Regd/AD

Application No
Appeal No ST/774/2010

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

SOUTH ZONAL BENCH, SHASTRI BHAWAN ANNEXE, 1ST FLOOR
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Date 11.05.12

To

M/s. LCS City Makers Pvt Ltd.,
No.17A Seethammal Road,
Alwarpet
Chennai-600 018. Applicant

vs Respondent

CST Chennai

I am directed to send herewith a certified copy of the
Final Order No 507/12
Stay Order No
Misc. Order No
dated **03.5.12** passed by this Tribunal.

Dy. Registrar

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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

SOUTH ZONAL BENCH AT CHENNAI

Appeal No.ST/774/2010

[Arising out of Order-in-Original No.40/2010dt.13.9.2010passed by the Commissioner ofService Tax, Chennai]

Hon'bleMr. S.S. Kang, Vice President
Hon'ble Mr.Mathew John, Technical Member

LCS City Makers Pvt. Ltd. — Appellant/s

Versus

Commissioner of Service Tax, Chennai — Respondent/s

Appearance:

ShriG.Natarajan, Advocate — For the Appellant/s

ShriParmod Kumar, SDR — For the Respondent/s

CORAM:

Hon'ble Mr. S.S.Kang, Vice President
Hon'ble Mr. Mathew John, Technical Member

Date of hearing : 20.3.2012

Final Order No. 507/12 dt 3/5/12

Per Mathew John

M/s.LCS Property Development (P) Ltd. (appellant herein)are engaged in construction of residential complexes. For this purpose, they used to enter into Joint Development Agreements with land owners, in terms of which they would undertake construction of residential flats/houses in the land owned by such land owners. As per the terms of the Joint Development Agreement, a portion of the constructed area, in the form of flats / houses, would be assigned in favor of the land owners and the remaining constructed area, in the form of flats/houses, would be sold by the appellant to various buyers. While selling the residential flats/houses belonging to the appellant, firstly the Undivided Share of the land (UDS) would be sold to the buyer and a construction agreement would also be entered into with the buyer, for construction of a flat/ house, in accordance with the agreed specifications. The constructed area in the form of flats/houses, allotted in favor of the land lord, would be dealt with by him according to his wish.

2. In this connection, the department conducted verification of the appellant's liability for payment of service tax and a show cause notice dated 11.02.2008 was issued to the appellant, stating various grounds of short levy of service tax and proposing a service tax demand of Rs.83,98,962/- from the appellant, for the period 16.06.2005 to 31.03.2007 and also proposing imposition of penalties.

3. After due process of law, an Order-in-Original No.60/2008 dated 22.12.2008 has been passed by the Commissioner of Service Tax,

service tax amount of Rs. 83,98,962/- has been once again confirmed along with interest and a penalty of Rs.84,00,000/- has been imposed on the appellant under Section 78 of the Finance Act, 1994. Aggrieved by the impugned order, the appellant is now in appeal before the Tribunal.

5. The service tax demand is in respect of the following projects :-

(i) TA Enclave, Velacherry consisting of 81 units

(ii) Himardri, T.Nagar consisting of 20 units

(iii) Kamakotivilasam, Madipakkam consisting of 16 residential units

6. We have heard both sides.We find that the disputes can be grouped under three major headings. These are,-

(i) disputes in respect of constructed flats/ houses handed over to the land owners, in the nature of non-payment of tax;

(ii) disputes in respect of constructed flats/ houses sold by the developer to the individual buyers, inthe nature of shot payment of tax on account of undervaluation;

(iii) disputes in respect of Kamakotivilasam Project in the nature of non-payment of tax, which dispute involves questions of facts and law.

7. Since these disputes are somewhat different in nature andhence are being treated separately. Further many legal issues are argued under each of the above disputes. So we consider it proper to record arguments issue-wise and give findings.

8. The Appellants argue that there is no relationship of service provider and service recipient between the Developer and the Land Owner. According to them it is a relationship in a joint venture for

profit. Both the parties have joined together in the business of construction of complex and the land owner brings in the capital by way of his land. The Developer by way of his capital and services and they jointly construct the complex and use or sell the flats for profit. He argues that CBEC had clarified the position that no service arises in such context. This clarification dated 29-01-09 is examined later in this order.

