THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 18.04.2009

\+ **WP(C) 1659/2008**

HOME SOLUTION RETAIL INDIA LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 4130/2008**

LIFESTYLE INTERNATIONAL P. LTD & ANR ... Petitioners

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 4131/2008**

SHOPPER'S STOP LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 4749/2008**

FUN MULTIPLEX P. LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

+ **WP(C) 5036/2008**

WADHAWAN LIFESTYLE RETAIL P. LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

+ **WP(C) 5643/2008**

DEVYANI INTERNATIONAL LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

+ **WP(C) 5976/2008**

MAHTANI FASHION PVT LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

+ **WP(C) 5978/2008**

BARISTA COFFEE COMPANY LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

+ **WP(C) 6033/2008**

M/S GKB OPTOLAB (PVT) LTD BARDEZ, GOA ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 6734/2008**

BIBA APPARELS P. LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 6744/2008**

ASHOK KUMAR JAIN ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 6993/2008**

VARDHAMAN PROPERTIES LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 7004/2008**

WADHAWAN LIFESTYLE RETAIL P. LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 7122/2008**

ASHOK JAIN AND ANOTHER ... Petitioners

- versus -

UOI & ORS ... Respondents

AND

\+ **WP(C) 7164/2008**

VATIKA LTD AND ANR ... Petitioners

- versus -

UOI & ORS ... Respondents

AND

\+ **WP(C) 7212/2008**

VATIKA HOSPITALITY PVT. LTD AND ANR ... Petitioners

- versus -

UOI & ORS ... Respondents

AND

\+ **WP(C) 7654/2008**

SAFFRON FOODS (P) LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 7664/2008**

M/S FOOD PLAZA EXPRESS KITCHEN AND ORS ... Petitioners

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 7722/2008**

SSIPL RETAIL LTD AND ANR ... Petitioners

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 7723/2008**

GENESIS COLORS PVT LTD AND ORS ... Petitioners

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 8538/2008**

M/S BATA INDIA LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

AND

\+ **WP(C) 7964/2008**

VINNAMR HOSPITALITY P. LTD ... Petitioner

- versus –

UOI ... Respondent

AND

\+ **WP(C) 8771/2008**

M/S BPTP LTD ... Petitioner

- versus –

UOI & ORS ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr S. Ganesh, Sr Advocate with Mr Birendra Sarat, Mr Ameet Naik, Mr Rishi Agarwal and Ms Hemangi Abhyankar for the Petitioner in WP(C) 1659/2008.
Mr Jayant Bhushan, Sr Advocate with Mr Shamik Sanjanwala, Mr Tapas Ram Mishra and Mr Shambhavi Sinha for the Petitioner.
Dr A. M. Singhvi, Sr Advocate with Mr Mahesh Agarwal, Mr Rishi Agrawala, Mr Bhagvan Swarup Shukla, Mr Rajeev Kumar, Mr Akshay Ringe, Ms Rohma Hameed, Mr Ankit Shah and Mr Jaiveer Shergill for the Petitioner in WP(C) 4131/2008.
Mr S. Ganesh, Sr Advocate with Mr S. Sukumaran and Mr B. Karunakaran for the Petitioner in WP(C) 8554/2008.
Ms Saanjh N. Purohit for the Petitioner in WP(C) 9642/2007.
Ms Anshul Singh for the Petitioner in WP(C) 5643/2008, 5976/2008, 5978/2008 & 7043/2008.
Mr N. S. Arora for the Petitioner in WP(C) 7043/08, 7664/08.
Ms Aradhana Patra for the Petitioner in WP(C)6734/08.
Mr Sanjay Goswami with Mr H. K. Balajee for the Petitioner in WP(C)Nos. 6744/08, 6993/08.
Mr J. K. Mittal with Mr Sunil Upadhyay for the Petitioner in WP(C) 7964/08.
Ms Rupal Bhatia for Mr Alishan Naqvee the Petitioner in WP(C) 7722/08 & WP(C) 7723/08.

Mr S. S. Pandit for the Petitioner in WP(C) 7654/08.
Mr Raman Kapur for the Petitioner Nos. 1 and 2 in WP(C) 7122/2008.
Mr A. R. Madhav Rao with Mr Pawan Shree Agrawal and Mr Tarun Jain for the Petitioner in WP(C)8538/08.
Mr R. D. Jolly with Ms Rani Kiyala for the Petitioner in WP(C) 6033/08.

