CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70722 of 2019

(Arising out of Order-in-Appeal No.MRT/EXCUS/000/APPL-MRT/95/2019-20 dated 23/07/2019 of Commissioner (Appeal) Central Goods & Service Tax Meerut)

M/s DBF Infrastructure Pvt. Ltd., ...Appellant
(DBF Building, Garhi Guldhar,
Delhi-Meerut Road, Ghaziabad)

VERSUS

Commissioner of CGST, Meerut ....Respondent

(Mangal Pandey Nagar, Room No.232,
CGO Complex-1, Kamla Nehru Nagar, Ghaziabad-201002)

APPEARANCE:

Shri Prashant Shukla, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70533/2024

DATE OF HEARING : 22 April, 2024
DATE OF PRONOUNCEMENT : 21 August, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No. GZB/EXCUS/000/APPL-MRT/95/2019-20 dated 23.07.2019 of Commissioner (Appeal) Central Goods & Service Tax Meerut. By the impugned order following has been held:

> *"12. In view of above discussion and findings, the impugned Order-in-Original no.03/ADCIST/GZB/2018-19 dated 28.05.2018 is set aside, and the appeal bearing no, 58-STAPPL-MRT/MRT/2018 dated 30.07. 2018 filed by M/s DBF Infrastructure Pvt. Ltd., DBF Building Garhi Guldhar, Delhi Meerut Road, Ghaziabad (U.P) is allowed by way remand."*

2.1 Appellant is engaged in providing taxable services namely *"construction of residential complexes",* and are registered for the same with the service tax authorities.

2.2 During the audit of the records of the appellant for the period April, 2013 to June, 2016, it was observed that the appellant,

- while providing the taxable service related to construction of residential complex to his customers in respect of flats booked by them was paying service tax on receipt basis, whereas he had to pay the service tax on accrual basis, in terms and conditions given in their respective agreements/ booking forms and Point of Taxation Rules, 2011' (in short 'PoT Rules'). Thus they short paid service tax amounting to Rs 62,40,916/-
- They were not paying service tax on the Preferential Location Charges (PLC) services provided to his customers. Service Tax Short paid Rs.3,25,123/-

2.3 A Show Cause Nolice dated 02.05.2017 was issued to appellant asking them to show cause as to why:-

(i) Service Tax amounting to Rs. 62,40,916/-, not paid on construction of residential complex service, should not be demanded and recovered from them under proviso to Section 73(1) of Chapter V of the Finance

(ii) Service Tax amounting to Rs. 3,25,123/-, not paid on PLC recovered from service recipients while providing the said construction of residential complex services, should not be demandcd and recovered from them under proviso to Section 73(1) of Chapter V of the Finance Act, 1994;

(iii) Interest, on the said Service la amounts as mentioned in (i) & (ii) above at the appropriate rate as applicable from time to time should not be demanded and recovered from them under Section 75 of Chapter V of the Finance Act, 1994; and

(iv) *Penalty should not be imposed upon them under Section 78(1) of Chapter V of the Finance Act, 1994*

2.4 The show cause notice has been adjudicated as per the order in original dated holding as follows:

(i) I confirm the demand of Service Tax amounting to Rs. 62,40,916/- (Rupees Sixty Two Lakhs Forty Thousands Nine Hundred Sixteen only) (incl Education Cess and Secondary and Higher Education Cess) relevant to construction of residential complex against the party for the period from April, 2014 to June, 2016, under Section 73(1) of the Finance Act, 1994 and order for its recovery from the party

(ii) I also confirm the demand of Service Tax amounting to Rs. 3,25,123/ (Rupees Three Lakhs Twenty Five Thousands One Hundred Twenty Three only) (incl. Education Cess and Secondary and Higher Education Cess payable on PLC recovered from service recipients against the party for the period from April, 2014 to June, 2016, under Section 73(1) of the Finance Act, 1994 and order for its recovery from the party

(iii) I also order for recovery of Interest at the applicable rates from the party under the provisions of Section 75 of the Finance Act, 1994 till the date of payment of dues as confirmed vide above sub-para (i) and (ii).