9. On the contrary we find that the Joint Development agreement does not indicate any terms on the above lines. The parties were neither taking risks jointly ordoing any common activity. There was no participation by the land Owners in organizing or carrying out the activity. The Joint Development Agreement as one in which the land owner transfers part of his rights in the land and gets the value of such rights transferred, in the form of constructed flats which consist of value of material used and services rendered by the Developer. After the Land Owner transfers a part of his rights through the agreement, his share of UDS is registered in his name and he is like any other prospective buyer for whom construction of complex is carried out under an agreement for construction of flats except that he has a guaranteed right to get his share of the number of flats constructed. We further examine the various issues raised in the light of this finding.

PART-I-MATTERS RELATING TO CONSTRUCTED FLATS HANDED OVER TO LAND OWNERS

10. The argument that the Contracts are Work Contracts and liable to pay tax only from 01-06-2007 and not before.

10.1. The Appellant argues that the contracts were in the nature of works contract involving supply of material and service. Since such service became taxable only from 01-06-2007, there cannot be any tax on such work carried out prior to that date.The Counsel relies on the decision of the Tribunal in the case of Turbotech Precision Engg. P. Ltd. Vs. CCE-2006 (3) S.T.R. 765 (Tri. - Bang.)

10.2. We have examined this argument. What we find is that the entry in section 65 (105) (zzzza) of Finance Act, 1994, called as "Works Contract Service" covers certain services which are covered by entries in section65 (105)(zzd), 65 (105) (zzq), 65 (105)(zzt), 65(105) (zzzh),etc of the said Act, before and after the introduction of the new entry for works contract. So this cannot be interpreted as an altogether new entry. It only provides a new method of determining the liability on such services at the option of the service provider. Accepting the argument of the appellants would render all taxes levied and collected on such services prior to 01-06-2007, as without authority of law. A reading of the entry in section 65 (105) (zzzza), Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and Rule 2A of Service Tax (Determination of Value) Rules, 2006, does not warrant such an interpretation.

10.3. We also note the Apex Court has held in BSNL Vs. UOI-2006 (2) S.T.R. 161 (S.C.) held that the nature of a composite contract should be decided with reference to intention of the parties and also with reference to the dominant aspect of the contract. Further it was held that a contract of the nature of composite contract as defined in Article 366 (29A) of the Constitution of India can be spilt into sale and service. In this case the Land Owners parted with partial rights in their land to be paid for in the form of constructed flats. Construction of

flat is in the nature of a composite contract specified in Article 366 (29A). So the value of the material supplied and the service provided can be separated and subjected to service tax. While levying service tax such splitting is done by providing abatements from the total value of contract.

10.4. The decision of the Karnataka High Court in Turbo-Tech (Supra) is with reference to the question whether the entry for "Consulting Engineer Service" during the period 1997 to 2001 could cover the activitiesof design, development in a contract for "Design, development and supply of turbo power pack and spares". In the first place the levy extended to only professionally qualified engineer or an engineering firm and not to a corporate entity as the respondent in that case. Further in that situation there was a basic question whether the contract was for supply of goods or for providing service. In the case of construction of a complex, which is the impugned service in this case, the contract is for providing service considering the aspect theory laid down by the Apex Court in the case of BSNL Ltd (Supra) and also in Tamil Nadu KalyanaMandapam Assn. Vs. UOI- 2006 (3) S.T.R. 260 (S.C.).This service is different from design and service involved in supply of material where the main aspect is supply of service.

10.5. Further the argument basically challenges the virus of certain taxing entries in Finance Act 1994, both for the period prior to 01-06-2007 andafter that and Tribunal is not an appropriate forum for such challenge.

10.6. So we reject this argument of the appellant.

11. The argument that the flats handed over to the Land Owners were for their personal use, and hence the activity is not covered by the definition of the service.

11.1. The appellants argue that the definition of "residential complex" excludes the construction of such flats intended for personal use as recipient of service and *Explanation* under Section 65 (91a) specifically states that "personal use" includes permitting the complex for use as residence by another person on rent or without construction. It is submitted that the fact that the land owners were given more than one residential unit, should not be a reason to disregard their claim that the flats given to the land owners were for their personal use. It is also his submission that land owners had joint families and subsequent to construction of the flats, the land owners desired to split the joint family into small families and live in individual flats and, therefore, there cannot be a conclusion that all flats in excess of one flat handed over to the land owners were not for personal use.

11.2. We have considered this argument.

11.3. The definition of "residential complex" as defined at section 65 (91a) reads as under:

(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.