For the Respondents: Mr P.P. Malhotra, ASG with Mr S. K. Dubey with Mr Deepak Kumar and Mr K. B. Thakur for the Respondent No.1/UOI in WP(C) 10757/06.
Mr Mukesh Anand with Mr Shailesh Tiwari for the Respondent/UOI in WP(C) Nos. 1659/08, 9642/07, 6033/08 & 5643/08.
Mr Dalip Mehra for the Respondent/UOI in WP(C) 5643/2008.
Mr Vivek Sibal with Mr Prabal Bagchi for the Respondents 10 & 11 in WP(C) 4130/08.
Mr Amrendra Kr. Singh for the Respondent No. 5 in WP(C) 5036/08.
Mr S. C. Rana for the Respondent in WP(C)5036/08.
Mr S. K. Nanda for Mr Rakesh Tiku for the Respondents 16 and 17 in WP(C) 5978/08.
Mr Rohit Kumar for the Respondents, 4 & 11-13 in WP(C) 6033/08.
Mr Ajay Kapur with Ms Savita Rajdor for the Respondents 5, 6 & 7 in WP(C)7164/08.
Mr Ajay Kumar for the Respondent No. 5 in WP(C)1659/08.
Mr Ajay Kumar for the Respondent No. 12 in WP(C) 4130/08.
Ms Anjana Gosain for the Respondent/UOI in WP(C) Nos.9642/07, 5036/08, 6734/08 & 8554/08.
Mr R. S. Mathur for the Respondents 17 & 18 in WP(C) 6033/08.
Mr Prakash Kumar for the Respondent No. 3 in WP(C) 4749/08.
Mr Pradeep Aggarwal with Mr Deep Dhamija for the Respondent No. 6 in WP(C) 1659/2008.
Ms Sonia Mathur with Mr Sushil Kr Dubey for the Respondent in WP(C) 4130/08, 4131/08, 4749/08, 5976/08, 5978/08, 6744/08, 6993/08, 7004/08, 7122/08, 7164/08, 7212/08, 7654/08, 7664/08, 7722/08, 7723/08.
Mr Amit Bhagat with Mr Pulkit Gupta for the Respondent No. 16 in WP(C) 5978/08.
Mr Ankit Jain for the Respondent No. 4 in WP(C) 5643/08.
Mr Rajesh Mahna with Mr Ramanand Roy for the Respondents 14-16 in WP(C) 6033/08.
Ms Priyadeep for the Respondent No. 6 in WP(C) 4131/2008.
Mr Sachin Sood for the Respondent No. 5 in WP(C) 4130/08.
Mr Sachin Sood for the Respondent No. 7 in WP(C) 4131/08.
Mr Sachin Sood for the Respondent No. 14 in WP(C) 5978 /08.
Mr Tarun Gulati with Mr Tushar Jarwal for the Respondent No. 11 in WP(C) 7043/08.
Mr Tarun Gulati with Mr Tushar Jarwal for the Respondent No. 4 in WP(C) 8554/08.
Mr Tarun Gulati with Mr Tushar Jarwal for the Respondent No. 3 in WP(C) 9642/07.
Mr Rajiv Tyagi with Ms Chanchal Biswal and Mr Udit Kumar for the Respondent No. 3 in WP(C) 7664/08.
Mr S. S. Pandit for the Respondent 27 in WP(C)5036/08.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether Reporters of local papers may be allowed to see the judgment ? YES

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. In this batch of writ petitions the legality, validity and *vires* of notification no. 24/2007 dated 22/05/2007 and circular no. 98/1/2008-ST dated 04/01/2008 issued by the Secretary, Ministry of Finance, Department of Revenue, Government of India, New Delhi is challenged. It is alleged that by virtue of the said notification and circular a completely erroneous interpretation is placed on section 65 (90a) and section 65 (105) (zzzz) of the Finance Act, 1994 as amended by the Finance Act, 2007. It is further alleged that because of this incorrect interpretation, service tax is sought to be levied on the renting of immovable property as opposed to service tax on a service provided "*in relation to the renting of immovable property*".

2. In essence, the petitioners have raised the question as to whether the Finance Act, 1994 (hereinafter referred to as the said Act) envisages the levy of service tax on letting out / renting out of

immovable property *per se* ? According to the petitioners, who are either landlords or tenants in respect of leased premises, no such tax is envisaged under the said act. Consequently, the said notification dated 22/05/2007 and the said circular dated 04/01/2008 are sought to be set aside as being *ultra vires* the said act.

3. Alternatively, the petitioners have taken the plea that in case it is held that such a tax is envisaged then the provisions of section 65(90a), section 65(105)(zzzz) and section 66 insofar as they relate to the levy of service tax on renting of immovable property would amount to a tax on land and would therefore fall outside the legislative competence of Parliament inasmuch as the said subject is covered under Entry 49 of List II of the Constitution of India and would fall within the exclusive domain of the state legislature. As such, the said provisions would have to be declared as un-constitutional.

4. The said notification dated 22/05/2007 is an exemption notification purportedly issued in exercise of the power conferred by sub-section (1) of section 93 of the Finance Act, 1994. By virtue of the said notification, the central government exempted the "taxable service of renting of immovable property", referred to in sub-clause (zzzz) of clause (105) of section 65 of the Finance act, from so much of the service tax levy as was in excess of the service tax calculated on a

value which is equivalent to the gross amount charged for renting of such immovable property less taxes on such property, namely property tax levied or collected by local bodies. An example has also been provided in the said notification by way of illustration. The example is as under:-

> "*Example:*
>
> Property tax paid for April to September = Rs 12,000/-
>
> Rent received for April = Rs 100,000/-
>
> Service tax payable for April = Rs 98,000/-(100,000-12,000) * applicable rate of service tax"

5. It is the contention of the petitioners that though this notification speaks of an exemption it also refers to the "taxable service as a taxable service of renting of immovable property". This, according to the petitioners, is not so provided under the said act. It is contended that section 65(105)(zzzz) refers to the service provided or to be provided to any person, by any other person, in relation to renting of immovable property for use in the course or furtherance of business or commerce. The reference in the said provision is not to the taxable service of renting of immovable property but to the taxable service "*in relation to*" the renting of immovable property. It is the petitioners contention that while the act does not treat renting of immovable property as a taxable service, the notification proceeds on the basis that the taxable service is the renting of immovable property itself. It is on

this basis that it has been contended that service tax is sought to be recovered from the petitioners on a pure misreading of the statutory provision.

6. Similarly, the impugned circular whilst giving a clarification in respect of commercial and industrial construction service has purported to clarify that the "right to use immovable property is leviable to service tax under the renting of immovable property service". Consequently, by the said clarification, the Union of India is seeking to levy service tax on renting of immovable property instead of on services in relation to renting of immovable property. According to the petitioners, the clarification therefore travels beyond the provisions of the said act by contemplating a service tax on the renting of immovable property itself.

7. Before we proceed any further it would be appropriate if the relevant provisions of the said act are pointed out. Chapters V and VA which comprise of sections 64 to 96-I of the Finance act, 1994 pertain to provisions for service tax. Section 65 of the said Act is comprised of definitions. Section 66 provides for the charge of service tax. It stipulates that there shall be levied a service tax at the rate of 12% on the value of the taxable services referred to in, *inter alia*, sub-clause (zzzz) of clause (105) of section 65 and collected in such manner as

may be prescribed. Clause (105) of section 65 of the said act defines "taxable service". Sub-clause (zzzz) thereof reads as under:-

"Section 65. Definitions.--in this chapter, unless the context otherwise requires,-

xxxx xxxx xxxx xxxx xxxx

(105) "taxable service" means any service provided or to be provided,-

xxxx xxxx xxxx xxxx xxxx

(zzzz) to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.