(iv) *I also impose a penalty of Rs.65,66,039/- upon the aforesaid party, under Section 78 of the Finance Act, 1994, for the reasons as discussed hereinabove*.

2.5 Aggrieved appellant filed the appeal before First Appellate authority which has been disposed as per the impugned order.

2.6 Hence this appeal

3.1 We have heard Shri Prashant Shukla Advocate for the appellant and Shri Manish Raj, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that:-

- Commissioner (Appeals) has wrongly held that the appellant is liable for payment of service tax on the

installments due on the buyers, though such payments were not received by it. The findings recorded are ignoring the decision as follows:

- Suresh Kumar Bansal [2016 (43) STR 3 (Del.)]
- Vasudha Bommireddy [2020 (2) TMI 632 - TELANGANA H.C.]
- Ballal Developers Pvt. Ltd. [2019 (9) TMI 889 - CESTAT- Bangalore].

- In the order dated 12.12.2018 in W.P. (C) No. 949/2018, Ruchi Goyal vs. NBCC (India) Ltd., the Hon'ble Delhi H.C. has granted the refund to the petitioner by following Suresh Kumar Bansal case (supra).- Review petition of the Department has been dismissed on the ground that Rule 2A of Service Tax (Determination of Value) Rules, 2006, has no application for the construction of residential complex- Ruchi Goyal vs. NBCC (India) Ltd., 2019 (29) G.S.T.L 392 (Del.).
- As per the agreement, the buyer is to make payments at the different stages of construction of the building. However, in case of default of such payment, the appellant has only recourse to cancel the agreement and refund the collected amount after deducting 15% of such collected amount. Hence, the appellant had no contractual right to compel the buyer to pay the amount which is payable on specified stage of construction. When the agreement has been breached on default in payment, such defaulted payment cannot be consideration for any service and, construed as taxable value under section 67 of the Finance Act, 1994. Hence, no service tax was payable on the payments which were not received by the appellant. Reliance is placed on following decisions:
  - Excel Industries Ltd., 2014 (309) E.L.T. 386 (S.C.).
  - Repco Home Finance Ltd. - 2020 (42) G.S.T.L. 104 (Tri. - LB).
  - ATS Township Private Limited [2019 (11) TMI 297 (CESTAT- ALL.).

- The appellant's agreement is revocable by the buyer till actual sale of flat and, the on-account payment (85% of the payment collected) received from the buyers were refundable till the actual sale of flat. The refundable payment received by the appellant cannot be construed as consideration for the construction activities carried out by it. Therefore, construction activities were not carried out by the appellant for the customers. Hence, the appellant has not rendered services continuously or on recurrent basis, under a contract, for a period exceeding three months.
- Impugned order has wrongly held that construction of residential complex [66E(b)] has been notified as continuous supply of service under rule 2 (c) of the Point of Taxation Rules, 2011. Therefore, the appellant's transaction cannot be defined as continuous supply of service.
- The appellant has sold the flats in the building at different price by adding preferential location charge (PLC) to a base price depending upon its location in the building. Hence, PLC is not consideration for rendering of service but merely a premium price charged for the sale of that particular flat.
- As per the agreement, the appellant's transaction is for sale of flat on construction of the building for which refundable on account payments were received. No service tax is leviable on sale of flat by the appellant [Magus Construction Pvt. Ltd. v. U.O.I, 2008 (11) S.T.R. 225 (Gau.)]
- Appeal be allowed.

3.3 Learned authorized representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records findings as follows:

"7. I find that the adjudicating authority has confirmed the demand of service tax of Rs.62,40,916/- by holding that the appellant was providing continuous supply of service to the buyers of flats and the value for payment of service tax was to be taken in terms of provision of Rule3(a) of PoT Rules, i.e. on accrual basis and not on actual receipt basis. The appellant, however, has contended that he had neither provided continuous supply of service nor was liable to pay service tax on the installments receivables/due from the prospective buyers and had correctly paid service tax on the amount received against the booking of flats. In this regard, I find that as per Notification No. 28/2011-ST dated 1st April, 2011 as amended, Construction of Residential Complex [Section 65(105) (zzzh)] service had been notified as "continuous supply of service" for the purpose of PoT, 2011. As per Rule 2(c) of PoT Rules, the continues supply of service is defined as "continuous supply of service" means any service which is provided, [or to be provided continuously or on recurrent basis, under a contract, for a period exceeding three months with the obligation for payment periodically or from time 10 time], or where the Central Government, by a notification in the Official Gazette prescribes provision of a particular service to be continuous supply of service, whether or not subject to any condition; find that the appellant had entered into Flat Buyer Agreement with customers for the construction of apartment. The agreement described stage-wise landmarks upon the completion of which, payments were to be made by the customers. On perusal of one such agreement entered between the appellant and one Shri Manish Kumar Shell (placed on record) find that at page no 19, of the said agreement, the stage wise Payment Plan (CLP) has been given which is spread into 12 stages of construction and in front of it the percentage amount of total amount to be paid has been mentioned This clearly shows that the payment was required to be made by the customer as per the completion of stage

of construction which makes it evident that the appellant was engaged in providing continuous supply of service to its buyers Thus, the contention of the appellant that he was not providing continuous supply of service is not tenable. I further find that the appellant in his letter dated 11.07.2016 addressed to Superintendent, Service Tax. Range-l, had admitted that as per Notification 38/2012-ST dated 20.06.2012 he was covered by the continuous supply of service,

8. As regards to the determination of point of taxation, I find that the Determination of Point of Taxation (Rule 3) states that the point of taxation shall be the time when invoice for service provided or agreed to be provided is issued. In case the invoice is not issued within the time period specified in Rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of the completion of such service. In case service provider receives payment before issuance of invoice or completion of service, the point of taxation shall be the receipt of payment to the extent of such payment. In the instant case the appellant had not issued invoice though the stage of completion till Jun-2016 was at the level 10'h floor slab and as per agreement upto this stage 90% amount was payable by the customers. The Hon'ble Madras High Court in the case of M/s Firm Foundation & Housing Pvt. Ltd Vs Pr Commr of ST, Chennai as reported in 2018(16) GSTL 209(Mad,) has held as under:

> *Point of Taxation - Determination of- Petitioner enters into agreements with customers for construction of apartments - Petitioner not raises invoices as and when a particular landmark is reached - Accrual of the consideration stage-wise occasioned automatically upon completion of the stage of construction set out in the agreement itself - However, petitioner confirms receipt of lump sum advances corresponding lo several initial landmarks in the contract, even prior t0 achievement of such landmarks -*

Entire sum received thus becomes taxable upon rece ipt as per provisions of Rule 3(b) of Point of Taxation Rules, 2011- Reporting of income in profit and loss account being irrelevant for the purposes of determination of Service Tax payable---. [paras 19, 20, 22, 24, 25, 34]

In view of above, I find that the appellant was liable to pay service tax on accrual basis and not receipt basis. However, the contention of the appellant that he was entitled to cum-tax benefit was tenable as there was nothing on record to infer that the service tax was charged or collected separately by the appellant in addition to the amount of consideration received by him.

9. As regards to levy of service tax on preferential location charges (PLC), Hon'ble High Court of Delhi in case of Suresh Kumar Bansal Vs UOI reported in 2016(43) S.T.R 3 (Del.,) as also relied by the appellant has held as under-

"54. insofar as the challenge to the levy of service tax on taxable services as defined under Section 65(105) (zzzzu) is concerned, we do not find any merit in the contention that there is no element of service involved in the preferential location charges levied by a builder. We are unable to accept that such charges relate solely to the location of land. Thus, preferential location charges are charged by the builder based on the preferences of its customers. They are in one sense a measure of additional value that a customer derives from acquiring a particular unit. Such charges may be attributable to the preferences of a customer in relation to the directions in which a flat is constructed; the floor on which it is located; the views from the unit; accessibility to other facilities provide in the complex, etc. As stated earlier, service tax is a tax on value addition and charges preferential location in one sense embody the value of the satisfaction derived by a customer from certain additional attributes of the property developed. Such charges cannot be traced directly to the

value of any goods or value of land but are as a result of the development of the complex as a whole and the position of particular unit in the context of the complex."

