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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
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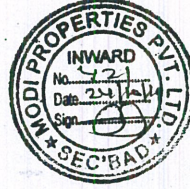
Dated: 03/10/2019

File No. :-ST/27013/2013

In the matter of :-

Modi And Modi Constructions
(Appellant as per address below)

Commissioner of Central Tax and
Central Excise, GST Commissionerate-
Secunderabad - G S T
(Respondent as per address below)



(Appellant)

Vs

(Respondent)

I am directed to transmit herewith a certified copy of Order No. : A/30575/2019 dated : 03/10/2019 passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.

Assistant Registrar

S.NO, Case Number, Name & Address of Appellant :-

1 ST/27013/2013 Modi And Modi Constructions
5-4-187/3&4, 2nd Floor, M.g. Road
SECUNDERABAD
TS-500003

S.NO, Case Number, Name & Address of Respondent :-

1 ST/27013/2013 Commissioner of Central Tax and Central Excise,
GST Commissionerate-Secunderabad
SHULK BHAVAN, LB STADIUM ROAD, BASHEERBAGH
HYDERABAD
TELANGANA-500004

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6. Advocate^(s) / Consultant^(s) / Representative:-

Hiregange & Associates Chartered Accountants (New)
4th Floor, West Block,
Anushka Pride, Opp. Ratnadeep Supermarket, Road
Number -12, Banjara Hills,
Hyderabad-500034

Assistant Registrar

DB-D-8

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench

Court - I

Appeal No. ST/27013/2013

(Arising out of Order-in-Appeal No. 14/2013 (H-II) S. Tax dt.30.01.2013 passed by CCCE & ST (Appeals-II), Hyderabad)

M/s Modi & Modi Constructions

5-4-187/3 & 4, 2nd Floor, M.G. Road,
Secunderabad - 500 003

.....Appellant

VERSUS

**Commissioner of Customs, Central Excise
& Service Tax, Hyderabad - II**

Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad - 500 004

.....Respondent

Appearance

Present for the Appellant: Shri Sudhir V.S, Chartered Accountant

Present for the Respondent: Shri B. Natesh, Authorized Representative

Coram:

HON'BLE MS. SULEKHA BEEVI C.S, MEMBER (JUDICIAL)

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)



FINAL ORDER No. A/30575/2019

Date of Hearing: 19.06.2019

Date of Decision: 3-10-2019 (18)

[Order per: P. VENKATA SUBBA RAO]

1. This appeal is filed against Order-in-Appeal No. 14/2013 (H-II) S. Tax dt.30.01.2013.
2. Heard both sides and perused the records. The appellants are engaged in providing works contract service and are registered with the service tax department. Show cause notices were issued to them by the department demanding service tax on row houses which they have constructed and sold to individuals under the project name "Nilgiri Homes". Initially, the SCN dt.12.04.2010 covering the period January, 2009 to December, 2009 was

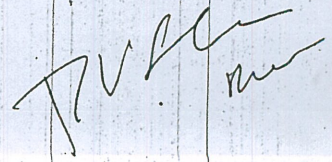
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issued proposing to demand service tax on amounts received towards construction agreements entered into by the appellant. This Bench vide Final Order No. A/30172-30178/2019 dt.31.01.2019 set aside the demands raised in the SCN holding that service tax is not applicable on construction services provided by the builder prior to 01.07.2010.

3. The present appeal pertains to the subsequent two SCNs for subsequent periods, part of which falls prior to 01.07.2010 and the rest post 01.07.2010. These demands are as follows:

SCN reference	Period	Proposed Demand
SCN OR No. 59/2011-Adjn (S.T.) Gr.X dated 23.04.2011	Jan 2010 to Dec 2010	Rs.12,06,447/-
SCN OR No. 53/2012-Adjn (Addl.Commr) dated 24.04.2012	Jan 2011 to Dec 2011	Rs.27,61,048/-
Total		Rs.39,67,475/-