Explanation 1. – For the purposes of this sub-clause, "immovable property" includes—

(i) building and part of a building, and the land appurtenant thereto;

(ii) land incidental to the use of such building or part of a building;

(iii) the common or shared areas and facilities relating thereto; and

(iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,

but does not include--

(a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;

(b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;

(c) land used for educational, sports, circus, entertainment and parking purposes; and

(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2. – For the purposes of this sub-clause, any immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;"

The expression "renting of immovable property" has been defined in section 65(90a) as under:-

"(90a) "renting of immovable property" includes the renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include—

(i) renting of immovable property by a religious body or to a religious body; or

(ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.

Explanation 1. – For the purposes of this clause, "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings;

Explanation 2. – For the removal of doubts, it is hereby declared that for the purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;"

8. Mr. S Ganesh, the learned senior counsel appearing on behalf of the petitioner in writ petition (civil) no. 1659/2008 [*Home*

Solutions Retail India Ltd v. Union of India], submitted that the provisions of the said act do not provide for the levy of service tax on the renting of immovable property as such. It was also contended that the said act does not treat renting out of immovable property as a service. According to him, in terms of section 65(105)(zzzz), service tax is levied only on a service which is provided or to be provided to any person by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce. It was contended that on a plain reading of this provision, the service provided must be something which is distinct and different from the transaction of renting of immovable property as such though the service would have to be in relation to such renting. If the legislature wanted to treat renting of immovable property as a service, then, nothing would have been easier or simpler for the legislature than to use the words "service by way of renting of immovable property" or "the service of renting of immovable property" or "service consisting of renting of removal property".

9. It was further contended that the said provision indicates that the service will be provided "by any other person" and not only by the owner or lessor or person in possession of the immovable property. Furthermore, the service could be rendered to any person provided it was in relation to the renting of the property and not merely to the

person who takes the property on rent. If the renting of property as such constituted a service which could be taxed, then such a service could only be rendered to the person taking the property on rent and not "to any person". According to the learned senior counsel, this clearly indicates that renting of immovable property as such cannot be regarded as a service on which service tax could be levied under the provisions of the said act.

10. Mr. Ganesh also sought to draw a distinction between the provisions of section 65(105)(zzzz) and section 65(88) of the said act. The latter provision has a reference to the service of a real estate agent in relation to the renting of immovable property. It was contended that the language of the two provisions is similar. From this it was sought to be contended that there is a clear indication that the expression "service in relation to the renting of immovable property" means a service which is distinct and different from the renting of property itself although it may be connected with or related to such renting. According to him, these services (which are not covered by other specific clauses of section 65) include air-conditioning service, standby power service, sanitation service, water supply service etc. He also made reference to a circular dated 17/09/2004 issued by the Central board of Excise and Customs which has been extracted at page 17 of the petition in WP(C) no. 1659/2008 [*Home Solutions Retail India Ltd*

v. Union of India] and which apparently states that "the activity of renting premises is not rendering of service".

11. It was therefore submitted that the impugned notification dated 22/05/2007 and the impugned circular dated 04/01/2008 which proceed on the assumption that the renting out of immovable property is by itself a service, are contrary to and inconsistent with the charging provision and are therefore *ultra vires* the Act and hence bad in law. With reference to the decision in the case of ***Union Of India v. Intercontinental: 2008 (226) ELT 16***, the learned counsel submitted that a circular or notification can never rewrite or amend the provisions of the statute.

12. Mr. Ganesh submitted that the judgment of the Supreme Court in the case of ***All India Federation Of Chartered Accountants v. Union Of India: (2007) 7 SCC 527*** fully supports the case of the petitioner that the service contemplated and covered by section 65(105)(zzzz) is a property-based or property related service, but it must be a service all the same. Reliance was placed on paragraphs 7 and 48 of the said decision. He also referred to the Supreme Court decision in the case of ***T. N. Kalyana Mandapam Association v. Union of India & Others: (2004) 5 SCC 632*** and submitted that the said decision also supports the case of the petitioners. According to him,

the said judgment makes it clear that a particular property can be regarded as a *Kalayana Mandapam (supra)* only if it has all the apparatus, equipment and infrastructure which enables it to be utilised for rendering services for the holding of ceremonial, religious or social functions. It was also submitted by him that the Supreme Court decision in the case of the ***Doypack Systems Private Limited v. Union of India: (1998) 2 SCC 299***, which had interpreted the words "*in relation to*", also contemplated that it applied to a different subject matter as compared to the thing to which it was related. In this backdrop, the learned counsel submitted that the service in relation to the renting of immovable property necessarily has to be a distinct subject matter as compared to the renting out of the property itself. There is no doubt that the words "in relation to" have a wide ambit but that only means that a wide variety of services relating to the renting a property would be covered by the charge of service tax.

13. It was further contended that a bare room in a commercial building could not be considered to be an office unless and until it was fully equipped with equipment and also manned by personnel. It is only then that the renting of such an office or permitting its use would constitute the rendering of a service. Similarly, renting out of a large property does not constitute a service in itself even though the tenant may use it for the purpose of conducting a wedding or other ceremonial

function. Referring to the Supreme Court decision in the case of ***BSNL v. Union of India:*** **(2006) 3 SCC 1,** the learned counsel submitted that the very same transaction cannot constitute both a transfer of property and also the rendering of a service. Whether the property is granted by way of a lease or licence it is merely a property transaction and cannot possibly be construed as the rendering of a service.

