CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. II

Date of hearing: 04.07.2018
Date of pronouncement: 25.07.2018

S. T. Appeal No. 54373 of 2014
(Arising out of Order-in-Original No. JAI-EXCUS-001-COM-152-13-14 dated 16.04.2014 passed by the Commissioner, Central Excise, Jaipur-I).

Rajasthan Housing Board Appellant

Vs.

CCE, Jaipur Respondent

Appearance:

Sh. Sanjiv Agarwal with Sh. M. B. Maheshwari, C.A. for the appellant
Sh. Amresh Jain, AR for the Respondent

Coram:

Hon'ble Mr. V. Padmanabhan, Member (Technical)
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order No. 52613/2018

Per: **V. Padmanabhan**:

The present appeal is challenging the Order-in-Original No. 152/2013-14 dated 16.04.2015.

2. The appellant is Rajasthan Housing Board (RHB), Jaipur. The appellant is a body formed under Rajasthan Housing Board Act, 1970 by the Government of Rajasthan. They are engaged in development and construction of houses, roads, parks, shops etc. The present dispute is regarding the payment of service tax. During the period 01.07.2010 to 31.12.2011, the appellant undertook construction of residential units and received consideration for the same. Such residential units were allotted to the applicants, by executing the Sale Deed as well as a Perpetual Lease

Agreement. Various amounts were recovered towards cost of land, cost of construction, periodic lease money (payable on yearly basis), one time lease money and other charges related to registration etc. The Department formed the opinion that the appellant has engaged in construction of residential units which are covered by the definition of Residential Complex Service under Section 65(91a) read with Section 65(30a) of the Finance Act, 1994 and the appellant was liable for payment of service tax on the consideration so received.

3. In addition to construction and allotment of residential units, appellant also constructed shops which were leased to successful bidders in the auction process. Such lease was for a period of 99 years and various amounts were recovered. The Department was of the view that the amounts recovered as lease charges were liable to payment of service tax under the category of "Renting of Immovable Property Service" falling under Section 65(90a) read with Section 65(105)(zzzz) of the Finance Act, 1994. Show cause notice was issued and the issue was finalised with the issue of impugned order in which the adjudicating authority ordered payment of service tax both under 'Construction Service' as well as "Renting of Immovable Property Service". Aggrieved by the impugned order, present appeal has been filed.

4. With the above background, we heard Sh. Sanjiv Agarwal, ld. C.A. and Sh. Amresh Jain, ld. AR for the Revenue.

5. Ld. C.A. assailed the impugned order, ordering payment of service tax on the following main grounds:

(A) **CONSTRUCTION OF COMPLEX SERVICE**:

(i) The appellant has constructed row houses and independent houses. Such residential units cannot be considered as a Residential Complex defined under Section 65(91a). Since the appellant is not involved in the construction of residential complex comprising more than 12 units, they are not liable for payment of service tax.

(ii) Attention was drawn to a few photographs said to be of row houses constructed by RHB.

(iii) They relied on various case laws given hereinbelow in which it has been held that individual residential unit is not liable to service tax under the category of construction of complex service.

- CST vs. Macro Marvels Projects Ltd. –(2012) 37 STT 358 (SC)
- Arhant Construction vs. CCE, Jaipur-II 2013 (30) STR 64; 2012 (37) STT 151 (CESTAT, New Delhi).
- Sri Venkateshwara Engg. Corporation -2013 (30) STT 328 (CESTAT, Chennai).
- A.S. Sikarwar vs. CCE, Indore -2012 (28) STR 479 (CESTAT, Delhi).
- Banna Ram Choudhary vs. CCE, Jaipur – 2012 (27) STR 348; 36 STT 618 (CESTAT, New Delhi)
- Vinod Kumar Goyal vs. CCE, Jaipur-I 2011 (23) STR 30 (CESTAT, Delhi).

(iv) If service tax is liable to be paid, it was prayed that the benefit of abatement in terms of Notification No. 1/2006-ST dated 01.03.2006 may be extended to the appellant.

(v) It was also submitted that the benefit of cum tax value may also be extended in determination of service tax, if tax is held payable.

(B) **RENTING OF IMMOVABLE PROPERTY**:

(i) Lease rent has been charged from various shops, which have been granted lease for 99 years. The ownership/ title in such property

stand transferred to the buyer and such transactions are subject to levy of stamp duty. No service tax is payable since 99 years lease partakes the character of sale.

