TaxGuru®
Complete tax solution

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 13203 of 2013-DB

[Arising out of Order-in-Original/Appeal No RJT-EXCUS-000-APP-270-13-14 dated 21.06.2013 passed by Commissioner of Central Excise and Service Tax-RAJKOT (Appeal)]

Nilesh T Patel .... **Appellant**
17, Phase-iii, Walkeshwari Nagari
JAMNAGAR, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Rajkot .... **Respondent**
Central Excise Bhavan, Race Course Ring Road
Income Tax Office, Rajkot, Gujarat-360001

APPEARANCE :

Shri Vikash Mehta, Consultant for the Appellant
Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 18.04.2023
DATE OF DECISION: 27.04.2023

FINAL ORDER NO. A/11032 / 2023

RAMESH NAIR :

The issue involved in the present case is that whether the appellant being involved in the sale and purchase of land and subsequently the land is sold to M/s. Sahara India Commercial Corporation Limited is liable to payment of service tax under the category of Real Estate Agent service as defined under Section 65(88) read with Section 65(89), 65(105)(v).

2. Shri Vikash Mehta learned Consultant appearing on behalf of the appellant at the outset submits that in the present case the appellant is engaged in purchase of the farmer's land under an agreement by making part payment and subsequently the sand is sold to M/s. Sahara India Commercial Corporation Limited. In these undisputed facts, the appellant is engaged in the business activity of purchase and resale of land which does

not amount to service of Real Estate Agent service. He submits that there is no activity such as Real Estate Agent service in the present case as the appellant purchase land at 'x' price and the same is sold to M/s. Sahara India Commercial Corporation Limited at 'x+1' price. The profit or lose is on the account of appellant only. Therefore, in these facts it cannot be said that appellant is acting as Real Estate Agent. He placed reliance on the following judgments:-

(a) Premium Real Estate Developers vs. CST, Delhi – 2019 (22) GSTL 373 (Tri. Del.)

(b) DLF Commercial Projects Corporations vs. CST, Gurugram – 2019 (27) GSTL 712 (Tri. Chan.)

3. Shri Rajesh K Agarwal, learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the record. We find that under the same arrangement of activity of purchase of land from farmers / landowners and re-sale the same to Real Estate Developers, in the present case M/s. Sahara India Commercial Corporation Limited, this Tribunal has taken a view that under this arrangement the purchaser and re-seller of land cannot be treated as Real Estate Agent for charging service tax under the said category. The relevant decision is reproduced below:-

> **"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* v. *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 :
>
> *"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.*
>
> *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.*

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 *mala fide* on the part of the appellant. The transaction is duly recorded in the books of account 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.**"**

5. In the above decision, in the identical nature of transaction, it was held that assessee cannot be charged with service tax under 'Real Estate Agent'. Following the said decision of this Tribunal, we are of the view that in the facts of present case the appellant's activity does not fall under the category

of Real Estate Agent Service, hence service tax demand under the said head cannot be sustained. Accordingly, the impugned order is set-aside and the appeal is allowed with consequential relief if any, in accordance with the law.

(Pronounced in the open court on 27.04.2023*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL