IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing: 30/07/2018
Date of Pronouncement: 27/11/2018

Appeal No. ST/50103-50104/2014-(DB)

(Arising out of Order-in-Original No. 133/G.B./2013 dated 30/09/2013 passed by the Commissioner of Service Tax Delhi,)

Premium Real Estate Developers — Appellant
Rajat Yadav

Vs.

C.S.T.-Service Tax – Delhi — Respondent

Appearance
Shri Ajay Aggarwal & Ms. Mallika Joshi, Adv — for the appellant
Shri Sanjay Jain & Amresh Jain, DR — for the respondent

CORAM: **Hon'ble Mr. ANIL CHOUDHARY, Member (Judicial)**
Hon'ble Mr. C.L.MEHER, Member (Technical)

Final Order No: 53322-53323/2018

Per Mr. Anil Choudhary

1. The issue involved in this appeal is whether the Appellant is liable to service tax under the category 'Real Estate Agent Services' as defined under Section 65(88) read with Section 65(89) & 65(105) (v).

2. The appellant 'Premium Real Estate Developers', New Delhi is a partnership firm and is in the business of real estate trade. The main objective of the partnership firm is to carry on the business of purchase, sale, develop, take and exchange or otherwise, whether for investment or sale in any real estate including

lands to carry on the business of builders, contractors, dealers in land, building and any other activity in connection therewith and incidental thereto.

3. Sahara India Commercial Corporation Ltd.('Sahara India' for short) was interested in acquiring large parcels of land for setting up townships. Accordingly Sahara India entered into three separate but similar memorandum of understanding with the appellant firm for acquiring three large parcels of land at three different locations as follows;

Name of the Associate	Place/Sites	Date of the MOU	Area of the land(in acre) Intended to acquire	Average rate per acre(in Rs.)
M/s Premium Real Estate Developers	Kanpur	09.08.2003	100	8,50,000/-
	Lalitpur	15.11.2003	100	5,75,000/-
	Raeberalli	16.05.2005	125	7,50,000/-

4. Under the MOU, Sahara India, had agreed to pay an average rate per acre of land to be purchased by Sahara India, which land would be identified, divided and demarcated by the appellant firm together with necessary documents and other formalities. The MOU for each site specifically provided the obligations of both the parties. It specifies that Sahara India had agreed to procure land at the aforementioned locations, at the fixed average rate per acre, which included all the cost of land, development expenses (items). The obligations of the appellant under the MOU were- (a) divide and demarcate the entire land into the blocks of

20 to 30 acres, (b) purchase the land in contiguity block wise, (c) furnish title papers and other necessary documents for the land to be purchased (d) obtain the permission and approval from the concerned authority for transfer of land and the expenses incurred in this regard, would be borne by the appellant firm, (e) bring the owners of the land for the purposes of negotiating, registration, etc , to the relevant places and bear all the expenses involved on these. The MOU further provided that the other expenses like stamp duty/registration charges, mutation charges would be borne by Sahara India. On satisfaction by Sahara India about the fitness of deal(s) for the land, appellant firm shall organise the registration in the name of Sahara India, after making the payment to the owners of land, from the advance amount given to them for the purchase of land. The difference, if any, between the amount actually paid to the owners of land and the average rate per acre settled between the parties as indicated, would be payable to the appellant firm, as their margin or profit. Further Sahara India had reserved its right to withhold 50 per cent of the amount (out of margin) to ensure that the obligations on the developer/appellant are fully discharged in terms of the MOU, and in case there was any serious default on the part of the appellant, the same could be made good by way of forfeiture of such amount, so withheld.

