCIL, Patna for constructing the complex for staff quarters of M/s. PGCIL at three different locations viz. Madhubani, Phulparas and Darbanga in Patna. M/s. PGCIL, in turn, admittedly, has given these quarters to its staff free of charge. Thus it becomes clear that there is no element of commerce /industry when M/s. PGCIL received services of construction of residential complex from the appellant. Further, I observe that the appellant was engaged by M/s. PGCIL only vide the letter of Award for Construction of Quarters dated 20.01.2005.

9. I further observe that it is not the case of the department that the complex was for less than 12 number of residential units and it lacked common facilities and services as are mentioned in sub-clause(iii) of section 65(91a) of Finance Act. From the submissions of learned Departmental Representative the only challenge is that M/s. PGCIL is not 'a person' as is mentioned in exclusion part of said sub-clause (iii) it is rather Bihar State Electricity Board (BSEB). But from the letter of award for construction dated 20.01.2005, I observe that the appellant, the provider of construction service has been directly engaged by M/s. PGCIL who required the constructed residential units for its employees. Admittedly the staff quarters/ said residential units were not meant for the employees of M/s. BSEB. Though Letter of Award was executed in association with M/s. BSEB, but for

the only reason that the land required for the impugned residential complex is owned by BSEB as is found clearly mentioned in clause 3.0 of the said letter of Award. Sub-clause (iii) Section 65(91a) of Finance Act do not require 'a person' to be the owner. The only requirement is that 'a person' should be one who needs the residential complex for its personal and he shall directly engage the service provider of construction of residential purposes. As already observed above, it is M/s. PGCIL and not M/s. BSEB who required quarters for the residence of its own staff and M/s. PGCIL only has directly engaged the appellant. The another requirement of said clause(iii) is that the 'other person' engaged should be the service provider of the Construction of Residential Complex service. In the present case, the said other person is the appellant and not M/s. PGCIL. Later is rather a person who in association with owner of the requisite land, M/s. BSEB, directly engaged the service provider, the appellant.

10. For the same reason even the circular of 23.8.2010 will not be applicable. It will rather be the circular both of 2004 and 2007 which clarifies that if the builder is constructing the complex for someone including Government from which no commercial benefit has to be derived, such construction is not to be taxed under section 65(105(zzza).

11. In view of the above observations, I am of the opinion that the services provided by the appellant to M/s. PGCIL are covered under the exclusion part of said sub clause (iii) of section 65(91a) of the Act, M/s. PGCIL being 'a person' of the said sub clause and appellant being the 'any other person'. Hence, irrespective the impugned service is the service of construction of residential complex but is the one as stands exempted from the tax liability due to the exclusion given to the residential complex which is meant for personal use as residence by the person who directly engaged the service provider and that no element of commerce or industry is involved.

12. The Board's circulars No. B2/8/2004-TRU dated 10.9.2004 and Circular No. 80/10/2004/ST, dated 17.09.2004 also clarifies the same.

13. Relevant para 13.2 in both the Board circulars are reproduced herein below:-

> "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."

Significantly Trade Notice dated may 27, 2015 also clarifies the afore stated legal position.

Relevant para is reproduced herein below:

"As per Union Budget 2015, certain exemption hitherto available on specified construction services provided to the Government, a local authority or a government authority have been withdrawn effect from 01.04.2015."

"(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession".

14. I also draw support from the decision of **Mittal Construction** (supra) where it is held that when admittedly, the building is used as guest house and not for commercial occupation of any guests other than the employees

of M/s. Aditya Cement (the company who engaged Mittal Construction for constructing guest house for them), the demand be dropped.

