

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO.III

Service Tax Appeal No.53905 of 2018

[Arising out of Order-in-Original No.04 & 05-Commr./CGST Audit-1/2018 dated 13.07.2018 passed by the Commissioner, Central Goods and Service Tax (Audit-I), Delhi]

**Commissioner of Central Excise &
Service Tax, Central Tax Commissionerate,**
EIL Annexe Building,
2nd & 3rd Floor, Bhikaji Cama Place,
New Delhi-110 066.

Appellant

VERSUS

M/s. Government Official Welfare Organisation,
UG-20, 47 & 48, Ansal Chambers-II,
Bhikaji Cama Place,
New Delhi-110 057.

Respondent

APPEARANCE:

Shri S.K. Ray , Authorised Representative for the Department
Shri A.K. Batra, Advocate for the respondent.

CORAM:

**HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

FINAL ORDER NO.58604/2024

**DATE OF HEARING: 27.08.2024
DATE OF DECISION:23.09.2024**

BINU TAMTA:

The Revenue has filed the present appeal challenging the order-in-original no.04 & 05-Commr./CGST Audit-I/2018 dated 13.07.2018 dropping the demand towards the service tax proposed under show cause notice under the category of "Real

Estate Agent Service” under Section 65(105)(b) read with section 65(88) and (89) of the Finance Act, 1994¹.

2. M/s. Government Official Welfare Organization, the respondent herein is a trust and is essentially serving officials of the Central & State Government both working and retired, their dependents and families.

2.1 The respondent entered into a Memorandum of Understanding (MOU) with M/s.India Affordable Housing Solution ² on 30.07.2009 as the later was specialized in market analysis, research and identification of reputed builders/developers. M/s. IAHS does not construct any house itself, rather identifies builders or developers on behalf of respondent.

2.2 Based on builders recommended by M/s. IAHS and analysis of market demand, respondent selected the suitable builder for bulk booking of the residential flats in 2009. During the disputed period, the respondent executed two MOUs with M/s.Apt Infrastructure Pvt. Ltd. and M/s. Supertech Limited.

¹ Act, 1994

²IAHS

3. The modus operandi of the respondent's business as explained is as under:-

3.1 The respondent book flats with the builders in bulk upon payment of earnest money to them and sells such flats to the Government officials. As per the terms of MOU, there is a lock in period of three to six months within which the respondent shall have the rights on the flats booked by it and if it failed to sell the flat/units within the prescribed lock in period, the builder will forfeit the earnest money deposited by the respondent for the booking of flats.

3.2 After booking flats with the builder, the respondent searched for prospective buyers for the said flats by way of advertisement in the newspapers and through brochure in its own name. The respondent received discount from the advertising companies and recorded the same as 'miscellaneous income' in its books of account.

3.3. The prospective buyers³ had to fill an application form and pay Rs.50,000/- plus 10% of sale price of the flats as booking amount to the respondent. The prospective buyer makes a deposit of Rs.5,000/- along with the application forms to the

³ Buyers

respondent, which is called "Demand Survey Amount". This demand survey is basically conducted to estimate the demand of the property in the market. The said amount received is refundable in case the flat is not purchased by the prospective buyer. Further, the buyer to whom flats have been allotted, the said amount is adjusted in the amount due from him.

3.4 After receiving booking amount, the respondent issued allotment letters (mentioning specific floor and flat number signed by respondent) to the buyers which was accepted by the builders as well as by the buyers.

3.5. The respondent transferred the 10% amount to the builder after adjusting the amount of security deposited with the builder and after retaining its profit margin or contributing its share of loss i.e. the difference between the agreed price with the builder and actual sale price.

3.6 Lastly, an agreement, namely, builder buyer agreement was executed between the builder, respondent and the buyer for the price as agreed between the respondent and the builder at the time of entering into a MOU. Further, the balance amounts in instalments are to be paid by the buyer directly to the builder.

4. Based on an information received from Anti Evasion Branch, an investigation was initiated against the respondent and it was alleged that the respondent is acting as "Real Estate Agent" and is providing such services on which service tax was not paid by it. Accordingly, the respondent was served with show cause notice dated 17.10.2014 proposing service tax demand at full rate on the demand survey, cancellation charges, miscellaneous charges and the margin money. During the period in dispute, the respondent sought registration with the Service Tax Department on 24.02.2011 and paid Rs.21,79,876/- under protest vide challan no.46 dated 28.03.2011.

5. The show cause notice was adjudicated vide the impugned order, whereby the entire demand was dropped by the Department holding that the respondent while executing the aforesaid activities is not covered under the ambit of Real Estate Agent's services because it is not carrying out any activity specified therein. They are mainly engaged in purchase and sale of units in various projects and they are not providing any service to their buyers.

6. Heard Shri S.K.Ray, Authorised Representative for the Department and Shri A.K. Batra, learned counsel for the respondent.

7. According to the Revenue, the respondent arranges blocks of residential flats from various builders and thereafter, by selling these flats to individuals, they act as an intermediary/facilitator between the builder and the end customers, thereby earning income from the difference between the buying and selling prices of the flats. The respondent introduces the end user customers to the builder companies and assist them in finding their desired accommodation. The respondent is not a purchaser of the flat but acts as a confirming party in the agreements, which indicates that they are involved in the transaction to help the customers and builders connect, rather than as a party directly involved in buying or selling the property. The respondent receives consideration for their services by retaining a certain amount from the total amount paid by the customer to the builder. According to the Revenue, this role is similar to the role of a "Real Estate Agent" as per the definition under Section 65(88) of the Act. Further, these facts have never been disclosed by the respondent to the Department, which were detected only during the investigation. While working under the self-assessment system, they are bound to correctly assess their service tax liability and accordingly file the ST-3 returns. Respondents having wilfully suppressed the facts from the Department with intent to

evade the payment of service tax, the extended period of limitation and the penalty are invocable.

8. The submissions of the learned counsel for the respondent are as under:-

8.1 The activities carried out by the respondent are outside the purview of the taxable category of "Real Estate Agent Services" as the respondent is engaged in the purchase and sale of allotment rights of flats. Thus, demand of service tax under the taxable category of "Real Estate Agent Service" has rightly been dropped vide impugned order.

8.2 Respondent is purchasing the allotment rights in bulk and is selling the units to the buyers.

8.3 The respondent is neither hired by builder nor the customers, thus they cannot be said as 'agent', rather the respondent is buying and selling the units in its individual capacity.

8.4. The learned Counsel has placed reliance on the following decisions:-

1. **Ess Gee Real Estate Developers Pvt. Ltd. Vs. CCE, Jaipur dated 30.05.2019** ⁴
2. **Saumya Constructions Pvt. Ltd. Vs. CST, Ahmedabad dated 25.09.2023** ⁵
3. **M/s.Rattha Holding Co. Pvt. Ltd. Vs. Commissioner of Central Excise Tax, Chennai dated 27.08.2018** ⁶

8.5 The Respondent's transaction falls outside the scope of "services" as defined in Section 65B(44) of the Finance Act, 1994 for two reasons:-

"(a) The respondent's acquisition of the right in immovable property constitutes a benefit derived from the land, which is subsequently conveyed to the ultimate buyer. Consequently, the transfer of such benefit tantamounts to transfer of land itself, as correctly observed by the learned Adjudicating Authority in its order.

(b) The respondent operates on a principal-to-principal basis, assuming the risks and rewards of the transaction, evidenced by the margin or loss incurred between the advance paid to the builder and the payment received from the ultimate buyer, thereby characterizing the transaction as a sale rather than a provision of service. In other words, there is no service provider-recipient relationship between the respondent and the ultimate buyer/the builder."

8.6 The extended period of limitation is not invocable as the issue involved relates to interpretation and there was no suppression and malafide intent to evade service tax. Thus, the demand amounting to Rs.2,04,16,392/- for the period 2009-10 to 30.09.2012 is barred by limitation.