5. Pursuant to the MOU, the appellant firm received advance amount from Sahara India for each site. Substantial part of such amount was used by the appellant to pay to the seller or the prospective seller of the land, for agreeing to

sell land to Sahara India. The details of such amount based on the payment made by Sahara India, are as follows;

Place/site	Amount paid under land purchase head to appellant	Area of land transferred in the name of Sahara(in acres)	Amount as per sale deeds in Rs.	Amount under develop ment head
Kanpur	8,98,00,000/	38.85	2,66,99,800/-	NIL
Lalitpur	5,50,00,000/	77.96	4,22,01,779/-	NIL
Raebarelli	6,75,00,000/	89.91	1,69,20,822/-	NIL

6. For the purpose of reference we refer to Memorandum of Understanding (MOU) dated 15th November 1983, related to Lalitpur town, entered between Sahara India and the appellant, wherein Sahara India was interested to purchase 100 acres of land for developing residential township in and around the city of Lalitpur. The appellant assured to make available 100 acres of land situated in the village Rora, Distt. Lalitpur U.P.,with direct opening or acess of at least 1000 feet on the National highway. The salient features of the agreement are;

6.1 The process of land purchase shall be in a compact contiguous, adjacent and plot wise or block wise manner starting from the roadside.

6.2 The appellant shall furnish the title papers and all other necessary documents with reference to the land proposed, within 15 days from the date of signing of the MOU.

6.3 Thereafter the appellant shall obtain and furnish, each and every other necessary permission/ approval from the Government body/competent authority, or other regulatory authority, required for transfer of the land proposed, and further arrange for the purchase of land proposed under the MOU, at the average agreed rate per acre, within two months or within such further time at the discretion of Sahara India.

6.4 All expenses for obtaining proof of title and approval (except for ULC clearance) required for the transfer of title in the land shall be borne by second party, that is the appellant, and all the supporting documents furnished in respect thereof shall reflect the latest position of the ownership of land.

6.5 Thereafter scrutinising the papers relating to title, the first party- Sahara India shall enter into an agreement of sale with the owners of the land, after payment of advance/signing amount, in favour of the cultivators/owner of the land.

6.6 Thereafter having completed and covered the entire land(area) under the MOU through agreement(s) to sell, the appellant shall thereafter get the sale deed(s) executed by the cultivators/owners

of land in favour of Sahara India or its nominees, after payment of remaining amount towards purchase. Where there are several co-owners in a 'Khata' (entry in the land record) the second party/appellant shall ensure that all the co owners execute the document (sale deed) at one time. In no case shall any document be executed by part co owners. That in the case the land is owned by minor, lunatic or an insane person, appellant will get appropriate guardianship certificate from the competent court/authority and agreement to sell shall be executed only with such guardian. In case any dispute is pending before any civil court or revenue Court, regarding title, share or for partition of the property, the appellant will try its best to get the settlement arrived among the co sharers/co owners and agreement to sell shall be executed accordingly.

6.7 That it is the responsibility of the appellant for bringing the cultivators/land owners to the Registrar office along with the necessary documents and photograph and to witness execution/registration of the documents.

6.8 That all payments to the Kashtkar/land owners, shall be made through pay orders/demand drafts/account payee cheques. That the difference, if any, of the amount being actually paid to the cultivators /owner of land and the average rate, shall be payable to the appellant. Such payment of difference to the appellant shall be regulated in such a

manner so as to ensure the performance of the terms and conditions of the MOU. The first party Sahara India may under discretion withhold maximum up to 10 per cent of the amount payable to the second party/appellant to ensure peaceful/proper demarcation and possession, mutation and construction of the boundary wall of the entire land. In case, the appellant fails to fulfil its obligations as stipulated in the terms of the contract/MOU, the same can be terminated by Sahara India and the withheld amount is liable to be forfeited. All expenses for registration of documents relating to the transfer or agreement of sale, etc., shall be borne by Sahara India. Further all expenses of mutation of land in the office of the concerned Revenue authority shall be borne by Sahara India and the appellant shall be required to coordinate and to do the work of Pairvi in respect thereof in the concerned offices and shall provide to Sahara India all necessary help so as to get the work of mutation completed.