9.1 In view of the above, the preferential location charges (PLC) were includible in the taxable value for the levy of service tax.

10. The appellant has further contended that the extended period proviso was not applicable as there was no suppression of facts or intent to evade any tax. In this regard find that the appellant was paying service tax on receipt basis instead of accrual basis as discussed above and had filed ST-3 accordingly. The correct taxable value in any return was therefore at variance with the taxable value on which the service tax was required to be paid during any month. However, there is nothing on record that any part of the consideration received towards provision of the taxable service had not been included for the purpose of discharge of the service tax liability. It is therefore evident that the appellant by adopting a wrong manner of payment of service tax (on receipt basis instead of on accrual basis) was deferring his tax liability and the service tax was eventually paid after the due date, as per provisions of the PoT as these applied to the supply of a continuous service, as was the case. Under the facts and circumstances of the case, neither the allegation of suppression of facts nor intent to evade payment of taxes is sustainable. Accordingly, penalty under Section 78 of the Act is not imposable. As the demand pertains to the period from April-2013 to June-2016 and the SCN was issued on 02.05.2017, it was incumbent upon the department to ascertain whether the appellant had already filed ST-3 returns of the subsequent period and if so, then what was the total lax liability admitted in the returns so filed. The admitted tax liability was required to be dealt with under the provisions of Section 73(1B) (w.e.f 14.05.2015) of the Act in respect of which no SCN was permissible under

law at the time of issuance of SCN. Accordingly to the extent of the admitted tax liability, no penalty was imposable under any of the provision of law. The admitted tax liability was required to be recovered along with interest hereon in any of the modes specified in Section 87 of the Act, as provided in the said Section 73 (1B) ibid. A show cause notice could have been issued only for the amount of tax not admitted in the returns by not including any part of the taxable value and that too only within the normal period of limitation

11. Under the facts and circumstances of the case, I find it proper and reasonable to remand the case back to the adjudicating authority to pass the orders afresh after ascertaining the status of the ST-3 returns filed and the total amount of tax liability self-assessed and admitted in the returns so filed. The contention of the appellant that the tax liability on the entire amount of consideration received by him stands discharged needs to be examined for which the appellant is directed to produce before the adjudicating authority necessary documentary evidence. Needless to mention that the appellant is liable to pay interest for the delayed payment of tax."

4.3 We do not find any merits in the submissions made in the appeal. From the impugned order it is evident that the entire issue is in respect of the time and manner of payment of service tax. From the impugned order it is evident that appellants are paying service tax on receipt basis and revenue has issued notice and confirmed the demand against the appellant demanding the tax on accrual basis relying on the provisions of Point of Taxation Rules, 2011. Indeed the scheme of levy of taxation of services was changed with the introduction of Point of Taxation Rules, 2011 and the service tax which was till then being paid on the basis of receipt basis was changed to accrual basis. Undisputedly, in India the accounts of the companies are based on the accrual basis and the Financial Statements are also prepared on the accrual basis. Taking note of AS-7 and Point of

Taxation Rules, Hon'ble Madras High Court has in case of **Firm Foundations & Housing Pvt Ltd** [2018-TIOL-703-HC-MAD-ST] observed as follows:

"9. Rule 3 is extracted below:

Rule 3 - Determination of point of taxation: For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be, -

(a) the time when the invoice for the service [provided or agreed to be provided] is issued:

[Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service.]

(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment:

(Provided that for the purposes of clauses(a) and (b),-

(i) in case of continuous supply of service where the provisions of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;

(ii) Wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a).]

Explanation – For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provisions of taxable service, the point of taxation shall be the date of receipt of such advance.]

10. Rule 3 finds part in the Point of Taxation Rules, 2011 applicable with effect from 01.04.2011. It provides for a methodology for determining the accrual and quantification of services, the exact delivery of which is not certain or ascertainable, and that may also be continuous in nature.

