CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 51464 of 2019 [DB]

[Arising out of Order-in-Original No. 08/COMM/DDN/2019 dated 26.03.2019 passed by the Commissioner of Central Goods & Service Tax Commissionerate, Dehradun]

M/s. Haridwar Roorkee Development Authority **...Appellant**
Tulsi Chowk, Mayapuri Road,
Haridwar, Uttarakhand - 249401

VERSUS

Commissioner of Central Goods and Service Tax, Customs and Central Excise, Dehradun **...Respondent**
E-Block, Nehru Colony,
Haridwar Road, Dehradun,
Uttarakhand – 248001

APPEARANCE:

Mr. R.M. Saxena, Advocate for the Appellant
Mr. Ravi Kapoor, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 27.05.2022
PRONOUNCED ON: 05/08/2022

FINAL ORDER No. 50700/2022

DR. RACHNA GUPTA

Present appeal has been filed to assail the Order-in-Original No. 08/Commr./DDN/2019 dated 26.03.2019, vide which the demand of service tax amounting to Rs.2,31,84,581/- for the Financial year 2012-13 to 2014-15 has been confirmed to have

been recovered from the appellant along with interest and the penalty of equal amount, in addition, penalty under Section 77 has also been imposed. However, no penalty upon Dr. Tanzeem Ali, Chief Finance Officer has been imposed under Section 78 A. The facts in brief relevant for the present adjudication are as follows:

2. Appellant is providing services in relation to "construction of residential complex service, renting of immovable property service" etc. Department observed that the appellant has neither taken the registration with the Service Tax Department nor the service tax has been ever paid by the appellant, despite that their activity was not a charitable activity. As such the exemption under clause (4) of Mega Notification No. 25/2012 dated 20.06.2012 was not applicable upon them. Alleging that the appellant has failed to comply with the provisions of Section 68 of Finance Act, 1994 read with Rule 6 of Service Tax Rules, 1994 by not paying total the service tax liability during the Financial Year 2012-13 to 2014-15 for providing various taxable services that the Show Cause Notice No. 68/2016 dated 24.04.2018 was served upon the appellants demanding service tax to the tune or Rs.2,71,09,544/- along with the interest and the appropriate penalty. The said proposal has been confirmed vide the order under challenge. Being aggrieved the appellant is before this Tribunal.

3. We have heard Mr. R.M. Saxena, learned Counsel for the appellants and Mr. Ravi Kapoor, learned DR for the Department.

4. It is submitted on behalf of the appellant that on the basis of enquiry by the department the appellant was found to have not discharged its tax liability towards;

a. residential complex constructed by the party;

b. various fees viz. Map fees, Development fee, compounding fee, Supervision fee, stacking fee, information fee, subdivision fee and form fee charged by the party;

c. income shown under heads viz. Free hold lease rent. Misc. receipts and Harilokmaintenance service.

4.1 It is submitted that appellants are a public entity which has been created as an Urban Development Authority in terms of Section 4 of Uttar Pradesh Urban Planning and Development Act, 1973 for development work of Haridwar and Roorkee. It is also mentioned that residential flats built by the appellant and allocated to the general public as per eligibility criteria on the basis of draw cannot be regarded as 'sale of flats'. It is also impressed upon that amount collected as mandatory/statutory fee in public interest by the appellant cannot be regarded as consideration received in lieu of providing service and therefore same is not liable to service tax. The performance of duties and collection of charges in the form of fee by the appellant are impressed upon to be nothing by levy. Hence, is prayed to not to be considered as service. Learned Counsel has relied upon the decision of the Tribunal in the case of Dy. **Commissioner of Police, Jodhpur Vs. Commissioner of C.Ex. & S.T., Jaipur-II reported as 2017 (048) STR 0275 (Tri.-Del.).** The decision of **CCE, Nashik Vs Maharashtra Industrial Development Corporation reported as 2018 (9) GSTL 972 (HC-Bom)** has also been impressed upon, wherein it was held that the activities performed by sovereign or public authorities under the provisions of law in nature of statutory

obligations for which there was compulsory levy will not amount to be called as service. Hence, no liability shall arise for discharging such services. It is submitted that the adjudicating authority below has failed to take into consideration the above submissions of the appellant and even the relied upon case law. Order accordingly, is prayed to be set aside. Appeal is prayed to be dismissed.