14. The learned counsel appearing for the petitioner in writ petition (civil) number 8554/2008 [***Alpha Future Airport Retail (India) Ltd v. Union of India***] submitted that his case had an added dimension. He submitted that Delhi International airport Limited has the right to operate duty-free shops in designated areas in the Delhi International airport. The said Delhi International airport Limited has granted a licence to the petitioner to operate the said duty-free shops. The licence agreement is a single indivisible agreement which grants to the petitioner the licence to operate the said duty-free shops and also permits the petitioner to use the space in the said areas. For this purpose, the petitioner pays a composite licence fee to Delhi International airport Limited which is partly a fixed amount and partly a percentage of the gross sale proceeds of the duty-free shops. It is impossible to ascertain what part of it is attributable to the user of the immovable property as distinct from the grant of the licence to operate a duty-free shop. It was submitted that in the very nature of things, the

user of the property and the grant of the licence were inseparable because the duty-free shops could not be operated in any place other than the said designated areas in the Delhi International airport. It was submitted that there is no machinery or provision under the said act to determine the amount which is attributable to the user of the property as distinct from the grant of the licence to operate the duty-free shops. Consequently, the charge of service tax would in any event break down. Thus, it was contended, that when the computation was not possible the charge itself would fail. Reliance was placed on the decision of the Supreme Court in ***Commissioner of Income-tax, Bangalore v. B.C. Srinivasa Shetty: 128 ITR 294*** **[(1981) 2 SCC 460].**

15. Dr. Abhishek Singhvi, senior advocate, who appeared for the petitioner in writ petition civil number 4131/2008 [***Shoppers Stop Limited v. Union of India***], submitted that the expression "in relation to" separates objects from each other. According to him the phrase by itself conceives of two separate things. He submitted that service tax is a value-added tax and therefore only the value addition is liable to be taxed by way of a service tax. He referred to the decision of the Supreme Court in the case of ***All India Federation of Tax Practitioners*** *(supra).* In particular, he referred to paragraph 8 of the said decision which reads as under:-

> "8. As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly "services" fall into two categories, namely, property-based services and performance based services. Property-based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwallas, etc. Performance-based services are services provided by service providers like stockbrokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents, etc."

16. On the strength of these observations, it was contended by Dr. Singhvi that since service tax is a value-added tax and can only be levied on the value addition, the words "in relation to" in section 65 (105) (zzzz) of the said Act are of great significance and importance. The value addition of service in the present context could be an improvement or the betterment of the property provided by the owner to the lessee or licensee. It is that betterment alone which can qualify as a service. The act of renting of the immovable property by itself does not provide any value addition to any person and therefore cannot be treated as a service. According to Dr. Singhvi, the legislature used the words "in relation to" with a clear intent of divorcing the actual renting of the property from the services to be rendered in relation to such renting. Thus, the transaction of renting of immovable property by itself is not taxable under section 65 (105) (zzzz) of the said Act. Consequently, the notification dated 22/05/2007 which purports to tax

the entire rent received by a landlord/owner tends to distort the legislative intent made clear through the said Act by means of an administrative interpretation.

17. It was further emphasised by Dr. Singhvi that an examination of the various entries falling within the scope of "taxable service" would reveal that it is only the value addition which is taxable. In the case of a stockbroker, real estate broker, auctioneer, travel agent, etc it is only the commission received by the service provider which is subjected to service tax and not the main transaction of sale or purchase. This by itself clearly indicates that it is only the service rendered by a person to another which is the intangible value addition to the main transaction which is subjected to service tax. Consequently in respect of renting of immovable property also the main transaction of renting of immovable property and the rents paid therefor cannot be subjected to service tax. It is only the value addition by a service relating to renting of immovable property that can be the subject matter of service tax.

18. Mr. Jayant Bhushan who appeared for the petitioners in writ petition civil numbers 7164/2008 and 7212/2008 and Mr. Mittal who appeared for the petitioner in writ petition civil number 7964/2008, reiterated and adopted the arguments of Mr. Ganesh and Dr. Singhvi.

Both of them also contended that renting of immovable property by itself did not constitute a service.

19. Mr. PP Malhotra, the learned Additional Solicitor General of India, appearing for the Union of India contended that the user of land/building itself is the service. He referred to the decision of the Supreme Court in the case of ***All India Federation*** *(supra)* and contended that service tax is a value-added tax which in turn is a general tax which applies to all commercial activity involving production of goods and provision of services. He contended that the transfer of the right to use a particular property for a commercial or business purpose was itself the service which was contemplated in section 65 (105) (zzzz) of the said act. According to him, the mere renting of immovable property in itself constituted a service. He submitted that the definition of renting of immovable property in section 65 (90a) was an all inclusive definition. Referring to the decision in ***Kalyana Mandapam Association*** *(supra)*, Mr. Malhotra submitted that even if premises were made available for a few hours for the purpose of utilisation as a mandap, whether with or without other services, would itself be a service and could not be classified as any other kind of legal concept. He submitted that merely providing a premises on a temporary basis for organising a financial, social or

business function would also include other facilities in relation there to and would therefore constitute a taxable service.

20. In response to the argument that the expression "in relation to renting of immovable property" does not refer to the renting itself but to some other service in relation to the renting of immovable property, Mr. Malhotra submitted that such an argument is demonstrably untenable. For this purpose he referred to section 65 (105) (zt) which defines the service provided or to be provided to any person, by a dry cleaner in relation to dry-cleaning. Here, the service provided in relation to dry-cleaning clearly includes the service of dry-cleaning. Mr. Malhotra then referred to section 65 (105) (zv) which defines the service provided or to be provided to any person, by a fashion designer in relation to fashion designing. Here, too, the service provided in relation to fashion designing includes the service of fashion designing itself. By this analogy, Mr. Malhotra contended that the expression "in relation to renting of immovable property" also covered the act of renting of immovable property. He submitted that the giving of a premises for commercial or business activity was itself a service.

21. He referred to Words and Phrases, permanent edition, volume 38A, page 542 wherein it is noted as under:-

> "The term "services" generally includes any act performed for benefit of another under some arrangement or agreement whereby such act must have been performed."

He also drew our attention to page 555 thereof wherein it is written:-

> "use of a garage is "service" within rent control regulation."

A reference was also made to the following at page 193:-

> "in common usage, a "service" is not property, tangible or otherwise, but, rather, is an act."