(ii) The amounts recovered by way of leasing have been paid to Rajasthan Government and no part of the same is retained by them. To this effect, ld. C.A. brought to our notice the certificate issued by the Chartered Accountant.

(iii) Even in respect of residential units constructed and allotted, lease amounts have been charged and collected and department has levied service tax on such lease amount also. As per the definition of "Renting of Immovable Property Service", service tax is not liable to be paid in respect of residential properties.

(iv) In respect of service tax demands raised under both the above heads, ld. Counsel also submitted that the demand is hit by time bar. It is submitted that RHB is an instrumentality of the State Government and as such it cannot be said that RHB has indulged in suppression of facts to evade service tax.

6. Ld. AR justified the impugned order. In respect of construction of complex service, he brought to our notice the findings of the lower authority in para 15 of the impugned order. He submitted that the lower authority has recorded that RHB constructed houses in a large common area having common approach road, water supply, park and many other common facilities. Hence, he submitted that the residential scheme developed by RHB satisfies all the criteria of residential complex.

7. Heard both sides and perused appeal record.

8. First we consider the demand of service tax raised under the category of "Construction of Complex Service". The activity undertaken by RHB includes the development of land and construction of residential units on the land made available by the Rajasthan Government. The demand for service tax under "Construction of Complex Service" has been mainly resisted by the appellant on the ground that they have undertaken construction of independent houses/ residential units and not of any complex with more than twelve such units. From a few photographs enclosed with appeal, it is noted that RHB has undertaken construction of row houses. We note that each house shares a wall with the houses on either side and perhaps with the one in front / behind. To ascertain whether these will fall within the definition of residential complex, we reproduce the relevant definition below:

> *"Definition and scope of service as per Section 65(30a) of the Finance Act, 1994 :*
>
> *"construction of complex" means -*
>
> *(a) construction of a new residential complex or a part thereof; or*
>
> *(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or*
>
> *(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;*
>
> *Definition of Residential Complex as per Section 65(91a) of the Finance Act, 1994 :*
>
> *"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;

"Taxable Service" as per section 65(105)(zzzh) of the Finance Act, 1994 :

"Taxable Service" means any service provided or to be provided 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 authorised 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 authorised 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 provided by the builder to the buyer.

9. For the activity to be covered by the definition of residential complex, it should comprise of more than twelve residential units. These should be situated within one building or more than one building. Further, the requirement is that these residential units should have common area and also water supply/ affluent treatment system and other common facilities such as

park, lift, common parking space etc. All these facilities should be located within a premises and the layout of such premises should be approved by an authority under any law for the time being in force.

10. The adjudicating authority has examined the satisfaction by RHB of the definition of residential complex. He has recorded that in the schemes developed by RHB, they are required to make available the facilities listed in the definition of residential complex, as per Section 28 of the Rajasthan Housing Board Act, 1970. From the findings recorded by the Adjudicating Authority, it does not appear to us that he has examined the situation in terms of satisfying the condition specified in the definition in respect of each and every cluster of houses constructed by RHB and for which demand of service tax has been made. The Tribunal in the case of ***Hari Narain Khandelwal vs. CCCE&ST -2017 (5) GSTL 277 (Tri Del.),*** which is one of the cases relied by the appellant, has observed as under:

> "5. ……*The common area and common shared facilities should be with reference to the approved lay out of a particular location and the residential units should be located in such approved lay out. Sharing facilities provided by local authorities available to all residential units by way of road, street lights, park, water supply unit does not make the residential unit covered by the tax entry under Section 65(91a) of the Finance Act, 1994. ……..*"

As observed by the Tribunal above, before concluding on the service tax liability in respect of the row houses constructed by RHB, it will be necessary to go through the layout plan of the residential units constructed by RHB in the form of row houses with a view to examine the factual position in each of those layouts. Without such clear findings, we are unable to uphold the demand of service tax under this category. Consequently, we set aside

the demand for service tax under the category of "Construction of Residential Complex" and remand the matter to the Adjudicating Authority for re-examination and denovo decision as noted above.

11. **Next we consider the demand of service tax raised under the category of "Renting of Immovable Property**".

The RHB has constructed various commercial buildings/ shops which have been allotted on the basis of auction on a 99 years Perpetual Lease. From such allottees, various amounts were recovered by RHB as lease charges. The charges are partly payable in lumpsum at the time of allotment and partly as recurring charges on annual basis. The lower authority has held that RHB will be liable to payment of service tax under this category on the entire amount received. This has been strongly resisted by the appellant with the submission that 99 years lease takes the character of sale, particularly in view of the fact that the allottee is free to sell or gift or mortgage the building. Further, it has been submitted that the lease amounts have been paid by RHB to Rajasthan Government and no part of the same is retained by them.