5. While rebutting the submissions learned DR has relied upon the order under challenge. It is submitted that from the alleged activities, it is clear that though the activities are undertaken by the Government or local authority but against consideration. Hence, constitute a service the amount charged for performing such activity shall be liable to service tax. Various fee charged by the appellants are also impressed upon to be rightly held as consideration for rendering services and as such are rightly charged to service tax. Justifying the reliance upon the circular dated 13.04.2016 in para 6.16 of the order under challenge it is held that appellant has rightly been held liable to pay the service tax. Learned DR has relied upon the decision of this Tribunal in the case of **RIICO Ltd. Vs. Commissioner of C.Ex. Jaipur-I reported as 2018 (10) G.S.T.L. 92 (Tri.-Del.)** and also the decision in the case of **Greater Noida Industrial Development Authority Vs. C.C.E. & S.T., Noida reported as 2015 (38) S.T.R. 1062 (Tri.-Del.).** With these submissions learned DR has prayed for dismissal of the impugned appeal.

6. After hearing the rival contentions and perusing the entire records, it is observed and held as follows:

6.1 Initially, total amount of Rs.2,71,09,544/- (Two Crores Seventy One Lakh Nine thousand Five Hundred Forty Four) was proposed to be recovered as service tax liability of the appellants for Financial Year 2012-13 to 2014-15 on three counts:

a. residential complex constructed by the party;

b. various fees viz. Map fees, Development fee, compounding fee, Supervision fee, stacking fee, information fee, subdivision fee and form fee charged by the party;

c. income shown under heads viz. Free hold lease rent. Misc. receipts and Harilok maintenance service.

7. However, the demand has been confirmed for an amount of Rs.2,31,84,581/- as a service tax liability of the appellant on receipt of various fee as mentioned above and for Rs.6,68,769/- as the tax liability of the appellant towards income received under the heads of free hold lease rent, misc. receipts etc. The demand with respect to the residential complex constructed by the appellant has already been dropped by the Adjudicating Authoring, giving benefit of entry no. 3 of Mega Notification No. 25/2012-S.T. dated 20.06.2012. Since the department is not in appeal, the findings on that aspect are held to have attained finality. The two issues on which demand has been confirmed are as follows:

(1) Whether the various fees as mentioned above and collected by the appellant can be held as consideration for rendering any service by the appellant to someone else.

(2) Whether income under free hold lease rent, miscellaneous receipt and Harilok Maintenance are consideration towards providing a service by the appellants.

8. Issue No.1:

8.1 For the purpose, definition of service and that of consideration shall be relevant. Section 65 B (44) of Finance Act, 1994 defines service to mean as follows:

> *(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
>
> *(a) an activity which constitutes merely,—*
>
> *(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
>
> *(iii) a transaction in money or actionable claim;*
>
> *(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*
>
> *(c) fees taken in any Court or tribunal established under any law for the time being in force.*

8.2. Consideration is something of value given by both parties to a contract that induces them to enter into an agreement to exchange mutual performances. Thus consideration is a benefit which must be bargained for between the parties and is essential reason for a party entering into a contract. Consideration must either be a value exchanged for performance or performance of promise itself is consideration.

8.3. The bare reading shows that for levy of service tax on any transaction, there should be a service provider and a service recipient apart from identifying a transaction under a specific

taxable category. Top of that the service provider must be getting something either monetary or non-monetary for his benefit in lieu of providing said service i.e. a quid pro quo.

8.4. Reverting to facts of present case, it is observed that the Adjudicating Authority has confirmed the demand on several kinds of fees collected by the appellant for the sole reason that as per clause (c) of Section 65 B (44) the fees taken in any Court or Tribunal only are excluded. The Section is silent about excluding any other fee. But the fact remains is that the appellant is an entity created as an Urban Development Authority in terms of Section 4 of Uttar Pradesh Urban Planning and Development Act, 1973 for development work of Haridwar & Roorkee prior to creation of state of Uttrakhand with the objects to promote and secure the development of the area and accordingly, to execute works in connection with the supply of water and electricity, sewage and to provide and to maintain other services and amenities for purposes of development. There is no denial that the appellant therefore is a statutory authority. It has been held so in the order under challenge while rejecting the demand on the ground of providing services of construction of residential complexes by the Adjudicating Authority itself. The benefit of Mega Exemption Notification has been given by the Adjudicating Authority below on the same ground. There is no denial to the fact that all the alleged fees as were collected by the appellant got deposited in the Government Treasury. Despite this admitted fact, the impugned fee collected have been held to be a consideration in view of the

service provided and reliance has been laid upon Circular No. 192/02/2016 dated 13.04.2016.

