

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 53435 of 2018 [DB]

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-47-17-18 dated 22.03.2018 passed by the Commissioner of CGST & Central Excise Commissionerate, Jaipur]

**Commissioner of CGST & Central Excise,
Jaipur I**

NCR Building, Statue Circle,
C-Scheme, Jaipur,
Rajasthan - 302005

...Appellant

VERSUS

M/s. Lotus Cons Build Technocrate Pvt. Ltd.

22, Satya Vihar Colony, Lal Kothi,
Jaipur, Rajasthan - 302015

...Respondent

APPEARANCE:

Shri Anand Narayan, Authorized Representative for the Appellant
None for the Respondent

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 20.09.2024

DATE OF DECISION: **15.01.2025**

FINAL ORDER No. 50055/2025

DR. RACHNA GUPTA

The present appeal has been filed by the department to assail the Order-in-Original (O-I-O) No. 47-17-18 dated 22.03.2018 vide which part of the proposed demand of service tax has been dropped. The facts in brief, relevant for the purpose of present adjudication are as follows:

1.1 M/s Lotus Cons. Build Technocrat Pvt. Ltd., the respondent, is registered for providing / payment of Renting of Immovable Service, Works Contract Service, Manpower Recruitment / Supply Agency Service, Sponsorship Service provided by Body Corporate,

Security Agency Service Rent a Cab Scheme Operator Service. The department got an intelligence that the respondent was not discharging their service tax liability on following services: -

(i) Services relating to development of plots :

The respondent was found engaged in the purchasing the agriculture land from the land owners and surrendering the same to the Jaipur Development Authority (JDA) for approval under 90B & 90A and after JDA approves the map, they issue patta to booking holder and thereafter on behalf of their patta, JDA issues patta. On verification of the records the respondent was found to have charged and collected sums from their customers/clients for the development of land/plots/shops, in addition to the sale value of the plots/shops. These sums were recorded in their books of accounts as "Land Development Receipt." The department formed an opinion that these activities fall under the definition of 'service' as per Section 65B(44) of the Finance Act, 1994, and considered those as taxable services under Section 65B(51) of the Act.

(ii) Works Contract Services:

The Respondent is a recipient of WorksContract Services where both the service provider and recipient are located in India. As per Section 68(2) of the Act read with Rule 2(I)(d)(i)(t)(c) of the Service Tax Rules, 1994, and Notification No. 30/2012-ST dated 20.06.2012, as amended, M/s Lotus is alleged liable to pay 50% of the service tax being a service recipient as a body corporate ,under reverse charge mechanism.

(iii) Miscellaneous income disclosed before the income tax department during survey proceedings under Income Tax Act, 1961:

Department observed that the respondent assisted parties in entering into transactions of purchase and sale of real estate, which resulted in them earning brokerage/commission for their services. Therefore, their activity prior to July 1, 2012, was considered as 'Real Estate Agent's Services' taxable under Section 65(105)(v) of the Finance Act, 1994 as they have acted as a Real Estate Agent/Real Estate Consultant as defined under section 65 (88)/65 (89) of the Finance Act 1994 and w.e.f. 01.07.2012 their activity is covered under the definition 'service' as defined under section 65B(44) of the Act.

(iv) Rent-a-Cab:

M/s. Lotus is a recipient of rent a cab service and both service provider and service recipient are located in the taxable territory (i.e. in India), M/s Lotus appears liable to pay 100% service tax in terms of Section 68(2) of the Act read with Rule 2(1)(d)(i)(F)(a) of the Service Tax Rules, 1994 and Notification No. 30/2012-ST dated 20.06.2012 as amended being a service recipient and registered as a body corporate on the amount paid by them to the service providers under reverse charge mechanism for availing rent a cab service.

1.2 Based on the above said observations, the department alleged that the respondent was liable to pay the service tax under Forward as well as Reverse Charge Mechanism. From the scrutiny of respondent records for the financial year 2012-13 and 2015-16 the department quantified the amount of service tax payable by the respondent amounting to Rs.3,34,13,650/- for services relating to development of plots, Rs.1,55,194/- for providing Works Contract Services, Rs.74,16,000/- on the commission earned for services for sale and purchase of plots / the miscellaneous income declared to IT department and Rs.4,411/- for receiving rent a cab service.

1.3 With the above observations and the quantification, the department served a Show Cause Notice No. 48/15-16 dated 1.11.2017 upon the respondent proposing the recovery of service tax amounting to Rs. 4,09,89,255 (Rs. 33413650 + Rs. 155194 + Rs. 7416000) along with the interest and the penalties under section 77 and 78 of Finance Act 1994. While adjudicating the said Show Cause Notice the original adjudicating authority vide Order in Original (O-I-O) no. 47-17-18 dated 22.03.2018 had accepted the said proposal except that the demand of Rs. 7416000/- on an amount of Rs. 6 crores (miscellaneous income received in the disputed period) which was surrendered to Income tax department on the ground of access cash found from the premises of the respondent during survey by income tax department. With respect to remaining three proposals i.e. demand on development charges, for providing work contract service and for receiving rent-a-cab service, the original adjudicating authority has held that the

respondent was providing taxable services without discharging their service tax liability. Hence has confirmed the remaining demand. Being aggrieved of dropping of demand of Rs.74,16,000/-, the department has filed the present appeal.

2. The respondent has not appeared in this matter though the notice of hearing, initially, was unserved upon the respondent however the department got the same served later. The copy of receipt of notice is placed on record by the department. After the said service, more than four adjournments were granted awaiting the presence of respondent but respondent failed to appear despite service. Vide order dated 07.06.2024 it was made clear that the appeal be decided on merits even if the respondent doesn't appear. On the subsequent date i.e. on 20.9.2024, since the respondent still not appeared that he was proceeded ex-parte in terms of rule 13 of CESTAT (Procedure) Rules, 1992. Hence arguments on behalf of department heard.

3. Learned Departmental representative at the outset has reiterated the findings in Review Order dated 26.06.2018 passed by the Committee of the Chief Commissioners, specifically Para 3.1 to 3.8, of the said review order. It is further alleged that the commissioner has erred in dropping the demand of service tax of Rs.74,16,000/- on the amount of undisclosed income of Rs.6,00,00,000/- declared by the respondent during the course of search conducted by the Income tax Department and reflected in their accounts for the year 2012-13. Imposition of penalty under

section 78(1) of the finance act 1994 equal to fifty percent instead of hundred percent of the amount of service tax confirmed for the period beyond 14.05.2015 has also been challenged. With these submissions the part order in original dropping the demand of Rs.74,16,000/- is prayed to be set aside.

4. Having Heard the Ld. DR and after perusing the entire record of the appeal we observe that the narrow compass of the present appeal is about the demand dropped by the original adjudicating authority with respect to miscellaneous income received by the respondent during the disputed period which was later disclosed to the income tax department.

5. We also observe that the original adjudicating authority has dropped the said demand with the following observations:-

*4.20 Demand of service tax has simply been proposed because the Noticee did not submit documents relating to sale and purchase of land such as sale deed, registration documents or agreements. **Therefore, in absence of documentary proof of purchase and sale of land, it has been inferred that the Noticee was engaged in the activity carried out by a Real Estate Agent.** I observe that the Noticee had helped various parties entering into transactions of purchase and sale of land and thereby provided real estate agent's services in the impugned Notice is too harsh and arbitrary. It is all the more strange that the charge has been proposed to be sustained in absence of documentary proof of purchase and sale of land. The fact of the matter is once the Noticee admitted non-accounted income and declared the same during the course of survey proceedings (of income Tax Deptt.) they were not under any legal obligation to produce documents. It is simple common sense that unaccounted for income can be generated only in those cases where the transactions have not been taken on record and, therefore, seeking documentary proof of what has not been taken on record,*

it too harsh and arbitrary as the same can never be available on record. The Noticee has submitted a ledger account of miscellaneous income for the period 01.04.2012 to 31.03.2013 wherein entries of cash receipts against miscellaneous income have been made. The miscellaneous income pertains to the period 15.04.2012 to 09.08.2012 and debited to the cash account. Cash receipt vouchers have also been placed on record again reflecting miscellaneous income. Nature of the source of such income has been declared by the Noticee during the course of assessment proceedings and accepted by the income tax authorities. The Noticee have also submitted a letter dated 22.09.2017 to the Senior Intelligence Officer, DGCEI, Jaipur Zonal Unit, Jaipur stating that the miscellaneous income of Rs. 6 crore declared during survey proceedings during the year 2012-13 was earned by the company by selling and purchase of various agricultural land and the amount earned by this activity was given as advance to various farmers / parties. It has also been argued in the said letter no service tax should be levied on the said income as the same was earned by purchasing and selling of agricultural land.

4.21 As per the definition provided under clause (88) of Section 65 of the Finance Act, 1994, 'Real Estate Agent' means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant who has been defined in clause (89) of the said Section 65 to mean a person who renders in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management of real estate.

4.22 On going through the records, I find that there is no evidence to indicate that the Noticee has carried out any activity as mentioned in the clause (88) or (89) of Section 65 of the Finance Act, 1994 in so far as the miscellaneous income of Rs. 6 crore declared by them during the course of income tax survey is concerned. I observe that the charge of provision of services by the Noticee in the instant case is not at all based on facts and evidences. I am of the view that such a serious charge of evasion of service tax requires the Department to produce sufficient and tangible corroborative evidences and it cannot simply be based on

presumptions and assumptions. Therefore, in absence of evidences, it cannot be alleged that the Noticee has rendered assistance to buyers and sellers of land in entering into transactions of purchase and sale of land and sellers of land and received consideration against provision of such services. In absence of total lack of evidences to prove charge of provision of 'Real Estate Agent's Service' in the case, I have no option but to accept the contentions of the Noticee that they have purchased and sold agricultural land and earned income as has been accepted by the Income Tax Authorities. Consequently, the demand of Rs. 74,16,000/- of service tax on 'Real Agent Agent's Service' does not sustain and deserves to be dropped."