15. Also in the case of **M/s. Manisha Project Pvt Ltd. vs. CCE** reported in **[2019 (3) TMI 448],** it was held:

> "5.Having considered the submissions from both the sides and on perusal of record and the said circular issued by C.B.E. & C., we note that Departmental officers are bound by the Circular issued by Central Board of Excise and Customs. We note that C.B.E. & C. had issued Circular No. 80/10/2004-S.T., dated 17-9-2004 and in Para 13.2 clarified that the leviability of Service Tax was primarily dependent upon the use of the building or civil structure. Further, it clarified that it was to be ascertained where building or civil structure was used or to be used for commercial or industrial purpose and further required or gather the information as to whether the buildings or civil structures were being used or to be used for the purpose of making profit or not and clarified that if the building or civil structure was used or to be used not for the purposes of profit then the same are not taxable.

16. In view of the above discussion of mine, I am in consonance with the findings recorded by Hon'ble Member (Judicial) on this issue.

Issue No. 2

In the facts and circumstances, the appellant is not a sub-contractor, as held by the learned Member (Judicial)

OR

The appellant is a sub-contractor, as held by the learned Member (Judicial)

17. As far as the submissions for personal use not leviable to service tax under the category of residential complex service also the existence of main contractor and sub contractor is concerned, appellant has relied upon the following decisions:

1) CC, CCE & ST vs Kasana Builders Pvt Ltd.
[2019 (24) GSTL 231 (Tri-All)];

2) M/s. Rama Construction Company vs CCE, Delhi I
[2018 (9) TMI-917(T)]

18. It is submitted on behalf of the appellant that as it is an admitted fact that the appellant constructed staff quarters for Power Grid Corporation India Ltd., Patna. During the period from 2006-08 at Madhubani, Phulparas and Darbanga who in turn has given these quarters to its staff, free of charge and for the purpose M/s. PGCIL has engaged the appellant. This fact conclusively establishes that present is not the case of existence of main contractor and sub-contracts relationship. It is submitted that the issue of sub contract is not otherwise raised in the show cause notice. Learned Counsel further submitted that M/s. PGCIL has engaged the appellant on behalf of M/s. BSEB, rather it was duly authorized representative of M/s. BSEB. While laying emphasis on the decision of **M/s. Rama Construction Company vs CCE, Delhi I**(supra) has mentioned that the issue of sub contractor has wrongly been raised by Hon'ble Member (Technical). Findings by Hon'ble Member (Judicial) upon this count are impressed upon. The findings to the fact is irrespective of contractor or sub-contractor issue. The service provided are held by Hon'ble Member (Judicial) as composite contract / work contract service. The same were not within the tax net prior to 7.2.2012. For this reason also, the demand may not sustain. Issue is prayed to be decided accordingly in terms of decision of Hon'ble Member (Judicial).

19. While rebutting these arguments learned Departmental Representative has mentioned that there has been a Board's circular dated 24.5.2010 specifying that where any agency being directly engaged by Government of India if subsequently engages someone else for carrying out whole or part of the construction, said someone else / sub-contractor would be liable to pay the service tax. It is impressed upon the said circular is relied upon by Hon'ble Member (Technical). Hence, the said finding have to sustain.

20. After hearing the rival contentions of both the parties, perusing the different opinions, it is observed and held as follows:-

Hon'ble Member (Technical) has relied upon clause (iii) of the Award of contract executed by M/s. PGCIL on behalf of M/s. BSEB engaging the present appellant for constructing the staff quarters for M/s. PGCIL. While relying upon the decision of CESTAT Bangalore in the case of **Nitesh Estates Limited** reported in [2016 (40) STR 815] and while relying upon the aforesaid circular of 24.5.2010, Hon'ble Member (Technical) has held the appellant to be the sub contractor of M/s. BSEB, accordingly, holding him liable to pay the service tax.

