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 : 03/08/2017.
DATE OF DECISION : 23/08/2017.

Service Tax Appeal No. 397 of 2011 with C.O. No. 199 of 2011

[Arising out of the Order-in-Original No. 4-7/SJS/CST (Adj.)/2010 dated 25/11/2010 passed by The Commissioner (Adjn.), Service Tax, New Delhi.]

CST, New Delhi — Appellant

Versus

M/s Ansal Properties and Infrastructures Ltd.] — Respondent

Appearance

Shri Amresh Jain, Authorized Representative (DR) – for the appellant.

Shri P.K. Sahu, Advocate – for the Respondent.

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

Final Order No. 56131/2017 Dated : 23/08/2017

Per. B. Ravichandran :-

The Revenue is in appeal against order dated 25/11/2010 of Commissioner (Adjudication), Service Tax, New Delhi. The respondents were registered with the Department for payment of service tax under various categories of taxable services.

Based on certain verification of documents maintained by the respondent, the Revenue initiated action against respondent to demand and recover service tax, not paid under various categories. The details of the demands are as below:-

DETAILS OF DEMAND

(Amount in Rupees)

Period of Dispute	2002-03 to 2005-06	01/04/2007 to 31/03/2008	01/04/2009 to 30/09/2008	01/10/2008 to 30/09/2009
Show Cause Notice Description of Service	SCN C. No. DL/ST/AE/09/05/ Pt./99 dated 01/01/2008	SCN C. No. DL-1/ST/R-II/SCN/API/5 / 08 dated 23/10/2008	SCN C. No. DL-1/ST/R-II/SCN/API/5 / 08 dated 21/10/2009	SCN C. No. DL-1/ST/R-II/SCN/API/4 / 10 dated 12/03/2010
Management consultancy service	1,73,93,040	84,66,083	48,43,530	44,56,803
Real estate agent service	2,14,79,405	70,92,944	50,68,806	42,23,836
Business auxiliary service	6,45,900	-	-	-
Management, maintenance and repair service	6,38,098	3,30,472	1,65,123	1,65,123
Advertising service	7,49,964	-	-	-
Total	4,09,06,407	1,58,89,499	1,00,77,459	88,45,762

2. These demand notices were adjudicated by a common impugned order. The Commissioner dropped demands under "management consultancy service", "real estate agency service" and "advertising service". A part of demand under the categories of management, maintenance and repair service and business auxiliary service totally amounting to Rs. 1,06,080/- has been confirmed by the Original Authority alongwith equal amount of penalty under Section 78 and further penalties under Section 77

of the Finance Act, 1994. Aggrieved by this order, the Revenue filed this appeal. The respondent also filed a cross objection contesting the grounds of appeal by Revenue as well as against the confirmation of a part of demand by the Original Authority, as mentioned above.

3. The learned AR elaborating the grounds of appeal submitted on the following points :-

(a) The Commissioner has erred in holding that services provided by the assessee in relation to transfer of know-how does not fall under the definition of management consultant service and hence not chargeable to service tax. Clauses 1.1 to 1.6 of the agreement entered into by the respondent with their client clearly bring out that the respondent has valuable knowledge, expertise and experience in the field of development relating to real estate projects. Relying on the decision of the Tribunal in **RPG Enterprises – 2008 (11) S.T.R. 488 (Tri. – Mum.)** it is contended that the management consultant services will cover any advice rendered by one organization/person to another organization for improving the organization by conceptualizing, devising, development upgradation of recipient organization. The agreement indicates that the respondent provided useful consultancy services to their clients ;

(b) when the respondent collected certain charges for changing the names of the owners of the flats by substitution in the records, the same should be covered under taxable service of real estate agent. The real estate agency service will cover all activities in relation to sale, purchase, leasing or renting, of real estate. The services provided by respondent are certainly in relation to real estate and they are liable to service tax on the consideration received for change of names of the buyers ;

(c) the Commissioner has erred in holding that supervision charges collected by the respondent from M/s Star Estate Management Ltd. for giving advice for any repair/modification was not covered by the tax entry, maintenance or repair service. There is no requirement of such service to be directly executed by the provider. Advising another person with reference to maintenance or repair is also to be covered as the tax entry is also for the activities "in relation to maintenance or repair".