6. We observe from the above paragraph of O-I-O that the demand in question was dropped on the ground that department had not provided any evidence to indicate any connection between the miscellaneous income of Rs. 6 crores declared to IT department with any taxable service provided / receipt by the respondent. We further observe that the present demand was proposed based on the statement of the director of the respondent where he simply stated that the amount disclosed to IT department was received from construction services. Apparently and admittedly, the respondent was providing various taxable services the said statement is not admissible in evidence till corroborated by any documentary evidence. Subsequent to the impugned order also the department has not produced any evidence to prove that the respondent had generated said disputed income / amount disclosed to IT department on account of providing taxable services. The proposal of demand of service tax on the income declared under survey to IT department cannot otherwise sustain. The proposal was purely on the basis of assumption and presumption. Hence, we

do not find any infirmity in the part of the order challenged by the department. We draw our support from the decision of Hon'ble Supreme Court in the case titled as **K.T.M.S. Mohd. & Others Vs Union of India reported as AIR 1992 SC 1831** wherein it was held as follows: -

g. Determination of tax under the Income-tax Act cannot be made, as it not incumbent on the income-tax authorities to take into consideration only the materials made available by the Central Excise Department, but the authorities are bound to make an independent enquiry, before passing any order, which enquiry has not happened in the present case. There is no provision to simply incorporate the demand made in the show cause notice issued under the Central Excise Laws for the purpose of computation of tax under the Income Tax Laws. The provisions under the two laws, viz., the Central Excise Act and the Income-tax Act, operate in two different fields. Without there being an independent enquiry by the concerned taxing authorities the demand made under the provisions of Central Excise Act cannot be incorporated as such, more so when the notice of demand has been modified by the adjudicating authority.

In the case of Kipps Education Centre, Bathinda v. CCE, Chandigarh reported in 2009(13) S.T.R. 422 (Tri. Del.), it was held by this Tribunal that income voluntarily disclosed before the income tax authorities could not be added to the taxable value unless there is evidence to prove the same. In this case also, there is no evidence to show that the income disclosed is the part of taxable service. Hence I do not find any infirmity in the impugned order. Accordingly, stay application as well as the appeal are rejected.

7. This tribunal also followed the said decisions in the case of **Commissioner of Income tax Trichy vs. Amman Steel and Allied Industries reported as 2015 (330) ELT 130 (Madras)**. In an another decisionin the case of **Deltax Enterprises Vs.**

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392 (Tri. – Del.) the tribunal held as follows: -

*"4 Admittedly, the appellant did not maintain detailed accounts for all the transactions undertaken by them. They have availed the provision of Section 44AD of Income-tax Act for filing returns. This formed basis for service tax demand as the income shown is much higher than the declared consideration for taxable service. We note that the appellants categorically asserted that they did not provide any other service other than those, the details of which have been submitted to the lower authorities. The Revenue also could not print out excess receipt on these contracts or the taxable service which gave them the consideration escaping the tax. In the absence of specific allegation with reference to the nature of service or the service recipient it is not tenable to hold an income of the appellant even if it is admitted to be an actual income, as consideration for a taxable service. **The minimum requirement to tax an assessee for service tax is to identify the nature of their taxable service along with the recipient of such service. In the present case all identified contracts for the identified service recipients have been examined and concluded by the lower authority. No service tax liability can be fastened on unidentified service for unidentified service recipient. There is no provision for such summary assumption even under Section 72 of the Finance Act, 1994.** Admittedly, the said section provides for arriving at the taxable value to be based on the Assessing Officer's best judgment in case where the appellant fails to furnish return under Section 70 or fails to assess the tax in accordance with Finance Act, 1994. In the present case the appellants did file returns under Section 70 and also made available all the contracts on which service tax liability will arise for them. As such, we find application of Section 72 cannot be extended based solely on the income tax return without identifying the specific taxable service or service recipient."*

8. In the light of above discussion, we upheld the order (O-I-O) dated 22.03.2018) even for dropping the demand of

Rs.74,16,000/- of service tax on miscellaneous income of Rs. 6 crores as was declared to IT department. It is held that without any evidence the said amount of Rs. 6 crores is wrongly alleged to be an amount received for providing Real Estate Agent Service. The demand which has been confirmed vide the said O-I-O has not been challenged by the respondent. Resultantly, the order under challenge/O-I-O dated 22.03.2018 is hereby upheld. Consequent thereto, the appeal filed by the department is hereby dismissed.

[Order pronounced in the open court on **15.01.2025**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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