CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 1798 OF 2012-DB

(Arising out of Order-in-Original No. 11/2012/ST/JPR-II dated 29.02.2012 passed by The Commissioner of Central Excise, Jaipur-302005)

M/s Ess Gee Real Estate Developers Pvt. Ltd. ..... **Appellant**
(51/54B, Nariman Bhavan, Backbay Reclamation Road, Nariman Point, Mumbai: 400021)

VERSUS

The Commissioner of Central Excise ...... **Respondent**
(New Central Revenue Building, Statue Circle, C-Scheme, Jaipur-302005)

APPEARANCE:
Shri B.L. Narasimhan, Advocate &
Shri Narender Singhavi Advocate for the Appellant
Shri Amresh Jain, Authorized Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING : 30 May, 2019

FINAL ORDER No. 50766/2019

JUSTICE DILIP GUPTA

This appeal is directed against the order dated 29 February, 2012 passed by the Commissioner of Central Excise, Jaipur by which the demand of Service Tax has been confirmed.

The Commissioner has also imposed penalty under sections 78, 76 and 77 of the Finance Act, 1994[1].

2. The Appellant, as a developer of residential and commercial properties, entered into a development agreement dated 5 September, 2001 with Marudhar Hotels Pvt. Ltd[2] who claimed to be owner and in possession of a parcel of land bearing Khasra No. 426 of Jodhpur Tehsil admeasuring 1,19,86,800 sq. ft. together with a hotel known as "Umaid Bhawan Palace". The Owners proposed to develop a portion of the aforesaid property admeasuring 43,56,000 sq. ft. in a phased manner by preparation of a lay out plan dividing the property into various plots, carrying out all infrastructure works, including leveling of plots, construction of Shopping Mall, Hospital, School, College, Market, and to sell them in accordance with the Rules framed by Urban Improvement Trust, Jodhpur, all of which was to be known as the "Umaid Township Project". The Appellant represented to the Owners that it is in the business of and has the expertise, skill, infrastructure in development and marketing/sale of properties and, therefore approached the Owners to permit it to develop the said 'Umaid Township Project' at Jodhpur. The Owners, granted and assigned unto the Appellant, the exclusive right to develop the said property and to sell individual developed plots. The Appellant accepted such authority, permission and the right to develop the said property and to sell the developed plots in a phased manner. Under the aforesaid agreement, the Appellant had to develop an area

1. The Act
2. Owners

measuring approximately 20 acres in the first phase within two and a half years from the date of approval of the plans and the remaining phases were to be completed within seven years. The Appellant was required to carry out all such acts, deeds and things for completing the project in terms of clause 11 of the agreement. In consideration of the Owners granting exclusive and irrevocable rights to the Appellant to develop the said property and to sell individual developed plots, the Owners were held entitled to receive an amount from the Appellant to be determined terms of Clause 12 of the agreement.

3. A show cause notice dated 6 October, 2010 was issued to the Appellant by the Department. It was stated that the Appellant had evaded payment of Service Tax to the tune of Rs. 5,45,52,288/- on the taxable service "Real Estate Agent" and " Site Formation and Clearance, Excavation and Earth Moving and Demolition"[3] provided by the Appellant during the period 2005-2006 to 2009-2010. The show cause notice mentions that the Appellant had signed an agreement with the Owners on 5 September, 2001 and received grant and rights for development of immovable property situated in Khasra No. 426. The show cause interpreted the development agreement to mean "preparation of a site for developing a real estate for commercial purpose". The agreement was, therefore, considered to be a composite agreement attracting levy of Service Tax on each of the constituent

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3. Site Formation

'Site Formation' and 'Real Estate Agent'. Paragraph 8 of the show cause notice, which deals with this aspect, is reproduced below:-

> "8. Whereas, gist of the Agreement mentioned above clearly indicates that the activities undertaken by the developers were leveling of land, laying of roads, street lightening, recreation of gardens, boundary walls, water connections, sewerage connections, electrical sub-stations and all other amenities and services as per the approved layout plans, which squarely covered under the category of 'site preparatory service. The developer has rendered prime services of a real estate agent inasmuch as "Real estate agent" implies a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate. The developer in a capacity of real estate agent rendered services of "Site formation and clearance, excavation and earthmoving and demolition services for developing the real estate which was ultimately sold by the developer after the year 2005-06 on pre-determined commission. **These services of "Site formation and clearance, excavation and earthmoving and demolition" and other activities are adjunct to the services of Real Estate Agenct under a composite contract where the developers retained a part of sale proceeds of the developed plots as consideration for the services rendered by them which is nothing but commission for preparation of site for developing a real estate. Service Tax appears to leviable as per the statutory provisions on real estate developed by site preparation on consideration basis as discussed above**. The service tax payable has been worked out to Rs. 5,45,52,288/- for the year 2005-06, 2006-07, 2007-08, 2008-09 & 2009-2010 on the consideration received in lieu of services rendered."
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> **(emphasis supplied)**