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;

11.4. We note that the residential complexes in question were not constructed for personal use of the owners of the land. It was predominantly for sale to individual buyers. The fact is that some of the flats might have been for the residential use of the land owners. Further we also note that at least in two of the projects the situation is not as if one or two flats were handed over to the Land Owners for their residential use. Considering that 18865 sq. feet of constructed area (16.46% of total constructed area) was handed over to flat owners in the case of TA Enclave and 17054 sq. feet of constructed area (55% of total constructed area) in the case of Himdari Complex was handed over to the Land Owners, it is clear thatthe Land Owner had engaged the Developer for construction of flatsfor him in a complex,in his share of land, which flats could be sold by him. So the residential complex as a whole was not for personal use. The exclusion in the definition of the service is for a complex intended for personal use. The clause cannot be applied to individual flats in a complex. So we donot see much merit in this argument.

12. **The argument that there was no service provider and service recipient relationship existed between the two parties.**

12.1. We have already recorded this argument that the appellant contests that the impugned activity is a joint business involving no service from one party to other. The Counsel argues that CBEC had clarified the position that no service arises in such context.

12.2. The appellant further relies on the definition of the serviceas reproduced in para 11.3as also CBEC's Circular 108/02/2009 dated 29-01-09.

Circular No.108/02/2009-ST, Dated : January 29, 2009

Subject : Imposition of service tax on Builders – regarding.

Construction of residential complex was brought under service tax w.e.f.01.06.2005, Doubts have arisen regarding the applicability of service tax in a case where developer / builder/promoter enters into an agreement, with the ultimate owner for selling a dwelling unit in a residential complex at any stage of construction (or even prior to that) and who makes construction linked payment. The 'Construction of Complex' service has been defined under Section 65 (105) (zzzh) of the Finance Act 'any service provided or to be provided to any person, by any other person, in relation to construction of a complex'. The 'Construction of Complex' includes construction of 'new residential complex'. For this purpose, 'residential complex' means any complex of a building or buildings, having more than twelve residential units. A complex constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex intended for personal use as residence by such person has been excluded from the ambit of service tax.

2. A view has been expressed that once an agreement of sale is entered into with the buyer for a unit in a residential complex, he becomes the owner of the residential unit and subsequent activity of a builder for construction of residential unit is a service of 'construction of residential complex' to the customer and hence service tax would be applicable to it. A contrary view has been expressed arguing that where a buyer makes construction linked payment after entering into agreement to sell, the nature of transaction is not a service but that of a sale. Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. It has also been argued that even if it is taken that service is provided to the customer, a single residential unit bought by the Individual customer would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax.

3. The matter has been examined by the Board. Generally, the initial agreement between the promoters / builders / developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the Promoters/Builders/Developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only when the ownership of the property gets transferred to the ultimate owner. Therefore, any Service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or similar service provider are received, then such a person would be liable to pay service tax.

4. All pending cases may be disposed of accordingly. Any decision by the Advance Ruling Authority in a specific ease, which is contrary to the foregoing views, would have limited application to that case only. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned."

12.3. He further submits that the said circular was reconfirmed by another circular dt. 10.2.2012.The main contention is that this is a joint venture between the land owners and the appellant where profit of the joint venture is shared by both the parties. The land owner makes available his land and the appellant does construction activity and constructed flats are divided in a ratio agreed at the time of execution of Joint Development Agreement. It cannot be considered that the appellant was providing any service to the land owners. The appellant was paying back the consideration for his share of the land which he bought through the Development Agreement by compensating in the form of flats constructed and handed over to the land owners.

12.4. We find that para 3 of the clarification dt29-01-2009deals with cases where flats are sold after construction. In the instant case, [illegible] and an agreement for construction is entered into

with individual buyers. The situation in respect of Land Owners also is the same. Firstly, UDS is registered in their name and then the Developer constructs flats for the original Land Owner, becoming UDS holder after registering UDS in his name, as per the terms of the contract. So this is clearly outside the scope of the clarification given by CBEC. In these cases there is a service provided to the UDS holders including the original Land Owners.

12.5. In the case of Land Owners also the UDS is registered in the name of the land owners. He parts with his rights in the land partially and receives a consideration for parting with such rights. The consideration is the form of constructed flats to be received later. Of course the constructed flat has got both value of material used and the value of service provided by the service provider. Obviously service tax can be levied only on the value of service and cannot be equal to the full value of the land parted with by the land owner. This principle gets complied with when abatement from value of the constructed flat is given to the extent of 67% by Notification No. 1/2006-ST and earlier Notifications.