21. To my opinion, the plea of sub contractor taken by the department and accepted by Hon'ble Member (Technical) stands falsified even from para 3 of show cause notice itself. There is no document produced by the department to support that plea except that there is a letter of Award for Construction of Quarters dated 20.1.2005 issued by M/s. PGCIL in favour of present appellant. Perusal thereof shows that M/s. PGCIL was not engaged by M/s. BSEB for providing the construction services but was authorized to act on their behalf to engage any other person who may provide the construction of residential complex services. Apparently and admittedly, PGCIL is not the concern which is engaged in providing services of construction of residential complex. This particular finding is sufficient for me to hold that the appellant cannot be called as sub -contractor of PGCIL. PGCIL rather was the agent acting on behalf of BSEB and as such is to be classified as " a person" as mentioned in sub-clause (iii) of 65(91(a). In view of this finding, CBEC Circular No. 25/2010 as relied upon by Hon'ble Member (Technical) has no significance. The said circular talks only about the sub-contractor being engaged by the provider of service of construction of residential complex for providing the said services to the persons for him he was otherwise engaged as the service provider.

22. As already discussed under issue No. 1, clause (iii) of Award of Contract is not about M/s. PGCIL being engaged by M/s. BSEB for constructing the staff quarters for M/s. BSEB. It is the contract of M/s. PGCIL on behalf of M/s. BSEB for engaging the builder i.e. the present appellant for getting the construction of residential staff quarters for M/s. PGCIL. This fact itself is sufficient to hold that Board's Circular of 24.5.2010 as relied upon by the Hon'ble Member (Technical) is not applicable to the given facts and circumstances of the case. The said circular was issued after the decision of CESAT, Bangalore in **Nitesh Estates Limited** (supra). In the said case M/s. ITC Ltd. engaged Nitesh Estates Limited for constructing residential complex for ITC Ltd. M/s. **Nitesh Estates Limited** partly raised the construction, however for the remaining construction, **Nitesh Estates Limited** sub contracted with M/s. Larsen and Toubro Ltd. to complete the said contract. Tribunal, Bangalore has held that M/s. Larsen and Toubro Ltd. not being directly engaged persons of M/s. ITC, the part of services provided by Larsen and Toubro Ltd. does not fall under the exclusion clause of definition of residential complex and as such, was held liable to pay the service tax for constructing the said residential complex to the extent of construction of said residential complex being constructed by M/s. Larsen and Toubro Ltd. Perusing the circular of 24.5.2010, it also shows that Government of India directly engaged NBCC for construction of residential complex intended for perusal use of Government of India. However, if said NBCC engaged the sub-contractor for carrying out the whole or part of construction, then the said construction would be liable to pay the service tax. In that case, NBCC would be the service receiver and construction would not be for their personal use. In the present case, facts and circumstances are that the appellant was directly engaged by M/s. PGCIL for construction of staff quarters to be used by M/s. PGCIL. Service receiver is M/s. PGCIL and service provider is the appellant. The work of providing the service of construction of residential complex has not further been awarded by the appellant to anyone else. This particular fact, to my

opinion, distinguishes the present case from **Nitesh Estates Limited** case(supra), thus also gets out of the scope of Circular dated 24.5.2010. In the present case, none is the sub-contractor, as already discussed under Issue No. 1, service provided by the appellant falls under the exclusion part of Section 65 (91a)(iii). The appellant is not liable to pay the service tax. Otherwise also the services rendered are apparently and admittedly in the nature of composite contract or work contract service. In terms of decision of Hon'ble Supreme Court in the case of **Commissioner of Central Excise vs. Larsen and Toubro** reported in [**2015 (39) STR 913**] tax cannot be charged for such services for the period prior to 7.2.2012. Though the period in dispute is pre as well as post the said date, even for the post dated period, the appellant is not liable to pay the service tax, the service being covered under exclusion part of 65(90a)(iii), Finance Act. In the light of above discussion, not only on this issue but on the Issue No. 1 as well, I am in consonance with the findings rendered by Hon'ble Member (Judicial) on this issue in the impugned order.

Issue No. 3

> **Extended period of limitation is not attracted, as held by the learned Member (Judicial)**
>
> **OR**
>
> **Extended period of limitation is attracted, as held by the learned Member (Technical)**

23. So far as the third issue of extended period of limitation is concerned, the findings given by Member (Judicial)have been impressed upon by the appellant. It is submitted that the extended period can be invoked if any only if the tax has not been paid or short paid for the reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of provisions of section 73 of Finance, 1994 thereof.

