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

COURT NO. III
DATE OF HEARING : 09/01/2017 & 26/04/2017.
DATE OF DECISION : 12/05/2017.

Service Tax Appeals No. 590, 2425, 2436, 3198, 3204 of 2012
Service Tax Appeals No. 55531-55533, 59077-59079, 59310-59314, 59371-59379, 59439, 59649-59650 of 2013
Service Tax Appeals No. 51503-51507 of 2014
Service Tax Appeals No. 51568, 51604, 51812-51813, 51834, 51911, 52049-52050, 55835 of 2014 and 50375, 50502, 50603-50605, 50667, 50673-50674, 50751, 50784, 50901, 50954-50955, 53498-53499, 53526, 54380 of 2015
Service Tax Appeals No. 50291, 52173-52174, 52176, 52625-52627, 52892, 52699 and 53010 of 2016

[Arising out of the Order-in-Appeal No. 29/AKJ/ST/JPR-I/2012 dated 29/02/2012, 77-78/AKJ/ST/JPR-I/2012 dated 14/05/2012, 163/RDN/ST/JPR-I/2012 dated 30/08/2012, 169/RDN/ST/JPR-I/2012 dated 31/08/2012, Order-in-Original No. 42-44/2012/ST/JPR-II dated 16/11/2012, 09-11/2013/ST/JPR-II/ Commr. dated 02/05/2013, Order-in-Appeal No. 34-39/VC/ST/ JPR-I/2013 dated 21/05/2013, 42-50/VC/ST/JPR-I/2013 dated 27/05/2013, Order-in-Original No. 28/2013/ST dated 04/06/2013, Order-in-Appeal No. 68-69/VC/ST/JPR-I/2013 dated 20/06/2013, Order-in-Original No. JAI/EXCUS/001/COM/098-099/13-14 dated 16/12/2013, JAI/EXCUS/001/COM/094-097/13-14 dated 13/12/2013, JAI/EXCUS/001/COM/108/13-14 dated 09/01/2014, Order-in-Appeal No. JAI/EXCUS/001/COM/100-101/13-14 dated 07/01/2014, Order-in-Appeal No. 365/OPD/ST/ JPR-II/2013 dated 30/12/2013, Order-in-Original No. JAI/EXCUS/002/ COM/106/13-14 dated 27/01/2014, Order-in-Original No. JAI/EXCUS/002/COM/105-107/13-14 dated 09/01/2014, Order-in-Original No. JAI/EXCUS/001/COM/36/14-15 dated 17/09/2014, Order-in-Original No. ALW/EXCUS/COM/002/14-15 dated 27/11/2014, Order-in-Original No. JAI/EXCUS/002/COM/27/14-15 dated 02/12/2014, Order-in-Original No. JAI/EXCUS/002/COM/ 22/23-14 dated 21/11/2014, Order-in-Original No. JAI/EXCUS/002/COM/24/26-14 dated 27/11/2014, passed by The Commissioner, Central Excise, Jaipur – II and Order-in-Appeal No. 219/AK/ST/ JPR/2016 dated 11/07/2016, Order-in-Original No. ALW/EXCUS/COM/004/ 14-15 dated 27/11/2014, Order-in-Original No. JAI/EXCUS/002/COM/22-23/14 dated 21/11/2014, Order-in-Original No. JAI/EXCUS/002/COM/24-26/14 dated 27/11/2014, Order-in-Original No. ALW/EXCUS/COM/005/14-15 dated 15/12/2015, Order-in-Original No. UDZ/EXCUS/000/ COM/002/ 14-15 dated 06/01/2015, Order-in-Appeal No. 16/SLM/ST/JPR/2015 dated 23/01/2015, Order-in-Original No. ALW/EXCUS/COM/008-009/14-15 dated 11/02/2015, Order-in-Original No. JAI/EXCUS/000/COM/09-08/15-16 dated 25/05/2015, Order-in-Original No. JAI/EXCUS/000/ COM/20/15-16 dated 15/07/2015, Order-in-Original No. JOD/EXCUS/000/ COM/0022/15-16 dated 31/08/2015, Order-in-Original No. ALW/EXCUS/COM/24/15-16 dated 02/12/2015, Order-in-Original No. ALW/EXCUS/COM/01-02/16-17 dated 13/04/2016, Order-in-Original No. ALW/EXCUS/COM/04/16-17 dated 18/04/2016, Order-in-Appeal No. 193-196/AK/ST/JPR/2016 dated 17/06/2016, Order-in-Original No. UDZ/EXCUS/000/COM/0018/ 16-17 dated 25/07/2016, Order-in-Appeal No. 193-219/AK/ST/JPR/2016 dated 11/07/2016 passed by The Commissioner (Appeals), Customs, Central Excise & Service Tax, Jaipur.)