8.5. In view of the above admitted fact, we are of the opinion that no Revenue benefits have been incurred by the appellant from the amounts of several different kind of fees collected by them, the entire amount so received been deposited in the Government Treasury, irrespective for any specified purpose. Accordingly, we hold that reliance on the Circular No. 192/02/2016 dated 13.04.2016 as mention above is absolutely wrongly on the part of the Adjudicating Authority. It is Circular No. 89/7/2006-ST dated 18.12.2006 according to which the fee and charges since are collected as per statute, they cannot be termed as consideration. The Circular resides as follows:

> *"the activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute, and it is deposited into the Government treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authority under the provisions of law does not constitute provision of taxable service to a person and, therefore, no service tax is leviable on such activities."*

Another circular 96/7/2007-ST, dated 23-8-2007 has clarified on the issue whether such activities of a sovereign/public authority, performed under a statute, can be considered as 'provision of service' for the purpose of levy of service tax and the amount or fee collected, if any, for such purposes can be treated as consideration for the services provided. On the above issue it has been clarified that activities assigned to and performed by the sovereign/public authorities under the provisions of any law are statutory duties. The fee or amount collected as per the provisions of the relevant statute for performing such functions is in the nature of a compulsory levy and are deposited into the Government account. Such activities are purely in public interest and are undertaken as mandatory and statutory functions. These are not to be treated as services provided for a consideration. Therefore, such activities assigned to and performed by a sovereign/public authority under the provisions of any law, do not constitute taxable services. Any amount/fee collected in such cases are not to be treated as consideration for the purpose of levy of service tax. However, if a sovereign/public authority provides a service, which is not in the nature of statutory activity and the same is undertaken for a consideration (not a statutory fee), then in such cases, service tax would be leviable as long as the activity undertaken falls within the scope of a taxable service as defined.

The above issue has been elaborately discussed in case of Dy Commissioner of Police, Jodhpur Vs CCE, Jaipur-ll 2017 (48) STR

275 (Tri-Del) (Para 12 of the order) and it has been upheld that if the duties are performed as statutory and mandatory acts, the amount is collected as provisions of relevant law and the amount collected is deposited in Govt treasury, the amount cannot be considered as consideration for levy of service tax."

8.6. We also observe that entry no. 25 of Mega Notification No. 25/2012 extends exemption to the services provided by a Government, a local authority or a governmental authority by way of - (a) carrying out any activity in relation to any function ordinarily entrusted to a municipality in relation to water supply, public health, sanitation conservancy, solid waste management or slum improvement and upgradation; or (b) repair or maintenance of a vessel or an aircraft. The fee, collected by the Appellant in the form of map fee, development fee, compounding fee, supervision fee and sub-division fee, is directly related to regulation of land and urban planning including town planning while stacking fee is for disposal of solid wate management. The form fee, information fee are performed as statutory duties assigned to HRDA and Harilok maintenance fee is against street lighting and sewage management and misc. receipts are against fee charged for providing various documents under RTI and other statutory functions. All these functions are covered under S. No 25 of the notification 25/2012, therefore, Appellant is entitled to exemption.

We rely on the judgments in case of **Karnataka State Industrial Area Dev Board Vs CCE, Banglore North 2020 (40) GSTL 33 (Tribunal)**, wherein Hon'ble Tribunal decided *"we are of the considered opinion that the appellant is a statutory body discharging the statutory function as per the statute KIAD Act, 1966*

and hence are not liable to pay service tax in view of the ratios of the various decisions cited the supra" Para 8 of the order. The judgment of Hon'ble High court of Bombay in case of **CCE, Nashik Vs Maharashtra Industrial Development Corp 2018 (9) GSTL 972 (HC-Bom)** wherein department had raised similar issue of activities performed by sovereign or public authorities under provisions of law in nature of statutory obligations for which there was compulsory levy. Hon'ble High Court passed stricture against the department and held in Para 14 *"MIDC is a statutory Corporation which is virtually a wing of the State Government. It discharges several sovereign functions. In our view, the Revenue ought not to have compelled MIDC to prefer Appeals before Appellate Tribunal. Not only that MIDC was driven to prefer Appeals before the Appellate Tribunal, these groups of Appeals were preferred by the Revenue. Needless to add that MIDC was required to incur huge expenditure on litigation. All this could have been avoided by the Appellant."*

The Hon'ble Apex Court also in the case of Calcutta Municipal Corporation Vs. Shrey mercantile (P) Ltd. reported in (2005) 4 SCC 245 examined the meaning and scope of terms "Fee" and "tax". It was held that:

> *"14. According to Words and Phrases, Permanent Edn., Vol. 41, p. 230, a charge or fee, if levied for the purpose of raising revenue under the taxing power is a "tax". Similarly, imposition of fees for the primary purpose of "regulation and control" may be classified as fees at it is in the exercise of "police power" but if revenue is the primary purpose and regulation is merely incidental, then the imposition is a "tax". A tax is an enforced contribution*

expected pursuant to a legislative authority for the purpose of raising revenue to be used for public or governmental purposes and not as payment for a special privilege or service rendered by a public officer, in which case it is a "fee". Generally speaking, "taxes" are burdens of a pecuniary nature imposed for defraying the cost of governmental functions, whereas charges are "fees" where they are imposed upon a person to defray the cost of particular services rendered to his account".

