CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.71117 of 2018

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-2029-17-18 dated 28.03.2018 passed by Commissioner (Appeals) Central Tax, Noida)

M/s ATS Township Pvt. Ltd., ...Appellant
(Plot No.16, Sector-135, Noida, U.P.)

VERSUS

Commissioner of Central GST, Noida ....Respondent
(Noida)

APPEARANCE:

Shri Kapil Vaish, Chartered Accountant for the Appellant
Shri Manish Raj, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70229/2025

DATE OF HEARING : 16 April, 2024
DATE OF DECISION : 25 April, 2024

P. K. CHOUDHARY:

This appeal has been filed by the Appellant against Order-in-Appeal No.NOI-EXCUS-001-APP-2029-17-18 dated 28.03.2018 passed by Commissioner (Appeals) Central Tax, Noida where in the demand of service tax of Rs.25,21,649/- alongwith interest and equal penalty has been upheld under the provisions of Section 73(1) and Section 78 of Finance Act, 1994.

2. Briefly stated, the facts of the case are that the Appellant is engaged in construction of Complex Service falling under taxable entry of Section 65(105)(zzzh) of Finance Act, 1994. The audit officers of Central Excise Commissionerate, Noida conducted an audit of the Appellant's records and reported that they have not paid service tax on the amount recovered as "Lease Rent" from the customers. It was observed that though these charges were recovered under the head lease rent, the

transactions had direct nexus against sale of flat and were accordingly chargeable to service tax.

2.1 The Adjudicating Authority observed that the Appellant has not produced any documents showing that the whole amount so collected has been deposited with the Noida Authority; it also held that the Appellant has not produced any documents in respect of lease rent required to be paid to Noida Authority and other terms and conditions imposed by the Authority. The demand of service tax was confirmed and penalty of equal amount was imposed.

2.2 On appeal, the learned Commissioner (Appeals) upheld the demand after observing that the activity of collection of payment of lease rent does not fall in the definition of pure agent as given in Rule 5 of Service Tax Rules (Determination of Value) Rules, 2006. He also observed that the decision in the case of Intercontinental Consultants & Technocrats Pvt. Ltd. is under appeal before the Hon'ble Supreme Court.

3. The learned Authorized Representative appearing on behalf of the Appellant submitted that lease rent is payable by the lessee; the customer is ultimate lessee and is liable for payment of lease rent; that Appellant's activity of one time payment of lease rent and its recovery from customer is in the nature of pure agent activity. He further explained that the complex is being constructed on the land taken on lease from Noida Authority. As per terms of lease, Appellant was required to pay either 1% *per annum* of the premium of the plot or 11% amount as one time lease rent. Appellant opted for one time payment of Rs.13.34 crores and during the relevant period have recovered Rs.8.21 crore only from the customers. He also submitted that the decision in the case of Intercontinental Consultants & Technocrats Pvt. Ltd. passed by Hon'ble Delhi High Court has also been upheld by the Hon'ble Supreme Court. He also relied on the following decisions in support of his arguments:-

(a) KDP Infrastructure (Pvt.) Ltd. Vs. CCE reported in 2019 (22) G.S.T.L. 450 (T).

(b) Final order No.70103/2024 dated 29.02.2024 in the case of M/s Supertech Realtors Pvt. Ltd.

4. The learned Departmental Representative supports the order passed by the Commissioner (Appeals).

5. Heard both the sides and perused the appeal records.

6. The main issue in this appeal is as to whether the amount recovered by the Appellant under the head lease rent was liable to be included in the value of construction of complex service under the provision of Section 67 of Finance Act, 1994.

7. During the course of hearing, the learned Chartered Accountant had drawn our attention to the copy of challan dated 14.06.2010 evidencing payment of Rs.13,34,16,568/-. It was contended that the said challan is towards payment of one time lease rent. Attention was also drawn to the Lease Deed dated 14.06.2010 between New Okhla Industrial Development Authority and the Appellant wherein payment of one time lease rent of aforesaid amount of Rs.13,34,16,568/- stands recognized.

8. The issue regarding liability for payment of service tax on development charges collected from the customers has come up for consideration in case of KDP Infrastructure (Pvt.) Ltd. Vs. CCE reported in 2019 (22) G.S.T.L. 450 (T). It was held that the amount collected towards development charges was paid to Ghaziabad Development Authority and the same was not collected for providing any taxable service. The relevant portion of the order reads as under :–

> ***"5*** *The second issue relates to the demand of service tax on 'External Development Charges' received by the appellant from the flat owners, which stands taxed under the category of "Special services provided by Builder" which category was introduced in the year 2010. According to the appellant the said amounts stand collected by them from flat owners and given to the Government Agencies for procuring the infrastructural facilities from them. The Adjudicating Authority has not disputed the said fact but*

has reasoned that inasmuch as the said amount collected by the appellant were given to Ghaziabad Development Authority, which cannot be considered to be Government, the same would be liable to tax under the above category".

" 6 *We have been shown the Circular issued by the Board vide Circular No.334/1/2010-TRU, dated 26-2-2010. While elaborating on the new entry introduced with effect from 2010, it stands clarified as under :-*

> *"8.2 Since these charges are in the nature of service provided by the builder to the buyer of the property over and above the construction service, such charges are being brought under the new service. Charges for providing parking space have been specifically excluded from the scope of this service. Development charges, to the extent they are paid to State Government or local bodies, will be excluded from the taxable value levy. Further, any service provided by Resident Welfare Associations or Cooperative Group Housing Societies consisting of residents/owners as their members would not be taxable under this service."*
>
> *The appellant's contention is that the Ghaziabad Development Authority is also working under the State of U.P. and constituted under Uttar Pradesh Urban Planning and Development Act, 1973. As such, being a part of the State Government, the payment made to the Development Authority are required to be*

considered as having been made to State Governments.

We find force in the above contention of the Learned Advocate. Admittedly Ghaziabad Development Authority has been constituted under Uttar Pradesh Urban Planning and Development Act, 1973 and money collected by the appellant stands paid to them for obtaining the facilities. As such nothing stand collected by the appellant from their customers for providing any taxable service. Accordingly, we hold that the said demand is also not sustainable".

9. The aforesaid issue had also come up for consideration before this Bench in case of M/s Supertech Realtors Pvt. Ltd. in Service Tax Appeal No.71018/2018. Vide order dated 29.02.2024, this Bench of the Tribunal held as under:–

The audit report on the basis of which the show cause notice has been issued records as follows:

"Non payment of Service Tax on Lease Rent: during the scrutiny of record it was also observed that during 2011-12 the unit had received an amount of Rs.27076858.00 as lease rent from the buyers but did not pay service tax on the same. Lease Rent collected in advance from buyers is very much taxable. Assessee did not agree on the ground that it is to be passed to NOIDA. Similarly the party collected an amount of Rs.7857408.00 as capital REP fund. From the customer but did not pay the service tax on the same."

From the perusal of the above extract of the audit report it is evident that in case of Lease Rent, appellant had taken categorical stand at the time *of audit itself that this amount was to be transferred to NOIDA authority as such. This stand of the appellant has not been countered either in the show cause notice, order in original or order in appeal. This amount was not towards any service provided by the appellant. However without specifying the purpose of this amount both the lower authorities have concluded that this amount is towards, renting of immovable property service. We do not find anything in the impugned order on basis of which both authorities have concluded so. Hence demand in respect of this amount, by holding that these amounts are towards renting of immovable property is not maintainable".*

10. Before the Commissioner (Appeals), Appellant had taken categorical stand that the amount collected from customers and paid to Noida Development Authority cannot be included in the value of taxable service under provisions of Section 67 of Finance Act, 1994. It is not the amount charged for services and Rule 5 of Valuation Rules is *ultra virus* the Section 66 and Section 67 of Finance Act to the extent it levies service tax on reimbursement of expenses. Reliance was placed on Hon'ble Delhi High Court's decision in the case of Intercontinental Consultants & Technocrats (Pvt.) Ltd. Vs. UOI reported in 2013 (29) S.T.R. 9 Delhi.

10.1 The aforesaid argument of the Appellant was brushed aside by learned Commissioner (Appeals) by observing that the decision in the case of Intercontinental Consultants & Technocrats (Pvt.) Ltd. is under appeal before the Hon'ble Supreme Court.

10.2 We find that the Hon'ble Supreme Court has upheld the decision of Hon'ble Delhi High Court as reported in 2018 (10) G.S.T.L. 401 (S.C.). It has been held that before amendment of Section 67 by Finance Act, 2015, any amount which is collected not for providing taxable service cannot form part of the taxable value. The value of taxable service cannot be anything more or less then consideration paid as *quid pro quo* for rendering such taxable service. The relevant portion of the order reads as under: –

> ***"24.*** *In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service".*
>
> ***"25.*** *This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider".*
>
> ***"29.*** *In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with*

valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited [(2015) 1 SCC 1] wherein it was observed as under :-

> *"27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation.*

Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-a-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal

> *with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*
>
> *29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."*

11. We find that the period involved in the present case is April, 2012 to January, 2015. Therefore the ratio of law laid down by Hon'ble Supreme Court in the case of Intercontinental Consultants & Technocrats (Pvt.) Ltd. (Supra) is squarely applicable in the Appellant's case. We, therefore hold that the lease rent recovered from customers cannot be said to be the amount recovered towards provision of construction of residential complex service.

12. In view of above discussions, we hold that the Appellant was not liable for payment of service tax on the amount collected towards lease rent from the customers. Consequently the penalties are also liable to be set aside. As we are allowing the appeal on merits, we are not delving into the issue of limitation in the present appeal.

13. In view of the above discussions, the appeal filed by the Appellant is allowed with consequential relief as per law.

(Order pronounced in open court on…………………………………..……………………..)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(Separate Order)
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS

SANJIV SRIVASTAVA

I have perused the order prepared by the learned brother. However, even after long hours of persuasion, I am not in position to agree with the same.

2.0 The present case is with regards to payment of service tax on the amount reflected as "Lease Rent Charges" by the appellant and recovered from flat buyers. The demand has been set aside only on the basis that the amount collected as lease rent is reimbursable expenses and in view of the decision of Hon'ble Supreme Court in the case of Intercontinental Consultants & Technocrats (Pvt.) Ltd. Vs UOI 2013 (29) STR 9 Delhi, this amount could not be subjected to service tax. Reliance is also placed on the Tribunal's decision in the case of KDP Infrastructure Pvt. Ltd. Vs CCE 2019 (22) GSTL 450 (T) and M/s Supertech Realtor Pvt. Ltd. Final Order No.70103/2024 dated 29.02.2024.

3.0 In the present case the facts pointed out that appellant is a builder who is engaged in providing services under the category of 'Construction of Residential and Commercial Complex Services'. They are engaged in construction of flats and after construction they selling the flats to their customers against the price agreed with the buyers. While collecting the said price paid by the flat buyers under the various heads, one of the head is mentioned as "Lease Rent".

4.0 In the impugned order it has been specifically recorded as follows:-

> *"I have gone through the material available on record and appeal memorandum. The appellant's contention is that they acted as an intermediary between their buyers and Noida authority just to facilitate their buyer. They normally pay one time lease rent equivalent to 11% of the land premium to the Noida Authority as an intermediary and collect the same from the prospective buyers proportionately to the area of the flat. They are just acting*

as pure agents on behalf of prospective buyers/development authority and amount so calculated is not liable for payment of service tax. A transaction of merely collection and payment of money doesn't fall within the purview of service tax. The total lease rent recovered by them had been towards the reimbursable expenses of lease rent to Noida Authority. The appellant have not collected anything over and above the said lease rent.

Section 67 of the Act, reads as under,-

"Section 67. Valuation of taxable services for charging Service tax (1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,- (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

……………………………………………………………………"

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

……………………………………………………………………..."

Further that,

"consideration" includes any amount that is payable for the taxable services provided or to be provided

In 2006 (w.e.f. 19.04.2006) the Service Tax (Determination of Value) Rules, 2006 (the Valuation Rules) were prescribed. The said rules brought in the concept of 'pure agent' and provided that expenditure or costs incurred by the service provider as pure agent alone will be eligible for exclusion from taxable value. Rule 5 pertains to

> *reimbursable expenditure incurred by the service provider as a pure agent of his client. Explanation (1) to rule 5(2) clearly specifies the criteria to decide whether the service provider acts as a pure agent or not in a given situation. The service provider who seeks to claim exclusion of certain value from the taxable value should also fulfill all the conditions specified in rule 5(2). The conditions comprise that the agent neither intends to hold nor holds any title to the goods or services, never uses such goods or services so procured and also that the service provider only receives the actual amount incurred to procure such goods or services.*

A perusal of allotment letter available on file reveals that the buyer of property is not directly concerned with the authority. All the terms and conditions are between the buyer and the builder (the appellant). The payment plan and details of consideration which include the details regarding One Time Lease Rent are between the buyer and the appellant. Under these circumstances it is hard to believe that the appellant worked only as a pure agent."

5.0 Is it possible to undertake development of the residential projects and construction of the flats without procuring the land? project has been developed on the land procured in terms of lease like any other construction material used in the process or any input services used by the appellant for providing these output services, that being so, even in terms of the above para these cannot have been considered as reimbursable expenses. What are to be considered as reimbursable expenses was clarified by TRU vide letter D O F.No. B1 / 4 / 2006-TRU.,dated : 19th April, 2006 stating as follows:

"4.1.8 The service provider in the course of providing any taxable service may incur certain expenditure or cost as a pure agent of the client. The service provider seeks to exclude such expenditure or cost incurred by him as a pure agent of his client

(generally known as reimbursable expenditure) from the value of the taxable services.

"4.1.9 There could be situations where the client of the service provider specifically engages the service provider, as his agent, to contract with the third party for supply of any goods or services on his behalf. In those cases such goods or services so procured are treated as supplied to the client rather than to the contracting agent. The service provider in such cases incurs the expenditure purely on behalf of his client in his capacity as agent of the client. Amounts paid to the third party by the service provider as a pure agent of his client can be treated as reimbursable expenditure and not includible in the taxable value. ***However, if the service provider acts as an undisclosed agent i.e. acting in his own name without disclosing that he is actually acting as an agent of his client, he cannot claim the expenditure incurred by him as reimbursable expenditure. Whether the expenditure or cost incurred by the service provider in his capacity as a pure agent of the client or incurred on his own account is a question of fact and law and is to be determined carefully.***

4.1.10 Indication of different elements of the transaction in the invoice or bill could often be misleading. One has to carefully examine the exact legal nature of the transactions and other material facts before taking a view as to whether or not the expenditure sought to be excluded from the value is reimbursable expenditure. Not only the form, but also the substance of the transaction should be duly taken into account."

6.0 Explanation 1 to Rule 5, defined Pure Agent stating as follows:

Explanation 1.– For the purposes of sub- rule (2), "pure agent" means a person who–

(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure

or costs in the course of providing providing taxable taxable service;

(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;

(c) does not use such goods or services so procured; and

(d) receives only the actual amount incurred to procure such goods or services.

I do not find any of the condition as specified in the above explanation has been satisfied in the present case, to treat appellant as pure agent in the present case.

7.0 It is the claim of the appellant that amount calculated under the category of "Lease Rent" has been for payment to be made towards "Lease Rent" to the Noida Authority. Hence, the same is in nature of reimbursable expenses and could not have been added to determine the value of taxable service under the category of Commercial and Industrial Construction Services. I do not find any merits in the said submission. There is no lease agreement as per which the buyers of the flat is required to make any payment to the Noida Authoity. Appellant is engaged for construction of the flats in this project procured the land on lease from Noida Authority. For such procurement as per the lease agreement they have paid the lease rent to Noida Authority. Lease rent paid by the appellant to Noida Authority is a cost incurred towards development of this project and flats thereon which have been sold to the buyers, as buyers have no responsibility of any type for payment of these charges to the Noida Authority. This cannot be considered as reimbursable expenses. In the case of M/s Intercontinental Consultants & Technocrats Pvt. Ltd. Hon'ble Supreme Court has observed as follows:-

"24. In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of

taxable services ofr charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service."

The issue that was considered and decided by the Hon'ble Delhi High Court and Hon'ble Supreme Court in the case of Consultants & Technocrats Pvt. Ltd., was in respect of addition of reimbursable expenses to the value of service provided. Both Hon'ble Court concluded that the addition of reimbursable expenses to value of taxable service as per Rule 5 was contrary to the definition of Taxable Value as per Section 67 and hence quashed the said rule. However they, did not lay down the law stating that the expenses incurred by the appellant/ assessee during the course of provision of taxable services shall be excluded from the taxable value.

8.0 In the case of KDP Infrastructure Pvt. Ltd. (supra) the issue was not in respect of lease rent, it was in respect of certain external infrastructure facilities which were made available to the flat buyers by making payments to the Ghaziabad Development Authority. Relying on the relying on TRU letter D O F No 334/1/2010-TRU dated 26.02.2010, tribunal has held that as these external development charges were paid to the said government authority the same would not be included in taxable value of the services provided. However, as I find the said decision distinguishable from the fact that it is not in respect of lease rent, I do not take up such judgment for any further discussion.

9.0 Hon'ble Allahabad High Court has in the case of Greater Noida Industrial Development Authority [2015-TIOL-1008-HC-ALL-ST], observed:-

> *"31. As far as the circular dated 23rd August, 2007 issued by the Government of India, which has been so heavily relied upon by the appellant is concerned, we may record that under Clause 032.01, it has been provided that the Prasar Bharati Corporation (Doordarshan and All India Radio), which has been constituted under the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 is liable to pay service tax for broadcasting services.*
>
> *32. Similarly under Clause-999.01 with regard to the sovereign/public duties/functions, 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.*
>
> *33. Therefore, such activities assigned to an 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 purposes of levy of service tax.*
>
> *34. However, if a sovereign/public authority provides a services, which is not in the nature of an 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.

35. Letting of immovable property for consideration, which is determined on the basis of offers received from public at large by the assessee Greater Noida Industrial Development Authority is a service provided for consideration and not on payment of statutory fees, neither it is a statutory service performed by the assessee. It may be that the statute permits such activities of letting out of immovable property for augmenting its finances but the same cannot be termed as the service in public interest nor it is a mandatory or statutory functions of the Development Authority. Accordingly such activity of leasing, do constitute a taxable service, in our opinion.

36. The judgment relied upon by the learned counsel for the petitioner in the case of Krishak Bharati Cooperative Ltd. v. Deputy Commissioner of Income Tax passed in Income Tax Appeal No. 205 of 2010 decided on 12th July, 2010 is clearly distinguishable in the facts of the present case. The other judgments referred to by the learned counsel for the petitioner i.e. (1) CIT v. Panbari Tea Co. Ltd. (AIR 1965 SC 1871, (2) Smt. Shanti Sharma and Others vs. Smt. Ved Prabha and Others [(1987) 4 SCC 193], (3) R.K. Palshikar (HUF) vs. CIT [(1988) 3 SCC 594], (4) Maharaja Chintamani Saran Naty Sah Deo vs. CIT (AIR 1961 SC 732) = 2002-TIOL-1184-SC-IT-LB, and (5) Associated Hotels of India Ltd. vs. R.N. Kapoor (1959 AIR SC 12262) do not lay down anything contrary to what has been recorded by us herein above."

10.0 In case of Builders Association Of Navi Mumbai [2018-TIOL-2767-HC-MUM-GST] Hon'ble Bombay High Court has observed as follows:

"13. What is heavily relied upon before us is the position of CIDCO. The CIDCO relies upon a notification issued under the MRTP Act. It may be designated as a New Town Development Authority for the purpose of the MRTP Act. For designation of a site as a new town and for development of any area as a site for the new town, sub-section (3A) of section 113 enables the State Government to require the work of developing and disposing of land in the area of new town by any such Corporation, company or subsidiary company as referred in sub-section (2) of section 113 there of. It could be declared, by a notification in a Official Gazette, to be the New Town Development Authority for that area. Pertinently, this notification, which is relied upon and which notifies the Navi Mumbai Disposal of Land (Amendment) Regulations, 2008 reinforces the position that by a final notification in Official Gazette, the CIDCO is constituted and designated as the New Town Development Authority.

14. ….

15. …..

16. …..

17. …….

18. In the case of Commissioner of Central Excise, Nashik (supra), the demand of service tax was in issue. The Finance Act, 1994 and particularly section 65 clause (64) was relied upon to urge that the service charges collected by the MIDC from the allottees of the plots are in relation to services provided by the MIDC to the plot holders and the same is covered by the category "maintenance, management and repairs" under clause (64) of section 65 of the Act. It is in relation to such a controversy that the Hon'ble Supreme Court's judgment in the case of Shri Ramtanu Co-operative Housing Society Ltd. (supra) outlining the legal position and the status of the

Corporation is referred by the Division Bench. The issue raised related to collection of service charges, but whether the services rendered are taxable services or not. The Division Bench noted that this consideration is an amount received for the facilities and amenities provided. That is a statutory function. It is in these circumstances that the Revenue's appeal was dismissed. All the observations in the paragraphs relied upon must be seen in the backdrop of the essential controversy noted above. With respect, it cannot be said that the activities performed by sovereign or public authorities under the provisions of law, which are in the nature of statutory obligations are excluded from the purview of the present enactment. Pertinently, the dividing line between governmental and non-governmental, sovereign and regal functions and otherwise is not very thin and post globalisation, liberalisation and privatisation. In that context, a useful reference can be made to a judgment of the Hon'ble Supreme Court in the case of N. Nagendra Rao and Co. vs. State of Andhra Pradesh AIR 1994 SC 2663. The observations in paras 23 and 24 are extremely relevant. These paragraphs read as under:-

"23. In the modem sense the distinction between sovereign or non-sovereign power thus does not exist. It all depends on the nature of power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be ultra vires, but since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government in exercise of its executive action be sued for its decision on political or policy matters. It is in public interest that for acts performed by the State either in its legislative or

executive capacity it should not be answerable in torts. That would be illogical and impractical. It would be in conflict with even modem notions of sovereignty. One of the tests to determine if the legislative or executive function is sovereign in nature is whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matter is impliedly barred.

24. But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modem jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted.

But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the "financial instability of the infant American States rather than to the stability of the doctrine's theoretical foundation", or because of "logical and practical ground", or that "there could be no legal right as against the State which made the law" gradually gave way to the movement from, "State irresponsibility to State responsibility". In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in Viscount Canterbury (supra). But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become *outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State."*

19. To the similar effect are the findings in the later judgment of the Hon'ble Supreme Court in the case of Agricultural Produce Market Committee vs. Ashok Hari Kuni AIR 2000 SC 3116 (see paras 22 and 31 to 33)

20. In the passing, we are of the opinion that the High Court of Judicature of Allahabad, while considering the demand, not arising out of the GST, but under the Finance Act in relation to the services of renting of immovable property of Greater Noida, has rightly arrived at the conclusion that the same was a taxable service and on the consideration received, the service tax could have been levied and demanded. Once we agree with the reasoning of the Division Bench, then, we do not feel it necessary to reproduce the paragraphs in the Division Bench judgment. We are not in agreement with the learned senior counsel appearing for the petitioners that the demand is contrary to law or unfair, unjust and unreasonable in any manner."

10.0 In the case of Supertech Realtors Pvt. Ltd., supra the observations made by us are not relevant because the issue therein was towards Renting of Immovable Property. The demand in that case has been set aside on the ground of limitation. In the case of Supertech Realtors Pvt. Ltd. order clearly records as follows:-

"Lease Rent and Capital Replacement Fund:

The audit report on the basis of which the show cause notice has been issued records as follows:

> *"Non-payment of Service Tax on Lease Rent: during the scrutiny of record it was also observed that during 2011- 12 the unit had received an amount of Rs 27076858.00 as lease rent from the buyers but did not pay service tax on the same. Lease Rent collected in advance from buyers is very much taxable. Assessee didn't agree on the ground that it is to be passed to NOIDA. Similarly the party collected an amount of Rs 7857408.00 as capital REP fund. From the customer but did not pay the service tax on the same."*

From the perusal of the above extract of the audit report it is evident that in case of Lease Rent, appellant had taken categorical stand at the time of audit itself that this amount was to be transferred to NOIDA authority as such. This stand of the appellant has not been countered either in the show cause notice, order in original or order in appeal. This amount was not towards any service provided by the appellant. However without specifying the purpose of this amount both the lower authorities have concluded that this amount is towards, renting of immovable property service. We do not find anything in the impugned order on basis of which both authorities have concluded so. Hence demand in respect of this amount, by holding that these amount are towards renting of immovable property is not maintainable.

Nothing has been stated in the above audit note in respect of the capital replacement fund. Even show cause notice do not specify anything in this respect. Assistant Commissioner have concluded that these services are classifiable are the category of Business Auxiliary Services and Commissioner (Appeal) do not specify under which taxable category he intends to classify the services provided by the appellant against this amount. Since impugned order upholds the order of the Assistant

Commissioner, we presume he agrees with the classification made by the original authority. However e do not find any basis in either of the order for classifying these services under this category.

Appellant have already paid service tax on these amounts by classifying them under the category of Construction of Residential Complex Service after availing the abatement as provided by Notification No 29/2010-ST dated 22.06.2010."

11. In the said case also it has been held that appellant has paid service tax on the amount calculated under the category of construction of residential complex services. In the case of Supretech Realtors the issue was whether service tax on this amount could have been again charged under the category of 'Renting of Immovable Property Service'. Since appellant had paid service tax under the category of 'Construction of Residential Complex Service' after availing abatement provided vide Circular No.334/1/2010-TRU, dated 26-02-2010, we have not upheld the demand made again under the category of 'Renting of Immovable Property Service', demand in this case has also been set aside on the ground of limitation. Hence I do not find that the said decision supports the case of appellant.

12. Since there is no liability on the flat buyers under the lease agreement between Noida Authority and the appellant to pay any amount towards the lease rent, I am not inclined to accept the contention of the appellant that appellant was acting as pure agent buyer, in the entire transaction. Appellant was paying the lease rent to Noida Authority for procurement of land himself, on which he has developed the project and sold the flats to the flat buyers. Thus I do not find any merits in the submissions made by the appellant on this account.

13. On the issue of limitation impugned order observes as follows:

"The peal against extended period invocation is mere rhetoric. Regularly filing of ST-3 returns and Audit by service atx department is also of no help to the appellant. Mere mention of figures in the periodic return is not enough to decide upon the inclusion/ exclusion from taxable value. Such facts can only be unearthed during preventive measures like audit. Mere filing of ST-3 returns may not mean immunity from statutory obligations. The argument regarding earlier audits cannot be of any help to the appellant. The statutory provision relevant for audit is Rule 5A(2) of Service Tax Rules, 1994 read with section 94 (2) (k) of the Act. While extended period provisions are provided under Section 73 of the Act. Both are effect of separate authorities and should not be read in such a way that it makes a particular provision redundant. Fact of earlier audits cannot be ground for rejection of invocation of extended period, if some issue appear to audit."

The show cause notice specifically observes as follows:

> *"6. … The party has not shown any transaction of the amount in their ST-3 returns. The party never disclosed the details of charges recovered by them from their customers in the guise of lease rent charges. And irregularity came to the notice of the department only when the officers of Central Excise & Service Tax Commissionerate Noida audited the records of the party. Therefore it appears that the party has suppressed the material information with regard to transaction of sum on the aforesaid counts from the department with intent to evade payment of service tax fraudulently. Therefore it appears that provisions of proviso to section 73 (1) are squarely applicable in the instant case for invoking extended period limitation….."*

Even if the appellant was claiming that these charges were recovered by them from their customers as pure agent, for paying to Noida Authority as lease rent on the behalf of customers then also the same should have been reflected in their ST-3 returns as amounts recovered as pure agent. From the show cause notice appellant have not shown this amount under the said head and have thus suppressed the gross value of services for determination of taxable value. Thus extended period has rightly been invoked in the present case.

14. In view of the above findings, I do not find any merits in the appeal and the impugned order is upheld.

15. Appeal is dismissed.

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

POINTS OF DIFFERENCE

In view of the difference in opinion expressed by the Member (Judicial) and Member (Technical), following questions are referred to Hon'ble President for referring the same to third member.

"Whether the amounts collected by the Appellant as "Lease Rent", payable to the Noida Authority from the flat buyers, is an reimbursable expense, which need to be excluded from the gross value to arrive at the taxable value for payment of service tax during the period of dispute, as have been held by Member (Judicial)?

Or

"Whether the amounts collected by the Appellant by christening them as "Lease Rent", payable to the Noida Authority from the flat buyers, is not in the nature reimbursable expense, and hence cannot be excluded from the gross value to arrive at the taxable value for payment of service tax, as have been held by Member (Technical)?

(Pronounced in open court on- **08th August, 2024**)

Sd/-

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Akp

BINU TAMTA:

1. The present appeal has been listed before me due to difference of opinion between the Bench. The Member (Judicial) following the decisions of the Delhi High Court in the case of **Inter-Continental & Techno Crats (Pvt.) Ltd. Vs. Union of India**[1] and upheld by the Supreme Court in the case of **Union of India Vs. Inter-Continental & Techno Crats (Pvt.) Ltd.**[2] held that the lease rent recovered from the customers is not leviable to service tax. On the other hand, the Member (Technical) distinguished the decisions of the Supreme Court saying that it did not lay down the law stating that the expenses incurred by the assessee during the course of provision of taxable service shall be excluded from the taxable value. In view of the difference of opinion, the following questions have been referred as under:-

> "Whether the amounts collected by the appellant as "Lease Rent", payable to the Noida Authority from the flat buyers, is an reimbursable expense, which need to be excluded from the gross value to arrive at the taxable value for payment of service tax during the period of dispute, as have been held by Member (Judicial)?
>
> **OR**
>
> "Whether the amounts collected by the appellants by christening them as "Lease Rent", payable to the Noida Authority from the flat buyers, is not in the nature reimbursable expense, and hence cannot be excluded from the gross value to arrive at the taxable value for payment of service tax, as have been held by Member (Technical)?

[1] 2013 (29) STR 9
[2] 2018 (10) GSTL 401

2. Show cause notice dated 9.10.2015 has been issued alleging that the appellant had not paid service tax on the amount of Rs.8.21 crores (Rs. 3,44,35,697/-. for the period 2012-2013, Rs.2,54,05,010/- for the period 1.04.2013 to 31.3.2014 and for the period, 1.04.2014 to 31.01.2015, a sum of Rs.2,23,09,730/-) collected from their customers during the period April 2012 to January 2015 in the guise of lease rent on the allegations that:

i) there is no evidence to show that these charges were in the nature of lease rent only.

ii). There is no documentary evidence with regard to payment of lease rent to the authority or subsequent execution of sub-lease by Allottees, Builder and Noida Authority, justifying the recovery of amount as lease rent charges.

iii).The amount was actually against sale of flats.

3. To appreciate the issue whether the lease rent recovered from the customers can be said to be the amount recovered towards the provisions of "construction of residential complex service", it is necessary to examine the contents of the lease deed itself. The New Okhla Industrial Development Authority, a body corporate constituted under the provisions of the Uttar Pradesh Industrial Area Development Act, 1976 had executed the lease deed dated 14.06.2010, in favour of the appellant with respect to the Plot, as described therein. The appellant paid the amount of Rs.121.29 crores (in instalments) as total premium towards the cost of land. In addition thereto, the Noida

Authority charged annual 'lease rent' equivalent to 1% of the premium amount, however, an option is provided to the allottee to make one time payment of lease rent equivalent to 11% of the premium amount. The relevant provisions of the lease deed referring to the payment of 'lease rent' is quoted below:-

> "(ii) AND THE LESSEE BOTH HEREBY DECLARE AND CONVENANTS WITH THE LESSOR IN THE MANNER FOLLOWING:
> a)Yielding and paying therefore yearly in advance during the said term unto the lessor in the month of March for each year the yearly lease rent indicated below:-
>
> (i)The Lessee has paid Rs.13,34,16,568.00 as ONE TIME LEASE RENT being 11% of the total premium of the plot."

4. From the contents of the lease deed, it is evident that the appellant had paid the amount towards one time lease rent. There is no reason to doubt the contents of the lease deed issued by the Noida Authority, specifically incorporating the fact that the appellant had deposited the amount towards one time lease rent.

5. The fact of payment of lease rent by the appellant is further evident from the voucher making payment to Noida Authority, as one time lease rent, copy of the Ledger voucher is quoted below:-

ATS TOWNSHIP PRIVATE LIMITED
Party Ledger(01/04/2010 to 31.03.2012)
All Branch Combined ONE TIME LEASE RENT TO NOIDA

Voucher Date Voucher No. Description Balance Amount	Amount Debit	Amount Credit
ONE TIME LEASE RENT TO NOIDA 13,34,16,568.00 Dr. 01/12/2010 OH-JV/38 LAND AT SECTOR 104	133,416.568.00	

Being ONE TIME LEASE RENT PAID ON BEHI OF CUSTOMS TO NOIDA BEING RECOVERABLE		
TOTAL:	133,416,568.00	
13,34,16,568.00 Dr.		
CLOSING BALANCE:		
TOTAL:	133,416,568.00	133,416,568.00

6. Along with the aforesaid voucher, the appellant has also placed on record the copy of the Challan No.10059 dated 14.06.2010 for payment of lease rent to Noida Authority, depositing a sum of Rs.13,34,16,568.00. Cumulatively, the Lease Deed, the voucher and the challan is the complete chain of documents showing that the appellant had deposited the one time lease rent.

7. I may now refer to the subsequent tripartite agreement between Noida Authority as the lessor/first party, the appellant as the lessee/second party and the subsequent purchaser of the flat as the sub-lessee/third party, titled as, Sale deed for Super Structure for Residential Complex and Sub-lease Deed for Land, which provided as under:-

> "The vacant and peaceful possession of the super structure of the dwelling unit has been given to the Third Party. **The lessor has received one time Lease Rent of the Plot from the lessee and the sub-lessee is not to pay any lease rent to the lessor during the un-expired portion of the said lease."**

8. From the aforesaid clause, it is crystal clear that the sub-lessee is not required to pay any lease rent to the lessor during the unexpired period of the lease as the lessee has already received the one time lease rent of the plot from the lessee. In other words, if the appellant had not paid the one time lease rent but had paid it annually the sub-lessee would have been liable to pay the lease rent amount towards the remaining period of the lease to the NOIDA Authority directly. By paying one time lease rent equivalent to 11% of the premium, the appellant only facilitated their customers and saved them from the excess amount of lease rent, which would have been payable over a period of 90 years. Consequently, on the execution of the Sub-Lease, the customers/flat owners paid the proportionate amount of lease rent to the appellant. This is evident from the Customer Lease Rent List for the period 1.04.2012 to 31.03.2013, giving the details of amount deposited customer wise total amounting to Rs.3,44,35,697/-. Similarly, for the period 1.04.2013 to 31.3.2014, an amount of Rs.2,54,05,010/- and for the period, 1.04.2014 to 31.01.2015, a sum of Rs.2,23,09,730/-has been deposited by all the customers of the appellant. In all Rs.8.21 crores have been received by the appellant as against the amount of Rs.13,34,16,568/- deposited with the Noida Authority towards lease rent. The show cause notice also gives the identical figures. Hence, there is no reason to dispute the said list given by the appellant which is further fortified by the documents submitted by the appellant as illustrations. The Provisional Allotment letter dated 24.07.2013 in favour of Ms. Heena Lala (Application No.1420) provisionally allotting the Unit bearing no.12183 for a consideration of Rs.1,14,81,700/-, the details of which have been given in the Annexure to it as follows:-

Details of Consideration

ATS One Hamlet Regd. No.1420
GH01, Sector-104,
Noida, U.P.

Charge Type		Total Amount (Rs.)
Basic Selling Price		Rs.1,14,81,700
PLC		
One Time Lease Rent		**1,31,925**
Two Basement Car Parkings		NIL
Maintenance Deposit		5,000
Power Back Up		1,00,000
Running Maintenance (as applicable)		
Total consideration		1,17,63,625
In words(Rupees One Crore Seventeen Lacs Sixty Three Thousand Six Hundred Twenty Five only)		

From the aforesaid, it is evident that the one time lease rent apportioned towards the liability of the customer, Ms. Heena Lala was Rs.1,31,925/- and the said fact is also substantiated by the customer lease rent list for the year 2013-2014 showing as under:-

ATS TOWNSHIP PVT LTD.
ATS ONE HAMLET
PLOT NO.GH-01
CUSTOMER-LEASE RENT
FROM 01/04/2013 TO 31.03.2014

Account Head	Period Debit	Period Credit	Net
HEENA LALA-C-1420	0.00	131925.00	131925.00

9. The Authorities below have completely failed to examine these documents in their entirety and thereby recorded a very bald finding that there is no evidence that these charges were in the nature of lease rent only. In view of the discussion above, I am of the opinion that the appellant has sufficiently proved that the charges were in the nature of lease rent only. Further, the terms of the lease deed, the voucher and the challan shows the complete chain of facts that the appellant had made the payment of one time lease rent to the authority. Also the execution of the sub-lease deed by virtue of tripartite agreement and the subsequent documents of provisional allotment clearly shows the nexus of the payments made by the subsequent purchasers by way of reimbursement to the appellant.

10. The next step to be appreciated is whether the amount deposited by the customers towards lease rent to the appellant by way of reimbursement can be subjected to service tax. As per Section 66, service tax is levied on the value of taxable services. Section 67 provides for determination of the value of the taxable service for the purpose of charging service tax under Section 66 as the gross amount charged by the service provider for such service provided or to be provided by him in a case where the consideration for the service is money. Thus the mandate of Section 67(1) is that the service tax is to be paid only on the services actually provided by the service provider. In this context, reference is invited to the decision of the Delhi High Court in **Intercontinental Consultants and Technocrats (supra)**, where the appellant was providing "Consulting Engineering Services" and received payment not only for the services provided by it, but was also reimbursed for the expenses incurred by it on air travel, hotel, stay, etc. The service tax was paid on the amount received by it for services rendered

to its clients but did not pay any service tax in respect of expenses incurred by it which were reimbursed by the clients. The High Court allowed the petition challenging the constitutional validity of Rule 5 of the Valuation Rules, holding it to be ultravires the provisions of Section 66 and 67 of the Act. Accordingly, it was concluded that reading Section 66 and 67(1)(i) together and harmoniously, it seems clear that the valuation of the taxable service is nothing more and nothing less than the consideration paid as *quid pro quo* before the service can be brought to charge.