7. It appeared to Revenue that the appellant was liable to pay the service tax under the classification 'Real Estate Agent Service' (introduced with effect from 1st October,2004) under section 65(88) of the Finance Act which defines a 'real estate agent' as a person who is engaged in rendering any service in relation to sale, purchase, leasing and renting, of real estate and includes a real estate consultant.

8. Real Estate consultant is defined under section 65(89) of the Finance Act. 'Real Estate Consultant' means a person who renders in any manner either directly or indirectly advice consultancy or technical assistance in relation to the evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management of real estate.

9. Section 65(105)(V) of the Finance Act defines 'Real estate agent service' as, the taxable service means any service provided or to be provided to a client by Real estate agent in relation to real estate.

10. It further appeared to Revenue that after the 1st October 2004 the appellant have received towards provision of service, in respect of real estate service, as follows;

S.	Details of amount	Project site			Total
		Kanpur Rs.	Lalitpur Rs.	Raebarelli Rs.	Rs.
1	Opening Balance as on 01.10.2004	2,50,73,500	150,00,000	.....	4,00,73,500
2	Amount received by M/s PRED after 01.10.2004	2,00,00,000	4,00,00,000	6,75,00,000	12,75,00,000

3	Total advance amount with M/s PRED/Appell.	4,50,73,500	5,50,00,000	6,75,00,000	16,75,73,500

11. Thus out of the total amount received Rs. 16,75,73,500/- an amount of Rs. 4,00,73,500/- was received prior to 1st October 2004. It further appeared to Revenue that the appellant have not done any development work at the sites, as confirmed by Sahara India. It further appeared that out of the advance payment received, only 38.85 acres of land, involving sale deed value amounting to Rs. 2,66,99,800/- was procured for Sahara India at Kanpur Site, 77.96 acres of land was procured valued at Rs. 4,22,01,779/-, as per the sale deeds for Lalitpur site, 89.91 acres of land at sale deed value of Rs. 1,69,20,822/- at Raebarelli site. Thus balance amount was lying (under trust) unutilised with the appellant for the unfinished obligation under the MOU. It further appeared to Revenue that in terms of Section 67 of the Finance Act, which provides that the gross receipts are to be taken for the purpose of calculation of taxable value for levy of service tax, therefore, the total amount received Rs. 16,75,73,500/- would be the proper value for calculation of service tax. Accordingly, as per the SCN dated 22nd April 2010, for the extended period 1st October 2004 to 31st March 2007, service tax including Cess was demanded at Rs. 1,55,10,433/- by treating gross value (receipt) as cum tax.

12. The SCN further alleged that the appellant have suppressed the facts of rendering the taxable service, during the said period. Further neither they obtained the service tax registration as 'Real estate agent/consultant' nor filed the service tax returns, as prescribed. Thus it appears that the appellant failed to disclose truly the material facts, like nature of service provided by them, the gross amount received by them for rendering of taxable service, necessary for their assessment to tax for the said period. It appeared that such act of omission was deliberate with intent to evade payment of service tax. Had the officers of Directorate General not initiated inquiry against the appellant, the none payment of service tax by the appellant would not have been unearthed. The SCN further proposed to impose penalty under Section 76,77 and 78 of the Act. Further personal penalty was proposed on Shri Rajat Yadav partner.

13. The SCN was adjudicated on contest, by the Ld. Commissioner, and the proposed demand was confirmed along with interest and equal amount of penalty was imposed under Section 78, along with further penalty under Section 77. The proposed penalty under Section 76 was dropped. Further personal penalty on Shri Rajat Yadav of Rs.10,000/-, under Section 77(c) of the Finance Act was imposed upon. Being aggrieved, the appellant are in appeal before this Tribunal.

