

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Service Tax Appeal No. 85459 of 2020
and
Service Tax Cross Objections No. 85374 of 2020
(On behalf of Respondent)

(Arising out of Order-in-Original No. 26/MRM-14/THCGST-03/2019 dated 26.11.2019 passed by the Commissioner of CGST & Central Ta, Thane)

Commissioner of CGST & C.Ex., Thane

Appellant

4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

Vs.

M/s. Ethics Infra Development Pvt. Ltd.

Respondent

CTS 2799, Radha Kunj Bungalow,
Opp. Raj Towers, I.C. Colony,
Borivali (W), Mumbai 400 103.

Appearance:

Shri Nitin Ranjan, Deputy Commissioner, Authorised Representative,
for the Appellant

Shri Bharat Raichandani, Advocate, for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. **A/87397/2021**

Date of Hearing: 21.12.2021

Date of Decision: 21.12.2021

PER: SANJIV SRIVASTAVA

This appeal filed by revenue is directed against the order in original No 26/MRM-14/THCGST-03/2019 dated 26.11.2019 of the Commissioner, CGST and Central Excise, Thane. By the impugned order, the Commissioner has dropped the entire demand of service tax made from the appellant as per the Show Cause Notice dated 09.10.2018.

2.1 Appellant is providing the taxable services under the category of "Construction of residential complex" as defined by Section 65(105) (zzzh) of the Finance Act, 1994 as amended.

2.2. During the course of audit, it is noticed that appellant has provided the services of "construction of residential complex services" to Borivali Ashwini Co-op Housing Society Ltd., Borivali

(West), Chaitanya Residency (Dabke Building) Goregaon (East) and Raj Bhawan Co-operative Housing Society, Andheri (E).

2.3 These projects were undertaken for re-development. For which appellant entered into Development Agreements with the existing Societies stating as follows

- (i) to appoint M/s EIDPL as the Developer for the redevelopment of all that piece and parcel of land or ground as mentioned therein.
- (ii) to grant Development Rights to the Developer for constructing residential complex by demolishing the already existing structures (for both society members and the builder themselves).
- (iii) that the Developer will provide specific number of flats with fixed carpet area free of cost to all the existing members of the Society in lieu of the development rights passed on to them.
- (iv) that after allotting the flats (inclusive of parking places) to the existing owners, the Developer shall become entitled to remaining slats & parking spaces as Developer's Allocation, which they were entitled to sell in the open market.

2.4 It was observed during the course of audit that the appellant did not discharged service tax on the services viz., "construction of residential complex services" rendered by them towards the flats allocated to existing members.

2.5 From 1.7.2012 these services had become classifiable as 'declared service under Section 66E(b) of the Finance Act, 1994. Its valuation method also had been highlighted vide CBEC Circular NO. 151/2/2012-ST dated 10.02.2012 r/w High Level Committee clarification issued vide Board's letter F.No. 354/311/2015-TRU dated 20.01.2016;

2.6 Thus, a Show cause cum demand notice was issued under F. No. CGST/ Audit Thane/ Cir-V/ Gr. 25/ EIDL/2017-18 dated 09.10.2018, to the appellant asking them to show cause as to why:

a. Their activities pertaining to construction under redevelopment scheme should not be considered as a taxable

service within the meaning of service category of construction of residential complex service defined under sub clause (zzzh) of section 65 (105) of the Finance Act, 1994 read with explanatory clause and further read with section 66 E (b) of the Finance Act, 1994;

b. Service Tax amounting to Rs. 6,47,88,658/- should not be demanded and recovered from them under provisions of sub section (1) of Section 73 read with Section 66 & 68 of the Finance Act, 1994,

c. Interest as applicable should not be demanded & recovered on the amount of service tax recoverable from them under Section 75 of the Finance Act, 1994,

d. Penalty should not be imposed on them under Section 77 of the Finance Act, 1994,

e. Penalty should not be imposed on them under Section 78 of the Finance Act, 1994.