4. It is alleged in the SCNs that the assessee had built residential complexes and have entered into a sale deed for sale of undivided portion of land together with semi finished portion of the flat/house and a separate agreement for completion of construction with customers. On execution of sale deed the right in property got transferred to the customer. There is no demand up to this stage. Thereafter, under an agreement of completion of construction was entered into which is taxable as there exists service provider and service recipient relationship between them. It is also alleged in the SCN that this construction agreement entered into by the appellant includes both transfer/deemed transfer of the property in goods and rendition of services. Therefore, these services fall under the category of "works contract service" and are chargeable to service tax under Section 65(105)(zzzza) of the Finance Act, 1994. It is further stated in the SCN that an optional composition scheme for payment of service tax in relation to works contract service has been provided vide notification 32/2007-ST dt.22.05.2007 effective from 01.06.2007 under Works Contract Service (Composition Scheme for payment of Service Tax) Rules, 2007. Under the said scheme, the assessee has to pay an amount equal to 2% of the gross amount charged for works contract including the VAT or sales tax paid. Further, with effect from 01.03.2008 the aforesaid rate of 2% has been enhanced to 4% vide notification 07/2008-ST dt.01.03.2008. The



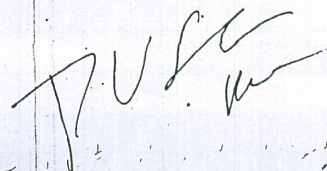
department obtained from the appellant amounts received by them and reckoned this amount as total consideration received by them for the service and calculated an amount of service tax payable. The assessee has already paid some amount of the service tax. It is further alleged in the SCN that the appellants have not been discharging their service tax properly and only on verification of records, these facts came to light. Accordingly, the SCN proposed to demand the above amounts as service tax along with interest and further proposed to impose penalties under Section 76 & 77 of the Finance Act, 1994. After following due process, learned adjudicating authority confirmed the demands and imposed penalties as proposed. On appeal, the first appellate authority upheld the demand but remanded the matter back to the lower authority for re-computation of the demand as the appellant has alleged that the demand was made on the sale deed value and not merely on the amount received for construction services. Further, the first appellate authority reduced the penalty imposed under Section 76 and set aside the penalty imposed under Section 77 of the Finance Act, 1994. In other words, while upholding the taxability on the appellant's activity under the works contract service as proposed in the SCN, learned first appellate authority in the impugned order only remanded it to the original authority for the limited purpose of re-computing the service tax.

5. Aggrieved by this order, the present appeal is filed. Learned counsel for the appellant argued as follows:

- 1). They have been building individual houses in the project "Nilgiri Homes" and not flats and therefore, the same is not chargeable to service tax as construction of residential complex service does not include individual homes. He draws the attention of the bench to the definition of residential complex in Section 65(91a) which is as follows:

"residential complex" means any complex comprising of—

- (i) *a building or buildings, having more than twelve residential units;*
- (ii) *a common area; and*
- (iii) *any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any*



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

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

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

2) He would submit that unless the building or buildings have more than 12 residential units each the same cannot be called as residential complexes. For this reason, they are not liable to pay service tax on the services rendered. He relies on the law of *Macro Marvel Projects Ltd v Commissioner* [2008 (12) STR 603 (Tribunal)]. Para 2 and 3 of which read as follows:

"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."

- 3) The department's appeal against the above order of the Tribunal was rejected by the Hon'ble Supreme Court as reported in 2012 (25) STR 1154 (SC). He would submit that it has categorically been held in the order of the Tribunal that for something to be a residential complex, each individual building should have at least 12 residential units. In their case, they have taken a piece of land and divided into plots along with some common areas and sold the plot along with partly built structures to their customers. Each of these structures is in the form of individual house. Therefore, what they built in the venture "Nilgiri Homes" are row houses and not flats. Since it has been settled by the Tribunal and upheld by the Hon'ble Supreme Court that for something to be residential complex, there should be at least 12 residential units in each building, the structures which they built do not qualify as residential complexes and accordingly, the entire demand needs to be set aside. He would, further, submit that relying on the aforesaid order of Macro Marvel Projects Ltd (supra) the Tribunal Allahabad has in the

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case of Baba Constructions Pvt Ltd [2018 (15) GSTL 345] set aside the demand where less than 12 residential units were in each building. This judgment of the Tribunal Allahabad was upheld by the Hon'ble Supreme Court as reported in 2018 (15) GSTL 1120 (SC). He would submit that as the issue has been settled by the Hon'ble Supreme Court not once but twice, the entire demand needs to be set aside on this ground alone.

- 4) As an alternative argument, he would submit is that even if demands are liable to be raised, no service tax is chargeable for construction services prior to 01.07.2010 and in the first demand covering the period January, 2010 to December, 2010 part of the demand is prior to 01.07.2010. He further submits that the demands were raised on the value of sale of land, VAT, registration charges under non-taxable receipts which cannot be charged to service tax. The details of which are as follows.

Particulars	Jan 2010 to Dec 2010	Jan 2011 to Dec 2011	Total
Gross receipts	3,86,50,693	6,54,15,715	10,40,66,408
Less: Amounts received for the period January 2010 to June 2010	1,83,60,608	Not Applicable	1,83,60,608
Amount received during the period July 2010 to December 2010	2,02,9,085	Not Applicable	8,57,05,800
Less: Sale of land	80,04,000	1,31,71,000	2,11,75,000
Less: VAT, Registration Charges and other non-taxable receipts	13,93,710	37,11,713	51,05,423
Taxable Value	1,08,92,375	4,85,33,002	5,94,25,377
ST Liability @4.12% :	4,48,766	19,99,560	24,48,326
Service Tax paid			23,80,124
Payable/(Excess paid)			68,202

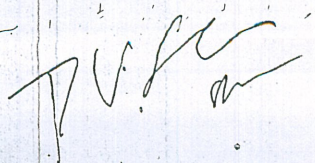
- 5) He fairly submits that the above computational dispute was agitated by them before the first appellate authority who remanded the matter back to the lower authority on this ground. He also argues as a third alternative argument that the contracts entered into with individuals for completion of the semi finished houses is meant for personal use and therefore, is excluded from section 65(91a). Even on this ground the demand cannot be raised on such agreements. As far as the construction done prior to sale is concerned, it is a self service and is

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not chargeable to service tax and there is also no demand on this count.

- 6) Lastly, he would argue that demand of interest and penalties are not sustainable.

6. Learned departmental representative reiterates the findings of the lower authority and take us through the agreement which the appellant had entered into with their customers. He would submit that the entire area viz., "Nilgiri Homes", in this case is a complex by itself as shown in the Annexure-I to the sale agreements. It is true that instead of constructing flats they have built row houses but the fact remains that there are common areas and facilities including roads in the complex itself. Therefore, the same gets qualified as residential complex. To the specific question of whether individual houses and villas can be considered as residential complexes or otherwise, he would submit that section 65(91a) provides for taxing any complex comprising **a building or buildings having more than 12 residential units**. He would further draw the attention of the bench to Explanation-B to this section which says **"residential unit" means a single house or a single apartment intended for use as place of residence**. He would submit that individual houses are clearly covered in the definition of residential units and therefore a complex may have more than 12 individual houses and it still qualifies as residential complex. If we interpret residential complex as meaning that each and every building should have more than 12 residential units, then the words, "or the buildings" in the definition of residential complex, the words "single house" in the definition under residential unit would become otiose. Otherwise, there could be no situation wherein 12 or more than 12 single houses can exist in the same building. Hence, the explanation provided in respect of residential units with the word "single house" and also the phrase "building or the buildings" in the main part of definition should be allowed to have their intended meaning in the particular case. He would submit that as can be seen in the order of the Tribunal in of Macro Marvel Projects Ltd (supra) the Tribunal has clearly ignored explanation to section 65(91a). The Tribunal has extracted a truncated part of the definition and came to the conclusion that the residential complex cannot mean individual houses which is contrary to the explanation in the section itself. It does not appear that this

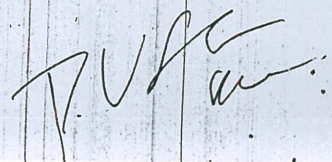


explanation was pointed out or considered either in Macro Marvel Projects Ltd (*supra*) or in the case of Baba Constructions Pvt Ltd (*supra*) either before the Tribunal or before the Hon'ble Supreme Court. Therefore, there is no force in the argument that individual houses cannot form part of the residential complex. Further, he would submit that in both the above cases, there was specific finding of the Tribunal that there was no residential complex built in those projects. In the present cases, both from the records and from the agreement it is evident that a plot of land is taken by the appellants and developed into a complex of individual residential units with some common areas. Therefore, the appellant's activity qualifies as residential complex services and accordingly, demands are sustainable. Therefore, the impugned order needs to be upheld and the appeal needs to be rejected.

7. Insofar as the question of computation is concerned, he would submit that the first appellate authority has already remanded the matter to the original authority for calculation.