M/s RIICO Ltd.	]	
M/s Rajasthan State Industrial	]	Appellants
Development & Investment Corpn. Ltd.	]	

Versus

CCE, Jaipur – I, Jaipur – II, Udaipur, Jodhpur, Alwar   Respondent

<u>Appearance</u>

S/Shri V. Laxmikumaran, B.L. Narasimhan, Rachit Jain and Ms. Diva Devarsha, Advocates – for the appellant.

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 No. 53210-53278/2017 Dated : 12/05/2017

Per. B. Ravichandran :-

These are 69 appeals filed by the appellant involving identical set of facts and covering the dispute of service tax liability on various charges collected by the appellant from the allottees of land. All these appeals are taken up together for disposal.

2. Briefly stated, the appellants are a company incorporated by the Government of Rajasthan under Companies Act, 1956. They are promoted and fully subscribed by the Government of Rajasthan and are engaged in development of industrial areas, export promotion parks, growth centres, SEZ etc. The appellant are registered with Service Tax department under the category of 'Management, Maintenance and Repair Service' and 'Renting of Immovable Property Service'. The dispute in the present set of appeals mainly revolves around the various charges collected by the appellant from the allottees of land. For the development of industrial areas, Government of Rajasthan allots vacant land on 99 years long term lease to the appellant in terms of Rajasthan Industrial Areas Allotment Rules, 1959 issued under Rajasthan Land Revenue Act, 1956. Such land is further allotted by the appellant to various allottees against payment of 'Development Charges/Allotment Rate/Cost of Land (Premium)' on lump sum basis or by auction and lease rental (economic rent) on long term

basis for a period not exceeding 99 years. The appellants apart from these two charges also collected other charges like service charges, fire charges, retention charges, restoration charges, unauthorized construction regularization charges, transfer charges and pre-payment charges.

3. The Revenue entertained a view that the appellant is liable to service tax on all these charges and accordingly various show cause notices were issued to all the registered offices of the appellant across the State of Rajasthan for demanding service tax. The demands were adjudicated by the Original Authority. The present appeals were against these impugned orders by the Original Authority (or First Appellate Authority) upholding the service tax liability of the appellant. In brief, the liability of the appellant as confirmed by the lower authorities can be summarized as below :-

Sl.	Charges received by the appellant	Period	Category under which service tax confirmed
1.	Economic Rent	01/07/2010 – 31/01/15	Renting of Immovable Property service
2.	Development charges/value of land allotted/ premium	01/07/2010 – 31/01/15	Renting of Immovable Property service.
3.	Fire Charges/ Service Charges.	01/04/2010 – 30/09/13	Management, Maintenance and Repair service.
4.	Retention Charges.	01/06/2007 to 30/06/12; 01/10/2012 to 31/01/15	Renting of Immovable Property service.
5.	Restoration Charges	Oct. 2008 to June, 2012	Renting of Immovable Property service.
6.	Unauthorized Construction Charges/	Oct. 2008 to January, 2013.	Renting of Immovable Property service.

	Regularization Charges.		
7.	Transfer Charges.	01/10/2004 – 31/01/15	Real Estate Agent service/Renting of Immovable Property service.