2.7 Aggrieved by the impugned order revenue has filed this appeal.

2.8 Respondents have filed cross objection to the appeal.

3.1 We have heard Shri Nitin Ranjan, Deputy Commissioner, Authorized Representative for the revenue and Shri Bharat Raichandani, Advocate for the respondents,

3.2 Arguing for the revenue learned Authorized representative, reiterated the grounds taken by the revenue in their appeal, and submitted that the Adjudicating authority has grossly erred while observing that there was no material change in the scheme of taxation of these services. With effect from 01.07.2012, the entire regime of taxation of services underwent a change and the switch was from the positive definition of taxable services to negative list of taxable services. Section 66E provided for declared services, which were declared as taxable services in all circumstances. In view of the failure to appreciate the changes made in respect of taxation of these services, adjudicating authority relied upon the Circular Issued by the CBEC for period prior to the 01.07.2012 and dropped the entire demand. In view of the changes made with effect from 01.07.2012 the reliance

placed by the adjudicating authority on the Circular issued for past period cannot be sustained and the order set aside.

- 3.3 Arguing for the respondent, learned counsel submits that
- the issue involved in the matter is no longer res-integra and adjudicated by the CESTAT in their favour in the case of DLF Commercial Projects Corporation Pvt Ltd [2019-TIOL-1514-CESTAT-CHD] and Vasantha Green Projects [2019 (20) GSTL 568 (T-Hyd)]
 - They have discharged the Service Tax on the gross amounts received by them for providing such taxable services.
 - Since they have discharged service tax on the entire taxable value of the service rendered, determined on the basis of gross amounts received by them for providing these services, no further service tax could be demanded by them.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments on the appeal.

4.2 Commissioner has dropped the proceedings initiated against the appellant stating as follows:

“6. The demand notice in nutshell is whether after amendment to the Finance Act, 1994 with effect from 01.07.2012 and introduction of negative list of services, the noticee ought to have paid service tax for the flats given to existing members of the societies with whom they had entered into redevelopment agreement?

7. Before going into the other details, it is necessary to see the provisions which were prevalent before and after 01.07.2012.

<i>Provisions prior to 01.07.2012 under the Finance Act, 1994</i>	<i>Provisions prior to 01.07.2012 under the Finance Act, 1994</i>
<i>Section 65(105 (zzzh) : "Taxable Service" means any service provided or to be provided to any person, by any other person, in relation to construction of a complex;</i>	<i>Section 66E - Declared services. - The following shall constitute declared services namely,</i> <i>1.</i> <i>2. construction of a complex,</i>

<i>Explanation.- For the purposes of this sub - clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;"</i>	<i>building, civil structure or a part thereof including a complex or building intended for sale to a buyer, wholly or partly except where the entire consideration is received after issuance of completion certificate by the competent authority.</i> <i>Explanation. - For the purposes of this clause,</i> <i>(I) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:</i> <i>(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or</i> <i>(B) chartered engineer registered with the Institution of Engineers (India); or</i> <i>(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority".</i> <i>(II) the expression "construction" includes additions, alterations, replacements or remodeling of any existing civil structure;</i>
--	---

8. On perusal of the provisions before and after 01.07.2012, it is seen that there is no change in the provision of the statutes except that the relevant sections have been renumbered. The provisions under section 66 E (b) are identical to those under

section 65 (105) (zzzh) of the Finance Act, 1994. The taxing principle for levy of service tax has remained the same except for the elaborate explanation. As per the provisions, construction of complex for residence for sale, was & is, a service, liable for levy of service tax, if the consideration is received before obtaining the completion certificate from the competent authority. In the instant case, the land was owned by the housing society which entered into a development agreement with the builder/ developer who is the noticee in the instant case. As per the development agreement, the noticee was required to give a fixed percentage as additional carpet area to the existing society members free of cost. Hence the basic requirement of 'sale' is not met in as much as giving flats to the existing society members in the developed/re constructed building is concerned.

9. The tax implication of such type of transactions prior to 01.07.2012 was clarified vide CBEC Circular number 151/ 2/ 2012 - ST dated 10.02.2012 issued under F No 332/ 13/ 2011 - TRU wherein different business models of construction were discussed. Para 2.2 of the said circular which is relevant to the present situation is being reproduced below:

"2.2 Redevelopment including slum rehabilitation projects: Generally in this model land is owned by a society, comprising members of the society with each member entitled to his share by way of an apartment. When it becomes necessary after the lapse of a certain period, society or its flat owners may engage a builder/ developer for undertaking re-construction. Society/ individual flat owners give 'No Objection Certificate' (NOC) or permission to the builder developer, for re-construction. The builder/ developer makes new flats with same or different carpet area of original owners of flats and additionally may also be involved in one or more of the following: . .

- (i) construct some additional flats for sale to others;
- (ii) arrange for rental accommodation or rent payments for society members/original owners for stay during the period of re-construction;
- (iii) pay an additional amount to the original owners of flats in the society.