24. The arguments have been objected by learned Departmental Representative and the findings of Learned Member (Technical) has been impressed upon.

25. After hearing the parties on this issue, I am of the opinion as follows:

The facts of the case and the findings in Issue No. 1 and 2 are sufficient for me to hold that the present is not the case where the proviso to section 73, Service Tax Act, can be invoked. Infact the appellant has been held not liable to pay service tax. I am of the opinion that the department had no occasion to invoke the extended period of limitation. Hence the show cause notice of 11.8.2010 raising the demand for the period from 2006-2008 is beyond the normal period of issuing the show cause notice raising the demand. I draw my support from the decision in the case titled as **Continental Foundation Joint Venture vs CCE, Chandigarh**, wherein Hon'ble Apex Court has held that omission by a party to do what he might have done would not render it suppression. As far as fraud, collusion are concerned, it is evident that the intent to evade duty, is build into these words. So far as the mis-statement or suppression is concerned, they are clearly clarified by the word 'wilful' preceding the words "mis-statement or suppression of facts" which again means intent to evade duty. Apparently, there is no deliberate intent on part of appellant to not to pay the duty. Accordingly, I am in consonance with the findings of Member (Judicial) on this issue as well.

Issue No. 4

Whether the appeal has been rightly allowed setting aside the impugned order, as held by the learned Member (Judicial)

OR

Whether the appeal has been rightly allowed by way of remand for re-determination of quantum of duty liability, as held by the learned Member (Technical).

26. In the light of above discussions on other issues, I am of the firm opinion that the appellant not being the sub contractor, but the service provider of construction of residential complex service being directly engaged by a person i.e. M/s. PGCIL who require the said residential complex for their own personal use, was not liable to pay the service tax. The Board's circular of May, 2010 and the proviso to section 73 of Finance Act invoking the extended period of limitation are observed to be not applicable to the facts and circumstances of the present case. I am in agreement with the findings of Hon'ble Member (Judicial) setting aside the order of Departmental Adjudicating authority confirming the demand. I do not deem fit that the case be remanded back for redetermination of the quantum of duty liability in terms of decision of **M/s. Larsen and Toubro** (supra) and in the case of **URC Construction Pvt. Ltd**. reported in [2017 (50) STR 147] Once the facts of this case stand distinguished absolutely from the finding and the facts of the case of **Nitesh Estates Limited** (supra) and from relied upon the Circular dated 24.5.2010, the question of redetermination of duty liability did not at all arise. Hence I am in

consonance with the findings of Hon'ble Member (Judicial) on this issue as well

27. Consequent to the above discussion on the issues under reference I confirm the findings of Hon'ble Member Judicial. The reference stands answered in the aforesaid terms.

(Pronounced in the open Court on 24.09.2021)

Sd/
(RACHNA GUPTA)
MEMBER (JUDICIAL)

ss

Majority/Final Order of the Tribunal

The opinion of ld. Third Member have been received by the Division Bench. On all the questions/points of difference, the ld. Third Member have agreed with the view of Member(Judicial). Thus, the final order by majority is as follows:-

1. Construction of residential complex for personal use is excluded under Explanation II to Section 65(91a) read with Section 65(30a), 65(105)(zzzza) and 65(105)(zzzh) and hence not taxable.
2. In the facts and circumstances, the appellant is not a sub-contractor.
3. Extended period of limitation is not attracted.
4. The appeal has been rightly allowed setting aside the impugned order.

Thus, the appeal is allowed with consequential benefits.

(Pronounced on 12.10.2021)

Sd/

(ANIL CHOUDHARY)
MEMBER(JUDICIAL)

Sd/

(SANJIV SRIVASTAVA)
Member (TECHNICAL)

Ckp.