4. When the cases were listed for hearing, the learned Counsel for the appellant submitted that there is a delay of 35 days in filing the appeal No. ST/53010/2016 – DB. Having examined the miscellaneous application for condonation of delay we are satisfied that the reason for delay has been satisfactorily explained and accordingly we condone the delay and allow the miscellaneous application. The said appeal also is taken up alongwith appeals listed on similar issue.

5. The learned Counsel appearing on behalf of the appellant submitted, elaborately, against the findings of the lower authorities on the liability of the appellant for service tax. He submitted that out of various charges collected by the appellant on which service tax liability has been confirmed, the most significant amount is relating to development charges/value of land received as lump sum premium (salami) amount. More than 90% (Rs. 183 crores) of the service tax demand relates to these charges. The main submissions of the learned Counsel can be summarized as below :-

(a) the land in State of Rajasthan is "lease hold land". Allotment is made to the appellant by the Government and the appellant in turn allots the land to various persons. The land allotment by the appellant constitutes 'sale'. The allotment of land/plot by the appellant cannot be treated akin to renting/leasing of immovable property because, in true sense, it is virtually a sale and cannot be treated as a normal renting or leasing for service tax purpose ;

(b) the premium/salami received by the appellant as development charges is nothing but price paid for obtaining the lease. It precedes the grant of lease and as such cannot be equated with rent which is paid periodically. A reference was made to the provisions of Section 105 of Transfer of Property Act, 1882. The Tribunal in the case of **Greater Noida Industrial Development Authority – 2015 (38) S.T.R. 1062 (Tri. – Del.)** held that 'premium or salami' paid by the lessee to the lessor for transfer of interest in property is not for continued enjoyment of leased property and is, therefore, not taxable under the category of renting of immovable property service. The said decision of the Tribunal was affirmed by the Hon'ble Allahabad High Court – **2015 (40) S.T.R. 95 (All.)** ;

(c) for the period post 01/07/2012, with the introduction of negative list based service tax levy, the term 'service' as provided in Section 65B (44) specifically excludes an activity which constitutes, merely a transfer of title in goods or immovable property ;

(d) the issue is related to classification service instead of valuation of service. The appellant performed different activities and collected different charges. The development charges are charged for the cost of the land which is a separate transaction altogether. This is not attributable to renting which is for continued enjoyment of land.

(e) the various other charges collected by the appellant are also not liable to service tax for the following reasons :-

(i) the appellant is performing statutory municipal function and are not covered for service tax liability. Appellant is a Government authority entrusted with some of the municipal functions under Article 243W of the Constitution of India. Notification 25/2012-ST dated 20/06/2012 exempts various services provided by a Government authority. Further reliance was placed on the clarification dated 10/01/2017 issued by the Ministry of Finance to the CMD of the appellant. The Ministry categorically clarified that the appellant shall be eligible for exemption from service tax under Notification No. 25/2012-ST w.e.f. 30/01/2014 ;

(ii) the retention charges, restoration charges and regularization of unauthorized construction charges are to be considered as penal charges and not as consideration. Retention charges is collected for failure to construct/commence commercial production within specified period. Restoration charges are collected for restoration of plot after such failure. Similarly, the regularization charges have no nexus to any service provided by the appellant ;

(iii) transfer charges cannot be taxed under the category 'Real Estate Agent Service'. They are not acting as agent between the buyer and seller of land. The charges are for taking note of the change in the lessee and administrative expense thereto. This record is maintained as part of 'municipal function'.

(f) the demand wherever made invoking extended period is not tenable. The appellant is a Government authority who cannot be attributed with malafide motive to evade payment of service tax. They were duly registered with the Department and were discharging service tax wherever applicable, regularly. On the same ground penalties cannot be imposed on the appellant. The issues involved were of legal interpretation and the appellant being a Government authority entertained a bonafide belief on their non-liability to service tax on various charges, discussed above.