Clarification: Under this model, the builder/developer receives consideration for the construction service provided by him, from two categories of service receivers. First category is the society/members of the society, who transfer development rights over the land (including the permission for additional number of flats), to the builder/developer. The second category of service receivers consist of buyers of flats other than the society/members. Generally, they pay by cash.

(A) Taxability:

(i) reconstruction undertaken by a building society by directly engaging a builder/ developer will not be chargeable to service tax as it is meant for the personal use of society/ its member. Construction of additional flats undertaken as part of reconstruction, for sale to the second category of service receiver, will also not be taxable service, during the period prior to 1-7-2010;

(ii) For the period after 1-7-2010, construction service provided by the builder/ developer to second category of service receivers is taxable in case any payment is made to the builder/ developer before the issuance of completion certificate.

(B) Valuation: Value in the case of flats given to second category of service receivers, shall be determined in terms of section 67 (1)(i) of the Finance Act, 1994,"

10. Since there is no material change in the provisions with respect to levy of service tax on construction of complexes, therefore, in my opinion, the clarification given by the Board vide Circular number 151/ 2/ 2012 - ST dated 10.02.2012 issued under F No 332/ 13/ 2011 - TRU would mutatis mutandis apply to such situations even after 01.07.2012. This is also affirmed from the fact that after budget speech of the Finance Minister in 2014-15, the Ministry of Finance had set up a High Level Committee to interact with trade and industry and ascertain areas where clarity on tax laws was required. Based on the report of the High Level Committee,

Government of India issued instructions vide F No 354/ 311/ 2015 - TRU dated 20.01.2016 wherein it has been stated that the guidelines issued vide CBEC Circular number 151/ 2/ 2012 - ST dated 10.02.2012 issued under F No 332/ 13/ 2011 - TRU

were more appropriate. Thus it is seen that the clarification issued vide circular dated 10.02.2012 were not rescinded even after 01.07.2012 but they have been affirmed vide circular dated 20.01.2016.

12. Thus, I am of the opinion that, by applying the ratio of guidelines issued vide Circular Number 151/ 2/ 2012 - ST dated 10.02.2012 issued under F No 332/ 13/ 2011 – TRU, which have not been rescinded, the activity of giving flats in new/ re-constructed building by the noticee to the existing members of the said society, who were flat owners in the said society is not sale and hence is out of ambit and purview of levy of Service Tax. It cannot be denied that entire income of the noticee, in the present transaction, had been generated from sale of flats to customers others than the existing society members, because, those members were provided flats free of cost. It is not denied in the demand notice that the noticee had paid service tax under construction of residential complex category on such flats which were sold for consideration. The demand notice, seeks to recover service tax under the category of construction of service, and I cannot travel beyond the scope of the demand notice and hence restrict my findings to this extent only. The demand notice is only in respect of the redevelopment agreement and service tax has been demanded only in respect of those flats where were to be allotted to the existing members of the society, therefore, it is not maintainable.”

4.4 Revenue has challenged the impugned order stating as follows:-

a The Adjudicating authority appears to have erred in considering that the provisions of Section 66E of the Finance Act, 1994 and Section 65(105)(zzzh) of the Finance Act, 1994 were identical and remained the same, except for the elaborate explanation.

b. On going through the provisions of the Sections 66E(b) and Section 65(105)(zzzh), vital difference between the provisions existing before and after introduction of the negative list from 01.07.2012 onwards has remained to be considered.

c. As per the amended provisions remodeling of any existing civil structure, in the instant case redevelopment of a housing society, is also a form of reconstruction.

d. Redevelopment of the society building, rendered by the assessee to the society and/or members are nothing but a taxable service. As per the Show Cause Notice the developer had entered into the shoes of contractor and undertaken to demolish and re-construct the existing building and such provision of service does not fall under the services in the negative list.

e It is apparent that when a person undertakes construction on the immovable property belonging to somebody else, he i.e. the developer, does not get title to the land pertaining to the existing constructed portion. However, so far as extra or additional area to be constructed which constitutes the saleable portion, the developer is entitled to development right and becomes 'developer' in true sense as he is in a position to sell the flats to outsiders and the value includes the value of individual portion land. Thus, the developer acts in dual capacity, i.e. as a construction contractor so far as the society and the members are concerned and as "developer" so far as the new purchasers are concerned. In the present context assessee therefore, was also liable to pay service tax on the services provided to the existing members, as rightly alleged in the notice to show cause.

f. Since the provisions as they existed prior to and after 01.07.2012, were materially different the reliance placed by the adjudicating authority on the circular dated 10.02.2012 is misplaced.

g. Even though the said Circular has not been rescinded, as found by the Adjudicating authority, the exemption from taxability for the existing users remains no longer in force, post 1st July 2012 and due cognizance of this vital fact has remained to be taken.

h. The Education Guide, 2012 at para 6.2.1 sated as follows:

“What would be the liability to pay service tax on flats/houses agreed to be given by builder/developer to the land owner towards the land/development rights and to other buyers. If payable, how would the services be valued?”