11. In the appeal filed by the **Union of India,** the Supreme Court noted that Rule 5 of the Valuation Rules does bring within its sweep, the expenses which are incurred while renting the service and are reimbursed and therefore, what was required to be decided was whether Section 67 of the Act permits subordinate legislation to be enacted as done by Rule 5. The Supreme Court held that service tax is on the value of taxable services and therefore, it is the value of the services which are actually rendered and which has to be ascertained for the purpose of calculating the service tax. Laying emphasis on the expression "value of such services", the Supreme Court observed that the authority has to find what is the gross amount charged for providing such taxable services and so any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as the amount is not calculated for providing such taxable service. The relevant para of the decision of the Supreme Court is set out below:-

> "**26.** In this hue, the expression "such" occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the "authorities are to find what is the gross amount charged for providing "such" taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as that amount is not calculated for providing such "taxable service". That according to us is the plain meaning which is to be attached to Section 67 (unamended *i.e.* prior to 1-5-2006) or after its amendment, with effect from 1-5-2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that the High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable

> service shall be the gross amount charged by the service provider "for such service" and the valuation of tax service cannot be anything more or less than the consideration paid as *quid pro qua* for rendering such a service."

12. Similar view has been expressed by the Apex Court, in the case of **Commissioner Vs. Bhayana Builders (P) Ltd.[3]**, with reference to the provisions of Section 67 of the Act --

> "Therefore, it is not any amount charged, which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily consideration for the service provided, which is taxable under the Act. By using the words "for such service provided", the Act has provided for a nexus between the amount charged and the service provided. Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67".

13. The Tribunal in the case of **M/s Supertech Realtors Pvt. Ltd versus Commissioner of Service Tax, Noida[4]** also dealt with a similar controversy as the audit report on the basis of which the show cause notice was issued records as: "Non-payment of Service Tax on Lease Rent: during the scrutiny of record it was also observed that during 2011–12, the unit had received an amount of Rs.2,70,76,858.00 as lease rent from the buyers but did not pay service tax on the same. Lease Rent collected in advance from buyers is very much taxable. Assessee didn't agree on the ground that it is to be passed to NOIDA". It was held that the lease rent amount which was to be transferred to Noida Authority was not towards any service provided by the appellant. The demand of service tax on the said amount was held to be not maintainable. In fact, I am of the opinion that the present case is squarely covered by the said decision as the only factual difference was that in the said case it was an advance payment towards lease rent from the flat owners payable to the Noida authority whereas in present case, it is in the form of

[3] 2018(10) GSTL 118 (SC)
[4] Service Tax Appeal No.71018/2018 vide Final Order No.70103/2024 dated 29.02.2024

reimbursement to the appellant by the flat owners which has already been paid by the appellant. Hence, no service tax can be levied on the amount paid by the appellant to the Noida Authority towards lease rent.

14. In reference to the present controversy, it needs to be appreciated that the provisions of Section 67 were amended by the Parliament by the Finance Act, 2015 w.e.f. May 14, 2015, whereby an explanation has been added, which provides that 'consideration' includes the reimbursement of expenditure or cost incurred by the service provider. The amendment being prospective in nature, it is only the post amendment that reimbursement of expenditure or cost incurred by the service provider gets included under the expression consideration, which was not available earlier. The period involved in the present case being prior to the said amendment, there could not be any service tax on reimbursed expenses as Section 67 did not provide for such an inclusion and, therefore, the term 'consideration' has to be construed in a limited manner, i.e. in respect of taxable services provided or to be provided and the other reimbursable expenses incurred are not to be included for computing the service tax.

15. The amount payable to the Noida Authority is actually borne by the customers through the appellant, which is apparent from the lease deed and sub-lease deed. The amount paid by the customers is not towards any services rendered by the appellant and as per the records, the same is not part of the consideration what has been specifically shown as the lease rent amount. On simple analogy, the amount paid by their customers towards lease rent which was paid by the appellant to the Noida authority is in the nature of reimbursement, which cannot be subjected to levy of service tax.

16. The counsel for the appellant has submitted that the appellant had acted as an intermediary between the buyers and the Noida Authority just to facilitate. Referring to the provisions

of Rule 5(2) of the Valuation Rules, it was submitted that the amount collected as lease falls in the category of "Pure Agent Service" and hence no service tax can be levied on the consideration paid by the service recipient. Since the reference is limited to the issue whether the lease rent payable to Noida Authority is a reimbursable expense to be excluded from the gross value and the same has been decided in favour of the appellant, it is not necessary to consider whether the appellant has acted as a pure agent, and therefore, the amount collected has to be excluded.

17. I, therefore, answer the reference in favour of the appellant and against the Revenue in the following terms:

> The amount collected by the appellant as lease rent payable to Noida Authority from the flat buyers is reimbursable expense, which needs to be excluded from the gross value to arrive at the taxable value for payment of service tax during the period dispute."

18. With these observations and findings, I return the reference made, to the Division Bench for further necessary action.

Sd/-

(BINU TAMTA)
Member (Judicial)

Ckp.

In view of the majority order, the amount collected by the Appellant as lease rent payable to Noida Authority from the flat buyers is reimbursable expense, which needs to be excluded from the gross value to arrive at the taxable value for payment of service tax during the period dispute. Accordingly, the Appeal is allowed with consequential relief, as per law.

(Pronounced in open court on 25.04.2025)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Nihal