14. The learned counsel for the appellant urges that the appellant is not a real estate agent. Appellant is not acting as an agent of Sahara India and is in fact transacting on a principal to principal basis. Therefore there can be no question of levying service tax on its business, alleged as service in relation to real estate. The object clause of the partnership deed states that the parties thereto have organised themselves to purchase/sale, develop, exchange or otherwise acquire, whether for investment or sale in real estate including land, among others. Under each of the MOU Sahara India has agreed to pay the appellant an average rate per acre of land, to be purchased by Sahara India through or from the appellant. Real estate agent service became taxable with effect from 1st October 2004. Under the MOU appellant received an advance amount for each site both prior to 1st October 2004, and also thereafter. Substantial amount of such advance was used by the appellant to pay the sellers of the land, for selling the land to Sahara India.

15. On reading of the MOU, it is evident that it is the nature of principal to principal basis, between the appellant and Sahara India, where Sahara India have entered into an agreement with the appellant for purchasing of land, in the manner specified in the MOU. As such the appellant is not acting as an agent of anybody or Sahara India and is not a real estate agent. The appellant is into buying/selling of property on a principal to principal basis. The appellant is not engaged in providing any real estate agent service, as alleged. The Ld. Commissioner has erred in treating the transaction of sale, as one to provide

services. Neither Sahara India have engaged the appellant to provide any service nor any service have been provided by the appellant. The understanding of the Ld. Commissioner that since the land sold to Sahara India is not in the name of the appellant, therefore it is not a transaction for sale and purchase of land, is misplaced. For a principal to principal transaction for purchase and sale of land, it is immaterial whether the property sold is in the name of the seller or in the name of some 3rd party. In the facts of the present case, admittedly there is a transaction of purchase and sale. The land being sold to Sahara India being not in the name of the appellant, is not the decisive factor. What is relevant is to see the transaction between the parties. As the transaction is for purchase and sale of land there is no element of service involved. The other incidental obligations of the appellant/seller to scrutinize all the documents, to ensure the actual owner's presence at the time of registry, et cetera, are for carrying out the objective of the MOU between the parties. It is further submitted that sale/purchase the property or investment/booking of land, is the business on principal to principal basis and not a service as an agent. The learned counsel relied on the ruling of Hon'ble Delhi High Court in the case of ***Home Solution Retail India Ltd vs. Union of India*** 2009 (14) STR 433(Tri-Delhi), wherein it has been held as follows: –

> *"On the other hand, the service referred to with section 65(105)(v) which refers to a service provided by real estate agent in relation to real estate, does not, obviously, include the subject matter as a service. This is so because the real estate by itself cannot by any stretch of imagination be regarded as a service. Going back to the structured sentence, that is – service provided to A by B in relation to 'C', it is*

obvious that 'C' can either be a service such as dry cleaning, hairdressing, et cetera or not a service by itself, such as real estate."

16. Thus in order to tax somebody under section 65 (105)(v), it has to be 1st shown that some service has been rendered by the person to some other person, which is not so in the present case. The Adjudicating Authority has failed to even consider this aspect of the matter and merely gone by the definition of "Real estate agent", without considering the applicability of this section, which is evident. Further no consideration has been received by the appellant from Sahara India for the alleged taxable service under the MOU.

17. Insofar as the advance received by the appellant from Sahara India is concerned, the same is reflected by the appellant as an 'Advance' in the balance sheet on the liability side. Further as regards payment to the appellant by Sahara India, under the MOU, it is provided that- if there is difference(supra), if any, of the amount being actually paid to the owner of land and the average rate, same shall be payable to the appellant/second party. It is further submitted, that this difference, if any, which the appellant may earn at the end of the MOU, upon settlement of the accounts, only is profit/loss of the appellant from the aforesaid business of buying and selling of property, on a principal to principal basis. By no stretch of imagination it is consideration for any service. Admittedly as on the date of the show cause notice, the account between the appellant and Sahara

India not being settled, nor the MOU concluded, the amount lying with the appellant continues to retain the character of advance (lying in trust).