11. Before me, two legal issues arise for determination:

(i) Relevance of the P and L accounts of the petitioner in the determination of point of rendition of service and the method of quantification of receipts in respect thereof and

(ii) The application of Rule 3 itself in the admitted facts and circumstances of the present case.

12. Rule 3 specifically provides clarity on the determination of point of taxation. Had the respondent merely applied the said Rule to determine taxability of the services rendered by the petitioner, the basis of assessment would have been perfectly in order. The flaw, as I see it, arises from reliance by the respondent upon the entries in the P and L account to determine the point of taxation of the services rendered and quantification thereof.

13. Before going to the basis of the SCN and impugned order, I extract the basis of finalization of the P and L account itself. Admittedly, the financials, including the P and L account have been prepared on the basis of the Accounting Standards (in short 'AS') issued by the Institute of Chartered Accountants of India (in short 'ICAI). In the present case, the petitioner states unambiguously in the reply to the SCN that the basis of preparation of financials as far as the income from the building project is concerned is the 'Project Completion method'.

14. AS 7 deals with the recognition of income from building projects on the basis of the 'Project Completion Method' and I extract the relevant portions of AS 7, in so far as it is relevant to this writ petition, hereunder:

". . . .

Recognition of Contract Revenue and Expenses

21. When the outcome of a construction contract can be estimated reliably, contract revenue and contract costs associated with the construction contract should be recognised as revenue and expenses respectively by reference to the stage of completion of the contract activity at the reporting date. An expected loss on the construction contract should be recognised as an expense immediately in accordance with paragraph 35.

22. In the case of a fixed price contract, the outcome of a construction contract can be estimated reliably when all the following conditions are satisfied: Construction Contracts 73 (a) total contract revenue can be measured reliably; (b) it is probable that the economic benefits associated with the contract will flow to the enterprise; (c) both the contract costs to complete the contract and the stage of contract completion at the reporting date can be measured reliably; and (d) the contract costs attributable to the contract can be clearly identified and measured reliably so that actual contract costs incurred can be compared with prior estimates.

23. In the case of a cost plus contract, the outcome of a construction contract can be estimated reliably when all the following conditions are satisfied: (a) it is probable that the economic benefits associated with the contract will flow to the enterprise; and (b) the contract costs attributable to the contract, whether or not specifically reimbursable, can be clearly identified and measured reliably.

24. The recognition of revenue and expenses by reference to the stage of completion of a contract is often referred to as the percentage of completion method. Under this method, contract revenue is matched with the contract costs incurred in reaching the stage of completion, resulting in the reporting of revenue, expenses and profit which can be attributed to the proportion of work completed. This method provides useful information on the extent of contract activity and performance during a period.

25. Under the percentage of completion method, contract revenue is recognised as revenue in the statement of profit and loss in the accounting periods in which the work is performed. Contract costs are usually recognised as an expense in the statement of profit and loss in the accounting periods in which the work to which they relate is performed. However, any expected excess of total contract costs over total contract revenue for the contract is recognised as an expense immediately in accordance with paragraph 35.

26. A contractor may have incurred contract costs that relate to future activity on the contract. Such contract costs are recognised as an asset provided it is probable that they will be recovered. Such costs represent an 74 AS 7 amount due from the customer and are often classified as contract work in progress.

27. When an uncertainty arises about the collectability of an amount already included in contract revenue, and already recognised in the statement of profit and loss, the uncollectable amount or the amount in respect of which recovery has ceased to be probable is recognised as an expense rather than as an adjustment of the amount of contract revenue.

28. An enterprise is generally able to make reliable estimates after it has agreed to a contract which establishes: (a) each party's enforceable rights regarding the asset to be constructed; (b) the consideration to be exchanged; and (c)

the manner and terms of settlement. It is also usually necessary for the enterprise to have an effective internal financial budgeting and reporting system. The enterprise reviews and, when necessary, revises the estimates of contract revenue and contract costs as the contract progresses. The need for such revisions does not necessarily indicate that the outcome of the contract cannot be estimated

29. The stage of completion of a contract may be determined in a variety of ways. The enterprise uses the method that measures reliably the work performed. Depending on the nature of the contract, the methods may include: (a) the proportion that contract costs incurred for work performed upto the reporting date bear to the estimated total contract costs; or (b) surveys of work performed; or (c) completion of a physical proportion of the contract work. Progress payments and advances received from customers may not necessarily reflect the work performed.

