IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 16/01/2017.
DATE OF DECISION : 24/04/2017.

Service Tax Appeal No. 58914 of 2013 with Stay Application No. 59563 of 2013

[Arising out of the Order-in-Original No. 80-83/GB/2013 dated 30/04/2013 passed by The Commissioner of Service Tax, New Delhi.]

M/s Delhi Development Authority   Appellant

Versus

CST, Delhi   Respondent

Appearance

Shri A.K. Batra, C.A. and Ms. Vibha Narang, Advocate – for the appellant.

Shri Harpreet Singh, Senior Standing Counsel with S/Shri Amresh Jain and Govind Dixit, Authorized Representative (DRs) – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 53021/2017 Dated : 24/04/2017

Per. B. Ravichandran :-

The appeal is against order dated 30/04/2013 passed by Commissioner of Service Tax, New Delhi. The appellants is a statutory organization set up by an Act of Parliament and constituted under Delhi Development Act, 1957. The appellant is a body corporate managed by Members as mentioned in Section 3 (3) of the Delhi Development Act, 1957. The Act is to provide for the development of Delhi according to plan and for matters ancillary thereto. The appellant is registered as charitable organization under Section 12AA of Income Tax Act, 1961 and operate as a non-profit making organization. Section 6 of the Delhi Development Act specifies the objects of the appellant. The main objects are to promote and secure the development of Delhi according to plan and for that purpose, the appellant shall have the power to acquire, hold, manage and dispose of land and other property, to carry out building, engineering, mining and other operations, to execute works in connection with supply of water and electricity, disposal of sewage and other services and amenities and generally to do anything necessary or expedient for purposes of such development and for purposes incidental thereto.

2. The appellants are registered with Service Tax Department under various categories of taxable services. In January 2008, the officers of Service Tax Commissionerate, Delhi conducted certain enquiry regarding service tax liability of the appellant. Upon enquiry, the Revenue felt that the appellants did not discharge proper service tax under the category of "renting of immovable property service", introduced as a taxable activity w.e.f. 01/06/2007. The Department conducted verification of records submitted by the appellant and gathered information based on various correspondence made with the appellant.

3. The appellants prepared their accounts in the form of annual balance sheet. There are three major accounting heads namely (a) General Development Account (GDA) which relates to all the development, construction and other activities undertaken by appellant either on their account or assigned to them ; (b) Nazul – I relates to transaction of old Nazul Estates entrusted to the appellant under Nazul Agreement, 1937 in which the appellant had succeeded Delhi Improvement Trust ; (c) Nazul – II account relates to large scale land acquisition development and disposal activities. GDA is prepared in the common format of accounts prescribed for central autonomous bodies. Nazul – I and Nazul – II accounts gave details of transactions on Government account.

4. On conclusion of the enquiry and audit of records of the appellant, the Revenue proceeded to initiate action to demand and recover service tax under the taxable category of "renting of immovable property service" in respect of incomes shown under the heads "sale value of developed land", "sale value of undeveloped land" and "sale value of shops". 4 different demand notices were issued to the appellant covering the period from 01/04/2005 to 31/03/2012. Except for demand notice dated 31/08/2010, which also had demand under the tax entry "club or association service", all demands are towards renting of immovable property service only. The appellants contested the demands and filed their submissions. The Original Authority

adjudicated the case. He dropped demand of Rs. 8,54,98,899/- under the category of 'club and association services'. He confirmed other service tax liabilities proposed in the 4 show cause notices, amounting to a total of Rs. 949.70 crores. He imposed various penalties under Section 76, 77 and 78 of the Finance Act, 1994.

5. The learned Consultant strongly contested the findings recorded in the impugned order. It is submitted that the findings are arbitrary and without factual or legal basis. The submission of the appellant, as elaborated by the learned Consultant, can be summarized as below :-

(a) Nazul lands are owned by the Central Government and the lease deeds are executed in perpetuity. Appellant is only a custodian of these lands and the allottee is taking the land of the Central Government and are not to be considered as lessee of the appellant. Reference was made to Rule 42 of the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981. Since, 2003 the appellant is engaged in sale of lands on free hold basis. The conveyance deeds, copies of which were submitted, will show that the transaction is for conveyance of free hold ownership rights of the property. The President of India (therefore the appellant) is identified as vendor and the allottee of the land is identified a purchaser. The amount paid is termed as 'consideration' for conveyance/sales of the land. In such situation, there is no scope to tax such sale as renting of immovable property ;

(b) the ground rent is a charge levied by the appellant as prescribed under Delhi Development Act, 1957. The appellant is discharging their statutory function under the Act and the levy is a statutory charge. The income is maintained under Nazul – II account for, or on behalf of the Central Government. It is in the form of land revenue and cannot be subjected to service tax liability. The levy of ground rent is not for use of the land. Even otherwise, the ground rent of non-commercial land cannot be subjected to service tax ;

