R

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 4th DAY OF JULY 2018

PRESENT

THE HON'BLE Dr.JUSTICE VINEET KOTHARI

AND

THE HON'BLE Mrs.JUSTICE S.SUJATHA

C.E.A.No.15/2016

Between:

Commissioner of Central Excise
Service Tax & Customs, Bangalore-II
P.B. 5400, C.R. Buildings
Queens Road, Bangalore-560 001.

Now Represented by:

The Principal Commissioner of Service Tax
Service Tax – I Commissionerate
TTMC/BMTC Building
Old Airport Road, Domlur
Bangalore-560 071.

...Appellant

(**By Mr. K.M. Shivayogiswamy, Advocate**)

And:

Nithesh Estates Ltd.,
7th Floor, Nitesh Timessquare
No.8, M.G. Road
Bangalore-560 001.

...Respondent

(**By Mr. K.S. Ravishankar, Advocate**)

This C.E.A. is filed under Section 35G of the Central Excise Act, Praying to decide the substantial questions of law formulated at para 6 of the Appeal Memo, set aside the Final Order No.21332/2015 dated 16-07-2015 in Appeal No.ST/1854/2010-DB passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Bangalore vide Annexure-B & etc.

This C.E.A. coming on for Admission, this day ***Dr. Vineet Kothari J***. delivered the following:-

JUDGMENT

Mr. K.M. Shivayogiswamy, Adv. for Appellant - Revenue
Mr. K.S. Ravishankar, Adv. for Respondent - Assessee

1. The Appellant - Revenue has filed this appeal under **Section 35G of the Central Excise Act, 1944** purportedly raising the substantial questions of law about the **Levy of Service Tax on the 'Residential Complex'** constructed by the Respondent Assessee, **M/s. Nithesh Estates Limited** for the Company, **M/s.ITC Limited** at **Bangalore,** the Contract of construction for which was given in turn by Respondent – Assessee- **M/s. Nithesh Estates Limited** to **M/s. Larsen and Toubro Limited (M/s.L & T Ltd.).**

2. The suggested substantial questions of law as framed by the Revenue in the Memorandum of Appeal are quoted below for ready reference:-

> *"1.Whether the Tribunal erred in coming to the conclusion that the "Residential Complex" constructed by the assessee falls within the meaning of "personal use" under Sec.65(91a) of the Finance Act, 1994 and therefore not liable to pay service tax?*
>
> *2. Whether the Tribunal erred in coming to the conclusion that the activity of the assessee is covered by Circular dated 24-05-2010 issued by CBEC and therefore not liable to pay service tax?*
>
> *3.Whether the Tribunal erred in coming to the conclusion that the demands made in Show Cause Notice dated 08-07-2009 do not fall within the extended period of limitation prescribed under Sec.73(1) of the Finance Act, 1994?"*

3. The learned Tribunal, **Customs, Excise & Service Tax Appellate Tribunal (CSTAT)** by its impugned Order dated **16/07/2015** held in favour of the Respondent - Assessee **M/s. Nithesh Estates Limited** while allowing the appeal filed by the Respondent Assessee **M/s. Nithesh Estates Limited** that the Respondent Assessee was not liable to pay any Service Tax on the said construction activity as the said construction activity fell within the Exclusion Clause of the definition of '**Residential Complex**' as defined in **Section 65(91a)** of the **Finance Act, 1994**. The Tribunal also relied upon the **Circular** of the **Central Board of Excise and Customs, New Delhi** dated **24/05/2010** which was extracted in its Order and which indicated that the **'Residential Complex'** constructed for Central Government, Ministry of Urban Development Department which engaged **National Building Construction Corporation (NBCC)** for such construction would not be exigible to Service Tax as

NBCC provides service to the Government of India for its personal use. It was also clarified in the same **Circular** dated **24/05/2010** that the main contract of NBCC where it engages the services of particular Contractors for carrying out full or part of the construction then such sub-contractor would be liable to pay Service Tax as in that case, the NBCC would be the Service Receiver and construction would not be for their personal use.