30. When the stage of completion is determined by reference to the contract costs incurred upto the reporting date, only those contract costs that reflect work performed are included in costs incurred upto the reporting date. Examples of contract costs which are excluded are:

(a) contract costs that relate to future activity on the contract, such as costs of materials that have been delivered to a contract site or set aside for use in a contract but not yet installed, used or applied during contract performance, unless the materials have been made specially for the contract; and

(b) payments made to subcontractors in advance of work performed under the subcontract.

. . . .”

15. AS 7 thus provides for a detailed methodology for the reporting and determination of the percentage of income

from the contract over the term of the project and sets out the mode of computation for arriving at the same. The basis of such recognition and reporting is the apportionment of the income earned and expenditure incurred over the tenure of the project. This is entirely different and distinct from the scope, object and application of the Point of Taxation Rules that seeks to set out a methodology for determination of when the service was rendered and consequently when the receipt of income from such rendition be taxed.

16. The emphasis and thrust of each methodology is in alignment with the different purposes that they bear reference to – AS 7, in the context of the preparation of financials, addresses the 'how much' of the transaction over the term of contract whereas Rule 3 of the Rules addresses the 'when' in relation to the rendition of service for computing taxability under the Finance Tax Act 1994.

17. The basis of the addition by the respondent is clear from the SCN wherein he states that 'further, on verification of the profit and loss account of the assessee for the financial years 2012-13, 2013-14 and 2014-15 along with Service Tax Payment shown in the ST3 returns, it appears that the assessee have not paid the appropriate Service Tax.' Despite the explanation offered by the petitioner to the effect that it is the Point of Taxation Rules that would govern the determination of time of rendition of service and consequent accrual of receipt and liability to tax thereof, and not the P and L accounts of the petitioner, the respondent persists in adopting the financials for the determination of service tax liability as well.

18. …...

19. Clause (i) of the proviso to Rule 3 specifically provides for determination of the point of taxation in cases of continuous supply as in the case of the petitioner herein.

20. The petitioner enters into agreements with customers for the construction of apartments. The agreement provides for

demarcated activities, described stage-wise (in short 'landmarks') upon the completion of which, payments are to be released by the customer. The rendition of the service results in the accrual of the receipt of consideration in respect thereof.

21. The relevant clause in the construction agreement dated 30.12.2014 (provided as a sample) reads thus:

…..

1. The party of the Second Part shall pay the party of the First Part a sum of Rs.1,75,43,320/- (Rupees One Crore Seventy Five Lakhs Forty Three Thousand Three Hundred And Twenty Only) for the construction of a Three Bed Room Flat measuring 2055 sq. ft. as per the specifications mentioned in Schedule B and Schedule C in the following manner:

At the time of booking - Rs.25,43,320/-

On completion of Basement work - Rs.26,00,000/-

On completion of Ground Floor Roof - Rs.18,00,000/-

On completion of First Floor Roof - Rs.18,00,000/-

On completion of Second Floor Roof - Rs.18,00,000/-

On completion of Third Floor Roof - Rs.18,00,000/-

On completion of Brick Work - Rs.18,00,000/-

On completion of Internal Plastering - Rs.18,00,000/-

On completion of Tile Laying in your flat - Rs.12,00,000/-

On Handing Over Possession of your flat - Rs. 4,00,000/-

2. The Party of the Second Part has paid a sum of Rs.87,43,320/- (Rupees Eighty Seven Lakhs Forty Three Thousand Three Hundred And Twenty Only) by the way of cheque no.049006 drawn on ICICI Bank, dated 05.11.2014., to the Party of the First Part as Advance, the receipt of which sum, the party of the First Part hereby acknowledges.