(c) lease of vacant land is not liable to service tax prior to 01/07/2010 as the same is outside the ambit of the definition or renting of immovable property service ;

(d) The appellants had paid Rs. 12.09 crores on 21/11/2013 under VCES. No adjustment for the same has been made in the impugned order ;

(e) details of various receipts under specific headings were submitted in chart form. It is argued that no analysis of the nature and scope of receipt and liability of such receipt to service tax has been made in the impugned order. Out of total demand of about Rs. 949 crores, about Rs. 758 crores is attributable to the period 01/06/2007 to 30/06/2010, towards income from vacant land not covered for tax liability, prior to 01/07/2010. Similarly, demand of about Rs. 85 crores is attributable to income from non-commercial land which is not liable to tax. There is no consideration or analysis of these details, in the impugned order.

(f) The service tax demands invoking extended period were contested on the question of time bar. The appellant is a organization of the Government and, as such, no allegation of fraud, willful mis-statement etc. with an intention to evade service tax can be made against them. There could be no malafide in not discharging service tax by a Government organization. Admittedly, the service tax liability under the category of renting of immovable property has been a subject matter of persistent litigation with various judicial authorities. The Hon'ble Delhi High Court in the case of **Home Solutions Retail Ltd. vs. Union of India** reported in **2009 (237) E.L.T. 209 (Del.)**, held that service tax is leviable only for services rendered in relation to renting and not on the income of rent *per-se*. The Government amended the legal provisions including certain retrospective amendments and also declaring non-liability for penalty in certain cases in terms of Section 80 (2) of the Finance Act, 1994. In such a situation it is not legally tenable to invoke demand for extended period alleging fraud, mis-statement etc. with an intention to evade service tax. The levy of service tax under this category itself is a matter of dispute and judicial interpretation. Accordingly, without prejudice to the submissions made on merits, it is submitted the demand for extended period as well as various penalties imposed on the appellant are liable to be set aside.

6. The learned Senior Standing Counsel appearing for Revenue defended the impugned order. First of all, he submitted that the appellants did not cooperate and submit the required documents and details of break-up figures, when called for by the Department. It resulted in the confirmation of full demand without considering the abatements or exemption, if any, applicable while arriving at the tax liability of the appellant. It is also submitted that the appellants have shown income under "sale of developed land", "sale of undeveloped land" and "ground rent". They have collected lease premium as well as ground rent

while letting out the property in their control. The submissions of the appellant that the property was sold to the purchaser and there is no lease arrangement/agreement is not acceptable. The appellants did not substantiate their claim with documentary evidence. The term "leasing" has not been defined under the Finance Act, 1994. Reference can be made to Section 105 of Transfer of Property Act, 1882 which stipulates that the lease of immovable property is a transfer of right to enjoy such property made for a certain time. It was argued that lease of immovable property is only a transfer of right to be enjoyed by the lessee for a fixed period or in perpetuity, against the price paid or promised. Hence, it is contended that perpetual lease agreement also will fall within the scope of tax entry for service tax.

7. Regarding non-consideration of various submissions and documents submitted by the appellant at the time of adjudication, the learned Senior Standing Counsel for Revenue submitted that the appellants were called upon to submit the relevant documents and details, repeatedly. On their failure to provide necessary document, the Revenue proceeded, based on the details on record and by invoking the provisions of Section 72 of the Finance Act, 1994 for arriving at the assessment based on best judgment.

8. We have heard both the sides carefully and also examined the appeal records including various written submissions made by the parties. The tax liability of the appellant is with reference to

provisions of Section 65 (105) (zzzz) of the Finance Act, 1994. The statutory provisions as applicable during the disputed periods are as below :-

"01/06/2007 to 30/06/2010

Taxable service means **any service** provided or to be provided to **any person**, by any other person, **by renting of immovable property** or any other service in relation to such **renting of immovable property** for use **in the course or, for furtherance of, business or commerce**.]

Explanation 1. — For the purposes of this sub-clause, "immovable property" includes —

(i) building and part of a building, and the land appurtenant thereto;

(ii) land incidental to the use of such building or part of a building;

(iii) the common or shared areas and facilities relating thereto; and

(iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,

but does not include —

(a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;

(b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;

(c) land used for educational, sports, circus, entertainment and parking purposes; and

(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2. — For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce; - Section 65 (105) (zzzz)

Note : Section 65 (105) (zzzz) has been substituted by Finance Act 2010 with retrospective effect from 01.06.2007 vide Notification No. 24/2010-ST dated 22.06.2010. Prior to its substitution, it reads as under :

Taxable service means any service provided or to be provided to any person, by any other person, in relation to renting of immovable property for use in the course of furtherance of business or commerce.]

<u>WITH EFFECT FROM 01.07.2010 TO 30.06.2012</u>

Taxable service means **any service** provided or to be provided to **any person**, by any other person, **by renting of immovable property** or any other service in relation to such **renting of immovable property**, for use **in the course or, for furtherance of, business or commerce**.]

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(ii) land incidental to the use of such building or part of a building;

(iii) the common or shared areas and facilities relating thereto; and

(iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,

(v) *vacant land given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce.*

but does not include —

(a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;

(b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;

(c) land used for educational, sports, circus, entertainment and parking purposes; and

(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

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DEFINITION OF RENTING OF IMMOVABLE PROPERTY (sec. 65 (90a)

01.06.2007 to 15.05.2008

"*renting of immovable property*" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include —

(i) renting of immovable property **by** a religious body **or to** a religious body; or

(ii) renting of immovable property **to** an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre ;

***Explanation*.** — For the purposes of this clause, "for use in the course or furtherance of business or commerce" includes **use of** immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings – Section 65 (90a).

With effect from 16.05.2008 to 30.06.2012

"*renting of immovable property*" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include —

(i) renting of immovable property by a religious body or to a religious body; or

(ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.

> ***Explanation 1*. —** For the purposes of this clause, "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings;
>
> ***Explanation 2.* —** For the removal of doubts, it is hereby declared that for the purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;"

9. The first point, we notice is that renting of immovable property is a taxable activity if the said property is for use in the course or, for furtherance of, business or commerce. If the immovable property is let out for other than these purposes no tax liability will be attracted. We note that the appellants strongly pleaded that, out of the total receipt subjected to service tax, more than 44% will relate to non-commercial land let out for schools or other non-commercial establishments. There is no discussion or finding by the Original Authority regarding non-commercial or commercial nature of the property let out by the appellant. In fact, considering the huge quantum of service tax demand of Rs. 950 crores confirmed against the appellant, we would expect a detailed analysis of factual as well as legal position, before the conclusion was drawn by the Original Authority. The analysis and discussion recorded in the impugned order is rather brief. After reproducing the statutory definitions, the Original Authority has concluded that the appellant is liable to

service tax. No analysis was made with break-up figures with reference to commercial or non-commercial property, valuation of taxable service, abatement or exemptions, if any, applicable to the appellant etc. The observation of the Original Authority in this regard is as below :-

> "22.11 I further find that the DDA is a premier agency not only engaged in development of land/building etc. but also providing various services to their customers. I find that there is a specific mention in the show cause notice that party was asked to provide requisite details/Bifurcated data with respect to ground rent; commercial, industrial built up property and shops allotted/sold on lease basis so as to quantify the exact service tax liability in respect of 'renting of immovable property service' keeping in view the various types of exemptions available to them. However, the party had failed to do so despite having been given number of opportunities. They have also not provided the same even during the course of adjudication proceedings. I further observe that the DDA has also contested that they have already paid due service tax on some of their activities under 'Renting of Immovable Property Service' but neither during the course of investigation nor during adjudication proceedings they submitted details of such tax paid in spite of the sufficient opportunities provided to them. In such circumstances, I have no alternative but to confirm the entire demand of Rs. 7,49,31,38,305/- on this account under Renting of Immovable Property Service as mentioned in the instant show cause notice and I hold it accordingly".

10. The Original Authority in respect of other 3 show cause notices confirmed various amounts of tax liability by recording

that the receipts under the heads "sale of developed land", "sale of undeveloped land" and "ground rent" are appropriately classified under taxable service of renting of immovable property and accordingly confirmed the demands.

11. Regarding the quantification of service tax liability, the Original Authority observed as below :-

> "I also observe that the department vide several letters as mentioned in the show cause notice had asked the DDA for submission of informations i.e. details of income under various heads for the period 16.06.2005 to 31.03.2010 but the relevant informations were not provided. They were also given ample opportunities during investigation for furnishing of segregated data from the consolidated figures of 'Sale of undeveloped Land' and 'Sale of developed land' (including leasehold and freehold basis) for the period under dispute but they filed to provide these bifurcated data to the department and only contested the levy. I further find that through instant show cause notice they were again given opportunity for submitting relevant data/ information to assess their service tax liability applying best judgment as provided under Section 72 of the Finance Act, 1994 they during the course of adjudication proceedings has also neither provided complete details of their receipts from different heads nor given cogent reasons to show that the liability arrived at by the department is not sustainable. In such circumstances, I have no option but to proceed for arriving at the service tax liability of the noticee for the period under dispute on the basis of the best judgment assessment as provided under Section 72 of the Finance Act, 1994 on the basis of material available on record. Accordingly, I confirm he veracity of the liability arrived at by the department as the same cannot be held against the

statutory provisions of the service tax law and I hold it accordingly".

12. During the course of arguments before us, the appellants submitted various tabulated charts giving split up figures, periodwise, under various heads of income. They have also submitted copies of conveyance deeds for transfer of free hold ownership rights of the property. We have perused some of the conveyance deeds and we note that the appellant's claim is to the effect that these are actually for transfer of free hold ownership of lands (sale) and not lease agreements to collect lease rent in the form of lump-sum lease premium or periodical rent. Admittedly these conveyance deeds, prima facie, appear to support the contention of the appellant. It is also strongly contended by the appellant, that after 2003, the appellants were engaged only in disposal of Nazul land on free hold basis and not on lease rent basis. These aspects have not been examined by Original Authority for a finding, for correctness and for implication of tax liability of the appellant.

13. The tax liability has been confirmed against the appellant for receipts w.e.f. 01/06/2007 considering all such receipts under the category "land premia". As already noted, we are of the view that the impugned order suffers from serious legal and factual infirmities due to non-examination of various relevant facts and also non-consideration of various legal issues before arriving at the tax liability of the appellant. Some of the very crucial issues,

not adequately examined and discussed in the impugned order are :

(a) commercial or non-commercial nature of land given on lease by the appellant. If both the types of lands are leased out, then split up income for taxable, commercial land ;

(b) tax liability on vacant land prior to 01/07/2010. Statutory provision as applicable prior/post 01/07/2010 not analysed. [Here, reference can be made to the decision of Tribunal in **Greater Noida Industrial Development Authority vs. CCE & ST, Noida** reported in **2015 (38) S.T.R. 1062 (Tri. – Del.)** as affirmed by Hon'ble Allahabad High Court **2015 (40) S.T.R. 95 (All.)**]. ;

(c) whether conveyance deeds executed by the appellant for transfer of land on 'free hold basis' without any provision for periodical lease rent can be considered as transaction in letting out. Copies of such conveyance deeds not examined for a finding.

(d) service tax liability of various heads of income are taken together in summary manner. The observation of Original Authority at para 22.11 of the impugned order (reproduced earlier in this order) cannot justify a demand of huge amount of about Rs. 750 crores on the appellant ;

(e) the application of provisions of Section 72 for arriving at the taxable value on 'best judgment' basis has not been justified. For following best judgment, the Original Authority simply stated "on the basis of material available on record". Section 72 has two clauses (a) and (b). It is not clear under what category the appellant's case was considered for invoking the said provision. The appellants made submission with detailed break up figures under various heads of income.

(f) consideration of service tax already paid, including under voluntary compliance scheme, not examined for a finding.

14. The appellant's plea regarding non-sustainability of demand for extended period in terms of proviso to Section 73 (1) of the Finance Act, 1994 also has not been dealt with in proper prospective by the Original Authority. The Original Authority sustained the demand for extended period on the ground that the tax entry under the category of renting of immovable property was introduced and widely publicized by the Department. It was held that non-payment of service tax cannot be termed as bonafide lapse. Appellant never informed the Department about the receipt of taxable amount and suppressed the fact with an intention to evade payment of service tax. Accordingly, the Original Authority concluded that they have deliberately contravened various provisions of law and rules with intend to evade payment of service tax. We find that such summary conclusions without examining the ingredients of proviso to Section 73 (1) and the activities of the appellant, is not proper. Admittedly, the tax liability on renting of immovable property itself is a matter of serious litigation. The Hon'ble Delhi High Court in the case of **Home Solutions Retail Ltd.** (supra) held that the services in relation to renting only are taxable and not the activity of renting *per-se*. The Government amended the

statutory provisions in 2010, including retrospective amendments in the tax entry. In fact, the penal provisions with reference to this tax entry has also been modified after such amendment to give relief for this particular category of assessees. Reference can be made special provision under Section 80 (2) ibid. As such, we find these important factual and legal issues have not been examined by the Original Authority before arriving at the conclusion.

15. On careful consideration of the impugned order, grounds of appeal and the arguments/documents submitted before us during the course of hearing, we find that the impugned order as its stand cannot be legally upheld. As already noted, it suffers from serious factual and legal infirmities and non-application of mind, both on the question of determination of tax liability as well as on quantification of such tax liability. Accordingly, we are of the considered opinion that the impugned order has to be set aside and the matter has to go back to the Original Authority for a fresh decision. We have not expressed any opinion on merit and the Original Authority has to examine all the aspects of the demand before arriving at the conclusion. The appellants shall be given adequate opportunity to present their side of the case alongwith supporting evidence and documents. Considering the substantial demand amount involved, we would advice the Original Authority to take up the denovo proceedings at the earliest and conclude the same preferably within 3 months.

16. In view of the above discussion and finding, we set aside the impugned order and remand the matter back to the Original Authority for a fresh decision. The appeal is allowed by way of remand. The stay petition also is disposed of.

(Order pronounced in open court on 24/04/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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