

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.1

**Service Tax Appeal No.76847 of 2016
And
Service Tax Cross Objection No.75046 of 2017**

(Arising out of Order-in-Original No.18/COMM/ST/SLG/16-17 dated 18.08.2016
passed by Commissioner of Customs, Central Excise & Service Tax, Siliguri.)

M/s. Luxmi Township Limited
(17, R.N.Mukherjee Road, Kolkata-700001.)

...Appellant

VERSUS

Commissioner of CGST & CX, Siliguri Commissionerate
.....Respondent
(C.R.Building, Hakimpara, Haren Mukherjee Road, Siliguri-734001.)

APPEARANCE

Shri Pulak Saha, FCA for the Appellant (s)

Shri K.Chowdhury, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

FINAL ORDER NO. 77349/2023

DATE OF HEARING : 19 September 2023
DATE OF DECISION : 18, Oct. 2023.

Per : K. ANPAZHAKAN :

Briefly stated facts of the case are that the Appellant, M/s Luxmi Township Limited, are engaged, inter alia, in the business of setting up of modern Townships which includes infrastructure and support

facilities. The Appellant obtained permission from Government of West Bengal to occupy land for the purpose of setting up of a satellite Township. They executed an indenture of Lease dated 21.11.2003, at the District Sub-Registrar office, Siliguri, granting a lease of 393.25 acres of land in favour of the Appellant. The lease is for a period of 99 years from 23.04.2002, with an option for renewal of the same for a further period of 99 years thereafter, upon the option of the lessee, with the same terms and conditions except the rent, which may be varied. As per the parent lease deed, the lessee shall pay an annual rent of Rs 2/- per decimal of the leasehold land in the District Land and Land Reforms Office (DLLRO), Darjeeling, within first 60 days of the year for which the rent is payable.

2. The Appellant (Assignor) had subsequently executed "Deeds of Assignments" with some business entities (Assignees) sub-leasing a part of land out of the total land measuring 393.25 acres which was taken on lease by them from the Government of West Bengal on 21.11.2003. The present issue is related to the following sub-leasing deeds executed by the Appellant with various companies:

- a) Deed No.00787 of 2008 executed with M/s. Ambuja Realty Development Ltd.
- b) Deed No.06226 of 2009 executed with M/s. Neotia Healthcare Initiative Ltd.,
- c) Deed No.07359 of 2011 executed with M/s. Choicest Enterprises Ltd.,
- d) Deed No.11220 of 2012 executed with M/s. Megha Builders,
- e) Deed No.04096 of 2012 of MLA-OSL Ltd.

4. On perusal of the Deeds of Assignments executed by the Appellant with the abovementioned companies, the department was of the view that the Appellant has sub-leased or assigned the plots to the said business/commercial entities on long term basis for a consideration and thus rendered taxable services relating to renting, letting, leasing or other similar arrangements of immovable property and such activity would fall within the purview of service tax.

5. The amount of 'Salami' or 'Premium' received by the Appellant towards sub-leasing of the said land as per the Deeds of Assignments are as follows:

- (i) Rs. 2,29,59,750/- received from M/s Choicest enterprises Ltd.
- (ii) Rs. 17,69,54,000/- received from M/s Megha builders
- (iii) Rs. 25,99,38,250/- received from M/s MLA-OSL Developers.
- (iv) Rs.2,41,25,000/- received from M/s Neotia Healthcare Initiative Ltd.
- (v) Rs. 19,42,05,000/- was received from M/s Ambuja Realty Development Ltd.

6. Finance Act, 2007 read with chapter V of the Finance Act, 1994 brought the services of "Renting of Immovable Property" for furtherance of business and commerce under the net of service tax w.e.f. 01.06.2007. The Finance Act, 2008 had inserted an explanation to the definition of "Renting of Immovable Property" w.e.f. 16.05.2008, to clarify that renting of immovable property services includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the immovable property. Finance Act 2010 specifically included 'vacant land given on lease for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce' within the definition of 'Renting of immovable property'

7. In view of the amended definition of 'Renting of Immovable property Service', the department was of the view that sub-leasing of the vacant land by the Appellant to Business entities on receipt of consideration would fall within the ambit of service tax and accordingly, the Appellant would be liable to pay service tax on the sub-leases executed on or after 01.07.2010, on the consideration received. Such services are liable to service tax after 01.07.2012 also, as stipulated in Section 66B of the Finance Act, 1994, as 'Declared service'.

8. The details of the particulars of land which has been subleased by the said assessee to the three business entities along with details of the deeds of assignment and date of execution are given below:

Sl.	Name of the	Deed of Agreement no.	Date of execution	Particulars of land
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No.	company/firm	and date	of the deed of assignment	
1.	Choicest Enterprises Ltd.	7359 2011dt.8.9.2011	08.09.2011	Total 3.036 acres under J.L. No.86, Plot nos: 74 & 75 (P) under L.R. Khatian no.307 and J.L. No.81, Plot nos: R.S.-173 & 174(P) under L.R. Khaitian no.1049
2.	Mega Builders	11220 of 2012 dt.19.12.12	16.11.2012	Total 1.887 acres under R.S. Khatian no.260, Plot no:297/459 crores to L.R. Khatian No.307, Plot no.817 under J.L. No.86 and R.S.Khatian No.847, R.S. Plot No.148 crores to L.R. Khatian no: 1049, L.R. Plot no:377 under J.L.No.81
3.	MLA-OSL Developers(JV)	04096 of 2012	30.04.2012	Total 6.61 acres under R.S. Khatian no.847, R.S. Plot no: 129 crores to L.R. Khatian no:1049, L.R. Plot no.375 under J.L. No.81.