13. The argument that there was no provision in law prior to 19-04-2006 to tax consideration received other than in the form of money.

13.1. The demand is made for the period 16.6.05 to 31.3.07. The counsel for appellant submits that in all these projects, Joint Development Agreements were signed prior to 19.4.2006 when the Service Tax (Determination of Value) Rules, 2006 were notified. It is his contention that, if it is considered that there is any service provided by the appellant to the respective land owners, the consideration was

only in the form of land which such owners were possessing and was transferred to the appellant prior to 19.4.2006. He contests that, prior to the said date, there was no provision to reckon the consideration received in the form of land to be value of service. Therefore, he contests that demand based on value of constructed flats handed over by the appellant to land owners on completion of project is not sustainable.

13.2. Till 16-06-2005 as per section 65 (105) service tax was to be paid on service "provided" and not on service "to be provided". From 16-06-2005 the section 65 (105) was amended to read "taxable service means any service provided or to be provided". Thus service to be provided became taxable from that date but that does not mean that service provided from that date was not taxable if consideration was received earlier. Thus we do not agree with the contention of the appellant in this regard. The new provision can be interpreted to mean only that prior to that date no tax was to be paid at the time when consideration was received but tax was to be paid at the time when service was provided. This position has been clarified by CBEC in its circular B1/6/2005-TRU dated 27-07-2005.

13.3 We note that this matter relates to the period prior to the notification of Point of Taxation Rules, 2011. So this issue has to be determined with reference to provisions in Act that were in force. As per the provisions of section 67 prior to 18-04-2006, the value of any taxable service was"the gross amount charged by the service provider for such service provided or to be provided by him". From 18-04-2006 section 67 was amended to provide as under:

"SECTION 67. Valuation of taxable services for charging service tax. (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner."

13.4. The argument of Revenue is that the Valuation Rules is only a machinery provision for collecting tax. Once it is decided that tax was payable on the activity, the liability cannot be set to naught because the section dealing with valuation specified only "amounts received" prior to 18.4.06.Revenue relies on the decision in the case of MahimPatram Pvt. Ltd Vs. UOI-2007 (7) STR 110 (SC) making the following observations.

> "25. A taxing statute indisputably is to be strictly construed. [See *J. SrinivasaRao* v. *Govt. of Andhra Pradesh & Another* - 2006 (13) SCALE 27]. It is, however, also well-settled that the machinery provisions for calculating the tax or the procedure for its calculation are to be construed by ordinary rule of construction. Whereas a liability has been imposed on a dealer by the charging section, it is well-settled that the court would construe the statute in such a manner so as to make the machinery workable."

13.5 So we, we donot agree with the argument that prior to 18-04-2006 the service could not be taxed for the reason that consideration was received in the form of land and not in the form of

amount. Further substantial part of service is provided after Service Tax (Determination of Value) Rules, 2006 were notified on 19.4.2006.

14. Argument regarding improper quantification of Demand.

14.1 The crux of the argument is that the value of service rendered by the appellant to the Land Owner is the value of the land transferred by the land Owner to the appellant and this was done at a time much earlier than the point of time when the service was rendered it is not proper to calculate value based on the prices at which flats were sold to independent buyers. The argument is that the service to the Land Owner commenced much earlier than the point of time at which the service commenced for other independent buyers.So the Counsel contests that if at all a value has to be adopted, then guideline values of the land fixed by the authorities registering transfer of immovable properties should be adopted rather than adopting the value of flats sold. The counsel argues that, if any service is considered as rendered by the appellant to the land owners the value should be determined by adopting the notional value of the share of rights in land sold to the appellant on the basis of value adopted for registration of property.

14.2 In the case of TA enclave it is specifically contended that the value of UDS to be handed over to the appellant was arrived atRs. 4,85,92,500/-. This was to be paid partly as cash of Rs. 3,46,50,000/- and Rs. 1,39,42,500 as cost of flats at the rate of Rs. 750 per Sq-Meter., but on the other hand the value of services rendered by the appellant has been arrived at by Revenue considering the value of flat at Rs. 1832 per Sq feet at which flats were sold to other buyers.