6. The learned AR strongly contested the submissions made on behalf of the appellant. To begin with, it is submitted that the appellants are a body corporate registered as a company and, as such, cannot be equated to Government. The main dispute involved in these appeals is with reference to service tax liability of the appellant on the lump sum premium received from the allottees at the time of leasing out the vacant land. The learned AR submitted, admittedly, more than 90% of a tax liability is on this issue. It is his submission that the Tribunal in **Greater Noida Industrial Development Authority** (supra) observed that a lease is a transaction which has to be supported by consideration. The consideration may be either premium or rent or both. The consideration paid periodically is called rent. Having categorically recorded the said finding, the Tribunal erred in referring to the provisions of Income Tax Act, 1962 while considering the value of service for tax liability. The learned AR strongly pleaded that when, admittedly, the appellant leased out the vacant land on a long term basis to allottees they received consideration both in the form of lump sum one time payment as well as periodical lease rent. Both are for leasing out the land. Artificially splitting up this single transaction into : (a) transfer of right of usage and (b) continued enjoyment of land, is totally

uncalled for. There are no two transactions involved here. The land which is with the appellant is allotted to a lessee on a consideration. The consideration is paid in two ways, by a premium lump sum payment at the time of initial allotment and thereafter on a periodical basis, a lease rent is also paid. It is not tenable to hold that lump sum payment called premium or salami is towards sale of land and the periodical payment is towards lease rent of the land. Such interpretation will be self-contradictory as one cannot collect rent on a sold land.

7. The learned AR specifically contested the findings of the Tribunal in **Greater Noida Industrial Development Authority** (supra) as recorded in para 10.1 of the order. He submitted that having recorded that the consideration may be either premium or rent or both, for lease transaction, the Tribunal referred to the decision of Hon'ble Supreme Court in **Panbari Tea Company Ltd. – 1965 (3) SCR (811)** to distinguish between premium and rent. It was recorded that the premium or salami is towards a price for parting with the interest on land and the periodical payment is in the nature of rent. The former is a capital income and a latter is revenue receipt. The premium is a price paid for obtaining the lease of an immovable property. The learned AR submitted that the treatment of Income Tax Act with reference to various types of incomes has no direct relevance while considering the provisions of Section 67 of the Finance Act, 1994. The provisions of Income Tax Act are having specific scope, purpose and intend, as decided by the legislature. The same

cannot be referred to for deciding taxable value with reference to service tax which is entirely on a different footing. Section 67 does not provide for such split up of consideration for service. In fact, the Government provided for partial exemption of consideration received, in long term lease arrangement, by issuing Notification No. 41/2016-ST dated 22/09/2016. The said notification exempts service tax leviable on one time upfront amount (called as premium, salami, cost, price, development charges or by other name) payable for such lease. As such, it is clear that prior to 22/09/2016 the said amount is liable to service tax.

8. The learned AR further elaborated on the concept of 'virtual sale' or 'deemed sale' of the land claimed by the appellant. He submitted that there is no concept of "deemed sale", recognized by the Finance Act, 1994. A land is sold or not sold. There cannot be a concept of quasi-sale. Even if such concept is recognized for different purpose like stamp duty or income treatment under Income Tax Act, the same cannot be brought in to split up the consideration received by the appellant for service tax purpose, as done by the Tribunal in the above-mentioned case.

9. Regarding further appeal against the decision of Tribunal in **Greater Noida Industrial Development Authority** (supra), he informed that on appeal by assessee, the Hon'ble Allahabad High Court in **2015 (40) S.T.R. 95 (All.)** upheld the service tax liability on long term leasing of vacant land. However, it was

recorded by Hon'ble High Court that "we may not enter into the issue as to whether premium paid alongwith rent fixed should form the total consideration for levy of service tax or not as no appeal has been filed by the Department against the order of the Tribunal". SLP (C) No. 23728 of 2015 filed by the assessee against this order is pending in Hon'ble Supreme Court. An interim stay of the judgment has been granted.