Mr. Malhotra also referred to Jowitt's Dictionary of English law, second edition, where service in connection with a landlord-tenant relationship has inter alia been shown to include:-

> "certain services were such as were fixed in quantity, as to pay a certain rent, or to plough a field for three days every year;"

From the above references, Mr. Malhotra sought to contend that the use of the property by itself was a service. He contended that letting out the property or permitting another person to use the same as a licensee by itself constituted an act which could be classified as a service.

22. With reference to the Supreme Court decision in ***Doypack Systems Private Limited*** *(supra)*, he contended that the expression "in relation to" is used in an expansive sense. It is an expression of

expansion and not of contraction. Therefore, the expression "in relation to renting of immovable property" must be given an expansive meaning of the widest amplitude. Consequently, he said that the expression would definitely cover the renting of immovable property itself and not be limited to some service in connection with the renting of immovable property.

23. Our attention was also drawn to the decision of the Supreme Court in the case of ***Lucknow development authority v. MK Gupta*: (1994) 1 SCC 243**, wherein at page 254 the following observation is to be found:-

> "4. What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of given property. The answer to all this shall understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. **The concept of service thus is very wide. How it should be understood and what it means depends in the context in which it has been used in an enactment."**
>
> (emphasis supplied)

24. A reference was also made by Mr. Malhotra to the Supreme Court decision in ***NS Nayak and Sons v. State of Goa*: (2003) 6 SCC 56**, wherein the court observed:-

"the expression "in relation to" is of the widest import as held by various decision of this court in Doypack Systems Private Limited ..."

"... when the legislature has used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning."

25. On the basis of the foregoing, Mr. Malhotra contended that there is no occasion for any debate after the decision of the Supreme Court in the case of ***TN Kalyana Mandapam Association*** *(supra)* where the mere making available of a mandap with or without other services was itself regarded as a service exigible to service tax under the said act. The said decision also settled any debate about the constitutional validity of service tax. In conclusion, Mr. Malhotra submitted that the writ petitions deserve to be dismissed.

26. In rejoinder, Mr. Ganesh submitted that a mere property transaction cannot be a service. He submitted that even in the ***T.N. Kalyana Mandapam*** case it has not been held that a mere property transaction could constitute a service and that too a taxable service under the said act. He submitted that a mandap was not a bare piece of property but property with other furniture, etc. Moreover the service was to be provided by a mandap keeper as defined in section 65 (67) of the said act. The Supreme Court decision itself noted that a mandap keeper provided a bundle of services and it was not the case of a mere

permission to use a particular property. The expression with or without other services appearing in paragraph 55 of the said decision does not mean with or without services but has a clear reference to "other services", other than the services provided by a mandap keeper such as catering services.

27. He submitted that whenever the meaning of words in a statute is in question the same has to be seen in the context in which they are used. Reliance was placed upon the Supreme Court decision reported in ***His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.:*** **(1973) 4 SCC 225 [at page 316]**. He submitted that the expression "in relation to" was used in varying contexts in section 65 (105) of the Act itself. For example, in section 65 (105) (zm) there is reference to a service provided or to be provided to any person by a banking company or a financial institution including a nonbanking financial company, or any other body corporate or commercial concern, in relation to banking and other financial services. The expression in relation to clearly refers also to the banking and other financial services. The activity, that is, banking and other financial services, is clearly an unmistakably a service. The service provider is identified and the nature of the service is such that it can be provided by the service provider. But, the renting of immovable property is merely a property transaction. There is no service provider.

Section 65 (105) (zzzz) does not specify the service provider. It also does not identify the service receiver. Nor is the nature of the service indicated.

28. Mr. Ganesh referred to other sub-clauses of section 65 (105) which were similar to the sub-clause relating to banking and other financial services. He referred to sub-clauses (zn) which pertained to Port services; (zo) service stations; (zq) beauty treatment; (zr) cargo handling services; and (zs) cable services. He then referred to section 65 (88) which defined a "real estate agent" to mean a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant. He submitted that here the expression "in relation to" did not cover the activity of sale purchase leasing or renting of real estate. It only referred to a service in connection with the activity of sale purchase leasing or renting of real estate. Consequently, the meaning of the expression "in relation to" has changed with the context. Similarly, he referred to section 65 (105) (v) which refers to a service provided or to be provided to any person by a real estate agent in relation to real estate. It is obvious that real estate by itself is not a service and therefore the expression "in relation to" has to be read in a manner where real estate does not constitute the service but there is a reference to some other service having a connection with real estate. Mr. Ganesh

finally contended that just as section 65(105)(v) refers to a service in connection with real estate and not to real estate itself as a service, section 65 (105) (zzzz) refers to a service in connection with the renting of immovable property and not to the activity of renting of immovable property itself as a service. This being the clear intention of the legislature, the notification and circular which tend to give a different construction are clearly *ultra vires* the said act and ought to be set aside.

29. The counsel appearing on both sides have sought to place reliance on ***T.N. Kalyan Mandapam*** *(supra)*, ***All India Federation*** *(supra)* and ***Doypack Systems Pvt Ltd*** *(supra)*. It would, therefore, be necessary to examine these decisions of the Supreme Court. In ***T.N. Kalyana Mandapam*** *(supra)*, the Supreme Court considered the issue of the taxable service provided by a mandap keeper. The said taxable service was earlier indicated under Section 65(41)(p) of the said Act. At present, with minor modifications, the relevant provision is Section 65(105)(m) of the said Act. Earlier, 'mandap keeper' was defined under Section 65(20) and 'mandap' itself was defined under Section 65(19). At present, 'mandap keeper' is defined under Section 65(67) and 'mandap' is defined under Section 65(66). There are only minor changes. As the provisions stood at the time of the decision of the

Supreme Court in ***All India Federation*** *(supra)*, the taxable service in question was:-

> "Any service provided to a client, by a mandap keeper in relation to use of a mandap in any manner, including the facilities provided to the client in relation to such use and also the service, if any, rendered as a caterer";

'Mandap keeper' was defined to mean a person who allowed temporary occupation of a mandap for consideration for organising any official, social or business function. Mandap was defined to mean any immovable property as defined in Section 3 of the Transfer of Property Act, 1882 and included any furniture, fixtures, light fittings and floor coverings therein let out for consideration for organizing any official, social or business function. In the context of these provisions, one of the questions that arose before the Supreme Court was whether the tax imposed under the Finance Act on catering services did not amount to a tax on sale and purchase of goods. The Supreme Court held that the taxable service provided as a caterer by a mandap keeper was within the legislative competence of the Parliament and could not be construed as a tax on the sale and purchase of goods. In this context, the Supreme Court observed that it was well-settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of the gross charges for catering did not

alter or affect the legislative competence of the Parliament in the matter. The Supreme Court then observed as under:-

> "47. The legislative competence of Parliament also does not depend upon whether in fact any services are made available by the Mandapmam -Keepers within the definition of taxable service contained in the Finance Act. Whether in the given case taxable services are rendered or not is a matter of interpretation of the statute and for adjudication under the provisions of the statute and does not affect the vires of the legislation and/or the legislative competence of Parliament. In fact, a wide range of services are included in the definition of taxable services as far as Mandapmam -Keepers are concerned. The said definition includes services provided "*in relation to use of Mandapmam in any manner*" and includes "*the facilities provided to the client in relation to such use*" and also the services "*rendered as a caterer*". The phrase "*in relation to*" has been construed by this Court to be of the widest amplitude. In ***Doypack Systems Pvt. Ltd. vs. Union of India and Ors.:1988 (2) SCC 299*** at p.302, this Court observed as under:
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> > "The expressions 'pertaining to', 'in relation to' and 'arising out of', used in the deeming provision, are used in the expansive sense. The expression 'arising out of' has been used in the sense that it comprises purchase of shares and lands from income arising out of the Kanpur Undertaking. The words "pertaining to" and "in relation to" have the same wide meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentence, a method followed in good drafting. The word 'pertain' is synonymous with the word 'relate'. The term 'relate' is also defined as meaning to bring into association or connection with. The expression 'in relation to' (so also 'pertaining to'), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both a direct significance as

well as an indirect significance depending on the context."

The Supreme Court also observed:-

> "51. Taxable services, therefore, could include the mere providing of premises on a temporary basis for organizing any official, social or business functions, but would also include other facilities supplied in relation thereto. No distinction from restaurants, hotels etc which provide limited access to property for specific purpose."

30. Furthermore, the Supreme Court emphasized that a tax cannot be struck down on the ground of lack of legislative competence by enquiring whether the definition accords with what the layman's view of service is. It noted the well-settled principle that in matters of taxation, the courts permit greater latitude to the statute to pick and choose objects and rates for taxation and has a wide discretion with regard thereto. At this juncture, it may be pointed out that the main challenge in the present petitions is not on the ground of lack of legislative competence, but on the ground that the impugned notification and circular are *ultra vires* the Act itself. Therefore, the areas of discussion in the ***T.N. Kalyana Kandapam*** *(supra)* and the present case are somewhat different.

31. In the said decision of the Supreme Court, it has also been observed that a levy of service tax on a particular kind of service could

not be struck down on the ground that it does not conform to the common understanding of the word "service" so long as it does not transgress any specific restriction contained in the Constitution. But, the scope of discussion in the present case is entirely different. It is the petitioners' contention that the intention of the legislature in enacting Section 65(105)(zzzz) was not to tax the activity of renting of immovable property, but only to levy a tax on a service which is provided in relation to renting of immovable property.

32. As noted above, Mr P.P. Malhotra, the learned Additional Solicitor General had placed reliance on the observation of the Supreme Court in ***T.N. Kalyana Mandapam*** *(supra)*, which is to the effect that "making available a premises for a period of a few hours for the specific purpose of being utilized as a mandap whether with or without other services would itself be a service and cannot be classified as any other kind of legal concept". But, we must not lose sight of the fact that the service provided by a mandap keeper is entirely different in nature to the service, which is in contemplation under Section 65(105)(zzzz). As noted in the Supreme Court decision in ***T.N. Kalyana Mandapam*** *(supra)* itself, the service of a mandap keeper does not involve transfer of movable property nor does it involve a transfer of any immovable property of any kind known to law either under the Transfer of Property Act or otherwise and, therefore, the said

activity could only be classified as a service. In the present petitions, we find that there is a transfer of immovable property insofar as those properties are concerned where leases have been executed. Although the right of ownership is not transferred and is retained by the owner, the right of possession certainly gets transferred in the case of a lease. In the case of a licence also, the possession is of the licensee although the nature of such possession is only permissive. Thus, the observations of the Supreme Court in ***T.N. Kalyana Mandapam*** *(supra)* that the utilization of the premises as a mandap by itself would constitute a service would have to be distinguished from the kind of activity that is contemplated under Section 65(105)(zzzz). We are of the view that the case of a mandap and service provided by a mandap keeper would not be applicable to the case of renting of immovable property simpliciter. The Supreme Court in paragraph 56 of the said decision itself makes it clear that mandap keepers provide a wide variety of services apart from the service of allowing temporary occupation of a mandap. A mandap keeper, apart from the proper maintenance of mandap, also provides the necessary paraphernalia for holding official, social or business functions, apart from providing the conditions and ambience which are required by the customer, such as providing the lighting arrangements, furniture and fixtures, floor coverings, etc. The service provided by him, as indicated in the Supreme Court decision, cover the method and manner of decorating

and organizing the mandap and the mandap keeper also provides the customer with advice as to what should be the quantum and quality of the services required keeping in view the requirement of the customer, the nature of the event to be solemnized, etc. It is in this context that the Supreme Court observed that the service of a mandap keeper cannot possibly be termed as a hire-purchase agreement or a right to use goods or property. It is obvious that there is a distinction between the services provided by a mandap keeper and the activity of hiring or giving on rent immovable property. The situations are different, the activities are different. The Supreme Court observed that a tax on services rendered by mandap keepers and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire-purchase activities. We feel that this conclusion of the Supreme Court makes the distinction clear between the case of a mandap keeper and that of a person who rents out an immovable property for use in the course or furtherance of business or commerce. Consequently, the Supreme Court decision in the case of ***Kalyana Mandapam*** *(supra)* does not advance the case of the respondents. On the other hand, it does go towards clarifying the stand taken by the petitioners.