3. The Party of the Second party shall pay the Balance Sum of the Rs.88,00,000/-(Rupees Eighty Eight Lakhs Only) to the Party of the First Part as specified in Clause 1 of this Agreement.

4. Payment shall be made by the Party of the Second Part without default to the Party of the First Part.

22. Rule 3(a) provides for a situation where the accrual of service is predicated upon the raising of an invoice. In the present case, the admitted position is that the petitioner does not raise invoices as and when a particular landmark is reached and the accrual of the consideration stagewise is occasioned automatically upon completion of the stage of construction set out in the agreement itself.

23. It is the specific case of Mr.Prabhakar that the customers have remitted, in advance, the consideration relating to several of the initial landmarks as a lump-sum and that the said amount has been offered to tax. It was then incumbent upon the respondent to have, in the light of the stand adopted by the petitioner in its Service Tax Returns, to have examined whether the receipts offered to tax correspond and cover the stages in respect of which consideration has accrued as per the agreement with the customer.

24. Rules 3(a) and (b) provide for the point of taxation to be either the point of raising of invoice (Rule 3(a)) or in a case where the service provider has received the payment even prior to the time stipulated in the invoice, upon receipt of

such payment(Rule 3(b)). In the present case, no invoice is said to have been raised. However, the petitioner confirms that it has, in fact, received lump-sum advances corresponding to several initial landmarks in the contract, even prior to the achievement of such landmarks. As per the provisions of Rule 3(b), the entire sum received thus becomes taxable upon receipt and according to Mr.Prabhakar, has been offered to tax.

25. Instead of such determination by application of the provisions of Rule 3, the respondent relies upon the P and L accounts to conclude that the amounts reflected therein have not been offered for service tax. The reporting of income in the P and L being irrelevant for the purposes of determination of service tax payable, the basis of the impugned assessment is erroneous.

26. It is a well settled position that when a statutory provision or Rule addresses a specific scenario, such rule/provision is liable to be interpreted on its own strength and context and one need look no further to alternate sources to seek clarity in regard to the issue that has been addressed by the aforesaid rule/provision.

27. ……

28. …...

29. …...

30. …. ..

31. The petitioner is, admittedly, recognizing revenue under the 'Project Completion Method' in terms of AS-7 issued by ICAI. We need not, in the present case, concern ourselves with the method followed for the preparation of financials as the same has no impact upon the Point of Taxation Rules. Suffice it to state that the AS provides a certain methodology for the computation of income from projects that is at variance with the method set out under Rule 3.

32. Insofar as Rule 3 sets out a specific modus operandi in this regard, it assumes priority and is the only relevant factor to be taken into account in the determination of point of rendition and accrual of services for the purpose of imposition of service tax. The first issue is answered accordingly.

33. ……..

34. In the light of the discussion above, the impugned order of assessment dated 21.04.2017 is set aside and the matter remitted to the file of the Respondent to be re-done de novo strictly in accordance with the provisions of Rule 3 of the Rules and in the light of the observations made in this order after affording due opportunity to the petitioner, within a period of three (3) months from date of receipt of this order."

4.4 In view of the above decision we do not find any merits in the submissions made by the appellant to the extent that Rule 3 of the Point of Taxation Rules shall not apply and service tax should be paid by them on the receipt basis. We also note that as per Notification 28/2011-ST dated 01.04.2011 specifically reads as follows:

"G.S.R. (E).- In exercise of the powers conferred under clause (a) and clause (hhh) of sub-section (2) of section 94 the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), read with clause (c) of rule (2) of the Point of Taxation Rules, 2011(hereinafter referred to as the said rules), the Central Government hereby notifies that the provision of taxable services referred to in clauses (zzq), (zzzh), (zzzx), (zzzu) and (zzzza) of section 65(105) of the Finance Act, shall be treated as continuous supply of service, for the purpose of the said rules."

