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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 18th February, 2020

\+ SERTA 18/2019

PRINCIPAL COMMISSIONER GOODS AND SERVICE TAX DELHI SOUTH ..... Appellant

Through: Mr. Amit Bansal, SSC with Mr. Aman Rewaria & Ms. Vipasha Mishra, Advs.

Versus

PREMIUM REAL ESTATE DEVELOPERS ..... Respondent

Through: Mr. Balbir Singh, Mr. Vijay Bahadur Singh, Sr. Advs. with Mr. Ruchir Bhatia, Ms. Madhura M.N. & Mr. Gurumurthy, Advs.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

% **JUDGMENT**

D.N. PATEL, CHIEF JUSTICE (ORAL)

1. This Appeal, preferred by the Principal Chief Commissioner, Goods and Service Tax under Section 35G of the Central Excise Act, 1944, assails Final Order, dated 27th November, 2018, passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as "the learned Tribunal"), in Appeal No. ST/50103/2014.

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2. Inasmuch as, in our view, the appeal is not maintainable before this Court, we may merely advert, briefly, to the facts.

3. The respondent is engaged in the business of real estate. A Memorandum of Understanding was entered into, between the respondent and M/s. Sahara India Commercial Corporation Ltd. (hereinafter referred to as "Sahara"), for acquiring three parcels of land. As per the said MOU, Sahara was to acquire the land, including the cost and development expenses, and the respondent was required to

i) demarcate the land into blocks,
ii) purchase the land in contiguity block-wise,
iii) furnish title papers etc. to enable purchase of the land,
iv) obtain permission and approval of the competent authority for transfer of the land, and to bear expenses thereof, and
v) bring the owners of the land for negotiation, registration, etc, to the relevant places and bear all the attending expenses.

The MOU also stated that stamp duty and mutation charges would be borne by Sahara.

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4. Advances were received, by the respondent, from Sahara, for each site, a substantial part whereof was paid to the seller/perspective seller of the land.

5. The Revenue was of the opinion that the above arrangement rendered the respondent liable to pay service tax under the head "Real Estate Agent" service. A "Real Estate agent", we may note, is defined in Section 65(88), as "a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate, includes a real estate consultant". "Real Estate Consultant" is defined in Section 65(89) as "a person who renders in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, constructions, implementation, supervision, maintenance, marketing, acquisition or management, of real estate".

6. On the ground that the respondent had not paid service tax, payable by it under the head "Real Estate Agent" service, a Show Cause Notice was issued to the respondent on 22nd April, 2010 by the Additional Director General, DZU, DGCEI, New Delhi, proposing a demand of service tax of Rs. l,55,10,433/-, for the period 1st October, 2004 to 9th December, 2005, along with interest and penalty.

7. The said Show Cause Notice was adjudicated, by the Commissioner, Service Tax, *vide* Order-in-Original dated 30th September, 2013, whereby the aforesaid proposed demand of service tax of Rs. 1,55,10,433/- was confirmed under Section 73(1) of the

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Finance Act, 1994 (hereinafter referred to as "Finance Act"), along with interest under Section 75 and penalty under Sections 77 and 78 of the Finance Act.

8. The respondent appealed, against the said Order-in-Original dated 30th September, 2013, to the learned Tribunal.

9. *Vide* the impugned Final Order dated 27th November, 2018, the learned Tribunal held that

i) the agreement between the respondent and Sahara required the respondent to procure land from the land owners and transfer a part thereof to Sahara, after verifying the title of the land owners,

ii) Sahara paid the price of the land to the respondent, instead of paying it directly to the land owners,

(iii) respondent was, therefore, essentially trading in land, which could entail profit,

(iv) the MOU required the respondent to indulge in various activities other than providing the service of acquisition of the land,

v) remuneration, for trading, in the land, was not specifically provided in the MOU,

vi) as such, Sahara and the respondent were really "partners in the deed",

vii) the MOU was not fully executed,

viii) in order to tax somebody as a "Real Estate Agent", under Section 65(105)(v) of the Finance Act, it had to be

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shown that the said person rendered service to some other person, which was not shown in the present case, and

ix) no consideration had been received, by the respondent from Sahara, for providing the alleged taxable service, the advance received by the respondent being reflected, in its balance sheet, on the liability side.