The relevant extract of the Order dated **16/07/2015** passed by the learned CESTAT is quoted below for ready reference:-

> "*7.1. In this case there is no dispute and it clearly emerges that the residential complex was built for M/s. ITC Ltd. and appellant was the main contractor. Appellant had appointed sub-contractors all of whom have paid the tax as required under the law. The question that arises is whether the appellant is liable to pay service tax in respect of the complex built for ITC. From the definition it is quite clear*

that if the complex is constructed by a person directly engaging any other person for design or planning o layout and such complex is intended for personal use as per the definition, service tax is nor attracted. Personal use had been defined as permitting the complex for use as residence by another person on rent or without consideration. In this case what emerges is that ITC intended to provide the accommodation built to their own employees. Therefore it is covered by the definition of 'personal use' in the explanation. The next question that arises is whether it gets excluded under the circumstances. The circular issued by CBEC on 24.05.2010 relied upon by the learned counsel is relavant. Para 3 of this circular which is relevant is reproduced below:

> *"3. As per the information provided in your letter and during discussions, the Ministry of Urban Development (GOI) has directly engaged the NBCC for constructing residential complex for Central Government officers. Further,*

the residential complexes so built are intended for the personal use of the GOI which includes promoting the use of complex as residence by other persons (i.e. the Government officers or the Ministers). As such the GOI is the service receiver and NBCC is providing services directly to the GOI for its personal use. Therefore, as for the instant arrangement between Ministry of Urban Development and NBCC is concerned, the Service Tax is not leviable. It may, however, be pointed out that if the NBCC, being a party to a direct contract with GOI, engages a sub-contractor for carrying out the whole or part of the construction, then the sub-contractor would be liable to pay Service Tax as in that case, NBCC would be the service receiver and the construction would not be for their personal use."

It can be seen that if the land owner enters into a contract with a promoter/builder/ developer who himself provided service of

design, planning and construction and if the property is used for personal use then such activity would not be subject to service tax. It is quite clear that CBE&C also has clarified that in cases like this, service tax need not be paid by the builder/developer who has constructed the complex. If the builder/ developer constructs the complex himself, there would be no liability of service tax at all. Further in this case it was different totally, the appellant, has engaged sub-contractors and therefore rightly all the sub-contractors have paid the service tax. In such a situation in our opinion, there is no liability on the appellant to pay the service tax.

8. Even though we have held in favour of the appellant on merits, the facts and circumstances in this case would show that appellant could have entertained a bonafide belief and therefore extended period could not have been invoked. CBE&C has issued a clarification in 2010 and appellants had written a letter in October 2008 to CBE&C seeking clarification wherein they had given

the details of agreement also. If the Board takes a view after a period of two years just before the amendment and also if that view is applicable to the facts of this case before us, we cannot find fault with the appellant for entertaining such a belief that they are not liable to pay tax. Since the entire demand is beyond the normal period of limitation, the appellants succeed on the ground of limitation also.

9. In view of the above, the appellants have made out a case in their favour entirely and accordingly the appeal is allowed with consequential relief, if any, to the appellants."

4. The learned counsel for the Revenue, Mr. K.M. Shivayogiswamy has submitted before us that in the present case, the Respondent assessee **M/s. Nithesh Estates Limited** had entered into a Contract with **M/s. ITC Limited** in the first instance on **01/04/2006** and the Respondent Assessee **M/s. Nithesh Estates**

Limited as a Developer had agreed to construct a '**Residential Complex**' on '**Turn-key basis**' approximately measuring **3,32,467 Sq.ft.** of construction for a sum of **₹63,34,36,920/-.** By a **Supplementary Agreement** between the said two parties dated **30/03/2007**, the Contract sum payable was revised from **₹63,34,36,920/-** to **Rs.71.00 Crores** and vide para. 3 of the said **Supplementary Agreement** dated **30/03/2007**, the Developer, **M/s. Nithesh Estates Limited** the Respondent Assessee represented to the Awarder of the Contract, viz. the Company, **M/s. ITC Limited** that it has appointed **Larsen and Toubro Limited ('L & T')** to carry out the construction of the aforesaid Multi-Storeyed Residential Apartment Complex at Site and that the consideration payable by the Developer (**M/s. Nithesh Estates Limited)** to **Larsen & Toubro Limited** would be to the extent of **₹49,96,21,093/-** under the following three heads:-