Here two important transactions are identifiable:

(a) sale of land by the landowner which is not a taxable service, and (b) construction service provided by the builder/ developer. The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers:

(a) from landowner: in the form of land/development rights; and (b) from other buyers: normally in cash.

Construction service provided by the builder/developer is taxable in case any part of the payment/ development rights of the land was received by the builder/developer before the issuance of completion certificate and the service tax would be required to be paid by builder/developers even for the flats given to the land owner.."

i. The clarification issued under Circular F.No. 354/ 311/ 2015 - TRU date 20.01.2016 was solely in respect of "Tripartite Business Model", as mentioned in para 2.1. of the Circular No. 151/ 2/ 2012 - ST dated 10.02.2012. Further, though the issue discussed in para 2.2. of Circular No. 151/ 2/ 2012 - ST dated 10.02.2012 was with reference to context, it was effective only upto 30.06.2012, as from 01.07.2012, in the description of activity given in the 'Declared Services' under Section 66E(b) Finance Act, 1994, the exclusion clause of "intended for personal use of residence" is not available in the present definition and therefore, construction made for existing flat owners for which no consideration or part consideration is paid to the Developer will be also be liable to Service Tax in terms of Section 66E(b) Finance Act, 1994, after 01.07.2012

j. The decision of the Hon'ble Tribunal in the case of LCS City Makers Pvt Ltd [2013 (30) STR 33 (Tri-Chennai)] is squarely applicable to the present case wherein it is held as:

"Valuation - Construction of residential complex - Land owner transferring part of his rights in land to developer, for consideration in form of constructed flats received later - HELD : It is a type of barter system, and therefore value indicated in agreement between Developer and Land owner was not correct - Flats handed over to land owners were not different from those sold to individual buyers, and could not be assessed at different

values for services in respect of both - Section 67 of Finance Act, 1994. [para 14.3]

14.3 Revenue's case is that this is a case involving a type of barter system and therefore the value indicated in the agreement between the parties is not a correct value. The flats handed over to the land owners were not different from what were sold to the individual buyers. The facts and circumstances of the case do not warrant assessment of a different value for services in respect of flats sold to individual buyers as compared to flat handed over to the land owners. From the point of time of execution of the agreement to the point of time of rendering of the service there is considerable gap and consequently the cost of the service also changes. The argument would have had force only if service tax was paid at the time when the land was received as consideration for future service. This is not the situation in this case. He points out that the Commissioner has already given abatement of 67% of the value of flats to separate the value of materials from the value of service.

14.4 Though this is matter where both the sides have submitted arguments with merits we find more merit in the argument of Revenue and hence we reject the arguments of the appellant."

4.4 The only ground that needs to be considered is whether with effect from 01.07.2012, when the scheme of taxation of services was changed from the positive definition of the taxable services to the negative list of taxable services was there any material change in the provisions relating to services chargeable to tax under the category of "Construction of Complex Services." Adjudicating authority has in his order analyzed the provisions as they existed prior to and after 01.07.2012, to conclude that there was no material difference in the provisions as applicable to the facts of present case and has concluded that there was no material difference. Revenue disputes this finding and opines that there were material changes and therefore the clarification dated 10.02.2012, relied upon by the Adjudicating authority which was applicable for period prior to 01.07.2012, was not applicable, and the clarifications as given by the par 6.2.1 of the Education Guide 2012 should be applied.

4.5 In para 8 of the impugned order adjudicating authority has concluded that the activity of construction of complex of residence for sale was an taxable activity both prior to and after 01.07.2012, and for determining the tax implication in respect of such taxable services he has relied upon the Circular Dated 10.02.2012. We find that the approach adopted by the adjudicating authority is in line with the CBEC Instruction issued as per F No 354/311/2015-TRU dated 20.01.2016, reproduced below:

“Sub: - Report of the High Level Committee; recommendation regarding valuation of flats for levy of Service Tax – reg.