4. The learned Counsel for the respondent contested the grounds of appeal and submitted that the Original Authority examined the statutory scope of the tax entries, the opinion obtained by CBEC from IIM, Ahmedabad regarding the concept of management, and various case laws, before arriving at his conclusion. The grounds taken by the Revenue in the present appeal have not brought out any factual or legal infirmity in such finding.

5. Explaining the grounds of cross objection, the learned Counsel submitted that the Commissioner wrongly confirmed the demand on maintenance or repair charges received from owners of the flats/plots for maintenance of common areas. Management of entire building and common areas is a single composite activity and cannot be attributed to each flat or plot owner, separately. The confirmation of demand is also contested on the point of limitation. There is no intention to evade payment of

duty on the same ground there can be no penalty imposed on the respondent.

6. We have heard both the sides and perused the appeal records.

7. The first point for decision is the correctness of findings recorded by the Commissioner in respect of tax liability of the respondent under the category of "management consultancy service" and "real estate agent service". We have carefully perused the findings recorded by the Original Authority and the objections raised by the Revenue. Admittedly, the respondent has expertise and experience in the field of real estate projects. They have a set of know-how which will help the client who is engaged in real estate project. The terms of agreement, also relied on by the Revenue in the present appeal, clearly brings out that the respondent are transferring know-how one time and furnished documents relating to real estate development projects, including group housing projects. The know-how is suitable and complete, which will enable the client to plan and execute the real estate development projects, including group housing projects, in a more profitable and efficient method. On careful consideration of the scope of the agreement, we note that there is no consultancy service with reference to improvement of organizational efficiency of the client. The Revenue contends that even a transfer of technical know-how which improves the profitability and efficiency of the client organization will also be

covered under the general category of management consultancy. We are unable to agree with such proposal. As rightly pointed out by the Original Authority the know-how was transferred in the shape of data, information, drawings, design specifications of materials and utilities etc. It is thus, an undisputed fact that the know-how, was transferred by the respondent to their clients. In para 3.3.6, the impugned order reproduced the statutory definition as amended from time to time. After extracting the opinion given by IIM, Ahmedabad on the concept of management, the Original Authority recorded as below :-

> "Seen, under the light of the aforesaid definition of concept of management, the transfer of 'know-how' by the assessee to his clients did not amount to providing the of management consultant's service. The assessee did not make any study of the organizational pattern of their clients and did not give any advice or consultancy, in any manner, with regard to management of organizations of his clients or any sub unit of the organizations. The assessee was no way involved with the planning, organizing, staffing, directing, controlling and coordinating the activities of his clients. The assessee was also not engaged in redesigning any organizational structure or functioning of any unit or activities of their clients. The assessee only transferred the available 'know-how' to his clients under the agreements. Once the 'know-how' was transferred, it was for the clients to use the 'know-how' in the manner they desired. The assessee had no control over the usage of the 'know-how'.

8. We are in agreement with the above observation of the Original Authority and his reliance placed on the decision of the Tribunal in **Castrol Ltd. vs. CCE, Raigad – 2007 (8) S.T.R.**

254 (Tri. – Mumbai). As such, we find that there is no merit in the objection raised by the Revenue on the above findings of the Original Authority. It is clear that transfer of know-how by the respondent to the client does not amount to management or business consultant service, as seen from the terms of agreement in the present case.

9. The respondents were sought to be taxed under the category of "real estate agent's service" in terms of Section 65 (88) (89) of the Finance Act, 1994. The statutory provision of the tax entry are as below :-

> "Section 65 (88) and (89) of the Act, 1994, defines the "real estate agent" and "real estate consultant" as under:
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> (88) "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;
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> (89) "real estate consultant" means 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;
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> Section 65 (105) (v) defines taxable service in relation to 'Real Estate Agent' as under :
>
> "taxable service" service means any service provided or to be provided to any person, by a real estate agent in

relation to real estate and the term 'service provider' shall be construed accordingly".