4.5 In fact impugned order, recognizes the fact that appellant's claim with regards to payment of service tax on the receipt basis and remands the matter back to the original authority for reconciliation of the payment of the service tax made by the

appellant on receipt basis with the payment of service tax on accrual basis as per Rule 3. He has specifically directed that demand should be limited to the amounts which can be reconciled. We do not find any infirmity in the direction given for the reason that Point of Taxation Rules, only determine the time when the service tax becomes due for the payment and do not create additional liability to tax. In case by following the receipt basis or any other basis if the entire tax liability has been discharged then there can be no demand for the same. However in view of specific stipulation as per the said Rules, if the tax is paid later than the due date then there interest has to be paid for the period of delay.

4.6 In respect of "Preferential Location Charges" impugned order has specifically followed the observations made by the Hon'ble Delhi High Court in case of Suresh Kumar Bansal, supra. In case of **Maharashtra Chamber Of Housing Industry [2012-TIOL-78-HC-MUM-ST] Hon'ble Bombay High Court has held as follows:**

> *"32. The provisions of clause (zzzzu) which were introduced by the Finance Act of 2010 in the provisions of Section 65 (105) are also sought to be challenged. The challenge is on the ground that firstly there is no element of service involved and the addition attaches to a location. Secondly, it has been submitted that there is no voluntary act of rendering a service. Thirdly, it has been urged that the tax is a tax on land per se, since it is a tax on location. Fourthly, it has been submitted that the provision is vague and therefore arbitrary since what constitutes a preferential location, an extra advantage or the basic sale price has not been defined.*
>
> *33. Now what clause (zzzzu) of Section 65(105) brings in are services provided to a buyer by a builder of a residential complex or a commercial complex for providing a preferential location or development of such complex, but to the exclusion of services covered under sub clauses (zzg), (zzq) and (zzzh) and those in relation to parking places. A*

preferential location is defined to mean any location having extra advantages which attracts extra payment over and above the basic sale price. The circular which was issued by the Central Board of Excise and Customs on 26 February 2010 takes note of the fact that in addition to activities involving construction, completion and furnishing repair, alteration, renovation or restoration builders of residential or commercial complexes provide other facilities and charge separately for them. These charges do not form part of the taxable value for charging of tax. These facilities include (i) Prime / preferential location charges for allotting a plot - or commercial space according to the choice of the buyer; (ii) Internal or external development charges which are collected for developing and maintaining parks, laying of sewage water pipelines, providing access roads and common lighting and other like charges. Since these charges are in the nature of service provided by the builder to the buyer over and above the construction service, they were brought within the purview of clause (zzzzu). In the affidavit in reply that has been filed in these proceedings reference has been made to the fact that builders as a matter of fact charge separately under diverse heads. A special value addition service includes the provision of a flat on a preferred floor to a prospective buyer, a flat facing a particular direction or a particular room in a particular direction. This involves a locational choice of a prospective buyer having an extra advantage for which additional payment is made by the buyer to the builder over and above the basic sale price. These according to the Revenue involve value additions and services when the prospective purchaser purchases a flat or a unit before the completion certificate is obtained. We find merit in the contention which has been urged on behalf of the Revenue that if no charge is levied for a preferential location or development, no service tax would be attracted in the first place. Builders, however, follow the practice of levying charges under diverse heads including preferred development

of the property intended to be sold or in terms of a preferred location which is made available to the buyer. Clause (zzzzu) only intends to obviate a leakage of revenue and plugs a loophole which would have otherwise resulted. To reiterate, if no separate charge is levied, the liability to pay service tax does not arise and it is only where a particular service is separately charged for that the liability to pay service tax arises. The fact that the service is rendered in the context of a location, does not make it a tax on land within the meaning of Entry 49 of List II. The tax continues to be a tax on the rendering of a service by the builder to the buyer. There is no vagueness and uncertainty. The legislative prescription is clear. Hence, there is no excessive delegation."

In view of the decision of Hon'ble Bombay High Court and the decision of Hon'ble Delhi High Court referred in the impugned order, we do not find any merits in the submission made in respect of Preferential Location Charges.

4.7 Thus we do not find any merits in this appeal.

5.1 Appeal is dismissed.

(Pronounced in open court on-21 August, 2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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