8. We have considered the arguments on both sides and perused the records. We find from the records that the appellant has taken a piece of land and developed that into a complex of individual residential units in the form of row houses with some common areas for parking, roads, etc. We have also seen the photographs produced by the appellant. These clearly indicate that they are row houses with some common boundaries along with roads and other facilities. The first question to be considered is whether this qualifies as residential complex or otherwise. Learned counsel for the appellant submits that individual houses cannot be considered as residential complexes because each building needs to have at least 12 residential units for it to be qualified as a complex as per the definition under section 65(91) of the Finance Act, 1994, as has been held in the case of Macro Marvel Projects Ltd (*supra*) and subsequent judgments.

9. Learned DR correctly points out that while passing the order in the case of Macro Marvel Projects Ltd (*supra*) the Tribunal has considered a truncated portion of the definition of residential complex. They have not



copied the explanation to the section which specifically states that residential unit also includes single houses.

Section 65(91a) reads as follows:

"residential complex" means any complex comprising of—

- (i) *a building or buildings, having more than twelve residential units;*
- (ii) *a common area; and*
- (iii) *any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.*

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

- a. "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;*
- b. "residential unit" means a single house or a single apartment intended for use as a place of residence;"*

10. It does not appear from the orders of the Tribunal that this was pointed out by the department. It also does not appear from the judgment of the Hon'ble Supreme Court upholding the decisions that these lacunae were pointed out before the Hon'ble Apex Court. This was also not considered in the case of Baba Constructions Pvt Ltd (supra) either before the Tribunal or before the Hon'ble Supreme Court. However, in the present case, the learned DR has pointed this out and we find the explanation to section 65(91a) was not considered in the aforesaid judgments. This explanation categorically indicates that single houses also qualify as residential units. It is inconceivable that there could be 12 single houses in a single building. The only logical understanding of the residential complex is that there should be 12 or more residential units either in the form of flats or as single houses in the entire complex. Evidently, in this particular case, the complex comprises of row houses as a gated community along with some common facilities and has more than 12 residential units. For this reason, we find that the project "Nilgiri Homes" qualifies as residential complex. It is not in dispute that the services were rendered in the form of works contract and therefore are chargeable to service tax in the works contract service.

11. The second question is the nature of the contract on which service tax is proposed to be charged. The SCN itself states that the plots along with semi-finished buildings were sold to the buyers under the sale agreement. Thereafter, a separate agreement was entered into with the individual home owners for completion of the building/structure as per the agreement. In other words, there is no agreement for completion of the entire complex but there are a number of agreements with each individual house owner for completion of their building. In other words, the individual house owner is engaging the appellant for construction of the complex for his personal use as residence. The explanation to section 65(91a) categorically states that personal use includes permitting the complex for use as residence by another person on rent or without consideration. Therefore, it does not matter whether the individual buyer uses the flat himself or rents it out. There is nothing on record to establish that the individual buyers do not fall under the aforesaid explanation. For this reason, we find no service tax is chargeable from the appellant on the agreements entered into by them with individual buyers for completion of their buildings as has been alleged in the SCN. Consequently, the demand needs to be set aside and we do so. Accordingly, the demands for interest and imposition of penalties also need to be set aside.

12. In conclusion, the impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Pronounced in the open court on 3-10-2019) *RV*

Separate concurring order
(SULEKHA BEEVI C.S.) *Recorded.*
MEMBER (JUDICIAL) *Sulekha Beevi*
26/10/2019

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(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

Per Sulekha Beevi C.S

13. I have gone through the order recorded by my brother Member Technical in the above said appeal.

14. I agree and concur with the conclusion that the demand is to be set aside and the appeal has to be allowed with consequential relief if any. However, with regard to the discussions made in para 8, 9 and 10, as to distinguishing the decision of the Tribunal in the case of Macro Marvel Projects Ltd. (supra) and that of the Hon'ble Apex Court which has upheld the decision, I am not in agreement with the discussions made by Member Technical. So also the reference made to the case of Baba Constructions Pvt. Ltd. (supra) observing that the Tribunal considered a truncated portion of the definition of residential complex etc., I am of the opinion that it is erroneous. The Hon'ble Apex Court having upheld the decision in Macro Marvel Projects Ltd. (supra), I am of the view that the same cannot be distinguished by the said discussion. I agree with the discussions in para 11 and the final conclusion arrived in the above appeal.

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(SULEKHA BEEVI C.S.)
Member (Judicial)

Rex

प्रमाणित प्रति / CERTIFIED COPY

सहायक पंजीकार / Asst. Registrar
सीमाशुल्क, उत्पादशुल्क और सेवा कर अपील अधिकरण
Customs Excise And Service Tax Appellate Tribunal
हैदराबाद / Hyderabad