10. The Revenue contended that the respondent received certain considerations for change of name of the owners of the flats, by way of substitution of the name by new buyer in place of earlier owner of the flat, was in relation to sale or purchase of such property and accordingly liable to service tax. To levy service tax first of all the provider of service should be a real estate agent and second while acting as such agent the person concerned should have provided service in relation to sale, purchase, leasing or renting of real estate. There is nothing in the show cause notice or the relied upon documents to show that the respondent acted in a capacity of "real estate agent" between the earlier owner and the new buyer of the flat. The changes made in the records of the respondent are not causative factors for such sale or purchase. We are in agreement with this observation of the Original Authority. In **RIICO – 2017 – TIOL – 1725 – CESTAT – DEL.**, the Tribunal held that the transfer charges received by the appellant for permitting the transfer of allotted land from one person to another cannot be taxed as real estate agent service because they were custodians of land and were dealing with the allottee on principal to principal basis, not as an agent of either party. We note that the reliance placed by Revenue on **Ajay Enterprises Pvt. Ltd. vs. CST, Delhi – 2016 (42) S.T.R. 471 (Tri. – Del.)** is not appropriate. In the said case it was admitted that the appellant was a real estate agent

registered with the Department. Here in the present case the respondent is a real estate developer selling their constructed flats. They are dealing with the buyers, old or new, on principal to principal basis. Accordingly, we are in agreement with the impugned order that no service tax liability can be confirmed against the respondent under this category.

11. Regarding tax liability of the appellant under the category of maintenance or repair service we note that they have entered into an agreement with M/s Star Estate Management Ltd. for maintenance of entire building including common area etc. The appellants are required to provide technical advice to M/s Star Estate regarding major repairs and modifications of the said property. We note that the Original Authority after extracting the statutory definition of "maintenance or repair service" in terms of Section 65 (64) from 01/07/2003, held that such activity of providing advice cannot by itself be categorized as management, maintenance or repair service. On careful examination of the statutory definition and the analysis made in para 3.5.1 of the impugned order we note that there is nothing in the present grounds of appeal by Revenue to persuade us to interfere with the said findings. Advice or consultancy rendered by the appellant is not covered by maintenance or repair of immovable property. Admittedly the appellants are not involved in any activity of management, maintenance or repair.

12. The Original Authority confirmed service tax liability on the appellant with reference to maintenance charges attributable to the money collected from the owners of plot/flat/office for maintenance of the said properties. The appellant/assessee contested their tax liability in the cross objection. We note that the entire building which was maintained and managed by the appellant/assessee for a consideration is for the collective benefit of the owners of the individual units in the building. Each owner is collectively and severely got the benefit of said maintenance and as such we are in agreement with the Original Authority that the consideration paid by the owners of flat/plot/office is liable to service tax as affirmed by the Original Authority. We find no merit in the objection raised by the appellant/assessee in their Cross Objection.

13. Regarding the limitation, we have examined the findings recorded in the impugned order. The Original Authority held that in the present case, the appellant/assessee failed to make out a case on bonafide belief for non-payment of service tax. It was also recorded that in one of the cases the appellant/assessee admitted their liability to pay tax to contended that they had sufficient balance in Cenvat credit and as such no demand can be enforced against them. We note that the appellant/assessee is a well organized large scale real estate developer. As such, it is not tenable for them to submit that they were not fully aware of the legal implications of various service tax entries applicable to

them. We could not discern any bonafide belief in the present case for non-payment of service tax in time.

14. In view of the above discussion and analysis, we uphold the impugned order and dismiss the appeal by the Revenue and also Cross Objection by the appellant/assessee.

(Order pronounced in open court on 23/08/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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