

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

PRINCIPAL BENCH – COURT NO. I

SERVICE TAX APPEAL No. 53481 OF 2018

(Arising out of Order-in-Appeal No. 648/CRM/ST/JDR/2018 dated 25 June, 2018 passed by the Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jodhpur)

M/s Quality Builders & Contractor
2/1301, Kudi Bhagtasani Housing Board
JODHPUR (RAJ.)

.....Appellant

Versus

**Commissioner of Central Goods &
Service Tax**
G-105, New Jodhpur Industrial Area
JODHPUR (RAJ.)

.....Respondent

APPEARANCE:

Shri O.P. Agarwal, Chartered Accountant, for the Appellant
Shri Ravi Kapoor, Authorised Representative of the Respondent

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

FINAL ORDER NO. 50809/2022

Date of Hearing: August 31, 2022
Date of Decision: September 05, 2022

JUSTICE DILIP GUPTA :

M/s Quality Builders & Contractor¹ has filed this Appeal to assail the order dated June 25, 2018 passed by the Commissioner (Appeals), Jodhpur, by which the order passed by

¹ the appellant

the adjudicating authority on April 21, 2017 rejecting the refund claim of Rs. 21,33,490/- filed by the appellant has been upheld.

2. The period involved in this appeal is from 2015-16 and the issue is as to whether the appellant is entitled to claim refund of the service tax deposited by the appellant on construction of individual/independent residential houses and whether the refund is hit by the principles of unjust enrichment.

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

2 the Housing Board

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

4. The Commissioner (Appeals) denied the refund of service tax paid for the reason that the appellant would not be entitled to claim benefit of the Exemption Notification dated June 20, 2012 for the period after July 01, 2012 and the relevant portion of the order is reproduced below:

"Thus, the entry no. 14(b) of said notification provides exemption to a single residential unit from levy of service tax. "Residential Complex" means any complex comprising of a building or buildings, having more than one single residential unit. Further, the said notification defines single residential unit as a self contained residential unit which is designed for use, wholly or principally for residential purposes for one family. Since an exemption notification would have to be strictly interpreted, it is clear, that construction of row houses, villas or individual houses, which form part of a gated community, have come under the service tax levy, with effect from 1-7-2012 given the fact that the new definition of "residential complex" is rather wide. The conditions related to approval of the layout, the need to have common area, etc. based on which, exemption could be claimed under the old law, are no longer relevant under the new law. Therefore, the decisions passed by considering the old law are also not applicable in the present scenario.

5.4 In view of the above work orders, the appellant has constructed more than one house for Rajasthan Housing Board in a particular area. However, they have not provided the details of the said houses whether they were horizontally or vertically. Moreover, the entry no. 14(b) is also not applicable for a single residential unit which is a part of a residential complex and as per the definition of 'residential complex' given in the said notification, it is any complex comprising of a building or buildings, having more than one

single residential unit in any of the form such as horizontally or vertically as flats, row houses, villas. Therefore, a building is considered as a residential complex if it is having more than one single residential units either vertically or horizontally spread. Therefore, I find that the construction of residential houses for the Housing Board is taxable service under Service Tax during the year 2015-16 and therefore, the appellant has correctly paid the same and the service tax paid is not refundable to them on merit."

5. The Commissioner (Appeals) has also rejected the refund claim on the ground of unjust enrichment.

6. Shri O.P. Agarwal, learned Chartered Accountant appearing for the appellant has submitted that the appellant is clearly entitled to exemption under the Exemption Notification dated June 20, 2012 since individual/independent houses were constructed by the appellant and levy of service tax is exempted under the Exemption Notification. In support of this contention, learned Chartered Accountant placed reliance upon the decision of the Division Bench of the Tribunal in **Beriwal Constructions Co. vs Commissioner of Central Excise & Service Tax-II, Agra**³. Learned Chartered Accountant also submitted that refund can be claimed by any person who has borne the incidence of tax and in support of this contention he has placed reliance upon the judgment of the Allahabad High Court in **Commissioner of Customs, Central Excise & Service Tax vs Indian Farmers Fertilizers Coop. Ltd.**⁴

3 2017 (5) GSTL 198 (Tri-All.)

4 2014 (35) STR 492 (All.)