The undersigned is directed to say that, as announced by the Finance Minister in his Budget Speech 2014-15, the Ministry of Finance has set up a High Level Committee (HLC) to interact with trade and industry and ascertain areas where clarity on tax laws is required. It has been pointed out by the HLC that there is a divergence of view between Para 6.2.1 of the Education Guide 2012 and the CBEC Circular No. 151/2/2012-ST dated 10.2.2012 on how flats handed over to land owners are to be valued for the purpose of levy of service tax. The two views need to be reconciled. The HLC has opined that the guidelines communicated by the said Circular are more appropriate.

2. The issue has been examined. In a tri-partite construction business model, there are 3 parties involved:

- i. The land owner;*
- ii. The builder/developer; &*
- iii. The contractor (who undertakes the construction).*

Typically, in such a model, the land owner enters into an agreement with the builder, whereby, the land owner gives either land /development rights (to construct/develop a residential complex and sell flats/houses of such complex to buyers) to the builder. The builder/developer, in turn, agrees to assign a portion of the constructed area, in the form of flats in favour of the land owner. The remaining flats are sold by the builder/developer to various buyers. The builder/developer receives consideration for the construction service provided by

him, from two categories of service receivers: i. from landowner, in the form of land /development rights; and ii. from other buyers, normally in the form of money.

3. According to the CBEC Education Guide on Taxation of Services, 2012 value of construction service provided to such land owner will be the value of the land when the same is transferred and the point of taxation will also be determined accordingly. However, Circular No. 151/2/2012-ST dated 10.2.2012 states that value of land / development rights in the land may not be ascertainable ordinarily and therefore, value, in the case of flats given to first category of service receiver, that is, the land owner, is determinable in terms of section 67(1)(iii) read with rule 3(a) of Service Tax (Determination of Value) Rules, 2006. Accordingly, the value of these flats would be equal to the value of similar flats charged by the builder/developer from the second category of service receivers. In case the prices of flats/houses undergo a change over the period of sale (from the first sale of flat/house in the residential complex to the last sale of the flat/house), the value of similar flats as are sold nearer to the date on which land is being made available for construction should be used for arriving at the value for the purpose of tax. Service tax is liable to be paid by the builder/developer on the 'construction service' involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or similar instrument(e.g. allotment letter).

4. The Circular dated 10.2.2012 is in accordance with the provisions relating to valuation as laid down in the Finance Act, 1994 and the Service Tax (Determination of Value) Rules, 2006. As regards the Education Guide, it has been clearly stated in the Education Guide, 2012 that it is merely an educational aid based on a broad understanding of a team of officers on the issues. It is neither a "Departmental Circular" nor a manual of instructions issued by the Central Board of Excise and Customs. To that extent it does not command the required legal backing to be binding on either side in any manner. The guide was released purely as a measure of facilitation so that all stakeholders could obtain some preliminary understanding of the new issues for

smooth transition to the new regime. Hence, Circulars such as the present one would prevail over the Education Guide, 2012.

5. In view of the above, it is directed that in valuing the service of construction provided by a builder/developer to a landowner, who transfers his land/development rights to builder, for getting, in return, constructed flats/dwellings from builder/developer, the Service Tax assessing authorities should be guided by the said Board Circular dated 10.2.2012 and not the Education Guide."

4.6 The instruction referred to in para 4.5, is only for the period post 01.07.2012, and holds in favour of applicability of the Circular dated 10.02.2012, in respect of the transactions, activities undertaken post 01.07.2012. Thus we find no error in the approach of adjudicating authority in placing reliance on the said circular for dropping the proceedings initiated.

4.7 Revenue has in their appeal relied upon the decision in case of LCS City Makers Pvt Ltd [2013 (30) STR 33 (Tri-Chennai)], and have argued that the said decision squarely covers the issue in favour of the revenue. Para 2 of the said decision is reproduced below:

"2. In this connection, the department conducted verification of the appellant's liability for payment of service tax and a show cause notice dated 11-2-2008 was issued to the appellant, stating various grounds of short-levy of service tax and proposing a service tax demand of Rs. 83,98,962/- from the appellant, for the period 16-6-2005 to 31-3-2007 and also proposing imposition of penalties."