14.3 Revenue's case is that this is a case involving a type of barter system and therefore the value indicated in the agreement

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

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

15. Argument regarding time bar

15.1 The demand is made for the period 16.6.05 to 31.3.07. Show cause notice is dated 11.02.2008. The demand in respect of services rendered from 01-09-07 to 31-03-2007 is within the normal period of limitation. The Counsel submits that the appellants had a bonafide belief that they were not required to pay tax and in such situation extended period of time cannot be invoked in view of the following decisions:

(i) Padmini Products Vs. CCE -1989 (43) ELT 195 (SC)

(ii) Tamil Nadu Housing Board Vs. CCE-1994 74 ELT 9 SC

(iii) Mahakoshal Breweries Pvt. Ltd Vs. CCE-2006 (3) STR 334 (Tri-Bang)

15.2 The reason given in the impugned order for invoking extended period is that the appellant did not take out registration on their own when the levy came into force 16-06-05 and took out registration only after visit of the officers during December 2005. So it is argued that their actions were not bonafide. Further it is argued that a clarification issued by CBEC on 01-08-2006 or on 29-01-2009 cannot be reason for their action prior to that date.

15.3. Further Revenue points out that the appellants were asked by letters dated 26-12-2006, 05-02-2007, 23-03-2007, 08-05-2007, 15-05-2007 and 06-06-2007 to furnish the required details but the appellants did not furnish the required details. So the appellants were stonewalling the action of Revenue to issue demand and now they cannot claim that the demand is time-barred.

15.4. We have considered arguments on both sides. What we find is that there has been persistent resistance on the part of the appellant in providing the required information.After resisting for providing information the appellant cannot claim benefit of bonafide belief and argue that demand for a period of one year from relevant date only will apply. We also note that the letter dated 23.12.05 addressed by the appellant to the Superintendent of Central Excise deals only with Kamakotivilasam project and the main issue raised in that letter is something different as is being discussed in later paragraphs.

15.5. So we reject the argument of the appellants in this regard.

PART-II- MATTERS RELATING TO FLATS/ HOUSES SOLD TO INDIVIDUAL BUYERS OTHER THAN LAND OWNERS.

16. The argument that the flats are constructed and sold and hence the construction service is for self.

16.1 For this argument also the Appellant is relying on the circular dated 29-01-2009 issued by CBEC reproduced in para 12 above.

16.2 Revenue argues that the said clarification will apply only in a situation where the Developer builds flats and sells and will not apply to a situation where the Undivided Share of land is first sold and then the complex is constructed for the group of owners of the land.

16.3 What we find is that the submission of the appellant is not factually correct because UDS was first registered and then an agreement to construct was entered into. Therefore the clarification dated 29-01-2009 issued by CBEC does not apply in this case. On this issue we are not in agreement with the argument of the appellant.

17. Arguments regarding the demand in respect of Reimbursable Expenses like registration charges and stamp duty

17.1. The Appellants argue that reimbursed expenses would not form part of taxable value. They rely on the following circulars of the CBEC,-

(i) F. NO. B11/3/98-TRU dated 07-1098

(ii) B11/1/2002 TRU dated 01-08-2002

(iii) B43/5/97 06-06-97

17.2. They also rely on the decisions of the Tribunal in the following cases:

(i) GlaxoSmithkline Pharmaceuticals Ltd CCE-2006 (3) STR 711

(ii) Malabar Management Services (P) Ltd Vs. CCE - 2008 (9) STR 483 (Tri-Chennai).

17.3. There cannot be a doubt that the registration fees and stamp duty paid by the appellant and recovered from the buyers would not form part of the assessable value of the service. This point is conceded in the impugned order also. The issue is that the appellanthas not produced any evidence to prove that the amount claimed from buyers were actuals.

17.4. The service involved is construction of a complex. Registration of land takes place before the service commences. Therefore the expenses relating to stamp duty and registration charges cannot be considered as expenses incurred in the course of providing the service. These are not reimbursed expenses incurred on behalf of the clients and in our view the expenses are outside the scope of the expression of "reimbursable expenses" very commonly used in the context of value of services. There can only be a dispute that a part of value of service is recovered as such expenses because such expenses charged are not against actual bills. Considering the position as already explained and the overall facts and circumstances Revenue has to make reasonable efforts to quantify such expenses and keep it outside the service tax net. Considering these aspects we propose to give one more opportunity to the appellants to provide reasonable basis to show that the amounts recovered are not in excess of amounts incurred on these activities. Here a liberal approach is required on the part of Revenue

because we consider that these not in the nature of reimbursable expenses incurred while providing service but are expenses incurred before commencement of the service. So if there is difficulty in collecting evidence in respect of registration ofUDS in all the cases, the appellants should be allowed to submit sample documents. Since the charges are expected to be uniform for one type of flat Revenue should accept such calculation except to the extent Revenue is able to prove the amounts to be more than what was incurred for the impugned activities.

PART-III- MATTERS RELATING TO KAMAKOTIVILASAM PROJECT

18. The argument that there is no residential complex as per the definition of the service

18.1. Appellant also submits that in the case of Kamakotivilasamsite plan, there were three distinct plots in respect of which separate proposals for approval were placed before the concerned authorities and permissions taken. Each of the projects housed less than 12 residential units. He, further, submits that there was no common facility to consider the all the three plots together as one complex of more than 12 residential units inasmuch as there were no common facilities such as park, lift, parking space, community hall, common water supply or effluent treatment system. He submits that each of these plots is having separate arrangements for handling ofeffluents and separate water supply arrangement. The roads which are common for the three plots are in fact not belonging to the owners of any of the flats inasmuch as the roads were surrendered to the local

authoritieswho have been maintaining such roads since execution of the project. Therefore, in respect of this project, it is the submission of the appellant that it does not qualify to be a "residential complex" within the definition under Section 65 (91a) of Finance Act, 1994

18.2. The Counsel also submits that the entire matter regarding Kamakotivilasam Project was brought to the notice of the departmental authorities videletterdt. 23.12.2005. In fact, this letter was in the context of visit of the officers to the office of the appellant on 14.12.05 and their letter dt.14.12.05. After disclosing all these information, and noting their contention that according to them, no service tax was payable, departmental authorities did not make any further correspondence in the matter and therefore, they were under a *bonafide* impression that the project was not covered by the entry for construction of residential complex. Thus the appellant submits that entire demand is time-barred.

18.3. The Ld A. R. who argued the case initially had doubt about the authenticity of letter dated 23-12-2005 said to be addressed by the appellant to the department under which the Appellant was taking shelter. On this matter the Counsel for the appellant submitted that the letter is one of the relied upon documents in the SCN and its authenticity has not been challenged at any stage of the proceedings. So we take the letter to be genuine and proceed accordingly.

18.4. We have examined this issue. In the first place this letter is dealing with Kamakotivilasam project. The main issue contended is that in each plot, there are only less than 12 residential units. In the last para, there is a mention about property developed for land owners

and sold on their behalf. In this letter, there is no mention about the other two projects and details that Revenue has been asking about the said projects. But in the appeal the argument is placed as if the letter would apply to matters relating to service provided to Land Owners in general which is not the factual position.

18.5. In the case of Kamakotivilasm project there are disputes about facts like whether there is common boundary wall, common playground, common roads, common lighting etc. It is rather strange that on these facts also there is no agreement.

18.6. But what we notice is that the issue whether the definition of a "residential complex" as given in section 65 (91a) will apply only to cases where one building has more than twelve flats or will extent to cases where different buildings in the same compound totally having more than twelve flats was examined by the Tribunal in the case of MACRO MARVEL PROJECTS LTD.- 2008 (12) S.T.R. 603 (Tri. - Chennai)

18.7. In that case the issue was examined with reference to the entry 65 9105) (zzzza) for works contract. But the definition of "residential complex" at section 65 (91a), applicable for works contract as also the present dispute is the same. That dispute was with reference to more than twelve individual houses in the same premises. Further the Tribunal had noted as under:

> "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."

18.8. But we note that Revenue had appealed against the said order to the Apex Court and the Apex Court upheld the decision as reported at 2012 (25) STR J154. So we are of the view that the expression "residential complex" will apply only in case of buildings which have more than twelve residential units. It is an agreed fact that this was not the case in respect of Kamakotivilasam project. So we are of the view that the demand in respect of Kamakotivilasam project is not sustainable and the same is set aside. Appellants have an argument of time bar in respect of this project. Since we are deciding the issue on merits we donot find it necessary to record our finding on this argument.

19. The appeal is disposed of in above terms. Adjudicating authority to re-quantify the demand under various heads based on our decision as above and also for deciding the penalty that may be imposed.

(Pronounced in open court on 3/5/12)

(MATHEW JOHN) 3/5/12
TECHNICAL MEMBER

(S.S. KANG)
VICE PRESIDENT

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