12. The relevant definition is reproduced below for ready reference:

"***Section 65(90a) of Finance Act, 1994***

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

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

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

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

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

Section 65(105)(zzzz) of Finance Act, 1994

"to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or, for furtherance of, business or commerce.

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

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

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

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

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

(v) vacant land, given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce;

but does not include :-

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

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

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

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

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

13. The issue whether long term lease of 99 years will be covered within the definition of "Renting of Immovable Property" has been examined in very great detail by the Tribunal in the case of ***Greater Noida Industrial Development Authority vs. CCE&ST, Noida - 2015 (38) STR 1062 (Tri. Del***.). The finding of the Tribunal is reproduced below:

> ***"9.2*** *The other plea of the appellant that the allotment of land by the appellant to various persons is on long term lease basis - the leases of 90 years, which amount to transfer of ownership and such leases are outside the purview of Section 65(105)(zzzz) and in this regard, the appellant have relied upon the judgments of the Apex Court in the case of Shanti Sharma & Ors. v. Ved Prabha & Ors. reported in (1987) 4 SCC 193 and also the judgment in the case of R.K. Polshikar (HUF) v. CIT reported in (1988) 3 SCC 594.*
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> ***9.2.1*** *While Section 65(105)(zzzz) provides that service provided to any person by any other person by renting of immovable property or any other service in relation to such renting in course of or for furtherance of business or commerce is taxable, Explanation 1 mentions as to which immovable properties are included in expression "immovable property" and which immovable properties are not included in this term. Section 65(90a) defines the term "renting of immovable property" and according to the definition "renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangement of immovable property for use in the course or furtherance of business or commerce but it does not include, "renting of immovable property" by a religious body or to a religious body; or renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject of field, other than a commercial training or coaching centre. Explanation 1 to 65(90a) clarifies that for the purpose of this sub-section, expression "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings". Explanation 2 to this sub-section provides that for the removable of doubts, it is hereby declared that for the purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property irrespective of the transfer of possession or control of the said immovable property.*
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> ***9.2.2*** *While the term, "lease" is not defined in Finance Act, 1994 in terms of Section 105 of the Transfer of Property Act, 1882, a lease of immovable property is a transfer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, of money, or a share of*

crops, service or any other thing of value, to be rendered periodically or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms. Thus, the term "lease" covers the "lease" for any period including lease in perpetuity. In terms of Explanation 2 to Section 65(90a), "renting of immovable property" also includes renting, letting, leasing, licensing or other similar arrangements of immovable property, irrespective of the transfer of possession or control of the said immovable property. Section 65(90a), while defining the "immovable property" does not make any distinction between the long term lease or short term lease and there is absolutely no provision to exclude the long term lease or lease in perpetuity from the purview of the expression "renting of immovable property". Therefore, it is difficult to accept that appellant's contention that long term leases or lease in perpetuity are excluded from the purview of Section 65(105)(zzzz) read with Section 65(90a).

9.2.3 *The appellant have cited the judgment of the Apex Court in the case of Shanti Sharma v. Ved Prabha (supra). This judgment is with regard to the provisions of Section 14(1)(e) of the Delhi Rent Control Act, 1958. Section 14(1) of the Delhi Rent Control Act provides that Rent Controller may, on an application made by the landlord in the prescribed manner, order for the recovery of the possession of the premises on the ground as mentioned in Clause (a) to (e). The ground mentioned in clause (e) is that the premises let for residential purposes are required bona fide by the landlord for occupation as a residence for himself or for any member of his family dependent on him, if he is the owner thereof, or for any person for whose benefit the premises are held and that the landlord or such person has no other reasonably suitable residential accommodation. In this case, the house let out by the respondent, Ms. Ved Prabha was built on a leasehold land allotted to her by DDA and it was the plea of the petitioner Ms. Shanti Sharma that the respondent Ms. Ved Prabha holding the plot on the land on leasehold basis cannot be treated as the owner. It is in this background that Apex Court held that while the respondent-landlord is the owner of the structure built on the leasehold land, so far as the land is concerned, since she holds the same on long term lease basis, she will fall within the ambit of the meaning of the term, "owner" as is contemplated in Section 14(1)(e). In this case, the Apex Court also observed that meaning of the term "owner" in Section 14(1)(e) is influenced and controlled by its context and hence, the petitioner's construction is not acceptable because it seems to be quite contrary to the reasonable operation of the statutory provisions. Thus, in this case, as observed by the Apex Court itself, the meaning of the word, "owner" in Section 14(1)(e) is influenced and controlled by its context and, therefore, the ratio of this judgment of the Apex Court is not of universal application and all long term leases cannot be treated as the transactions of the transfer of ownership.*