4. The show cause notice, therefore, called upon the Appellant to explain as to why:-

> "(i) Service tax amounting to Rs. 5,45,52,288/- as detailed in Annexure 'A' to this notice should not be demanded and recorded from them under the proviso to section 73(1) of the Finance Act, 1994;
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> (ii) Interest should not be recovered from them on the aforesaid amount under section 75 of the Finance Act, 1994;
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> (iii) Penalty under section 77 and 78 of the Finance Act, 1994 should not be imposed upon them for contravention of Section 66,67,68,69 and 70 of the Finance Act, 1994 read with Rule 4, 6 and 7 of the Service Tax Rules, 1994."

5. The Appellant submitted a detailed reply to the aforesaid show cause notice pointing out inter alia that no taxable service had been rendered by the Appellant under the said agreement and the notice should be withdrawn.

6. The Commissioner, however, did not accept the contentions advanced by the Appellant and confirmed the demand. After perusal of the definition of 'Site Formation' as contained in section 65(97a) of the Act and the definition of 'Real Estate Agent' as contained in section 65(88) of the Act and on consideration of the fact that the Appellant had been granted the right for development of land, the Commissioner concluded that the activities of developing the land by leveling it and carrying out infrastructural work, would fall under the definition of "Site Formation". Further, after noticing that the Appellant was also required to market the developed plots and retain consideration from the sale proceeds of the plots and remit the land value to the Owners in terms of Clauses 12 and 13 of the Agreement, the Commissioner concluded that the Appellant had also provided service of a 'Real Estate Agent' to the Owners. The Agreement was, therefore, acknowledged as a composite agreement in which the developer had to provide two services, both of which were taxable. Paragraphs 22, 23 and 24 of the Order which deal with this aspect are reproduced below:

> "22. From the above facts it is clear that the developer had undertaken the work of developing the land by leveling of land and carried out all the infrastructural work including laying of roads, street light, recreation gardens, boundary walls, water connections, sewerage connections, electrical sub-stations. **All these activities are the activities of site formation and clearance, excavation and earthmoving and demolition**

> **covered under Section 65(97a) of the Finance Act, 1994**. I also find that the definition of site formation and clearance, excavation and earthmoving and demolition provided under section 65(97a) of the Finance Act, 1994 is an inclusive definition and the activities specifically mentioned are indicative and not exhaustive. Prior to construction of buildings, factory or any civil structure, activity of mining or laying of cables or pipes, preparation services of site formation and clearance, excavation and earthmoving or leveling are normally undertaken for a consideration to make the land suitable for such activities. Such services include blasting and rock removal work, clearance of undergrowth, drilling and boring, overburden removal and other development and preparation services of mineral properties and sites and other similar excavating and earthmoving services. Demolition of structures, buildings, streets or highways is also undertaken for a consideration as a preparatory activity for subsequent construction activity or for clearing the site for any other purpose. All such activities fall within the scope of this service.
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> 23. I further observe from the contents of the contract entered between developer and land owner that the developers will themselves market the developed plots and will retain their consideration to the services provided, from the sale proceeds of the plots and remit the land value of the owners as per the agreed formula given in Para 12 and 13 of the contract. **I thus hold that the developer has provided the services of real estate agent to the land owner as the activity of selling the developed plots and retaining the consideration from the sale proceeds is squarely covered under the Real Estate Agent services defined under section 65(88) of the Finance Act, 1994.**
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> 24. **In view of above, it is clear that it was a composite agreement in which the developer has provided two services to the land owner. First of all, they had prepared the site for developing a real estate for commercial purposes covered under Site Formation Service. Secondly they had sold out the developed plots on behalf of the land owner and in turn rendered the service of Real Estate Agent**. The developer had retained the consideration from the sale proceeds of the developed Plots for their services rendered to the land owner on which service tax is leviable as per the statutory provisions discussed above. **I also find that both the services are taxable and there is no needs to bifurcate the consideration service wise."**
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> **(emphasis supplied)**

7. The Appellant was, however, held entitled to the benefit of cum service tax and so the amount of service tax was directed to be recalculated. The Commissioner, therefore, confirmed the demand of

Service Tax amounting to Rs. 4,87,71,787/- instead of 5,45,22,288/-, but with penalty under sections 78,76 and 77.

8. Shri B.L. Narasimhan, learned counsel appearing for the Appellant has made the following submissions:-

(i) Confirmation of demand under two categories of service "Site Formation" and "Real Estate Agent" is not sustainable;

(ii) The show cause notice as well as the impugned order are not only vague but also in the teeth of section 65A of the Act, as the activities under the agreement for a single consideration have been classified under two category of services;

(iii) In terms of the agreement, the Owners transferred the land development rights to the Appellant and in exercise of such rights and against payment of a specified consideration, the Appellant developed the property and sold it on its own. The Appellant has, therefore, not rendered any service to the Owners;

(iv) The Appellant as a recipient of development rights from the developer has developed and sold the property on its own. There is no provision of service by the Appellant to the Owners. Service if any, is a service to self;

(v) The arrangement contemplated in the agreement dated 5 September, 2001 is in nature of co-venture and there is no provision of service inter se parties;

(vi) In any case, the services, if any, are not classifiable under 'Site Formation' or 'Real Estate Agent'; and

(vii) The extended period of limitation could not have been invoked, nor penalties could have been imposed.

9. Shri Amresh Jain, learned Representative of the Department has, however, supported the impugned order and has made the following submissions:

(i) The Commissioner committed no illegality in confirming the demand after granting the benefit of cum service tax on the Appellant;

(ii) A perusal of the show cause notice indicates that the essential character of the service rendered by the Appellant, is 'Site Formation' in terms of section 65A of the Act and 'Real Estate Agent' Service is merely adjunct;

(iii) The order passed by the Commissioner has correctly appreciated the terms of the agreement for imposing tax liability upon the Appellant.

10. The submissions advanced on behalf of the parties have been considered.

11. In order to appreciate the contentions, it would first be appropriate to refer to the terms of the agreement. As noticed above, the Owners had represented that they were the absolute owners of the property which they intended to develop in a phased manner and that the Appellant represented to the Owners that it

had the requisite expertise, skill, infrastructure and reputation in development and marketing/sale of properties. The Owners granted and assigned to the Appellant the exclusive right to develop the said property and to sell individual developed plots and the Appellant accepted such authority, permission and the right to develop the said property and to sell the developed plots in a phased manner. The relevant clauses of the agreement are reproduced below:-

"WHEREAS

A. The Owners represent that they are the absolute owners and seized and possessed of or otherwise well and sufficiently entitled, inter alia, to all that piece or parcel of land bearing khasra No. 426 of Jodhpur Tehsil, admeasuring 1,19,86,800 sq. ft. (One Crore Nineteen Lacs Eighty Six Thousand Eight Hundred square feet) or thereabouts together with a palace known as Umaid Bhawan and a hotel known as "Umaid Bhawan Palace" and the hereditaments and premises standing thereon. (hereinafter referred to as "the said entire Property"). The said entire property is described in Annexure "A" herein and shown surrounded by yellow colour boundary line on the Plan hereto annexed and marked as Annexure "B".

B. The Owners propose to develop a portion of the said entire property to the extent admeasuring approximately 43,56,000 sq ft. (Forty Three Lacs Fifty Six Thousand square feet) i.e. 4,84,000 sq. yards (hereinafter referred to as "the said property") more particularly described in the Annexure "C" hereto and shown surrounded by Red Colour hatched line on the said plan being Annexure "B" in phased manner by preparation of lay out of the said property dividing the said property into various plots, construction of infrastructure, leveling of such individual plots/Shopping Mall, Hospital, School, College, Market, etc., hereinafter called "Umaid Township Project" for sale thereof in accordance with the rules framed by Urban Improvement Trust, Jodhpur (hereinafter called "UIT Jodhpur"). The actual area of Development will be ascertained after survey of the said property.

C. The Developers have represented to the Onwers that the Developers are in the business of and have the expertise, skill infrastructure and reputation in development and marketing/sale of properties and the Developers have approached the Owners to permit them to develop the said Umaid Township Project at Jodhpur (hereinafter called "the Project").

D. --------------

Now it is hereby agreed, confirmed and declared by and between the parties hereto as follows:-

2. The Owners hereby grant and assign unto the Developers exclusive right to develop the said property describes in Annexure "C" hereto and to sell individual developed plots and the Developers accept such authority, permission and right to develop the said property and to sell the developed plots thereof in phase manner TO THE INTENT that the Developers shall complete the said project in accordance with the layout/building plans that may be sanctioned by UIT, Jodhpur and other concerned authorities and in accordance with all Rules, Regulations and bye-laws of the Public body and/or authority that may be applicable to the said property.

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8. The Developers shall undertake the development of the said property in phases. In the First phase, the Developers shall develop an area admeasuring approximately twenty acres of the said property or such other area as may be mutually agreed upon and such development of the first phase to be completed within a period of two and a half years from the date of approval of the plans or such period as may be mutually agreed upon. The period of completion of the remaining phases shall be seven years from the date of approval of plans or such extended period as may be mutually agreed after completion of first phase.

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11. The Developers shall subject to clause 6 above be responsible for doing, executing and carrying out all such acts, deeds and things as may be necessary to complete the said project including the following:

a. To bring and /or arrange finance within a period of nine months from the date of approval of plans towards initial cost for infrastructure, roads, sewerage treatments, cables, water lines, electricity, etc., as may be required, for the development of the said property.

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d. Applying and obtaining from officers of the Government of Rajasthan all such permissions/consent/ sanctions/approvals as may be necessary for the development envisaged herein and to do and perform all acts connected therewith or pertaining thereto, including any application made to the Housing and Urban Development Department, and /or anybody corporate, department, authority or agency.

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g. Carrying out all the infrastructural work including leveling of the said property, laying or roads, street light, recreation gardens, boundary walls, water connections, sewerage connections, electrical sub-stations and all other amenities and services on the said property as may be required as per the approval, layout plans, or order of any governmental semi-governmental authority;

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i. Appointing the Architects, Quantity Surveyor, RCC Consultant, structural Engineers, Soil Survey Experts and other professionals in connection with the said development of the project;

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n. To complete the proposed development in phases and to take all steps necessary for marketing the developed plots with or without building and for that purpose undertake publicity campaign through advertisement, brochures, electronics and print media etc.

12. (a) In consideration of the Owners granting exclusive and irrevocable rights to the Developers to develop the said property and to sell the individual developed plots, the Owners shall be entitled to receive from the Developers the following amounts:

(i) In case of sale of Plot for the price upto Rs. 2,500/- per sq. yards then the Owners shall be entitled to receive 40% of the sale proceeds thereof;

(ii) In case of sale of plot above Rs. 2,500/- per sq. yards and upto Rs. 3,500/- per sq. yards then the Owners shall be entitled to receive 48% of the sale proceeds thereof;

(iii) In case of sale of plot above Rs. 3,500/- per sq. yards and upto Rs. 4,500/- per sq. yards then the Owners shall be entitled to receive 54% of the sale proceeds thereof;

(iv) In case of sale of above Rs. 4,500/- per sq. yards and upto Rs. 5500/- per sq. yards then the Owners shall be entitled to receive 56% of the sale proceeds thereof;

(v) In case of sale of plot above Rs. 5500/- per sq. yards then the Owners shall be entitled to receive 60% of the sale proceeds thereof;

(b) -------------------

(c). The Owners shall receive a minimum of Rs. 400/- per sq. yards towards the land cost for residential and commercial plots. However in respect of the plots utilized for public utilities like schools, hospitals. Colleges, religious places, etc. the Owners will be entitled to receive such amount as may be mutually agreed between the parties.

13. It is agreed between the parties hereto that on completion of the entire project, if any land and/or plots with or without construction remain unsold, then the same shall be divided between the Owners and the Developers equally. In that event, the Developers shall pay to the Owners only the cost of the land and/or plots retained by the Developers after deducting the cost of development therefrom. The price of the land or of the plots along with the construction thereon retained by the Developers shall be ascertained as may be mutually agreed upon between the parties hereto and if the parties fail to do so, then a Valuer shall be jointly appointed by the Owners and the Developers to determine the price of the unsold land/or plots and such valuation will be final and binding on the parties.

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19. The Development Agreement hereby executed and the Development Project as set out herein, will not be treated as Partnership/joint Venture between the parties hereto nor an Agreement for Sale by the Owners to the Developers and the Developers are given only a right to develop the said property. It is hereby agreed and declared that the Owners and the Developers have each undertaken their respective obligations and have rights specified hereinabove on their own account and on principal to principal basis and not on behalf of or on account of or as agent of any of them or anyone else.

12. It is, therefore, clear from the aforesaid agreement that:-

(i) The Owners had granted and assigned exclusive rights to the Appellant to develop the said property and to sell individual developed plots in a phased manner. The Appellant was required to do, execute and carry out all such acts, deeds and things necessary for completing the said project, including arranging finance towards the initial cost for infrastructure, roads, sewerage treatment. The Appellant had also to apply and obtain permission/ consent/ sanctions/ approvals for the development envisaged in the agreement and to carry out all infrastructural work, including appointment of Architects, Quantity Surveyor, RCC Consultants and other professionals in connection with the said development of the project.

(ii) In consideration of having been granted exclusive and irrevocable rights by the Owners to develop the said property and to sell individual developed plots, the Owners were entitled to receive from the Appellant the amount indicated in paragraphs 12 and 13 of the agreement depending on upon the size of the plots. The Owners were also entitled to receive a minimum of Rs. 400 per. sq. yard towards the land cost for residential and commercial plots.

(iii) If for any reason any land/plot was not sold, the same was be divided between the Owners and the Appellant equally and in that event the Appellant would pay to the Owners only the cost of the land/or plots retained by the Appellant, after deducting the cost of the development.

(iv) The Owners and the Appellant also agreed that the Development Agreement will not be treated as a Partnership/ Joint Venture between the parties and that the Appellant had been given only the right to develop the property and that each of them had undertaken their respective obligation and have the rights specified on their own account and on principal to principal basis and not on behalf of or on account of or as agent of any of them or anyone else.

13. According to the Revenue the activities undertaken by the appellant would fall in the taxable category of 'site formation' and 'real estate agent'.

14. It is, therefore, appropriate to reproduce the definition of 'site formation' as contained in section 65(97a) of the Act and it is as follows:-

> **"65(97a)** "site formation and clearance, excavation and earth moving and demolition" includes,-
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> (i) Drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or
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> (ii) Soil stabilization; or
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> (iii) Horizontal drilling for the passage of cables or drain pipes; or
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> (iv) Land reclamation work; or
>
> (v) Contaminated top soil stripped work; or
>
> (vi) Demolition and wrecking of building, structure or road,
>
> But does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies;

15. 'Real Estate Agent' has been defined in section 65 (88) of the Act as follows:-

> "**65(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"

16. Taxable Service has been defined in section 65 (105) of the Act and in relation to 'Real Estate Agent' and 'Site Formation' it is as follows:-

> **"65(105)** "taxable service" means any service provided or to be provided;
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> **---------------**

(v) to any person, by a real estate agent in relation to real estate;

(zzza) to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities."

17. The Appellant has laid emphasis on section 65A of the Act. It is, therefore, reproduced below:-

Classification of Taxable Service

65A. (1) For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of section 65;

(2) When for any reason , a taxable service is prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-

(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;

(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration;

18. It is in the light of the aforesaid provisions of the agreement and the definitions of 'real estate agent' and 'site formation' services that the submissions advanced by learned Counsel for the Appellant and the Authorized Representative of the Department have to be examined.

19. Learned counsel for the Appellant placed emphasis on paragraph 8 of the show cause notice that has been reproduced above, and pointed out that whereas the first part of the said

paragraph refers to the activities undertaken by the Appellant under the category of "site preparation", the second portion of the paragraph refers to the activities undertaken by the appellant under the category of "real estate agent" and it has been alleged that service tax 'appears to be leviable as per statutory provision on real estate developed by site preparation on consideration basis'. Learned counsel submitted that it was incumbent for the Department to have classified the activities under one or the other category of service contemplated under section 65(105) of the Act in view of the provisions of section 65A of the Act. According to the learned counsel, an assessee may provide a variety of service for a single consideration in the same contract, but even in such a case it is obligatory on the Department to find out the essential character of the service under which the liability of the assessee is proposed to be taxed.

20. The submission of learned Authorized Representative for the Department is that a perusal of paragraph 8 of the show cause notice would indicate that the Department has clearly come out with a case that the essential character of the service rendered by the Appellant is of a "real estate agent" and the other activity of "site formation" is merely adjunct to the service of a "real estate agent" under a composite contract. According to him this is clear from the sentence in paragraph 8 which states that "developer has rendered prime services of a real estate agent…." and "other activities were adjunct to the services of real estate agent". It is, therefore, his submission that the learned counsel for the Appellant is not correct in his submission that the show cause notice has not

indicated that the essential character of the services mentioned in the show cause notice is of 'real estate agent'. It is also his submission that the Appellant has performed 'real estate agent' service, as is apparent from a perusal of the agreement.

21. Section 65(105) of the Act defines "taxable service" to mean any service provided or to be provided under the sub-clauses of clause (105) of section 65. Whereas section 65(105)(v) contemplates a service provided to any person by a real estate agent in relation to real estate, section 65(105)(zzza) contemplates a service provided to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such similar activities. Section 65A deals with classification of taxable services. Sub-section (1) provides that classification of taxable service shall be determined according to the terms of the sub-clauses of clause (105) of section 65. However, if a taxable service, for whatever reason, is prima facie classifiable under two or more sub-clauses of clause (105) of section 65, then sub-section (2) of section 65A of the Act provides that the classification shall be effected in the manner described below;

> "(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more description;
> (b) composite services consisting of a combination of different services which cannot be classified in the manner specified in (a) shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;
> (c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally mere consideration."

22. Paragraph 8 of the show cause notice does mention that composite services were rendered by the assessee consisting of "real estate agent" and "site formation". Section 65A (2) (a)

provides that when a taxable service is prima facie classifiable under two or more sub-clauses, than the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description. Section 65A(2) (b) provides that if the composite service cannot be classified in clause (a), they shall be classified as if they consisted of a service which gives them their essential character.

23. The show cause notice is vague as it does not specify which particular category of service was leviable to tax as it states that "service tax appears to be leviable as per the statutory provisions on real estate developed by site preparation on consideration basis". The earlier portion of paragraph 8 of the show cause notice mentions that the developer in the capacity of a real estate agent rendered services of site formation for developing the real estate which was ultimately sold by the developer on pre-determined commission. It is very difficult to really cull out from the show cause notice as to which particular category of service was intended to be taxed. The show cause notice should have clearly indicated whether the service of "real estate agent" or "site formation" was leviable to tax, for this is the requirement of section 65A of the Act. This confusion is maintained in the impugned order. After referring to the provisions of the agreement dated 5 September 2001, the Commissioner in paragraph 22 of the order finds that the service rendered by the Appellant is of "site formation" as defined in section 65 (97a) of the Act. In paragraph 23, the Commissioner also finds that the service rendered by the Appellant is of "real estate agent" as defined in section 65 (88) of

the Act. It is for this reason that in paragraph 24 of the order, the Commissioner observed that it was a composite agreement in which the developer has provided the two service to the land owner the first service is "site formation" and the second is "real estate agent". In the last sentence of the paragraph the Commissioner observed "I also find that both the services are taxable and there is no need to bifurcate the consideration service wise." It was obligatory for the Adjudicating Authority to have specifically classified the service under which service tax was to be levied. The impugned, therefore, for this reason alone needs to be set aside.

24. In this connection it will be appropriate to refer to the Order passed by the Chennai Bench of the Tribunal in **M/s CMS India Operation And Maintenance Company Pvt Ltd Vs. Commissioner of Central Excise, Puducherry**[4] and the relevant paragraphs are as follows;

> "8. Sub-clause (b) under sub-section (1) of Section 65A provides classification of cluster of services under a specific taxing entry which gives the essential character of the services. Such an exercise was not carried out by the adjudicating authority and also there is no whisper the show cause notice in this regard. Such legal infirmity in the show cause notice is incurable at the appellate stage. Unless the show cause notice exhibits the activity carried out, and the service which has essential character to embrace the cluster of service to its fold, it is difficult to comprehend to classify such services under an appropriate taxing entry.
> 10. In view of the aforesaid observation, without finding any foundation in the show cause notice, we painfully allow the appeal for the short comings in the show cause notice and the adjudication order failing to appreciate law relating to classification.
> 11. At this stage, both sides agree that on the similar situation, where a final order was passed by Tribunal in the assessee's own case reported in 2007 (7) STR 369 (Tri. – Chennai) = **2007-TIOL-892-CETAT-MAD** holding no taxability has been upheld by the Hon'ble High Court of Madras as reported in – **2016-TIOL-1267-HC-MAD**. Therefore, there is no scope to appreciate that Revenue has still a good stand today for reconsideration of the issue in the present appeal."

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4. 2017-TIOL-1491-CESTAT-MAD

25. The submission of learned Authorized Representative of the Department that the show cause notice proceeds to require the Appellant to explain why service tax should not be levied on "real estate agent" service can also be examined by treating the "real estate agent" service as the essential character of the services. The show cause notice states that this was the "prime service" rendered to the Appellant. 'Real estate agent' has been defined in section 65(88) of the Act to mean 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. The "taxable service" is the service provided to any person by a "real estate agent" in relation to real estate. This category of service would cover services rendered by one person as agent of another in relation to sale, purchase, leasing or renting of real estate. A service provider must, therefore, carry out an activity in the capacity of an agent of another. The Appellant in the present situation is himself selling the plots. A principal to principal transaction would, therefore, not be covered under section 65(105)(v) of the Act. The Appellant does not act an agent for any person when it is selling property to purchasers. The development and sale of property under the agreement is undertaken by the Appellant on its own and in exercise of the rights vested in the Appellant. The Appellant had to arrange the finances for the project. The execution of the conveyance deed by the Owners in favour of the purchaser is for the reason that ownership is retained by the Owners. The right to develop and sell the property is with the Appellant under the Agreement. The Appellant is, therefore,

entitled to receive the price from the purchase. In any view of the matter, the scope of the activity of the Appellant is to conceptualize and develop the property, which is not an activity attributable to a 'real estate agent'. It cannot, therefore, be urged that the Appellant had undertaken the activity of a 'real estate agent'.

26. In this connection, it would be appropriate to refer to the CBEC Circular dated 7 October 1998. The aforesaid Circular notices that some international reality concerns are providing services to real estate developers and promoters in respect of evaluation of a proposed real estate scheme/ project by conducting techno economic study, providing feasibility report and even helping in marketing real estate projects. Such services attract service tax. The Circular clarifies that the activity of actual construction of any building carried out by builder/ developer does not attract service tax levy as it is not a service within the meaning of the term "real estate agent" or "real estate consultant". The said Circular containing a clarification regarding service tax on 'real estate' agents and 'real estate consultants' is as follows;

"CLARIFICATION REGARDING SERVICE TAX ON REAL ESTATE AGENTS AND REAL ESTATE CONSULTANTS

EXTRACTS OF CBEC CIRCULAR F.NO.B-11/3/98-TRU, DATED 7-10-1998/ TRADE NOTICE NO. 7/98-ST, DATED 13-10-1998, MUMBAI COMMISSIONERATE

8.1 (i) As per Section 65(35), "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. Section 65(36) defines a "real estate consultant" to mean any 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.

8.2 (ii) The rate of service tax on realty service is 5%. It may be noted that some international realty concerns, such as Richard Ellis, Colliers and Jardine etc. have opened shop in India and they are providing comprehensive realty services. Apart from the traditional

> services in respect of sale/purchase/leasing of real estate, such concerns are, inter alia, providing services to real estate developers and promoters in respect of evaluation of a proposed real estate scheme/project by conducting techno-economic studies, providing feasibility reports and by even helping in marketing real estate projects. Such services shall also attract service tax. However, it is clarified that activity of actual construction of any building, carried out by builders/developers does not attract service tax levy as it is not a service within the meaning of the term real estate agent or real estate consultant".

27. In this connection it will also be appropriate to refer to the decision of the Tribunal in **Saumya Construction Pvt Ltd. Vs. C.S.T., Ahmedabad**[5]. One of the issues that arose for consideration in the aforesaid case was whether the appellant was liable to discharge service tax ability under the category of "real estate agent" services for the amount received by it as development charges. The Tribunal found from a perusal of the agreement, that the Appellant had conceptualized, developed, implemented and marketed the scheme/ project for himself, and the amount received as development charges in the form of profit, would not be covered under the category of 'real estate agent' service. The relevant paragraph is reproduced below;

> "11. From the plain reading of above said definition of real estate agent and real estate consultant, it is seen that to get covered under the said definition, it has to be brought on record that the person has rendered directly or indirectly any services. **It is seen from the records and the agreement entered into by the appellant with various entities, we find that the appellant is liable for the profit or the loss of the said project despite the said project was executed in the name of special purpose vehicle. It is also seen that the entire project was financed by the appellant herein.** The said facts are not denied or disputed by the lower authorities. It is to be seen on this factual matrix whether there was any service rendered by the appellant in the category of real estate agent for receiving development charges. It is common knowledge that the real estate agent transacts the business of sale or purchase of the property, leasing or renting of the property and gets an amount as a commission. Though the definition of real estate consultant talks about evaluation, construction, design, development, construction, implementation, supervision, maintenance, marketing,

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5. 2016 (46) S.T.R. 723 (Tri. – Ahmd.)

> acquisition or management of real estate, it has to be borne out of the record that such services are rendered. **As already stated hereinabove that the appellant herein has not rendered any of the services. On the contrary, he envisaged conceptualized developed, implemented and marketed the scheme/ project for himself which is evident from the contract entered by the appellant with the special purpose vehicles. We are of the view that the amount received by the appellant as development charges which are nothing but in the form of profit, will not get covered under the category of real estate agent services".**
>
> **(emphasis supplied)**

28. It is however, sought to be contented by learned Authorized Representative of the Department that a 'real estate agent' has been defined to include a 'real estate consultant' and a 'real estate consultant' has been defined in Section 65(88) of the Act 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. It has, therefore, been urged that the service rendered by the Appellant was of 'real estate agent'.

29. This submission of the learned Authorized Representative cannot be accepted. In the first instance, the show cause notice that was issued to the Appellant seeks to restrict the definition of a 'real estate agent' to the first part of the definition as paragraph 8 of the show cause notice does not refer to 'real estate consultant'. The Appellant was never put to notice that the service rendered by the Appellant was attributable to a 'real estate consultant'. Secondly, the Circular dated 7 October, 1998 that has been reproduced above, specifically clarifies that the activity of actual construction of any building carried out by builders/developers

does not attract service tax levy as it is not a service within the meaning of the term 'real estate agent' or 'real estate consultant'.

30. The clauses of the present agreement clearly indicate that extensive construction and development had to be carried out by the Appellant and, thereafter, land/ plots were to be sold. The finances were also to be arranged by the Appellant. An agent does not carry out these activities. Thus, for this reason also the impugned order cannot be sustained.

31. It may not be necessary at all to deal with the submission of learned Counsel for the Appellant that the services, if any, rendered by the Appellant would also not fall under the category of "site formation" services since it has been contended by the learned Authorized Representative that the category of service for the activity undertaken by the Appellant would be 'real estate agent'. However, as learned counsel for the Appellant has made extensive submissions, this submission can be examined.

32. "Site formation" service is defined in Section 65 (97a) of the Act. It includes services for preparation of site for further development. This is apparent from the Circular dated 27 July 2005 issued by the Government of India, Ministry of Finance for the year 2005-2006 when this service was added. It is reproduced;

> "6.1. Any service provided or to be provided to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities is leviable to service tax under sub-clause (zzza) of section 65 (105) of the Finance Act, 1994. "Site formation and clearance, excavation and earthmoving and demolition" has been defined in clause (97a) of Section 65 of the Finance Act, 1994.
>
> 6.2. The definition of site formation and clearance, excavation and earthmoving and demolition is an inclusive definition and the activities specifically mentioned are indicative and not exhaustive. **Prior to construction of buildings, factory or any civil structure, activity of mining or laying of cables or pipes, preparation services of site formation and clearance, excavation and earthmoving or leveling are normally undertaken for a consideration to make**

> **the land suitable for such activities. Such services include blasting and rock removal rock, clearance of undergrowth, drilling and boring, overburden removal and other development and preparation services of mineral properties and sites, and other similar excavation and earthmoving services.** Demolition of structures, buildings, streets or highways is also undertaken for a consideration as a preparatory activity for subsequent construction activity or for clearing the site for any other purpose. **All such activities fall within the scope of this service.**
> 6.3. However, site formation and clearance, excavation and earthmoving and demolition services when provided in relation to agriculture, irrigation watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies are specifically excluded and not within the scope of this service.
> 6.4. Notification 17/2005-S.T., dated 7-6-2005 exempts this service provided in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, major and minor port".

(emphasis supplied)

33. A Division bench of the Tribunal in **Radius Corporation Ltd. vs. Commissioner of Central Excise, Raipur**[6] examined the scope for "site formation" services and it was observed that the contract signed for construction of the Major Ground Balancing Reservoir for raising the height of the existing reservoir would not fall under the category of "site formation". The relevant portion of paragraph 6 of the order is reproduced;

> "6. We find that Engineering, Procurement and Construction contracts were signed by the appellant for construction of Major Ground Balancing Reservoir, for raising the height of existing major ground reservoir and for protection work of existing major ground reservoir and extension of secondary reservoir. Activities undertaken in relation to these contracts neither fir in the definition of site formation and clearance, excavation and earthmoving and demolition service nor these relate to repairing/ renovating water sources as water sources in present case is river. **Some part of site formation, excavation and earthmoving done by the appellant was for preparing of further construction of reservoir and other civil works. We therefore are of the view that these activities undertaken by the appellant are out of purview of Site Formation, and Clearance Excavation and Earthmoving and Demolition Service as defined under Section 65(97a) of the Act".**

(emphasis supplied)

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6. 2014 (33) S.T.R. 416 (Tri. – Del.)

34. The activity carried out by the Appellant would, therefore, not fall under 'site formation'.

35. Thus, all the reasons stated above, the impugned order dated 29 February 2012 passed by the Commissioner of Central Excise, Jaipur cannot be sustained and is set aside.

36. It is, therefore, not necessary to deal with the other submissions advanced by learned Counsel for the Appellant relating to co-venture or extended period of limitation. The pre-deposit made by the Appellant in this Appeal shall be refunded to the Appellant within a period of two months from the date of copy of the order is produced before the competent authority. The Appeal is, accordingly, allowed.

(Operative portion of the order pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

Rekha