10. The Department also filed civil appeal against the Tribunal's order and the Hon'ble Allahabad High Court upheld the Tribunal's finding that prior to the introduction of new clause on 01/07/2010 the renting of vacant land cannot be taxed – **2015 (40) S.T.R. 46 (All.)**.

11. When these appeals were again heard on 26/04/2017, the learned Counsel for the appellant submitted that Section 104 of Finance Act, 1994 was inserted w.e.f. 31/03/2017. In view of the new statutory development brought in by this section, the appellants are not liable to pay service tax in respect of consideration received as one time upfront amount [premium, cost, development charge etc.] for grant of long term lease of 30 years or more of industrial plots. The exemption has been made applicable from 01/06/2007 to 21/09/2016. Notification 41/2016-ST was issued on 22/09/2016, for exemption of the said consideration, from that date. Accordingly, the learned Counsel submitted that more than 90% of the demand against the appellant is not sustainable. Regarding the tax liability of

economic rent received periodically as well as other charges the learned Counsel reiterated their submission already made during the course of argument as well as in the written submission.

12. The learned AR also stated that the introduction of new Section 104 in Finance Act, 1994 through an amendment by Finance Act, 2017 extended the relief to the appellant in respect of one time upfront payment received for leasing out of industrial plot for more than 30 years. On tax liability of economic rent and other charges received by the appellant, he reiterated his earlier submission in support of the findings by the lower authorities.

13. We have heard both the sides and perused the appeal records, written submissions and various case laws referred to. The appellant is a company incorporated with the object of increasing the industrialization in the State of Rajasthan. One of their main activity is to allot and transfer vacant land to entrepreneurs for setting up of industrial units and allied purposes. The appellant is free to devise its own plan for industrial development, earmarking industrial vacant lands and further allotting the same for industrial and allied purposes. The terms and conditions under the scheme are notified by the appellant. The appellants allotted different plots to entrepreneurs and others for the stated purpose. The appellants recovered development charges and economic rent for such allotted land. We have perused the provisions of Rajasthan State Industrial Development and Investment Corporation, Disposal of Land

Rules, 1979. Rule 9 stipulates that the lease period will be 99 years on payment of annual economic rent that may be prescribed by the appellant from time to time. Rule 12 of the said rules provides for terms of payment of development charges by the allottees. It states that the allottee shall pay the cost of the land at the rate prescribed by the corporation for each industrial area from time to time.

14. The statutory provisions relevant to the case are :-

Section 65 (90a) of Finance Act, 1994

"[(90a) "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;]"*

<u>Section 65 (105) (zzzz) of Finance Act, 1994</u>

"[to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of 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,

[(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.

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 65B (44) w.e.f. 01/07/2012 :

"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,—

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

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

(iii) a transaction in money or actionable claim;"

Section 67 :

Valuation of taxable services for charging service tax.

— (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such 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;*
>
> *(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;*
>
> *(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.*

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(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.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

***Explanation**. — For the purposes of this section, —*

> *(a) ["consideration" includes —*

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.'.]

*[(b) * * * *]*

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]]"

15. Admittedly, substantial part of the demand against the appellant in various proceedings, relate to their service tax liability on lump-sum premium amount, received by them from the allottees on allotment of land on long term basis. In view of the introduction of new Section 104 in the Finance Act, 1994 the appellant's liability on such consideration no longer exists. The

one time payment received for grant of long term lease of 30 years or more of industrial plot, is not liable to service tax for all the periods covered in the present proceedings. However, we hold that the appellants are liable to pay service tax in respect of such one time amounts received in respect of lease granted for less than 30 years. We do not find any justification to consider the one time payment on a different footing when compared to the regular lease rent, received in a periodical manner. We note that on identical set of facts, with reference to lease granted by Tripura Industrial Development Corporation, the Hon'ble High Court of Tripura in the case of **Hobbs Brewers India Pvt. Ltd. vs. Union of India** reported in **2016 (45) S.T.R. 60 (Tripura)** held as below :-