⁴2020(34)GSTL 486 (Tri.-Del.) –Affirmed by Hon'ble Apex Court

⁵2016(46)STR 723 (Tri.-Ahmd.)

⁶2018(9)TMI 1722-CESTAT-Chennai.

9. The Adjudicating Authority, on merits formulated the following questions for consideration:-

"A. Whether the income earned by the noticee from the foresee transaction of selling allotment rights in respect of selling flats to buyers is exigible to service tax?

B. Whether amount charged in the name of demand survey is taxable under service tax.

C. Whether service tax is applicable on such cancellation charges and miscellaneous income received by the notices? "

From the modus operandi; mentioned above, it is evident that the nature of the transaction, in which the respondent enters into is governed by the MOU with the builders creating legal rights over the properties which are then sold to other customers at higher price.

10. The period involved includes both pre-negative and the post-negative era. According to the Revenue, for the period 01.04.2009 to 30.06.2012, the services rendered by the appellant were classifiable under Section 65(105)(v) as "Real Estate Agent" which includes services provided by a Real Estate Agent in relation to real estate. Section 65(88) of the Act defines "Real Estate Agent" and section 65(89) defines the term "Real Estate Consultant" as under:-

"65(88) Real Estate Agent:- A person engaged in rendering any service in relation to sale,

purchase, leasing, renting of a real estate and includes a real estate consultant.

65(89) Real Estate Consultant:- A person, who renders, in any manner, either directly or indirectly advice consultancy or technical assistance in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management of real estate.”

11. The above statutory provisions makes it clear that in order to be covered under the definition of “Real Estate Agent” or “Real Estate Consultant”, it is necessary to ascertain whether the appellant is providing the services referred therein. Hence, the nature of services provided by the appellant is that of sale-purchase of flats in the various projects. As noticed from the introduction in the agreement/contract, where it says that, “the three essential aims and objective with which the society has been created is to provide low-cost and affordable housing, welfare and consultation. Under the heading main objectives, comes the aim of providing low cost housing, and under the heading incidental objectives falls the welfare activities and consultation (Govt. Advisory: Nation Building).”

12. Therefore, the main and the dominant activity is providing low cost housing, i.e, sale of flats and any other activity, which the appellant performed are only incidental or ancillary to the main activity. No sale-purchase transaction is completed without

other necessary formalities. In order to fructify the final sale of flats, the appellant is required to carry out the incidental jobs, which are inbuilt and part and parcel of the main activity and are, therefore, not classifiable as separate services under the heading "Real Estate Agent/Real Estate Consultant".

13. On examining the terms and conditions under the MOU, we find that the society had agreed to book 232 apartments, the sale price of which was payable by them. Further, Clause 6 of the MOU is relevant to be appreciated as it provides that in case the society fails to confirm the purchase of all the 232 apartments to the company within the time prescribed, the company will be entitled to forfeit the entire sum of Rs.11 lakhs, which has been deposited by the society as advance. This establishes that the appellant is acting on principal to principal basis being solely responsible for the sale of the flats and in the event of failure, are liable to bear the consequences.

14. We find that the Adjudicating Authority in holding that the appellant while executing the aforesaid activities, is not covered under the ambit of real estate agent services has rightly relied on the decision in **M/s Glaxo Smithkline Pharmaceutical Vs.**

CCE, Mumba-IV⁷ where the Tribunal has held that executory services shall not be included in the phrase advice, consultancy or technical assistance, and therefore, if a person is executing some work, it cannot be said that it is providing advice, consultancy or technical assistance services in respect of such work and vice versa. Moreover, the appellant has not been appointed by the builder to make sales on his behalf, nor has he been appointed by the ultimate consumer to purchase on his behalf rather the appellant has acted on its own account. As can be seen from the records of the case, the appellant had advertised the sale of flats in his own name through advertisement in newspapers or brochures and hence cannot be termed as an 'agent'. The very basic ingredient for a person to be characterised as an agent is that he represents or acts on behalf of another party, which is not fulfilled in the present case. As a result, the conclusion is that the appellant cannot be termed as an 'agent' and hence the services provided do not fall within the ambit of "Real Estate Agent".

15. An important factor, which needs to be appreciated is that under the MOU, the appellant is exclusively responsible to sell the flats. As in the event, the booked flats are not sold within the prescribed time limit, the earnest money deposited by the

⁷ 2006(3)STR 711(T-Mumbai)

appellant with the builder is forfeited. The relevant para of the MOU is quoted below:-

“In case the society fails to confirm the purchase of all the 232 flats (or such reduced number of flats, being the minimum number of flats required to be booked by the society) to the company within the time prescribed in Clause 5 above, the company will be entitled to forfeit the entire sum of Rs.11,00,000/- which has been deposited as advance.”

16. In the entire transaction, there is no scope of 'commission' being paid to the appellant either by the builder or by the subsequent customers. The contention of the Revenue that the respondent receives consideration for the services by retaining a certain amount from the total amount paid by a customer to the builder and, therefore, the role is similar to the role of a Real Estate Agent, cannot be upheld. The profit earned by way of difference in the amount which the appellant paid to the builder and what is collected from the customers cannot really be termed as 'commission'.

17. The allegation in the show cause notice is that the services rendered by the respondent with effect from 01.07.2012 to 31.03.2014, is not covered under the negative list of services nor any exemption is available to the activities carried out by the

appellant and, therefore, the service tax is leviable under Section 66B of the Act which reads as under:-

“Section 65B (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**

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution;

(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.”

The definition of “service” specifically excludes the activities which constitutes a transfer of title in goods or immovable property, by way of sale, gift, or in any other manner. In view of our conclusion that the respondent is engaged in sale-purchase of flats which involves transfer of rights in immovable property, on the simple reading of the definition, the activity rendered by the appellant does not fall within the ambit of “services”. Consequently, even during the post-negative era, respondent is not exigible to service tax.

18. The Adjudicating Authority has relied on the Department Educational Guide issued on 20.06.2012 where same view has been taken and the relevant extract is reproduced from there as under:-

"6.2.8 If the person who has entered into a contract with the builder for a flat for which payments are to be made in 12 installments depending on the stage of construction and the person transfers his interest in the flat to a buyer after paying 7 installments, would such transfer be an activity chargeable to service tax?

Such transfer does not fall in the declared service entry as the said person is not providing any construction service. In any case transfer of such an interest would be transfer of a benefit to arise out of land which as per the definition of immovable property given in the General Clause Act, 1897 is part of immovable property. Such transfer would therefore be outside the ambit of 'service' being a transfer of title in immovable property."

19. In arriving at the conclusion that the appellant has not rendered any service in the nature of real estate agent, we would like to refer to the decisions relied on by the learned Counsel for the appellant. In the case of **Saumya Construction P. Ltd,** (supra), the Tribunal while dealing with the issue whether the appellant was liable to discharge service tax under the category of "Real Estate Agent Service" for the amount received by it as development charges, had taken the view that in order to be covered under the definition of "Real Estate Agent" and "Real Estate Consultant", it is necessary to find out whether any

services have been rendered directly or indirectly involving the business of sale or purchase of the property, leasing or renting of the property and thereby gets an amount as a commission. Considering the facts in that case, the Tribunal found that the appellant envisaged conceptualized developed, implemented and marketed the scheme or project for himself and the development charges were only in the form of profit. Therefore, they were held to be not covered under the category of "real estate agent services".

20. Following the decision in **Saumya Construction** (supra), the Principal Bench in **Ess Gee Real Estate Developers Pvt. Ltd.** (supra), where the owners granted/assigned exclusive rights to the appellant to develop the property and to sell individual developed plots in a phased manner and as consideration for the same the owners were entitled to receive from the appellant the amounts specified in the agreement. Taking note of the Circular No. B-11/3/98-TRU dated 7.10.1998 clarifying that activity of actual construction of any building, carried out by builders or developers does not attract service tax levy as it is not a service within the meaning of the term "Real Estate agent" or "Real Estate Consultant", it was concluded that as per the agreement, extensive construction and development had to be carried out by

the appellant and it is thereafter the land or plots were to be sold for which the finances were also arranged by the appellant and, therefore, does not fall in the category of "Real Estate Agent".

21. We would also like to refer to the decision of the Chennai Bench in **M/s.Rattha Holding Co. Pvt. Ltd.** (supra) where the demand was raised by the department on the amount received by the appellant consequent to the deed executed by them relinquishing their right in the property in favour of the buyer treating the same as commission received for real estate agent services. The conclusion drawn by the Bench was that the amount received does not attract levy of service tax under the category of real estate agent service holding it to be transfer of right /interest in the property by the appellant to the purchaser on which the appellant has also paid the income tax on capital gains.

22. In the case of **Elegant Developers** (supra), the assessee entered into an agreement of trading in land, wherein they agreed to transfer an area of land in favour of Sahara India and the assessee had arranged the land from the land owners and was obligated to examine the title of the prospective land owner

and to further ensure availability of land owner at the office of the registrar for execution of sale deed. The Tribunal held the transaction to be one of trading in land, where no specific remuneration was fixed in the deal for acquisition of land and the assessee either had surplus/profit or had incurred loss. The relevant para of the said decision is set out below:-

“32. From the perusal of Memorandum of Understanding (MoU) between the appellants 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 in the nature of margin (profit/loss). **We hold that for levy of service tax, a specific amount (consideration for service) 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 *Cricketer 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.”

23. The decision relied on by the learned Authorised Representative in **Chattisgarh Steel Castings (P) Ltd.**⁸ is distinguishable on facts and hence does not support the case of the Revenue as the documents relied on were general power of attorney and the declaration, which were only an authorization to sell and facilitate the appellant therein to find a buyer for the land without the involvement of the land owners. The sale deed was ultimately executed by the land owners and not by the appellant and therefore it was held that the appellant had acted as a middleman or agent in the purchase and sale of immovable property and the amount received is consideration for such services.

24. On the second issue of amount charged by the respondent in the name of ‘Demand Survey’, we find that the Adjudicating Authority referring to the actual transaction on the basis of which the amount of Rs.5000/- was deposited by the customers along

⁸ 2020(34)GSTL 70(Chhattisgarh)

with the application form had dropped the demand. We agree with the findings arrived at as the said amount is adjusted against the price of the property in the customers account on finalising the deal or is refunded to the customer in the event the property is not found to be suitable. It has been rightly noted that the department has accepted the said situation in the show cause notice as under:-

“7.1 Some of the application forms for “Demand Survey” as submitted by the notice are attached as RUD-54. The perusal of the forms clearly indicates that the notice takes the service activities relates to real estate and undertakes the process of “demand Survey” for the new locations. They charge the money for the same from the customers. The money may be refundable as per the form indicates but the fact remains that the notice provides the services to the customers after charging the money from them. The element itself qualifies the notice in the category of service provider.”

25. On the issue of leviability of service tax on the ‘Cancellation Charges’ we have no hesitation in agreeing with the findings arrived at by the adjudicating authority that the cancellation charges are in the nature of penalty levied on the buyers for not fulfilling the commitment in which no real estate agent service is being provided by the appellant and hence, no service tax is leviable thereon. Similarly, the Miscellaneous Income has been verified as per the ledger account where the miscellaneous

income has been reflected as discount extended to them on the advertising service on which no element of service is involved.

26. Since the issue on merits stands decided in favour of the respondent , we do not find any reason to go into the question of the applicability of the extended period of limitation or the imposition of penalty and interest.

27. We find no error in the impugned order and the same is, hereby affirmed. The appeal filed by the revenue is, accordingly, dismissed.

[Order pronounced on 23rd September, 2024]

(Binu Tamta)
Member (Judicial)

(Hemambika R.Priya)
Member (Technical)

Ckp.