18. That hypothetically if the appellant instead of MOU, would have bought the land first in its own name and then sold the same to Sahara India, while making profit/loss out of the transaction of sale, Department would not have treated the said transaction as service. Mainly because in the present case the appellant does not transfer the land first in its own name and then in the name of Sahara India, rather the deal for land is struck by appellant, and then directly transferred in the name of Sahara India by the seller, would make no difference insofar as the nature and character of transaction is concerned, which is one of booking profit/loss in a transaction of sale and purchase of property. This is evident from the fact that, suppose appellant only makes a loss in the entire transaction, then obviously there would be no service tax, even as per the Department. It is further submitted that service tax is not dependent upon profit or loss in a transaction. A true consideration in a service contract is the consideration for the service rendered, which is irrespective of the fact whether the service provider earned profit or loss out of the transaction. In the present case, if the department's case is to be accepted, only in the event of appellant making profit out of the transaction, it would be liable to pay service tax and no service tax will be payable in case of there being a loss. This negates the rendition of any service, apart from showing lack of consideration. Mere sale and purchase of land against profit or

loss does not involve any service. Sale and purchase can be outright, or can be upon booking, or in any other manner. Reliance is placed on the ruling of this Tribunal in the case of ***Commissioner of Service, New Delhi vs. Karam Freight Movers-*** 2017(4) GSTL 215 (Tri-Delhi), wherein it was held that income earned by assessee to be considered as a taxable service under any service category must be shown in lieu of provisions of a particular service. Earning profit on a mere sale and purchase of cargo space in the process, is not a taxable activity under the service tax law. It is also held that such an activity is on principal to principal basis, and not an activity for the client. The said principle it is submitted, fully applies to the facts of the present case. The words in the agreement – 'difference if any', is not consideration for service, is evident from the words 'if any' itself, which clearly suggests that so-called consideration itself may or may not be there. This emphatically shows absence of consideration for any alleged service. Further it is not known at the time of transaction as to what is the difference, which can only be known subsequently at the end of completion of the transaction envisaged under the MOU, emphatically shows that it is the nature of business profit. In the facts of the present case, as there is no provision for service, for lack of consideration, the question of its classification under the various clauses of Section 65(105) does not arise.

19. That the learned Commissioner have erred in assuming that there is service provided by the appellant to Sahara India, by treating the MOU between the

parties for sale and purchase of land on principal to principal basis, as consideration for allegedly providing 'real estate service agent' and further treating the profit earned by the appellant out of the aforesaid transaction for sale and purchase of land on principal basis, as consideration for such alleged service. The MOU between the parties is not for provision of any service, but is in the nature of sale and purchase of land on principal to principal basis. Further the learned counsel places reliance on the ruling in the case of ***C.C.E Kerala Vs. Larsen Ltd & Toubro Ltd.*** 2015 (39) STR 913 (SC) which was rendered by the Apex court in the context of levy of service tax on work contract. Supreme Court has held that service tax under the Finance Act can be levied on the services contracts simplicitor, without any other element involved in them (transfer of property in Goods). It is further submitted that even though the aforesaid decision was rendered in the context of indivisible works contract, the principal on the basis of which the said decision was rendered, is that the Finance act seeks to tax service contracts simplicitior and not other contracts. Applying the same principle in the facts of the present case it is evident that the Finance Act seeks to tax only such service, which are provided in relation to Real estate by a real estate agent. It does not contemplate taxing a transaction like the present one, which is for sale and purchase of immovable property and assuming without admitting, includes some alleged real estate service. In the absence of any statutory mechanism to tax the different element of an indivisible contract, in the aforementioned case, no service tax can be levied in the present case. The contention of the Ld.

Commissioner that since the land cost is capable of being known, in the facts of the present case, the profit, if any, amounts to being the consideration for service, is completely erroneous. It have also been held in the said decision that when the Finance Act levies service tax, it only levy service tax on those activities which are for providing services simplicitor and it does not provide for levy of service tax on an indivisible transaction.