It is quite evident that the in this case the period of demand was for period 16.06.2005 to 31.03.2007 i.e. prior 01.07.2012. When the entire appeal of the revenue is based on the changes made in the Law, and it is their case that provisions are materially different, then what makes them rely upon this decision. In our view the reliance placed by the revenue on this decision is totally contrary to their own stand in the appeal.

4.8 In the present case the respondent has discharged the complete service tax liability on the gross amount received by him for providing the taxable services. Once he have discharged the tax liability on the gross consideration received by him by the sale of flats to new buyers, the demand of service tax for the

flats handed over to the existing members of the societies without any consideration cannot be sustained. We also find that in case of Vasantha Green Projects [2019 (20) GSTL 568 (T-Hyd)] Hyderabad Bench has observed as follows:

“10. The adjudicating authority, in the impugned order, had relied upon Board Circular No. 151/2/2012-S.T., dated 10-2-2012 to arrive at the value in the case of flats given to land owners to be determined based upon the value of the villas sold to prospective customers seems to be inappropriate reasoning and when the cost for acquisition of land has already been considered for discharge of service tax of an amount received from prospective customers, taxing the same under the laws of service tax liability for the consideration received for the services to land owners, seems to be incorrect, as also on the case of LCS City Makers Pvt. Ltd. [2013 (30) S.T.R. 33 (Tri.-Chennai)].

11. We find that C.B.E. & C. vide circular dated 16-2-2006 in respect of collection of service tax under construction of complex services had issued instructions under Section 57B of Central Excise Act, 1944 which are made applicable to service tax under Section 83 of Finance Act, 1994, in Para No. 8 of the said instructions stated as under :

“8. It is noticed that in the construction business different practices and financial arrangements concerning (a) promoters, developers & builders, (b) land owners (c) contractors and (d) buyers exist. These practices influence the ‘taxable value’ under the construction of complex services. In all such situations, the taxable value under section 67 shall be the gross amount charged by the service provider (builder in this case) for such services provided or to be provided by him. This read with notification No. 18/2005-S.T., dated 7-6-2005 entitles a builder/contractor an abetment of 67% on the gross amount charged, which shall include the value of goods and material supplied. Further, there is no deductions/exemptions provided for computation of such taxable value in the composite contract.” (emphasis supplied)

12. It can be seen from the abovesaid instructions, the gross amount charged by the builder is liable to tax. The said instructions are in force till today and has not been

withdrawn by the Board. As already detailed herein above, the appellant has discharged the service tax liability on the gross amount charged i.e. consideration received from land owners in the form of kind other than cash (value of the land/development rights) + consideration received from prospective buyers in cash by way of financial arrangements on the construction services undertaken by the appellant on joint development basis. We also note that appellant had declared the same in the books of account like IT returns and ST-3 returns which has been certified by Chartered Accountant wherein it is stated that service tax compliance is towards the payment of gross amount of the construction undertaken on joint development basis and received from the customers has been made. This leads to conclusion that it is evident that appellant has complied with the service tax liability on the construction undertaken on joint development basis on the value of construction which is mandated in Section 67 of Finance Act, 1994, read with rules made thereunder. In our view, if once the service tax liability has been discharged on the gross amount, demand of service tax on the same amount again would amount to double taxation.

13. The reliance placed by Ld. DR on the case of LCS City Makers Pvt. Ltd. will also not carry the case of Revenue any further, as in that case Bench upheld the contention of the Revenue on a recording that “the facts and circumstances of the case do not warrant assessment of a different value, for services in respect of flats sold to individual buyers as compared to flat handed over to the land owners”; and recorded that the flats which were allotted to land owners were sold by land owners. In the case in hand, the facts are different.

14. In respect of the arguments put forth on limitation, we do find that in the situation wherein the interpretation of the provisions of Section 67 and the rules were involved and there could be different interpretation. It is undisputed that appellant had declared the value received from prospective customers in their returns and discharged the service tax liability thereon, which include the value of consideration paid in kind towards the land, there cannot be any allegation that there was a deliberate

intention on the part of the appellant as to non-payment of differential service tax liability. In our view, in the peculiar facts and circumstances of this case, it cannot be held that there was a mala fide intention on the part of the appellant to suppress any facts or make misstatements, with an intention to evade service tax liability. Accordingly, we hold that demands are also hit by limitation and extended period cannot be invoked for the demands received.”

5.1 In view of discussions as above we do not find any merits in the appeal filed by the revenue and dismiss the same.

5.2 Cross objections filed by the respondent are also disposed off accordingly.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu