

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. 4

Service Tax Appeal No. 51435 Of 2018

[Arising out of order-in-original No. DL-GST-WEST-COM-08-17-18 dated 31.01.2018
passed by the Commissioner of Goods and Service Tax, Delhi West]

Aerens Goldsouk Projects (Hissar) P Ltd : **Appellant**

Plot No. 1, Wedding Souk, Local Shopping Centre
Sharda Niketan, Pitampura, New Delhi

Vs

Commissioner of Central Goods Service Tax, Central Excise-Delhi-III : **Respondent**

Block-II, 7th Floor, CGO Complex, Lodhi Raod
Central, New Delhi-110003

APPEARANCE:

Shri Atul Gupta, Chartered Accountant, Shri Anmol Gupta, Chartered
Accountant and Shri Varun Gaba, Advocate for the Appellants
Shri Anand Narayan, Authorized Representative for the Respondent

CORAM :

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 59871/2024

Date of Hearing:17.09.2024

Date of Decision:11.12.2024

HEMAMBIKA R. PRIYA

The present appeal has been filed by M/s Aerens Goldsouk Projects (Hissar) Private Limited¹ to assail the order-in-original No. DL-GST-WEST-COM-08-17-18 dated 31.01.2018 wherein the Commissioner has confirmed the demand of service tax of Rs. 86,90,088/- along with interest and penalties for the period 2011-12 to 2014-15.

1 the appellant

2. The brief facts of the case are that the Appellant is a private limited company engaged in the business of Construction and Real Estate development and registered with the Service Tax Department for providing, 'Rent-a-cab scheme Operator', 'Real Estate Agent Service', 'Repair & Maintenance Services', 'Construction services other than residential complex, including commercial/industrial buildings or civil structures', 'Transport of Goods by Road', 'Works Contract Service', 'Legal Consultancy Service' and 'other taxable services'. During the period of dispute, the appellant was engaged in development of various projects and sold the plots and shops therein. The appellant followed the practice of receiving advances against the sale of plots and shops in the projects which were developed. The appellant also took loans to meet the financial requirements to buy land during the period in dispute. The appellant received advances from parties to meet financial needs of the business. An enquiry was initiated by the Anti-Evasion wing of Service tax Commissionerate, Delhi vide letter dated 21 August 2014 on the basis of information that the Appellant was rendering taxable services and had got registered themselves in the year 2013 and have not paid any service tax prior to 19.09.2013. On completion of investigations, show cause notice dated 13.12.2016 was issued to the appellant proposing recovery of service tax, which was adjudicated vide order dated 31.01.2018 wherein the Commissioner confirmed the demand of service tax of Rs. 86,90,088/- out of the total demand of Rs. 2,16,74,956/- along with interest and penalties for the period 2011-12 to 2014-15. Being aggrieved by the impugned order, the appellant has filed the present appeal.

3. Learned Chartered Accountant for the appellant submitted that show cause notice was served on the appellant with an allegation that entire value as shown in P&L account as well as advances shown in Balance Sheet are towards taxable service only and when compared with taxable value already shown in ST-3 returns, Service tax demand was computed on differential value. On the same basis, demand has been confirmed vide impugned order as well, while accepting part submissions of the appellant. However, no analysis has been made in the impugned order. Learned Chartered Accountant submitted that various decisions have held that service tax demand cannot be sought on differential value assuming it to be as remunerable for taxable services without carrying out due verification or ascertaining the nature of said activity/services. Moreover, he submitted that Para 4.4 of SCN dated 13 December 2016 notes that a visit was made to registered premises of the appellant (under Rule 5A of Service Tax Rules, 2004) to collect requisite information in pursuance of authorization by Deputy Commissioner (Anti-evasion). Hence, the department could have easily ascertained the nature of activities of the Appellant and only then, demand could have been proposed. However, on the contrary, no single evidence has been brought on record that the revenue as well as advances shown in financial statements of the appellant are towards taxable services provided by the Appellant. In support of his submission, the learned counsel relied upon the following decisions:-

