CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10887 of 2013-DB

[Arising out of Order-in-Original/Appeal No STC-50-COMMR-AHD-2012 dated 02.01.2013 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD]

M S Khurana Engineering Limited .... **Appellant**
MSK, Near Kashiram Rana Bhawan,
Ambawadi, AHMEDABAD, GUJARAT-380055

VERSUS

Commissioner of Service Tax, Ahmedabad .... **Respondent**
7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi, Ahmedabad,
Gujarat-380015

APPEARANCE :

Shri Devan Parikh, Sr. Advocate & Shri Nirav Shah, Advocate for the Appellant
Shri Ghanasyam Soni, Joint Commissioner (AR) for the Revenue.

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

DATE OF HEARING : 30.08.2022
DATE OF DECISION: 22.12.2022

FINAL ORDER NO. A/12258 / 2022

RAMESH NAIR :

The present appeal is filed against the Order-in-Original No. STC/50/COMMR/AHD/2012 dated 19-12-2012.

2. The brief facts of the case are that the appellant during the period under consideration (01.04.2006 to 30.06.2010) were engaged in the business of construction of residential Complex services under Jawaharala Nehru National Urban Renewal Mission (JnNURM). All the project executed by Appellant under the JnNURM scheme pertained to construction of House for Economic Weaker Section (EWS). The said project under the JnNURM scheme were executed by Appellant for Ahmedabad Municipal Corporation (AMC) and Ahmedabad Urban Development Authority (AUDA) only. As per the department service tax on "Construction of Complex Service" was levied

under Sub-Section (105)(zzzh) of Section 65 of the Finance Act, 1994 with effect from 16.06.2005. Thus the services provided by Appellant under the JnNURM scheme fell under the category of "Construction of Complex Service". Further, Government of India vide Notification No. 28/2010 dtd. 22.06.2010 exempted the taxable services of construction of complex referred to in sub-clause (zzzh) of clause (105) of section 65 of the Finance Act, when provided to Jawaharlal Nehru National Urban Renewal Mission of (JnNURM) and Rajiv Awas Yojana, from the whole of the service tax leviable thereon under Section 66 of the Finance Act w.e.f. 01.07.2010. It is thus, services provide by the Appellant under the category of "Construction of Complex Service' for JnNURM Project were taxable upto 01.07.2010. Appellant was issued show cause notice for demanding Service Tax alongwith interest and penalty which was confirmed by the impugned order in original. Being aggrieved, the appellant has filed the present appeal.

3. Shri Devan Parikh learned Sr. Advocate along with Shri Nirav Shah, learned Counsel appeared on behalf of Appellant submits that the Appellant had undertaken such work for construction of residential complex for economically weaker section i.e. urban poor under JnNURM Scheme in the vicinity of Ahmedabad. Providing basic residential facilities to Urban Poor is covered under the provisions of basic services under the JnNURM Scheme and hence, in the city of Ahmedabad such schemes were undertaken by the Ahmedabad Municipal Corporation (AMC) as well as Ahmedabad Urban Development Authority. The Government had invited tenders prior to levy of service tax on construction of residential complex service. Hence, as per the tender terms, no service tax was applicable on such projects. The Appellant had been allotted project under the aforesaid scheme by the AMC as well as AUDA.

4. He also submits that upon the introduction of Service tax on residential complex services, there was no clarity in the field. Appellant sought clarification from AUDA and AMC regarding discharge of service tax liability; in response to which AUDA has referred the matter to the Commissioner of Service tax on 06.12.2006. AUDA has specifically sought clarification as any service tax liability arises on AUDA or otherwise. The Commissioner had opined that the service tax is payable, but this reply was never shared with the present appellant. Hence the Appellant had approached the AUDA and AMC for clarification as well as payment towards service tax upon introduction of new levy, but neither they clarified nor they revised the terms of tender to allow charging of Service tax. Hence, the Appellant had not charged any service tax on service provided to AMC/AUDA for construction service.

5. He further submits that on the subject issues various show cause notices were issued all across the country. The aforesaid issue had been decided in favour of the assessee. He placed reliance on the following judgments.

(i) Santosh Katiyar vs. Commissioner of Central Excise Bhopal - 2017 (3) G.S.T.L. 203 (Tri. - Del.)

(ii) Commissioner of C.Ex., Aurangabad vs. Mall Enterprises - 2016 (41) S.T.R. 119 (Tri. - Mumbai)

(iii) B.L. Mehta Construction Pvt. Ltd. vs. Commr of C.Ex & ST, Chandigarh - 2018(8)GSTL 92

(iv) NCR Builders Pvt. Ltd. vs. Commissioner of C.Ex. & S.T., Ghaziabad 2017 (3) G.S.T.L. 198 (Tri. - All.)