20. It is further submitted that if the contention of the Department is to be accepted, it will result into an absurd situation holding the profit element of a purchase/sale transaction of land, as the consideration for alleged real estate service.

21. The learned counsel further assails the show cause notices for invocation of extended period of limitation. There is no cause or justification for invocation of extended period of limitation. The only allegation in the show cause notice for invoking is failure to disclose. The other allegation is that the appellant failed to obtain opinion from the Department as to whether it was liable to pay service tax or not. For these two allegations invocation of extended period is not tenable as held by Hon'ble Supreme Court in ***Easland combines vs. CCE Coimbatore***-2003 (152) E.L.T.39(SC). Further the appellant was under a bona fide belief that it is not liable to pay service tax on the transaction of purchase/sale of land. There is no

allegation in the show cause notice that the appellant ever attempted to withhold information from the Department.

22. By way of alternate submissions, the appellant further submits that (without admitting) if the appellant is liable to pay service tax, the quantum of tax imposed in any event is incorrect. The total demand to the tune of ₹ 1,55,10,433/- for the impugned period the total advance of Rs. 16,17,33,500/-is wrong. The total advance of ₹ 16,17,33,500/-. The said calculation is erroneous as no tax is payable prior to 1st October 2004, when service tax was introduced with respect to 'real estate agent service'. Further no service tax can be levied on the cost of land. At best service tax may survive only on the difference of the amount received per acre (average cost minus the cost of the land) as is evident from the sale deed. Further under the facts and circumstances there is no malafide alleged or any suppression of facts, for imposition of penalties is made out. Further no service tax is leviable on the price of land which is discernible from the value shown in the sale deeds. The appellant have also admittedly not collected any service tax. Hence they are also entitled to the cum tax benefit. Further in the facts and circumstances no penalty is imposable.

23. To Ld. A.R. for revenue states that the appellant have provided services to Sahara India relating to acquisition and development of real estate. Separate MOUs were executed with Sahara group in connection with the acquisition of

land in the vicinity of three different cities. Under the MOU the appellant was to do several acts like to identify the land, to negotiate with the land owner, to examine the title paper, to confirm the title with the land records and thereafter to facilitate the transfer of land in favour of Sahara India. Also It was also required to obtain necessary permission/approval, if need be, from the appropriate authority for the transfer of the land. The expenses for search of the title of the prospective seller of land, was on the appellant. It was stipulated that Sahara India will enter into agreement for sale/purchase with the owner of the land after payment of advance, on advice of the appellant. The appellant also coordinated and provided necessary assistance in relation to mutation of land. As per the MOU, Sahara India gave the advance to the appellant and the appellant paid to the land owners and also incurred the other incidental expenditure. These activities are undoubtedly in relation to real estate and are squarely covered under the definition of taxable service as a real estate agent, as defined in section 65(88) read with section 65(105) (v) of the Finance act.

24. Ld. D.R. further submit, in the present case Sahara India through the MOU have engaged the appellant for procuring land for their projects. The appellant being exporter agreed to provide the services as per the MOU. Further it is a matter of fact that the appellant was not involved in the sale and purchase of real estate in their own name at any given time. They were providing the services of connecting various land owners with Sahara India, after scrutinising the suitability

of land, authentication of documents of title. Further the MOU entitled the appellant to keep the difference amount with them (average price of land as agreed minus the price of land as per the sale deed). Once it is established that the services were provided and due consideration for that has been received by the appellant, the liability for payment of service tax definitely arises. The terms of an MOU between two private parties cannot determine or circumvent the service tax liability, when it is apparent that consideration has been received for the services so provided. The argument of the appellant that the terminology – the difference if any, shows that there may be a condition, when there is no difference,(Supra), cannot determine the tax levy. Further the appellant failed to prove in even a single instance, wherein the difference/profit was not there. It is further a fact that the land/real estate was never transferred in the name of the appellant, and accordingly the appellant was in the shoes of agent/consultant. Further from the agreement/MOU it is evident that the payment for the price of the land is made by Sahara India directly to the land owners. Thus the appellant nowhere enters into the shoes of the land owner or seller of the land.

25. Further in the statement of Mr. Yadav – partner, he had stated that the average rate of land as per the MOU is inclusive of all the taxes. Further the consideration for the service is the difference between the average rate and the actual price of the land, paid to the land owner, which is payable to the appellant. Further the case laws relied by the appellant are not applicable in the facts of the

present case. Further the Ld. Commissioner has held in para 40.5 of the impugned order, that the cost of land is not to be included the gross value for levy of service tax however the appellant failed to provide the details of the amounts retained by them in the said transaction. Further the contention of the appellant on the basis of the judgement of Larsen and Toubro of the apex court, that the contract is indivisible and the service tax on part of the contract value, which pertains to services provided cannot be taxed. This argument is completely baseless and factually incorrect. The reason for this is the price given to the land owners is definite, the amount received from Sahara India is definite. Thus the difference between the two amounts is a matter of simple calculation. The consideration received is workable.

26. So far the limitation is concerned it is urged that the case was booked by the DGCEI. The services rendered by the appellant are squarely covered under the definition of 'real estate agent service'. The belief of the appellant that they were not liable to pay service tax, cannot be termed as bonafide.

27. Having considered the rival contentions and on perusal of record, we find that there is no consideration defined and/or provided for the alleged service. In absence of any defined consideration for the alleged service, there is no contract of service at all, and hence the transaction is not liable to service tax. Under the facts and circumstances we find that the appellant entered into an agreement of

trading in land, wherein they agreed to transfer, a measurement or area of land, in a particular area in favour of the Sahara India. Such land was to be arranged by them by way of procurement from the land owners. The appellant was also obligated to examine the title of the prospective land owner and to further ensure the availability of land owner at the office of the Registrar for execution of the sale deed. In fact Sahara India instead of paying the price directly to the land owner, paid lump sum amount to the appellant. Thereafter the appellant identified the land, the seller, and after being satisfied with the title of the seller, entered into agreement with the seller and obtained power of attorney, in their favour. Thereafter the appellant transferred the land in favour of Sahara India. Thus we find that the transaction is one of trading in land. In such transactions the appellant could either incur a loss or have a surplus (profit).

28. From the perusal of Memorandum of Understanding (MoU) between the appellant and M/s Sahara India Ltd. It is very obvious that MoU is not only for providing purely service for acquisition of the land but involves many other function such as verification of the title deeds of the persons from whom the lands are to be acquired and obtaining necessary rights for development of the land from the Competent Authority. The remuneration or payment for providing this activity has actually not being quantified in the MoU. The MoU provides that "the difference, if any, of the amount being actually paid to the owner of the land and the average rate shall be payable to the second party (appellant). It is very

clear from the provision of the MoU that the amount payable to the appellant is not quantified and it is more of the nature of a margin and share in the profit of the deal in purchase of land. We feel that for levy of service tax, a specific amount has to be agreed between the service recipient and the service provider. As no fixed amount has been agreed in the MoU which have been signed between the parties, the amount of the remuneration for service, if any is not clear in this case. In this regard, we also take shelter of this Tribunal's decision in the case of **Mormugao Port Trust vs. CC, CE&ST, Goa – 2017 (48) S.T.R. 69 (Tri. – Mumbai)**. The relevant extract is reproduced here below :-