- **Go Bindas Entertainment Pvt. Ltd. v. Commissioner of S.T., Noida²**
- **Commissioner of ST, Ahmedabad v. Purni Ads Pvt. Ltd³**
- **Sharma Fabricators & Erectors Pvt Ltd v. CCE Allahabad⁴**
- **Synergy Audio Visual Workshop Pvt. Ltd. v CST, Bangalore⁵**
- **Kuoni Travel India Pvt. Ltd. (Now SOTC Travel Services Pvt. Ltd.) v. Pr. Commissioner of Central Excise, New Delhi⁶**
- **M/s RK Singh & Co. v. Commissioner Customs & Central Excise Bilaspur, Raipur⁷**

3.1 Learned Chartered Accountant further submitted that for the period under dispute FY 2011-12 & 2012-13 whereiin it is mandatory to give appropriate classification in Show Cause Notice. However, on the contrary, multiple and vague classifications has been given in Show cause notice without clarity as to which revenue/advances/receipts are classified under which category of taxable service. Moreover, even vide the impugned order, no classification has been given by Adjudicating Authority while confirming demand for the period prior to 01 July 2012. It has been alleged in the Show cause notice that services of the appellant are covered under "Construction services other than Residential Complex, including commercial/industrial buildings or civil structures and/or 'Works Contract Services' while definition of both the category of services is given in the show cause notice respectively. Thus, even after conducting visit on the premises of the appellant under Rule 5A of Service Tax Rules, 2004, the Department has failed to bifurcate and classify as to which activity/revenue falls under Business Auxiliary Services and which activities/revenue falls under Repair,

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- 2 **2019 (27) G.S.T.L. 397 (Tri. - All.)**
3 **2010 (19) STR 242 (Tri. - Ahmd.)**
4 **2017 (5) GSTL 96 (Tri. - All.)**
5 **MANU/CB/0304/2008**
6 **2024 (3) TMI 406 CESTAT NEW DELHI**
7 **2023 (5) TMI 721 - CESTAT NEW DELHI**

reconditioning, restoration or decoration or any other similar services of any motor vehicle. In this regard, the Ld. chartered accountant relied upon the following decisions:-

- **CCE v. Brindavan Beverages Private limited⁸**
- **Shubham Electricals v. Commissioner of C. Ex. & S.T., Rohtak⁹ affirmed by Hon'ble Delhi High Court in 2016 (42) S.T.R. J312 (Del.)**
- **M/s RV Infrastructural Pvt. Ltd. v. Commissioner of Central Tax, New Delhi¹⁰**
- **M/s Jai Shree Shyam Borewell Co. v. Commissioner of Central Excise, Jaipur¹¹**

3.2 Ld. Chartered Accountant also submitted that 'advance against property' represents interest free advances received from M/s Aerens Goldsouk International Limited (AGIL) to acquire land in the rural agricultural areas. A copy of MOU between AGIL and the appellant had been furnished to the adjudicating authority which provides for granting interest free loan to acquire land. However, the Adjudicating Authority had rejected the said plea of the Appellant on the basis of various discrepancies pointed out in MoU. In this regard, Ld. chartered accountant submitted that the Adjudicating Authority did not understand the MOU between both the parties and contended that the said MOU was executed for the reason that AGIL was desirous of purchasing rural agricultural land. However, since as AGIL was not in a position to strike a proper bargain for land, they approached the Appellant to purchase/acquire the land/land rights in the rural agricultural areas in the state of Delhi/MP/Bihar/Rajasthan/Andhra Pradesh, etc. For the said purpose, as per Clause 3 of MoU, funds

8 2007 (213) ELT 487 (SC)

9 2015 (40) S.T.R. 1034(Tri.-Del.)

10 2023 (12) TMI 379-CESTAT NEW DELHI

11 2023 (1) TMI 740-CESTAT NEW DELHI

required to purchase the land and the incidental expenses thereto was provided by AGIL to the Appellant in the form of interest free advances. Hence, Adjudicating Authority's contention that MoU does not contain the value of advances given by AGIL to Appellant is in itself unsustainable since the purpose of MoU is for the Appellant to find & purchase land in rural agricultural areas. Therefore, it would be impossible for both the parties to mention the amount of interest free advance given to purchase land when said land had to be identified by the Appellant. It is not the case that said land was readily available and was to be purchased only but the Appellant was entrusted with the responsibility to find and buy land as per the requirements/in prior consultation with AGIL. Similarly, Adjudicating Authority's contention that the period upto which this MoU is valid is not mentioned anywhere is unsustainable. In support of his contentions, Ld. CA has relied upon the following decisions:-

Commissioner of Central Excise, Chennai vs. MEL Systems & Services Limited¹²

Collector of Central Excise, Ahmedabad vs. Vikshara Trading and Invest. P. Limited¹³

3.3 Ld. CA further submitted that the Adjudicating Authority has wrongly interpreted the clause 6.7 of Sale Deed which provides that Service tax/Sales tax or any other taxes imposed/levied by the Government shall be borne and paid by the buyer as the purpose of said clause was merely to seek Service tax/sales tax over & above the sale consideration, in case the levy of the same is attracted. Presence of such a clause in any agreement does not necessitate that Service

12 2008 (232) ELT 69 (Tri.-Chennai)

13 2003(157) ELT 4 (S.C.)

tax levy is attracted or collected by the appellant. Further, if Appellant did not receive any consideration from its buyers prior to receipt of completion certificate, no service tax levy gets attracted.

3.4 Further, the Ld. CA submitted that it has been wrongly contended in Impugned OIO that appellant did not argue about 'Other Advances' as shown, and stated that said amount of Rs. 4,80,16,419/- had been received from AGIL as a financial arrangement involving no service component. Thus, the Adjudicating Authority had failed to take into consideration the submissions filed by the Appellant and instead, in a mechanical manner, had confirmed the demand. The Appellant had maintained their books of accounts in accordance with AS-7, i.e.. Accounting for Construction Contracts where revenue has to be recognized based on percentage of completion method (POCM). Whatever amount is received by the appellant is first shown as "Advances received and later, out of the same, year-wise revenue is recognized as per the Accounting Standards. The Adjudicating Authority, even after accepting the values submitted by the Appellant at adjudication stage, had erred in taking the same amount twice, once in Advances received and again in Revenue. Hence, tax has been demanded twice on the same receipts. Learned Chartered Accountant further contended that the entire case had been formed on the basis of the data reflected in Financial statements and ST-3 returns and hence, allegation of suppression cannot sustain when both the documents are available in public domain itself (and ST-3 is filed with Service tax department itself). In support of his submissions, he relied upon the following case laws:-

- **Samsung India Electronics Pvt. Ltd. v. Commissioner of Central Excise, Noida¹⁴**
- **M/s Mega Trends Advertising Ltd. v. Commr. of Central Excise & Service Tax, Lucknow¹⁵**
- **Central India Engineering Co. v. Commissioner of C. Ex., Nagpur¹⁶**
- **Khandwala Securities Ltd. v. Commissioner of Service tax, Mumbai¹⁷**
- **Valencia Construction Pvt. Ltd. v. Commr. of C. Ex., Cus. & S.T., Nagpur reported in ¹⁸**

Moreover, Ld. CA submitted that Ld. Adjudicating Authority has wrongly held that intent to evade payment of tax is not required for invoking extended period of limitation. In support of his submission, he relied upon the following decisions:-

- **M/s International Air Charter v. Commissioner of Central Tax (Appeals - II), Delhi¹⁹**
- **M/s GD Goenka Private Limited v. Commissioner of Central Goods and Services Tax, Delhi South²⁰**
- **Bharat Hotels Limited v. Commissioner, Central Excise (Adjudication)²¹**
- **Mahanagar Telephone Nigam Ltd. v. Union of India and Ors.²²**

Learned Chartered Accountant contended stating that cum-duty benefit under Section 67(2) of the Act must be granted to the appellant, if any, demand is upheld.

4. Learned Authorized Representative for the Department submitted that the appellant had received advances from M/s Aerens Goldsouk International Ltd. (AGIL) to acquire land in the rural

14	2019 (11) TMI 1204-CESTAT ALLAHABAD
15	2019 (5) TMI 1027-CESTAT ALLAHABAD
16	2016 (44) S.T.R. 657
17	2015 (40) S.T.R. 738
18	2016 (41) S.T.R. 436
19	2023 (12) TMI 1004-CESTAT NEW DELHI
20	2023 (8) TMI 995-CESTAT NEW DELHI
21	2018 (2) TMI 23-DELHI HIGH COURT
22	2023 (4) TMI 216-DELHI HIGH COURT

agricultural areas. They also submitted copy of Memorandum of understanding (MOU) entered into with AGIL, wherein it was agreed that AGIL would provide interest free advances to the appellant to purchase such land. This MOU was not registered with the appropriate authority, in the absence of which the MOU has no legal validity. Learned Authorized Representative further submitted that the MOU is required to be signed by all the parties at each page alongwith the witness. In the instant case, the MOU was not signed by both the parties, nor any witness had signed on it. No amount had been indicated in the MOU which was given to the appellant by AGIL on account of purchase of land. The MOU was executed on 01.04.2010, but, the validity period of MOU had not been mentioned. Thus, MOU could not be a legally valid document. Besides, the said MOU neither quantified the amount transacted between AGIL and the appellant, nor specified the period. Further, as per the conditions of the MOU, the appellant was to receive consideration in lieu of their activity which was nothing, but commission and was liable for service tax levy. As per appellant's submissions, transactions had taken place between both of them (i.e. AGIL & appellant), however, no revenue was shown by them in their balance sheet in lieu of such type of income. Thus, it was held that the MOU might be fabricated and not a valid document in support of their contention.

4.1 Learned Authorized Representative further submitted that the appellant claimed Rs. 63,64,587/- on account of 'Sale of Plot' during the whole period of Show Cause Notice, but they could produce details amounting to Rs. 36,41,336/- only. Documents related to rest of the amount, were not submitted by the appellant to the adjudicating

authority. As the documents were not available with the appellant and the appellant was held to be liable for service tax. It was also held that as the appellant had charged service tax and clearly shown the same in the documents submitted by them, therefore, the contention made by them, that the value is received by them against 'sale of plot', was not tenable. It is submitted that for the amount claimed as exempted by appellant on account of 'Sale of Plot', appellant is liable for service tax levy under Section 68 read with Section 66 and 67, and the same is recoverable from them under Section 73 of the Finance Act, 1994. He further submitted that the appellant did not argue for the other heads of the above table like 'Other advances' and 'Rectification entries'. Therefore, these are clearly liable for service tax levy.

4.2 Learned Authorized Representative further submitted that the Hon'ble Supreme Court, in the cases of **M/s. Konkan Synthetic Fibres Vs. CC (Import) Mumbai** ²³ & **M/s. Indian Oil Corporation Vs. Commissioner of Central Excise, Vadodara** 2012-TIOL-04-SC-CX,²⁴ clearly states that the provisions of exemption have to be construed strictly and if the exemption is subject to certain conditions, the conditions have been complied with and that the substantial compliance is not enough. Thus, without any legal supportive documentary evidence, benefit of exemption cannot be given to appellant as was claimed by them on account of transaction made with AGIL and advances received for sale of plots, projects & properties etc. The appellant had intentionally not submitted all the documentary

23 2012 (278) ELT 0037 (SC)

24 2012 (278) ELT 0037 (SC)

evidences in order to conceal the actual nature of the activities carried out by them.

4.3 Learned Authorized Representative further submitted that the extended period as provided in proviso to Section 73(1) of the Act *ibid* has rightly been invoked in this case and no portion of the demand is beyond a period of five years from the relevant date for show cause notice.

5. We have heard the Ld Chartered Accountant for the appellant and the Ld AR for the Department. The issues before us for consideration are as follows:-

- (i) Interest free advances received against property
- (ii) Advances received against Projects, viz., Advances received for sale of plot

6. We take up the first issue for consideration. In this context, the Ld Counsel submitted that these were in the nature of advances received to acquire land in rural areas and a copy of the MoU was also submitted to the adjudicating authority. The impugned order has taken note of the said MoU, but has not accepted the same for the reason stated hereinafter. The relevant para is reproduced for ease of reference:

“4.3.4 (C) (a) Noticee contended that they received advances from M/s. Aerens Goldsouk International Ltd. (AGIL in short) to acquire land in the rural agricultural areas. They also submitted copy of Memorandum of Understanding (MoU) entered into with AGIL, wherein it was agreed that AGIL would provide interest free advances to the Noticee to purchase such land.

I have perused the above said MoU carefully and the following points were noticed:

- (i) This MoU was not registered with the proper authority, in absence of which it has no legal validity.
- (ii) MoU should be signed by all the parties at each page along with the witness. However, the same was not properly signed by both the parties, nor any witness has signed on it.
- (iii) No amount had been mentioned in the MoU given to Noticee by AGIL on account of purchase of land.
- (iv) The MoU was executed on 01.04.2010, however, the period, upto which MoU was valid, had not been mentioned; Thus, in my opinion, this MoU is not a legally valid document as evidence. Besides, it neither quantifies the amount transacted between AGIL and the Noticee, nor specifies the period. Moreover, at Point 5 of MoU, it has been stated that:-

"5. That the First Party pay a fee to the Second Party as below:

1% of purchase consideration of said land as per purchase deed to be registered in favour of the Second Party or Rs. 5000/- per acre; whichever is less."

Thus, as per this condition, the second party, i.e. the Noticee, should receive consideration in lieu of their activity which was nothing, but commission and was liable for service tax levy. As per Noticee's submissions, transactions had taken place between both of them (i.e. AGIL & Noticee), however, no revenue was shown by them in their balance sheet in lieu of such type of income. Thus, it was clear that, this MoU might be fabricated and hence was not a valid document in support of their contention."

6.1 In this context, we note that the salient features of a Memorandum of Understanding (MoU) typically include the following:

- It should determine the intent of the two parties entering into an agreement.
- Mention of specific date and time as to when it began and its end

- A clear understanding between the parties regarding their duties and responsibilities
- All information regarding payment and finance is indicated in clear terms
- Dispute resolution and allocation of risks should be mentioned.
- Clauses regarding termination of the said MoU

6.2 In the instant case, it has been observed in the impugned order that the MoU is not registered with any competent authority. However, it has been noted that the said MoU does not have any signature and date. This is required as both the parties have to understand and accept the duties & responsibilities cast on the First & Second party as per the clauses in each page of the MoU. The termination date has also not been mentioned, due to which also MOU cannot be accepted as a legal document/arrangement between two parties. There is no mention of payment of any amount as advance to the appellant. In this context, we note that the Ld Counsel has submitted that it was a preliminary understanding between the two parties, prior to entering into a contract. However, we note that no such contract has been produced before this Tribunal to negate the findings of the adjudicating authority. In addition, we note that the impugned order has taken note of clause 5 of the said MoU wherein the appellant is to receive consideration in lieu of their service for identification and purchase of agricultural lands. We are in agreement that the appellant was rendering taxable service to the service recipient. At this juncture, we take note of the Hon'ble Supreme Court in the case of **Dalmia Cement (Bharat) Ltd. vs. M/s. Galaxy Traders and Agencies Ltd**

[MANU/SC/1722/2001] wherein the importance of clear and unambiguous language in an MoU was emphasised. The Hon'ble Apex Court emphasized that the intent of the parties should be evident from the document, and any ambiguity could lead to challenges in enforcement. However, we note that there are deficiencies in the said MoU which has led the adjudicating authority to doubt its veracity. We also observe that the appellant has not submitted any other evidence before this Tribunal to substantiate the veracity of the said MoU. Further, we note that there is a percentage of the purchase consideration which is paid as fee to the appellant, which in the impugned order has been held to be in the nature of consideration for the taxable service provided by them. Therefore, we find it appropriate to remand this matter to the original authority to examine the contentions of the appellant, regarding revenue recognition and adjustment from advances received for projects.

7. We now consider the second issue regarding advances received against projects. The impugned order has taken note of the documents submitted by the appellant during the course of hearing. It has been noted that the appellant has submitted documents only for ₹ 36,41,336/- and could not produce the documents for the remaining amount. In this context, the Ld Counsel has submitted the indication of service tax/Sales tax in the agreement is not evidence that service tax has been collected. We are in agreement that this would have to be substantiated by documents. Consequently, we are of the opinion that this aspect of the case also requires to be remanded back to the original authority for verification.

8. As regards the other advances and rectification entries, the impugned order has stated that the appellant has not submitted any averments in this regard, and has concluded the same to be exigible to service tax. This is not acceptable. Service tax can be charged only when the amount is received as consideration for service rendered by a service provider to a service recipient. Consequently, we are of the opinion that this issue also requires to be remanded to the adjudicating authority to examine relevant documents and consider the submissions of the appellant before passing the order.

9. As regards the issue of invocation of extended period, since we have held that the matter needs to be remanded for re-consideration as discussed above, we do not deem it necessary to consider these submissions.

10. In view of the above discussions, we set aside the impugned order and remand the matter back to the original adjudicating authority for reconsidering the submissions made by the appellant before this Tribunal. The adjudicating authority shall provide opportunity to the appellant to submit all relevant documents to substantiate their claim.

11. Accordingly, the appeal is allowed by way of remand.

(Order pronounced in the open Court on 11.12.2024)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)