Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3
Service Tax Appeal No.11929 of 2016

(Arising out of OIA-VAD-EXCUS-001-APP-270-271-2016-17 dated 01/08/2016 passed by Commissioner of Central Excise-VADODARA-I(Appeal))

Rajni Builders Pvt Ltd **.....Appellant**
1 St Floor Shanti Bhavan Near
Baroda People Bank Rajmahal Road
Vadodara, Gujarat

VERSUS

C.C.E. & S.T.-Vadodara-i **.....Respondent**
1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat-390007

WITH
Service Tax Appeal No.11930 of 2016

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VERSUS

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Race Course Circle,
Vadodara, Gujarat-390007

APPEARANCE:
Shri. Saurabh Dixit, Advocate for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR) for the Respondent

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

Final Order No. 11897-11898 /2024

DATE OF HEARING: 10.06.2024
DATE OF DECISION:30.08.2024

RAMESH NAIR

The brief facts of the case are that the appellants are engaged in trading of land, i.e. purchase and sale of land. As per the customary in such transaction, generally such sale and purchase transactions are preceded with

Agreement to sale. The appellant pays advance to the seller of land and executes such agreement to sale, and later on, purchases the land by executing sale deed. On at some occasions, due to various reasons, it may so happen that the appellant becomes confirming party where the property is eventually sold to the third buyer, and the appellant receives their advance back along with some mark up in such transaction. The entire sale price suffers Stamp duty, include the component of advance as well as mark up being received back by the appellant. Such arrangement may involve stand alone buyer or buyer of residential / commercial units, if the parcel of land was developed by someone, and sold to individual buyers as residential / commercial property wherein the appellant simply acts as confirming party. In such circumstances, the entire sale price would have also suffered Service Tax. In the above background, the short issue involved in the present appeal is, whether having sold the land which was intended to be purchased initially for a profit, attracts the levy of Service Tax under the Service category of "Real Estate Agent".

2. Shri. Saurabh Dixit, Learned Counsel appearing on behalf of the appellant at the outset submits that this issue is no longer *res integra* as the same has been decided in various judgments as relied below:

- Nilesh Patel 2023(5) TMI 97-CESTAT AHMEDABAD
- Premium Real Estate Developers 2018(11) TMI 1472- CESTAT NEW DELH
- Premium Real Estate Developers 2020(2) TMI 1071- Delhi HC
- Rattha Holding Co. P. Ltd. 2018(9) TMI 1722-CESTAT CHENNAI
- M.N. Dastur & Co. P. Ltd. 2023(6) TMI 1083- CESTAT KOLKATA

He submits that in view of the above judgment, the issue is no longer *res integra.*

3. On the other hand, Shri. Himanshu P Shrimali, 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 records. We find that in the given fact as discussed above. The appellant is dealing in purchase and sale of the land during which some profit is earned. As per the department, the said profit is liable to be taxed as Real Estate Agent Service. We find that this issue has been considered in various judgments as under:-

- Nilesh Patel 2023(5) TMI 97-CESTAT AHMEDABAD is reproduced below:

> 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:-*
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> > *"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 5 ST Appeal No. 13203 of 2013-DB 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"

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"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 22 ST/50103-50104/2014 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).

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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."

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

In view of the above judgments, the issue in hand stand settled in favour of the appellant, therefore, the demand is not sustainable.

5. Accordingly, the impugned order is set aside, appeals are allowed with consequential relief in accordance with law.

(Pronounced in the open court on 30.08.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C. L. MAHAR)
MEMBER (TECHNICAL)

Prachi