1. Civil structural & Architectural work : Rs.34, 85,54, 394/-

2. NSC Provisional sum : Rs.13, 73,33,362/-

3. Coordination fee @10% on NSC Scope: Rs.1,37,33,336/- (Provisional)

Total: Rs.49,96,21,093/-

5. The learned counsel for the Revenue also drew our attention towards certain other Clauses of the said Contract between the parties, **M/s. ITC Limited** and the Developer **M/s. Nithesh Estates Limited,** that the Developer **M/s. Nithesh Estates Limited** shall pay the Works Contract Tax, Service Tax, Municipal Land Tax etc. in respect of the construction at the Site and the Project in question.

6. He urged that the construction of the **'Residential Complex'** in question by the Sub-contractor, **M/s. L & T Limited** on which Service Tax Liability was also discharged and paid by **L & T Limited** to the Government, could not be taken as discharged of the liability to pay the Service Tax by the Respondent

Assessee Developer **M/s. Nithesh Estates Limited** on the entire contracted sum, which are received by it during the relevant year involved in the present case from **March 2007 to March 2008** amounted to **₹38.00 Crores** approximately. He submitted that the said sum received from **M/s. ITC limited** by the Respondent assessee **M/s. Nithesh Estates Limited** was exigible to Service Tax for the said period, because the said construction activity did not fall within the **Exclusion Clause of Section 65 (91a) of Finance Act, 1994,** which defines **'Residential Complex'** as under:-

> *"Section 65(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 herby 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 a s a place of residence:]"

7. Mr. Shivayogiswamy, learned counsel appearing for the Revenue urged before us that unless the

Company, **M/s.ITC Limited** itself constructed the **'Residential Complex'** in question for its personal use, viz., for occupation for its Managerial Staff, the said construction would not fall within the Exclusion Clause of the aforesaid definition and therefore, the Respondent Assessee **M/s. Nithesh Estates Limited** would be liable to pay the Service Tax being the **Service Provider** to the **Service Receiver, M/s.ITC Limited**.

8. He also submitted that there was no personal use of the said **'Residential Complex'** by the Company, **M/s.ITC Limited** and for this reason also, the liability to pay the Service Tax could not be denied by the Respondent Assessee **M/s. Nithesh Estates Limited.**

9. Mr. Shivayogimath, however submitted that the definition of **'Taxable Service'** as defined in **Section 65(105) (zzzh),** since the 'Explanation' was inserted in the said Clause by the **Finance Act of 2010** with effect from **01/07/2010** fixing such Service Tax Liability on the Developer as well, the same will not apply to the

facts of the present case as the period in question is from **March 2007 to March 2008**. The said **Sub-Clause(zzzh) of Clause(105) of Section 65** of the **Finance Act, 1994** is also quoted below for ready reference:-

> ***"Section 65(105): "taxable service"*** *means any [service provided or to be provided],*
>
> *(a) [any person], by a stock-broker in connection with the sale or purchase of securities listed on a recognized stock exchange;*
>
> *(b) to (zzzg) … … …*
>
> ***(zzzh):*** *to any person, by any other person, in relation to construction of complex'] [**Explanation** : For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction*

(except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provide by the builder to the buyer;]

10. He therefore submitted that the substantial questions of law arise from the Order of the learned Tribunal requiring interference by this Court in the present appeal.