The fee and other charge collected by the appellant in the present dispute are fixed by the law with no discretion or option vested with appellant or the employers. As such these cannot be considered as amounts received for providing any taxable service of BOFS.

9. In view of the entire above discussion, we hold that confirmation of demand of Rs. 2,31,84,581/- as a liability towards various amount received by the appellant on account of various fee is not sustainable. The order to that extent is hereby set aside.

10. Issue No. 2:

10.1 To adjudicate it is necessary to see whether this income was purely on account of discharging a sovereign function or was an income in the form of commercial gain for appellant itself. No doubt the appellant is a statutory body but as evident from their names the amount received as lease rent and maintenance service, these are liable to service tax. We draw our support from the decision of Hon'ble Allahabad High Court in the case of Greater Noida Industrial Development Authority wherein the Allahabad High Court held that if the sovereign/public authority provides a service, which is not in the nature of statutory activity and the same is

undertaken for a consideration (not statutory fee), then in such cases, service tax would be leviable as long as the activity undertaken falls within the scope of a taxable service and defined in Finance Act, 1994. We observe that amounts received by appellant towards free hold lease rent, maintenance charges are received as quid pro quo to providing Renting and Maintenance Services, hence are the monetary benefits to the appellant. Irrespective it being statutory body, these amounts are liable to tax. We further observe that the findings of adjudicating authority "regarding misc. receipts and the service tax liability there upon has not contested by the appellant. Accordingly, we hold that on the income under heads of 'Free Hold Lease Rent, Miscellaneous Receipt and Harilok Maintenance Service', the appellant was liable to pay service tax.

10.2. Finally coming to the issue of show cause notice being barred by limitation, it is observed that demand in question pertains to the period 2012-13 and 2013-14. The show cause notice is given in April 2018 i.e. much beyond the period of normal limitation. The extended period can only be invoked in terms of proviso to Section 73 (1) of Finance Act, 1994 i.e. only in the cases where ingredients of fraud, collusion, willful mis-statement, suppression of facts etc. with an intent to evade tax are present. We observe that there is no evidence adduced on record to prove the aforesaid allegations and to prove the attempt of the appellant to commit any of the above alleged acts. It has already been observed that all the receipts on account of collection of statutory fees and all income shown under various heads were duly recorded in the books of accounts of the appellant and have been admitted to have been

deposited by the appellant in the designated bank account for infrastructural development fund. The expenses thereof were regulated in terms of the Government order with the approval of committee formed for the purpose. This fact, to our opinion, is sufficient to hold that there is no reason with the appellants to have any intention to suppress any fact relating the said transaction that too evades the service tax. No positive act of the appellant is brought to the notice by the department which may be sufficient to hold that the act amounts to committing fraud or collusion etc. Above all, as already held that appellant is a public entity acting under the mandate of statute for the infrastructural development in these areas of Haridwar and Roorkee, question of suppression of facts by such public entity otherwise does not arise. The Hon'ble High Court Calcutta in the case of **Infinity infotech parks Ltd. Vs. Union of India reported as 2014 (036) STR 0037 (Cal.)** has held that once there is no allegation in the show cause notice of any conscious act on the part of the assessee that constitutes fraud, collusion, willful mis-statement, suppression of facts or contravention of any provision of the Finance Act, 1994 or any rule made their under with intent to evade service tax, the extended period of time while issuing said show cause notice cannot be invoked. Hon'ble Apex Court also in the case of **NRB Bearings Ltd. Vs. Commissioner of Customs, Mumbai reported as 2015 (322) E.L.T. 0599 (S.C)** has held that when there is no suppression of facts or mis-declaration, the extended period is not invokable and the demand has to be held to be barred by time. As we have already observed that the department upon whom lies the honors, has failed to adduce any such evidence which may entitle

the department to invoke the extended period in terms of proviso to Section 73 (1) of Finance Act, 1994. We hold that the show cause notice raising demand for the year 2012 to 2014 cannot be issued in the year 2018. Such show cause notice is definitely barred by time. In view of the entire above discussion the order to be set aside on this ground as well.

11. In view of the entire above discussion, the order of Adjudicating Authority below is hereby set aside. Consequent thereto, the appeal stands allowed.

[Order pronounced in the open Court on 05.08.2022]

(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

HK