33. The next decision which requires consideration is the decision of the Supreme Court in the case of ***All India Federation of Tax Practitioners*** *(supra)*. We have already quoted paragraph 8 of the

said decision wherein it has been observed that service tax is a value added tax and that just as excise duty is a tax on value addition on goods, services tax is on value addition by rendition of services. A distinction has also been sought to be made between property based services and performance based services. The property based services cover service providers, such as architects, interior designers, real estate agents, construction services, mandap keepers, etc. Whereas the performance based services are those provided by persons, such as stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc. The Supreme Court also noted that service tax is a tax on service and not on the service provider.

34. From the above discussion, it is apparent that service tax is a value added tax. It is a tax on value addition provided by a service provider. It is obvious that it must have connection with a service and, there must be some value addition by that service. If there is no value addition, then there is no service. With this in mind, it would be instructive to analyse the provisions of Section 65(105)(zzzz). It has reference to a service provided or to be provided to any person, by any other person in relation to "renting of immovable property for use in the course or furtherance of business or commerce". The wordings of the provision are so structured as to entail – a service provided or to be

provided to 'A' by 'B' in relation to 'C'. Here, 'A' is the recipient of the service, 'B' is the service provider and 'C' is the subject matter. As pointed out above by Mr Ganesh, the expression "in relation to" may be of widest amplitude, but it has been used in the said Act as per its context. Sometimes, "in relation to" would include the subject matter following it and on other occasions it would not. As in the case of the service of dry cleaning, the expression "in relation to dry cleaning" also has reference to the very service of dry cleaning. On the other hand, the service referred to in Section 65(105)(v), which refers to a service provided by a real estate agent "in relation to real estate", does not, obviously, include the subject matter as a service. This is so because real estate by itself cannot by any stretch of imagination be regarded as a service. Going back to the structured sentence, i.e.– service provided or to be provided to 'A' by 'B' in relation to 'C', it is obvious that 'C' can either be a service (such as dry cleaning, hair dressing, etc.) or not a service by itself, such as real estate. The expression "in relation to" would, therefore, have different meanings depending on whether 'C' is a service or is not a service. If 'C' is a service, then the expression "in relation to" means the service 'C' as well as any other service having connection with the service 'C'. Where 'C' is not a service, the expression "in relation to" would have reference only to some service which has a connection with 'C'. But, this would not imply that 'C' itself is a service.

35. From this analysis, it is clear that we have to understand as to whether renting of immovable property for use in the course or furtherance of business or commerce by itself is a service. There is no dispute that any service connected with the renting of such immovable property would fall within the ambit of Section 65(105)(zzzz) and would be exigible to service tax. The question is whether renting of such immovable property by itself constitutes a service and, thereby, a taxable service. We have already seen that service tax is a value added tax. It is a tax on the value addition provided by some service provider. Insofar as renting of immovable property for use in the course or furtherance of business or commerce is concerned, we are unable to discern any value addition. Consequently, the renting of immovable property for use in the course or furtherance of business of commerce by itself does not entail any value addition and, therefore, cannot be regarded as a service. Of course, if there is some other service, such as air conditioning service provided alongwith the renting of immovable property, then it would fall within Section 65(105)(zzzz).

36. In view of the foregoing discussion, we hold that Section 65(105)(zzzz) does not in terms entail that the renting out of immovable property for use in the course or furtherance of business of commerce would by itself constitute a taxable service and be exigible

to service tax under the said Act. The obvious consequence of this finding is that the interpretation placed by the impugned notification and circular on the said provision is not correct. Consequently, the same are *ultra vires* the said Act and to the extent that they authorize the levy of service tax on renting of immovable property *per se*, they are set aside.

37. Before parting with this batch of cases, we would like to observe that we have not examined the alternative plea taken by the petitioners with regard to the legislative competence of the Parliament in the context of Entry 49 of List II of the Constitution of India. Such an examination has become unnecessary because of the view we have taken on the main plea taken by the petitioners as indicate above.

38. The writ petitions are allowed to the extent indicated above. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

April 18, 2009
HJ/dutt

For this reason, the impugned order is set aside and matter remanded to Commissioner (Appeals) for *de novo* consideration. Matter shall be disposed of within four months from the date of receipt of this order.

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[2008] 17 STT 479 (CHENNAI - CESTAT)

CESTAT, CHENNAI BENCH

Macro Marvel Projects Ltd.

v.

Commissioner of Service Tax*, Chennai

P.G. CHACKO, JUDICIAL MEMBER
AND P. KARTHIKEYAN, TECHNICAL MEMBER

FINAL ORDER NO. 1047 OF 2008
STAY ORDER NO. 842 OF 2008
APPLICATION NO. S/PD/158 OF 2008
AND APPEAL NO. S/184 OF 2008
SEPTEMBER 24, 2008

Section 65 of the Finance Act, 1994 - Construction of complex service - Period 16-6-2005 to 30-11-2005 - Assessee had constructed individual residential houses each being a residential unit - Revenue demanded service tax in category of 'construction of complex service' - Whether since for levy of service tax in category of 'Construction of complex service', it should be a residential complex comprising more than 12 residential units, individual residential units constructed by assessee would not be subjected to service tax - Held, yes [Paras 2 and 3]

Smt. G. Dhana Madhri *for the Appellant.* **V.V. Hariharan** *for the Respondent.*

ORDER

P.G. Chacko, Judicial Member. - After examining the records and hearing both sides, we are of the view that the appeal itself requires to be summarily disposed of. Accordingly, after dispensing with pre-deposit, we take up the appeal.