11. Per contra, the learned counsel appearing for the Respondent – Assessee, Mr. K.S.Ravishankar submitted before us that the Respondent Assessee **M/s. Nithesh Estates Limited** gave the construction activity in its entirety for the said '**Residential Complex**' in question meant for occupation by the Managerial Staff of **M/s. ITC Limited** to **M/s. L & T Limited** and the Respondent Assessee **M/s. Nithesh Estates Limited**

itself did not carry out any construction activity in question. However, being the Principal Contractor, it was bound to receive the contractual sums from the Awarder of the Contract, viz. **M/s. ITC Limited** which in turn was substantially paid to the sub-contractor, **M/s. L & T Limited.** Since the Service Tax Liability with respect to the said construction activity stood discharged by payment of such Service Tax by the Sub-contractor, **M/s. L & T Limited,** as per the provisions of law as explained by CBE&C itself, there was no question of the Revenue again demanding the Service Tax from the Respondent Assessee **M/s. Nithesh Estates Limited** on the basis of Audit objection raised by the internal Auditors of the Department.

12. He further urged that the **'Residential Complex'** in question was constructed for **'personal use of ITC Limited'** and therefore the same was excluded from the definition of **'Residential Complex'**

as defined in **Section 65 (91a)** of the **Finance Act 1994**.

13. He further drew our attention towards the **Circular No.108/2/2009-S.T.** dated **29/01/2009** issued by the **Central Board of Excise and Customs (CBE&C)** even prior to amendment by inserting Explanation in **sub-Clause (zzzh)** with effect from **01/07/2010,** vide para.3 of the same making the aforesaid position clear.

Paras 3 & 4 of the **Circular** dated **29/01/2009** are quoted below for ready reference:-

> *"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 then 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 a 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 case, 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."

14. The learned counsel for the Respondent Assessee also relied upon the **Circular** dated **24/05/2010** quoted by the learned Tribunal in its impugned Order itself and submitted that the Principal Contractor, viz. **M/s. Nithesh Estates Limited** did not provide any service of construction activity to the Awarder of the Contract, **M/s. ITC Limited** as admitted under the aforesaid two Agreements between the Company **M/s. ITC Limited** and the Respondent Assessee **M/s. Nithesh Estates Limited.** The

construction activity stood sub-contracted to **M/s. L & T Limited** and the **L & T Limited** being the Service Provider to Respondent Assessee **M/s. Nithesh Estates Limited** had already discharged its Service Tax liability in terms of the aforesaid **Circular** dated **29/01/2009**.

15. He also submitted that the 'personal use' by a Corporate entity like the **ITC Limited** by occupation of the **'Residential Complex'** constructed for the Managerial staff of the **ITC Limited** has never been disputed or denied by the Appellant Revenue and even the Audit objection itself and the relevant Show Cause Notice served by the Revenue on the Respondent Assessee **M/s. Nithesh Estates Limited** are based on the said premise itself. He therefore submitted that no substantial question of law arises in the present case.

16. In support of his contentions, he relied upon the decision of the Hon'ble Apex Court in the case of ***B.M. LALL (dead) by his Legal Representatives & R.N. Dutta Vs. M/s. Dunlop Rubber Co. (India) Ltd.***

and another AIR 1968 Supreme Court 175, wherein the Hon'ble Supreme Court held that the premises owned by a Limited Company where the Company was under an obligation to provide free accommodation to Staff Officers would be deemed to be in its own occupation within the meaning of **Section 13(1)(f) of the West Bengal Premises Tenancy Act, 1956.**

17. Having heard the learned counsel for the parties, we are of the opinion that no substantial question of law arises in the present case requiring our consideration. The reasons are as follows:-

18. The '**Residential Complex'** in question was undertaken to be constructed by the Respondent Assessee **M/s. Nithesh Estates Limited** for **ITC Limited** under the Contract dated **01/04/2006**. It is equally undisputed before us that the construction activity in question was in its entirety sub-contracted by **M/s. Nithesh Estates Limited** to **M/s.Larsen and Toubro Limited.** There is no material on record or

evidence to indicate that any part of construction activity in question was undertaken by the Respondent Assessee **M/s. Nithesh Estates Limited** itself. The fact of sub-contract of the entire **'Residential Complex'** in question by the Respondent Assessee **M/s. Nithesh Estates Limited** to **M/s.Larsen and Toubro Limited** is not disputed by the Revenue. It is also not disputed that due Service Tax on the payments made to the sub-contractor **M/s. L & T Limited** stood paid to the Government.