> "4. We are not at all inclined to even issue notice in the writ petition. A perusal of Section 65(90a) and Section 65(105)(zzzz) of the Finance Act, 1994 as quoted in the letter dated 23-11-2015 clearly shows that "Renting of Immovable Property Service" includes renting, letting, leasing, licensing or other similar arrangements amounts to providing service and under Section 65(105)(zzzz) it is a taxable service.
>
> 5. It is urged on behalf of the petitioner that what is taxable is the rent and not premium. This argument is without any basis whatsoever. What is taxable is the consideration for the transfer. Even if premium is charged that is like charging of one time rent and then rebate is given for the yearly rent to be paid. Premium is also part of the lease money. Therefore, the entire transaction both

premium and rent are amenable to service tax and service tax will have to be paid on the same.

6. Another submission has been made by Mr. Bhattacharji, that this premium includes capital investment. We do not understand what is the meaning of this argument? It is true that the payment of premium will be treated as a capital investment but this does not mean that it is not the consideration for the lease".

16. In view of the legal position as explained above by the Hon'ble Tripura High Court, we find that the appellants are liable to service tax on the premium received on leasing of land for the periods of less than 30 years.

17. Regarding tax liability of the appellant on the economic rent received by them from 01/07/2010, we find that on the similar matter, this Tribunal has examined this very same issue in the case of **Greater Noida Industrial Development Authority** (supra) and upheld the service tax liability on such charges. The said decision of the Tribunal has been upheld by the Hon'ble Allahabad High Court as noted earlier in this order. As such, we hold that the appellants are liable for service tax on the lease rent/economic rent received periodically, on the lands allotted for industrial purpose for the period post 01/07/2010.

18. The appellants also received various other considerations, under different names. Retention charges are collected from the allottees of the land who failed to construct the building or commence commercial production within the specified period

mentioned in the land allotment agreement/letter. Restoration charges are collected from allottees who failed to start the production within the prescribed time or committed any breach of condition of lease or allotment, which may entail cancellation of allotment. However, on an application from allottee for restoration of the allotment of the plot, the appellants restore the plot to the original allottee in terms of Rule 24 (3) of RIICO Rules, by collecting restoration charges. Similarly, the appellants also collected charges with reference to unauthorized construction and regularization from the allottees in terms of the said rules.

19. The appellants pleaded that these charges are in the nature of "penal charges" and are not relatable to any consideration for providing taxable service. We are not in agreement with the said submission. We note that the retention charges are defined under Rule 2 (xxxi) of RIICO Disposal of Land Rules, 1979. These charges are fixed by the appellant to be levied while granting time extension for commencement of construction/production activities, for which the allotment of plot is made, beyond the stipulated time in these rules. The appellants have a declared policy for restoration of allotment of cancelled plot. Rule 24 (3) of the above said rules elaborates the policy. For restoration, the allottee should pay restoration charges as decided by the appellant. The charges for unauthorized construction/ regularization are also with reference to usage of allotted plot by the allottees in terms of the agreement. It is clear that these

charges are nothing but consideration received by the appellant in terms of their dealing with the allottee as per the conditions of allotment and closely linked to the lease arrangement for the plot. In other words, the continued facility of lease enjoyment by the allottee is linked to payment of these charges. Though under different names, these are attributable to the lease arrangement of plot between the appellant and the allottees and we have no hesitation to hold that these are considerations received for allowing the allottee to use the plot and they have direct nexus to the service of renting of immovable property by the appellant. As such, these charges are also liable to be taxed under the said tax entry.

20. We have examined the decision of the Tribunal in **Religare Securities Ltd. vs. CST, Delhi** reported in **2014 (36) S.T.R. 937 (Tri. – Del.)**, which is relied upon by the appellant. We find that the said decision is with reference to delayed payment charges collected by stock broker from their clients. We find the facts of the said case have no application to the present situation. As explained earlier, these charges are all having direct nexus to the service of renting of industrial plot by the appellant. The continued enjoyment of lease property is closely linked to the above considerations and, as such, we find the appellants are liable to service tax on the same.