(v) Commissioner of Customs, C.Ex & ST. Allahabad vs. Ganesh Yadav – 2017(6)GSTL 428 (Tri. –All)

(vi) B.G. Shirke Construction Technology Pvt. Ltd. vs. CCE & ST, Pune –II- 2020 (43)GSTL 242 (Tri. –Mumbai)

6. He also submits that Appellant has paid VAT throughout the period on these projects. It is well settled law that once the VAT is paid no service tax can be demanded. He placed reliance on decision of M/s UFO Movies India Ltd. – 2018(11) GSTL 391 (Tri. Mumbai)

7. He further submits the extended period is not invokable in the present matter.

8. The Shri Ghanasyam Soni, learned Joint Commissioner (AR) reiterated the findings of the adjudicating authority.

9. We have heard both sides and perused the appeal records. We are of the considered opinion that the matter requires to be examined in the light of the Section 65(91a) of the Finance Act, 1994 and the explanation thereof which reads as under :

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

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

(i) a building or buildings, having more than twelve residential units;
(ii) a common area; and
(iii) any one or more of facilities or services such as park, lift, parking spaces 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 personaluse as residence by such person.

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

(a) "personaluse" 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;***"**

The perusal of the above definition makes it dear that the complex which is constructed with an intention for personaluse as residence by a person who is directly engaging any other person for designing/planning of layout and

the construction of such complexes out of the ambit of such construction and thus from taxability. We draw the support from the case of *C.C.E., Aurangabad* v. *Mall Enterprises* - 2016 (41) S.T.R. 119 (Tri.-Mum.) wherein it was held that not only residential complex is designed or laid out by another person are excluded from the definition but also the ones intended for personaluse of such person i.e. the owner of the complex. In another case titled as *Nithesh Estates Limited* v. *C.C.E., Bangalore,*2015 (40) S.T.R. 815 wherein it was held that the construction of residential complex for ITC (in that case) intended to provide accommodation built for own employees, activity was covered by definition of personaluse in *Explanation* to Section 65(91A) of Finance Act, 1994. Hence, the assessee's activity falls under exclusion of that Section and as such is excluded from levy of Service Tax.

10. In the present case, the quarters/residential complexes were got constructed by the AMC and AUDA for urban poor people for their residential use, the same amounts to 'personaluse'. The confirmation of demand qua these services by the Commissioner is therefore not sustainable.

11. We also find that on the identical facts and issue in the matter of Santosh Katiyar Vs. Commissioner of Central Excise, Bhopal – 2017(3)GSTL 203 the Delhi Tribunal held that :-

> ***"4.*** *From the record, it appears that during the period under consideration, the appellant neither took credit nor paid any Service Tax on the impugned services. The department is of the view that the said services are subject to service tax as per Chapter 5 of the Finance Act, 1994. But the fact remains that Section 65(91)(a) of the Finance Act provides the meaning of complex where the building having more than 12 residential units with the common area.*
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> *In the explanation for the removal of doubts, it was 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.

In the instant case, the allottee is paying the nominal rent or without consideration.

5. *From the record, it appears that the Notification No. 28/2010-S.T., dated 22nd June, 2010, clarified that the services is provided to JawaharlalNehru National Urban Renewal Mission and Rajiv Awaas Yojana are exempted from the clutches of Service Tax. Further, vide F. No. 137/26/206-CX.-4, dated 5th July, 2006, it was clarified that Service Tax would not be leviable on construction of complexes under question if their lay out does not require approval by an authority under any law for the time being in force. From the letter dated 30-1-2004 issued by the M.P. Urban Development Department, it appears that the said construction was made under "Rajiv Gandhi basti Vikas karyakram" which was the Central sponsored scheme and the same is exempted from service tax as per Circular No. 125/2010-S.T., dated 30th July, 2010.*

5. *In the light of above discussion and by considering the facts and circumstances of the case, we are of the view that the M.P Government has constructed the accommodation for the gandi basti people under the Central sponsored scheme which is attempted to clean India as per Prime Minister's mission.*

6. *When it is so, then we find no merits in the impugned order as no service tax is leviable in the instant case. Hence, the impugned order is set aside. The appellant will get the relief accordingly.*

From the above judgment it can be seen that the identical fact is involved in the above judgment and in the case in hand in as much as in both the cases the construction service was provided to Jawaharlal Nehru National Urban Renewal Mission and Rajiv Awaas Yojana. On this common fact in the above judgment it was held that the service tax is not leviable to such project. Hence, the ratio of the above judgment is directly applicable in the present case.

12. As per our above discussion and finding which gets support of above cited judgments, the impugned order is clearly not sustainable, hence the

same is set aside. The appeal is allowed with consequential relief, if any arise, in accordance with law.

(Pronounced in the open court on 22.12.2022*)*

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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