> "18. In our view, in order to render a transaction liable for service tax, the nexus between the consideration agreed and the service activity to be undertaken should be direct and clear. Unless it can be established that a specific amount has been agreed upon as a *quid pro quo* for undertaking any particular activity by a partner, it cannot be assumed that there was a consideration agreed upon for any specific activity so as to constitute a service. In *Cricket Club of India* v. *Commissioner of Service Tax*, reported in 2015 (40) S.T.R. 973 it was held that mere money flow from one person to another cannot be considered as a consideration for a service. The relevant observations of the Tribunal in this regard are extracted below :
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> > "11. …Consideration is, undoubtedly, an essential ingredient of all economic transactions and it is certainly consideration that forms the basis for computation of service tax. However, existence of consideration cannot be presumed in every money flow. … The factual matrix of the existence of a monetary flow combined with convergence of two entities for such flow cannot be moulded by tax authorities into a taxable event without identifying the specific activity that links the provider to the recipient.
> >
> > 12. … Unless the existence of provision of a service can be established, the question of taxing an attendant monetary transaction will not arise. Contributions for the discharge of liabilities

> or for meeting common expenses of a group of persons aggregating for identified common objectives will not meet the criteria of taxation under Finance Act, 1994 in the absence of identifiable service that benefits an identified individual or individuals who make the contribution in return for the benefit so derived.
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> 13. … Neither can monetary contribution of the individuals that is not attributable to an identifiable activity be deemed to be a consideration that is liable to be taxed merely because a "club or association" is the recipient of that contribution.
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> 14. … To the extent that any of these collections are directly attributable to an identified activity, such fees or charges will conform to the charging section for taxability and, to the extent that they are not so attributable, provision of a taxable service cannot be imagined or presumed. Recovery of service tax should hang on that very nail. Each category of fee or charge, therefore, needs to be examined severally to determine whether the payments are indeed recompense for a service before ascertaining whether that identified service is taxable."

29. We feel that since the specific remuneration has not been fixed in the deal for acquisition of the land we are of the view that both the parties have worked more as a partner in the deal rather than as an agent and the principle, therefore we are of view that taxable value itself has not acquired finality in this case.

30. It is also seen that some of the MoUs were not fully executed at the time of the issue of the show cause notice for example, in the case of MoU dated 15/11/2003 entered between Sahara India Ltd. and the appellant, the agreement is for provisioning of 100 acres of land at Village Rora, Distt. Lalitpur, U.P. and for this purpose an amount of Rs. 6,75,00,000/- have been remitted for land cost and

an amount of Rs. 1,66,50,000/- have been remitted for the purpose of stamp duty and registration. Thus, a total amount of Rs. 8,41,50,000/- have been remitted to the appellant out of which a total amount of Rs. 3,66,32,000/- have been spent by the appellant for procurement and registration of land. Thus, an amount of Rs. 4,75,18,000/- still remain unspent with the appellant. It is to be seen that out of the above amount though the MoU was for 100 acres of land till the issue of the show cause notice only 77.96 acres of land could only be acquired and thus the remaining amount still was to be used for procurement/acquisition of balance land. This indicates that firstly; the MoU has not been executed fully and therefore the actual remuneration to the appellant have not got finalized and therefore we feel that issuing the show cause notice in such a stage was premature and unwarranted.

31. As discussed above, since the exact amount of remuneration for providing any service, if any, has not been quantified at the same time since most of the MoU remained to be fully executed and therefore the exact amount of remuneration, which was the difference in amount paid to the seller of land and average price decided in MoU, could not be finalized and therefore we feel that taxable value has not reached finality and therefore demanding service tax on the entire amount paid to the appellant for acquisition of land is not sustainable in law in view of the discussion in the preceding paras.

32. Further we find that the issue relates to interpretation, and there is no malafide on the part of the appellant. The transaction is duly recorded in the books of accounts maintained by the appellant. Further there is no suppression of information from the revenue. Accordingly, we hold that the extended period of limitation is not applicable.

33. Consequently, we allow the appeals and set aside the impugned order. The appellant shall be entitled to consequential benefits, in accordance with law.

(Pronounced in court on 27/11/2018)

(C.L.Mahar)
Member(Technical)

(Anil Choudhary)
Member(Judicial)

Tejo