21. The appellants also collected service charges/fire charges from the allottees of the plot. They have submitted that these

charges are collected to upkeep and maintain the industrial areas and also to maintain fire station in the said areas. The appellants claimed that repair and maintenance of roads is exempted from payment of service tax in terms of Section 97 of the Finance Act, 1994. The said exemption has been made applicable from 16/06/2005 upto 26/07/2009. Thereafter exemption Notification 24/2009-ST dated 27/07/2009 and Notification No. 54/2010-ST dated 21/12/2010 are applicable. We agree with the contention of the appellant on this issue. Wherever any charges are collected by the appellants towards repair and maintenance of roads, the same shall not be liable to service tax under the category of management, maintenance and repair service.

22. However, regarding other services rendered by the appellant to the allottees in the industrial areas, we find no exemption is available. The claim of the appellant that they have undertaken the said maintenance as a governmental authority and, hence, not liable to tax, is not tenable. The appellant is a corporate company, allotting industrial plots for commercial purpose. As a part of the arrangement of developing industrial areas, they have undertaken certain maintenance works in these industrial areas, which is in furtherance of commercial activity. There is no exemption available for such services prior to 01/04/2014. For the period 01/07/2012 to 30/01/2014 [negative list regime], the appellants claimed that the services rendered are not liable to tax as they are a governmental authority in terms of Sl. No. 39 of Notification 25/2012-ST dated 20/06/2012.

We note that services by governmental authorities by way of any activity in relation to any function entrusted to a municipality under Article 243W of the Constitution, is exempted from service tax. However, term "governmental authority" has been defined in the same notification, in para 2 (s). For the period prior to 30/01/2014 the appellants are not covered by the definition of "governmental authority" as the same is an authority or any other body set up by an Act of State Legislature. The appellant are not set up by an Act of Legislature. They are a company incorporated by the Government of Rajasthan. However, the services rendered by the appellant after 30/01/2014 are eligible for exemption in terms of Sl. No. 39 of Notification 25/2012-ST dated 20/06/2012 as the said entry was substituted w.e.f. 30/01/2014, by Notification 2/2014-ST dated 30/01/2014. The substituted definition changed the scope of "governmental authority" to include any authority or any other body established by Government, with 90% or more participation by way of equity or control, to carry out any function interested to municipality under Article 243W of the Constitution. We have perused Article 243W of the Constitution. It empowers legislature of a state by law endow the municipalities with such powers and authority as has been necessary to enable them to function as institution of self-Government. The said Article provides for empowering committees to carry out the responsibilities including those listed in 12th Schedule. We have perused letter dated 21/01/2015 of Principal Secretary, Government of Rajasthan, Local self-

Government Department. It is clarified therein that the appellant are carrying out municipal function in their industrial areas as laid down in the Municipal Act, 2009 and the municipal body of the concerned area does not undertake such work in the industrial areas falling under the jurisdiction of the appellant. The matter was further clarified by the Ministry of Finance, Government of India, vide a letter dated 10/01/2017 of Joint Secretary (TRU – II), to the effect that the appellant shall be eligible for exemption from service tax in respect of functions entrusted to them in terms of Article 243W of the constitution w.e.f. 30/01/2014. We note that the 12th Schedule of the Constitution specifies fire services/public amenities including street lightings, parking lights, public convenience etc. as the nature of services to be provided by the municipalities. As such we hold that appellant are liable service tax for the period prior to 30/01/2004 as no exemption is available to them.