10. On the basis of the above reasoning, the learned Tribunal has returned the following conclusions, in paras 19 and 20 of the impugned Final Order:

> "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 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."

11. The case sought to be build up, by the appellant, in the present appeal, is that the learned Tribunal erred in not treating the respondent as providing "real estate agent" service, and in treating the transaction, between the respondent and Sahara, as one of trading.

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12. Clearly, the issue in controversy relates to chargeability of service tax.

13. Appeals to the High Court, against orders passed by the learned Tribunal, in matters relating to service tax, lie under Section 83 of the Finance Act which, in turn, refers to Section 35G and 35L of the Central Excise Act, 1944.

14. For ready reference, Section 83 of the Finance Act and Section 35G and Section 35L of the Central Excise Act, 1944 are reproduced thus:

> "**Section 83**. **Application of certain provisions of Act 1 of 1944.**
>
> The provisions of the following sections of the Central Excise Act, 1944, as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise: –
>
> sub-section (2A) of section 5A, sub-section(2) of section 9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 15, 15A, 15B, 31, 32, 32A to 32P (both inclusive), 33A, 34A, 35EE, 35F, 35FF to 35-O (both inclusive), 35Q, 35R, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40."
>
> **"Section 35G. Appeal to High Court. –**
>
> (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

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(2) The Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be -

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and eighty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

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(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

(8) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this Section."

(Emphasis supplied)

"**Section 35L. Appeal to the Supreme Court** –

(1) An appeal shall lie to the Supreme Court from –

(a) any judgment of the High Court delivered –

(i) in an appeal made under section 35G; or

(ii) on a reference made under section 35G by the Appellate Tribunal before the 1st day of July, 2003;

(iii) on a reference made under section 35H,

in any case which, on its own motion or on an oral application made by or on behalf of the

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> party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or
>
> (b) any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.
>
> (2) For the purposes of this Chapter, the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment."
>
> (Emphasis supplied)

15. It stands authoritatively held by this Court, in catena of pronouncements, including ***Commissioner of Service Tax v. Gecas Services India Pvt. Ltd.***[1], ***Commissioner of Service Tax, New Delhi v. Menon Associates***[2], ***Commissioner of Service Tax v. Amadeus India Pvt. Ltd.***[3] and ***Commissioner of Service Tax, Delhi v. Transcorp International Ltd.***[4], relying on Section 83 of the Finance Act read with Sections 35G and 35L(2) of the Central Excise Act, 1944, that, where the *lis* pertains to chargeability of the activity, conducted by the assessee, to service tax, no appeal would be maintainable before this Court, and that the appeal would lie, instead, to the Supreme Court. This position, it has been noted in the said decisions, also stands clarified by Circular No. 334/15/2014-TRU, dated 10th July, 2014 of the Central Board of Excise and Customs.

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[1] **2015 (39) STR 980 (Del)**
[2] **2017 (49) STR 284 (Del)**
[3] **2015 (39) STR 973 (Del)**
[4] **2016 (41) STR 822 (Del)**

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16. Mr. Amit Bansal, learned Sr. Standing Counsel acknowledged, with his customary fairness, that the issue in controversy, indeed, pertains to chargeability of the activity, being carried out by the respondent, to service tax under the head "Real Estate Agent" service.

17. That being so, the present appeal is, clearly, not maintainable before this Court.

18. In view thereof, without expressing any opinion regarding the merits of the impugned Final Order, dated 27th November, 2018, passed by the learned Tribunal, this appeal is dismissed as not maintainable before this Court.

19. There shall be no order as to costs.

CHIEF JUSTICE

C.HARI SHANKAR, J.

FEBRUARY 18, 2020
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