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

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

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

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

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

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

"Construction of Complex" means

- (a) Construction of a new residential complex or a part thereof; or

- (b) Completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic application or fittings and other similar services; or
- (c) Repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;"

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

"Residential Complex - Section 65(91a)

'Residential Complex' means any complex comprising of -

- (i) a building or buildings, having more than 12 residential units;
- (ii) a common area; and
- (iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system

located within a premises and layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation:- For the removal of doubts, it is hereby declared that for the purposes of the clause,

- (a) "Personal use" includes permitting the complex for the use a residence by another person on rent or without consideration;
- (b) "Residential unit" means a single house or a single apartment intended for use as a place of residence;"

13. It is seen that a 'residential complex' has been defined to mean any complex comprising of a building or buildings, having

more than twelve residential units; and a 'residential unit' has also been defined in Explanation (b) to mean a single house or a single apartment intended for use as a place of residence.

14. The definition of a "residential complex" leaves no manner of doubt that it would be a complex comprising of a building or buildings, having more than twelve residential units. In other words a complex may have a building having more than twelve residential units or a complex may have more than one building each having more than twelve residential units. Independent buildings having twelve or less than twelve residential units would not be covered by the definition of "residential complex"

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

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

Projects Ltd. v/s Commissioner of Service Tax, Chennai⁶

wherein the demand of service tax was for the period 16 June, 2005 to November, 2005 under 'construction of complex' service under section 65(30a) of the Act. The Bench examined the scope of 'construction of complex' and the meaning of a 'residential complex' under section 65(91a) of the Finance Act and the observations are as follows:-

"It is abundantly clear from the above provisions that construction of residential complex having not more than 12 residential units is not sought to be taxed under the Finance Act, 1994. **For the levy, it should be a residential complex comprising more than 12 residential units. Admittedly, in the present case, the appellants constructed individual residential houses, each being a residential unit, which fact is also clear from the photographs shown to us.** In any case, it appears, the law makers did not want construction of individual residential units to be subject to levy of service tax. Unfortunately, this aspect was ignored by the lower authorities and hence the demand of service tax. In this view of the matter, we are also not impressed with the plea made by the appellants that, from 1-6-2007, an activity of the one in question might be covered by the definition of 'works contract' in terms of the Explanation to section 65 (105)(zzzza) of the Finance Act, 1994 as amended. According to this Explanation, 'construction of a new residential complex or a part thereof' stands included within the scope of 'works contract'. But, here again, the definition of 'residential complex' given under section 65(91a) of the Act has to be looked at. **By no stretch of imagination can it be said that individual residential units were intended to be considered as a "residential complex or a part thereof."**

(emphasis supplied)

17. It needs to be noticed that the Bench also examined whether 'construction of a new residential complex or a part thereof' would be covered within the meaning of a 'works contract', after 1 June, 2007 and held that in this case also the

definition of a new 'residential complex' given in section 65(91a) of the Act was required to be looked. The Civil Appeal filed by the Department to assail the aforesaid order of the Tribunal was dismissed by the Supreme Court on 7 July, 2009.

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

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

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

maintainable. Accordingly, we allow this appeal and set aside the impugned order. The appellant shall be entitled for consequential benefits in accordance with law.”

(emphasis supplied)

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

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

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

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

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

constructed 15 independent HIG Houses, each being a residential unit.

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

(emphasis supplied)

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

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

23. The Commissioner (Appeals) was also not justified in holding that the refund was hit by the principles of unjust enrichment. As per the work orders, service tax was to be borne by the appellant and the Commissioner (Appeals) has also found, as a fact, that the contract awarded by the Housing Board to the appellant mentions that service tax shall be borne by the contractor. The Allahabad High Court in **Indian Farmers Fertilizers Coop. Ltd.** held that a refund can be claimed by a person who has borne the incidence of tax. Even in accordance

with the Exemption Notification dated June 20, 2012, 50% of the tax to be deposited by the Housing Board under the reverse charge mechanism was deducted by the Housing Board from the amount payable to the appellant. The Commissioner (Appeals) was, therefore, not justified in rejecting the refund claim of the appellant on the ground of unjust enrichment.

24. The order dated June 25, 2018 passed by the Commissioner (Appeals), therefore, cannot be sustained and is set aside. The appellant would be entitled to refund in accordance with law. The Appeal is, accordingly, allowed.

(Pronounced in the open Court on September 05, 2022)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)