23. The appellants were also receiving transfer charges as per Rule 18 of RIICO Rules. The transfer of plot is subject to payment of transfer fee. These transfers from one allottee to another or due to change in composition of the allottee, are permitted by the appellant. The Revenue demanded service tax on such charges either under 'real estate agent service' or under 'renting of immovable property service'. We note that the said charges cannot be subjected to service tax liability under the category of real estate agent service. Section 65 (88) states that "real estate agent" means a person who is engaged in rendering any service

in relation to sale, purchase, leasing or renting, of real agent and includes a real estate consultant. Section 65 (105) (v) defines taxable service, as to any person by real estate agent in relation to real estate. We note that in the present case, the appellants are collecting transfer charges for permitting the transfer of allotted land from one person to another. The appellants are not acting as a agent in connection with leasing of the said land. They are the custodian of the land and they are dealing with the allottee on principal to principal basis. There is no agency work carried out by the appellant in leasing of the land. As such, we find that the appellants cannot be considered as real estate agent in terms of the above statutory definition. However, the appellants are liable to be taxed under the category of renting of immovable property, on receipt of this consideration. We have noticed that the transfer of allotment is enabling the transferee to obtain the land on lease and it is an integral part of lease arrangement. As such, the said consideration is to be considered as a taxable value received for rendering taxable service of renting of immovable property. Wherever demand of service tax on this income is with reference to this tax entry, the appellant is liable to pay.

24. The appellants contested the demands, wherever issued invoking extended period of limitation. We note that the appellants are a Government company. The issues dealt with above are involving interpretation of legal provisions. Some differing views are already on record. As a Government agency it

is not incorrect to assume that the appellant did not have any malafide intend to mis-represent or suppress facts from the tax authorities in order to evade the tax. They were registered with the Department and were discharging service tax under various categories. Renting of immovable property service introduced w.e.f. 2007, had been put to several judicial tests. In fact, the Hon'ble Delhi High Court in the case of **Home Solutions Retail Ltd. vs. Union of India** reported in **2011 (21) S.T.R. 109 (Del.)** held that renting *per-se* is not a taxable service. Service in relation to renting only can be subjected to service tax. It led to statutory amendments, including retrospective amendments, in the provisions of Finance Act, 1994. Keeping these facts in view, we find there is no justification to allege fraud, collusion, willful mis-statement on the part of the appellant with an intention to evade payment of service tax. In fact, substantial service tax liability of the appellant [and similarly placed Industrial Development Corporations of the States] has been exempted by a special legislative provision, introduced in Finance Act, 2017 but made effective from 01/06/2007. As such, we find the demands for extended period are not sustainable against the appellant. On the same reasoning we hold that the penalties imposed on the appellant are also liable to be set aside.

25. The appellants claimed benefit of calculation of service tax by applying the provision of Section 67 (2) of the Finance Act, 1994. Section 67 (2) stipulates as below :-

> "Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged".

26. Subject to production of evidence that the appellants have charged gross amount which is inclusive of service tax and the arrangement with the service recipient/the documents support such assertion, we hold the appellant should be allowed to calculate the tax liability in terms of the said provision.

27. In view of the above discussion and analysis, the various points of the appeals filed by the appellant are decided in following terms :-

(a) the appellants are liable to service tax on the activity of leasing of land, for use in the furtherance of commerce or business, from 01/07/2010. However, considerations received as lump-sum upfront payment in respect of lease of land for a period of 30 years and above shall not be liable to such tax ;

(b) the appellants are liable to pay service tax on retention charges, restoration charges, unauthorized construction charges/regularization charges and transfer charges relating to lease land under the tax category of renting of immovable property services for the period 01/07/2010 onwards ;

(c) the appellants are liable to service tax under management, maintenance and repair services in respect of charges collected from allottees with reference to provision of various services other than management, maintenance of roads ;

(d) the demands wherever raised invoking extended period of limitation shall be restricted to normal period ;

(e) the penalties imposed on the appellants are set aside and

(f) subject to verification of the fulfillment of condition with documentary evidences, the provisions of Section 67 (2) shall be available to the appellant to calculate the quantum of service tax liability payable by them.

28. The appeals are disposed of accordingly.

(Order pronounced in open court on 12/05/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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