2. The appeal is against demand of service tax of Rs. 15,63,145 for the period 16-6-2005 to 30-11-2005 under the head "Construction of complex" service under section 65(*30a*) of the Finance Act, 1994. The lower authorities have also imposed a penalty on the assessee under section 76 of the said Act. The impugned demand is on the amount collected by the appellants from their

*In favour of assessee.

clients as consideration for construction and transfer of residential houses. It is the case of the appellants that the work done by them fell within the ambit of 'works contract', which became taxable only with effect from 1-6-2007 *vide* section 65(*105*)(*zzzza*) of the Finance Act, 1994. It is also submitted that service tax cannot be levied from the appellants under any other head for any period prior to 1-6-2007. We have heard the learned Jt. CDR also, who submits that the case may at best be remanded to the authorities below, who apparently did not examine all the submissions of the party. After examining the records of the case, we do not think that a remand is warranted in this case inasmuch as the authorities below chose to sustain the demand of service tax raised in the show-cause notice, regardless of the fact that construction of individual residential units was not included within the scope of "construction of complex" defined under section 65(*30a*) of the Finance Act, 1994. The definition reads as follows:—

"'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 applications or fittings and other similar services; or

(*c*) Repair, alteration, renovation or restoration of, or similar services in relation to, residential complex."

'Residential complex' stands defined under clause (*91a*) of section 65 of the Act, which is 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 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."

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'. These observations of ours with reference to 'works contract' have been occasioned by certain specific grounds of this appeal and the same are not intended to be a binding precedent for the future.

3. For the reasons already noted, we set aside the impugned order and allow this appeal. The stay application also gets disposed of.

■■

[2008] 17 STT 481 (NEW DELHI - CESTAT)

CESTAT NEW DELHI BENCH

Delux Colour Lab (P.) Ltd.*

v.

Commissioner of Central Excise, Jaipur

JUSTICE S.N. JHA, PRESIDENT
AND M. VEERAIYAN, TECHNICAL MEMBER

FINAL ORDER NOS. ST/285 TO 288 OF 2008
SERVICE TAX APPEAL NOS. 86 & 487 OF 2006, 147 & 333 OF 2007
OCTOBER 22, 2008

Section 65 of the Finance Act, 1994 - Photography service - Whether deemed sale of materials takes place in rendering of photography service and, therefore, value of materials cannot be included while computing value of said service - Held, yes - Assessee was a photography service provider - Authorities below rejected assessee's plea that photography service was in nature of works contract involving sale of material used in it on which sales tax was payable and demanded service tax on gross amount charged from customers which included cost of materials - Supreme Court in case of BSNL v. UOI [2006] 3 STT 245 held that works contract involves element of both sale and service contract and that service and sale elements can be split up - Whether if photography service is a 'works contract', it would follow that it

*Matter remanded.

2008 (12) S.T.R. 603 (Tri. - Chennai)

MACRO MARVEL PROJECTS LTD.

Versus

COMMR. OF SERVICE TAX, CHENNAI

Final Order No. 1047/2008 and Stay Order No. 842/2008, dated 24-9-2008 in Application No. S/PD/158/2008 in Appeal No. S/184/2008

Construction of Residential Complex service - House construction - Residential complex to comprise more than 12 units to attract liability - Photographs indicating construction of individual residential houses each being a residential unit - Legislative intention not to levy Service tax on construction of individual residential units - Plea by appellant that from 1-6-2007, impugned activity can be covered under Works Contract service, not acceptable - Works Contract service includes residential complex and not individual residential units - Impugned activity not liable to Service tax - Sections 65(30a), 65(105)(zzzza) and 73 of Finance Act, 1994. *[paras 2, 3]*

Works Contract service - House construction - Explanation in relevant provision includes construction of new residential complex or part thereof within the scope of works contract - Individual residential units not to be considered as residential complex or part thereof - Construction of individual residential houses not covered under Works Contract service - Sections 65(91a) and 65(105)(zzzza) of Finance Act, 1994. *[para 2]*

Construction of Residential Complex service - Legislative intention - Construction of individual residential units not subject to levy of Service tax - Section 65(30a) and 65(91a) of Finance Act, 1994. *[para 2]*

Appeal allowed

REPRESENTED BY : Smt. G. Dhana Madhri, Advocate, for the Appellant.
Shri V.V. Hariharan, Jt. CDR, for the Respondent.

[Order per : P.G. Chacko, Member (J)]. - After examining the records and hearing both sides, we are of the view that the appeal itself requires to be summarily disposed of. Accordingly, after dispensing with pre-deposit, we take up the appeal.

2.The appeal is against demand of service tax of Rs. 15,63,145/- for the period 16-6-2005 to 30-11-2005 under the head "construction of complex" service under Section 65(30a) of the Finance Act, 1994. The lower authorities have also imposed a penalty on the assessee under Section 76 of the said Act. The impugned demand is on the amount collected by the appellants from their clients as consideration for construction and transfer of residential houses. It is the case of the appellants that the work done by them fell within the ambit of 'works contract', which became taxable only with effect from 1-6-2007 vide Section 65(105)(zzzza) of the Finance Act, 1994. It is also submitted that service tax cannot be levied from the appellants under any other head for any period prior to 1-6-2007. We have heard the learned Jt. CDR also, who submits that the case may at best be remanded to the authorities below, who apparently did not examine all the submissions of the party. After examining the records of the case, we do not think that a remand is warranted in this case inasmuch as the authorities below chose to sustain the demand of service tax raised in the show-cause notice, regardless of the fact that construction of individual residential units was not included within the scope of "construction of complex" defined under Section 65(30a) of the Finance Act, 1994. The definition reads as follows :-

"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 applications or fittings and other

similar services; or

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex.

'Residential complex' stands defined under clause (91a) of Section 65 of the Act, which is 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 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."

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'. These observations of ours with reference to 'works contract' have been occasioned by certain specific grounds of this appeal and the same are not intended to be a binding precedent for the future.

3.For the reasons already noted, we set aside the impugned order and allow this appeal. The stay application also gets disposed of.

(Dictated and pronounced in open court)

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