19. The Central Board of Excise and Customs (CBE&C) for the pre-amendment period prior to **01/07/2010** has issued the aforesaid **Circular No.108/2/2009-S.T.** dated **29/01/2009** clarifying this position, that in such cases, where the ultimate owner (**M/s. ITC Limited** in the present case) enters into a Contract for construction of a '**Residential Complex'** with the Promoter/Builder/Developer (**M/s. Nithesh Estates Limited** in the present case) which itself

provides service of Design, Planning and Construction and after such construction, the ultimate owner receives such property for 'Personal use', then such activity would not be subjected to Service Tax, because this case would fall under the 'Exclusion Clause' provided in the definition of '**Residential Complex**'.

20. However, in such a situation, if the Service of any person like the Contractor or a similar Service Provider **(M/s.Larsen & Toubro Limited** in the present case) is received, then such a person (**M/s. L & T Limited.** in the present case) would be liable to pay the Service Tax.

21. In view of this clear position of law indicated by the CBE&C itself, we are of the considered opinion that the Revenue cannot be allowed to argue against the legal position rightly explained by the CBE&C itself which can certainly be invoked and applied by this Court for interpreting the provisions of law on the Principles of interpretation of *Contemporenea Expositio*

and the Central Board of Excise and Customs or the highest Administrative body of the Respondent Department itself has interpreted the provisions that the construction activities of this nature where Bi-parte or Tri-partite Agreements are entered into is clearly indicated in the said Circular, which clearly and rightly hold the sub-contractors liable to pay the Service Tax as it is the Sub-contractor who actually undertakes the construction activity.

22. In view of the undisputed factual matrix of the present case, that the sub-Contractor **M/s. Larsen and Toubro Limited** has duly discharged the obligations to pay the Service tax in the present Contract, we are at a loss to understand how the Revenue could again demand the Service Tax from the Respondent Assessee **M/s. Nithesh Estates Limited,** the Principal Contractor or the Developer, who did not undertake any construction activity in the present case.

23. In our opinion, the learned Tribunal was perfectly justified and correct in applying the **Circular** dated **24/05/2010** also, while holding that if the Government of India Department could be treated as using the **'Residential Complex'** in question constructed by NBCC for its 'personal use', how another Corporate body like **M/s.ITC Limited** in the present case could be denied the benefit of that type of user of '**Residential Complex**' to be occupied by its Managerial Staff. The law does not envisage any such distinction among the Private Sector Corporate Entities and the Departments of Government or Government Companies or Undertakings.

24. The present case of Revenue, therefore, appears to have emanated on a misconceived Audit objection raised by the internal Auditors of the Department.

25. The learned Tribunal on the basis of relevant facts and evidence available before it, in our opinion,

therefore, has rightly concluded that the Respondent assessee was not liable to pay any Service Tax on the '**Residential Complex**' constructed through the sub-contractor, **M/s. L and T Limited** in the present case and such finding of facts recorded by the learned Tribunal based on relevant material and evidence, in our opinion, does not give rise to any substantial question of law in the present case.

26. In view of the aforesaid, all the three proposed substantial questions of law suggested by the Revenue need not be separately answered, as we have come to the conclusion that no substantial question of law would really arise in the present case including the question of extended period of limitation under Section 73(1) of the Finance Act, 1994. When the levy of Service Tax on the Respondent Assessee itself is held to be illegal, the question of availability of extended period of limitation for levying such Service Tax does not arise.

27. The appeal filed by the Revenue is thus found to be devoid of merit and the same is liable to be dismissed. Accordingly it is dismissed. No costs.

Sd/-
JUDGE

Sd/-
JUDGE

BMV*