9.2.4 *In case of R.K. Polshikar (HUF) v. CIT (supra), the petitioner was holding a plot of land on 99 years lease. After developing the said*

plot, he transferred on long term lease basis to other person against the lump sum amount as premium and in addition to this, an annual lease rent, which was also to be paid in advance. The lessor reserved his right to take back the possession of the land leased if the rent is not paid for two consecutive years. The point of dispute was as to whether income tax (Capital Gains Tax) under Section 12B of the Income Tax Act would be chargeable on the premium amount. In terms of Section 12B of the Income Tax Act, the tax shall be payable by an assessee under the head "Capital Gains" in respect of any profits or gains arising from the sale, exchange, relinquishment or transfer of a capital assets effected after 31-3-1986 and such profits and gains shall be deemed to be the income of the previous year in which the sale, exchange, relinquishment or transfer took place. The terms "capital asset" was defined as property of any kind held by an assessee, whether or not connected with his business, profession or vocation. The Apex Court in this case held that when the petitioner has given his property on long term lease basis for 99 years, it would appear that under the leases in question, he has parted with an asset of enduring nature, viz. the right to possession and enjoyment of the property leased for a period of 99 years subject to certain conditions on which the leases could be terminated and that provisions of Section 12B of the Income Tax Act would be applicable to the income from such leases. Thus, this judgment of the Apex Court is also with regard to the provisions of Section 12B of the Income Tax Act and the ratio of this judgment is that income from transfer of a plot of land on long term basis is to be treated as capital gain income which would be taxable under Section 12B of the Income Tax Act. This judgment is not an authority for the appellant's proposition that all long terms lease of land amount to transfer of ownership of land.

9.2.5 *We, therefore, hold that all the leases of immovable property as defined in Section 65(105)(zzzz) would be covered for Service Tax whether the lease is short term or long term or lease perpetuity."*

14. The above decision of the Tribunal was affirmed by the Hon'ble Allahabad High Court, reported as ***2015 (40) STR 95 (All.)***. In the above case, the Tribunal has examined the leviability of service tax on long term lease of vacant land but we are of the view that the finding is equally applicable to the present case.

15. By following the above decision, it is to be held that RHB will be liable for payment of service tax on the lease amounts recovered by them

from the allottee of commercial properties and shops by whatever name. But no service tax levied can be upheld in respect of such lease amounts recovered for allotment of residential units.

16. The appellant has strongly contended that the demand raised under both the categories of services are hit by time bar. It is submitted that RHB is an instrumentality of the State Government and as such it cannot be said that RHB has indulged in suppression of facts to evade service tax.

The justification for raising the demand for service tax by invoking the provision to Section 73 has been discussed by the Adjudicating Authority in para 19 of the impugned order. The only justification provided by the Adjudicating Authority is that RHB did not comply with the provisions of Service Tax Law by not declaring the fact to the Department. In view of the fact that 99 years lease is liable for stamp duty, we are of the view that the appellant entertained a bonafide belief that such lease of commercial property/ shops may not be liable for payment of service tax under the category of "Renting of Immovable Property". Consequently, we hold that the Department is not justified in invoking the extended period of time limit for demanding the tax. However, since the issue is settled against the appellant in the case of ***Greater Noida Industrial Development Authority*** (supra), we order payment of service tax along with interest for the period falling within the normal time limit, only in respect of commercial properties/ shops leased by the appellant.

17. The appellant is an instrumentality of Rajasthan Government and performing statutory functions in accordance with the Rajasthan Housing

Board Act and they were under the bonafide belief that the activity would not attract service tax, we consider this to be a fit case and waive penalty in terms of Section 80 of the Finance Act, 1994.

18. The appeal is disposed of in the above terms.

(Pronounced on 25.07.2018).

(Rachna Gupta)
Member (Judicial)

(V. Padmanabhan)
Member (Technical)

Pant