9. Accordingly, a Show Cause Notice dated 11.06.2015 was issued to the Appellant demanding service tax along with Education Cess and SHE Cess amounting to Rs. 5,11,88,790/- on the total consideration of Rs.46,15,42,078/- received from the three Business Entities mentioned at SI No. (i), (ii), and (iii) in Pare 5, supra, during the Financial Years 2010-11 to 2012-13.(The amount received from the Business Entities mentioned at SI No (iv) and (v) in Para 5 has not been taken into account as the Deeds were executed prior to 01.07.2010). The said Notice was adjudicated by the Commissioner, Central Excise and Service Tax, Siliguri vide Order-in-Original dated 18.08.2016, wherein the duty demanded in the Notice was confirmed along with interest and imposed equal amount of duty as penalty. Aggrieved against the impugned order, the Appellant has filed the present appeal.

10. In their Grounds of appeal, the Appellant made the following submissions:

(i) They have executed a Deed with the State Government and acquired 393.25 acres of land for a period of 99 years, with effect from 23.04.2002. Out of this, they relinquished their leasehold right on certain portion of the land and permanently assigned the same on long term lease in favour of the said three companies vide three different Deeds of Assignment. The permanent assignment of land, executed as per the Deeds of Assignment, is not covered by Section 65(105)(zzzz) of the Finance Act,1994.

(ii) The said plots have been transferred to the said three companies on assignment basis with the approval of the DLLRO, with the condition

that all subsequent interaction on the land shall be between the above said three parties and the DLLRO, without the intervention of the Appellant.

(iii) The DLLRO, vide his letter dated 10.03.2014 has clarified that necessary permission has been accorded by the competent authority to the Appellant for executing Deeds of assignment with the said three parties. He has also confirmed that the land transferred in favour of the assignees have been mutated in the respective names of the assignees. From the date of execution of the said deed of assignment, the Assignee is deemed to be the lessee of the said plot and the Assignor has to apply for renewal of lease after expiry of the 99 years lease period. The full rights and Title goes in favour of the Assignee, subject to renewal of the original deed after its expiry.

(iv) The Title of the land which has been assigned to the Appellant has been transferred in the name of the said three parties and lands have already been mutated in the name of the respective parties. Therefore, the transaction must be treated as 'sale of leasehold rights' and service tax would not be applicable on the outright transfer of rights.

(v) The Impugned order has considered the Salami or premium deposited by Business entities with the Appellant as 'rent' paid by them to gain the right of occupation. They have received the premium or Salami for permanent assignment of all rights in favour of the Assignees and not in favour of sub-leasing of the land to the assignees. In fact, the assignees are liable to pay rent at the rate specified in Clause(2) of the Deed of Assignment to the DLLRO, Darjeeling. Thus, if the transfer of leasehold right is treated as 'lease' then, the State of west Bengal represented through the DLLRO should be treated as the Lessor, since the lease rent is paid to them and not to the Appellant.

(vi) There is a difference between the 'Premium or Salami' and Property Act, 1882. The price paid for transfer of possession or the right to enjoy the property is called the 'premium or salami' and the periodical payments made for continuous use of the property under lease is called 'rent'. In support of this contention, they relied upon the decision of the

Hon'ble High Court in the case of A R Krishnamurthy and A R Rajagopalan vs Commissioner of Income Tax, Madras (1982) 133 ITR 922 (Mad).

(vii) They also referred the Judgement of the Hon'ble Supreme Court in the case of Commissioner of Income Tax vs The Panbari Tea Co. Ltd. 1965 (57) ITR 422 (SC), to highlight the difference between 'Premium' and 'rent' in a transaction of lease.

(viii) They cited the decision of the Tribunal in the case of Greater Noida Industrial Development Authority vs Commissioner of Central Excise and Service Tax, Noida (20140 51 Taxman.com 73 (New Delhi-CESTAT), wherein it has been held that the Salami or Premium received in respect of lease of immovable property is not exigible to service tax.

(ix) The entire demand is barred by limitation. They were registered with service tax department under the category of 'Renting of immovable property' service and were paying service tax regularly. They have file ST-3 returns regularly. The department has alleged that they have received the following considerations in the respective Financial Years as mentioned below:

(i) In the Fin. Year 2010-11 - Rs. 12,29,59,750/-

(ii) In the Fin. Year 2011-12 - Rs. 16,14,00,000/-

(iii) In the Fin. Year 2012-13 - Rs. 17,71,82,328/-

The above details have been taken from their profit and loss account. They have not suppressed any information from the department. The department initiated the investigation vide letter dated 13.08.2013. They have furnished all information regarding the Deeds of Assignment executed by them vide letter dated 26.08.2013. The Notice was issued on 11.06.2015, more than two years after all information was furnished by them to the department. Hence, the entire demand issued in this case was beyond the normal period of limitation. As they have not suppressed any information from the department the Notice issued invoking extended period is not sustainable.

(x) Accordingly, they prayed for setting aside the impugned order confirming the demand and imposing penalty on the Appellant.

11. The Ld. A.R submitted that the sub-lease executed by the Appellant with the three Business Entities fall within the ambit of the definition of 'Renting of immovable property' service with effect from 01.07.2010. Finance Act 2010 specifically included 'vacant land given on lease for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce' within the definition of 'Renting of immovable property'. The sub-lease executed cannot be considered as 'sale of property' as there was no sale agreement executed. Accordingly, he prayed for upholding the impugned order.

12. Heard both sides and perused the appeal records.

13. From the information available on the record, we observe that the Appellant executed a Deed with the State Government and acquired 393.25 acres of land for a period of 99 years, with effect from 23.04.2002. Out of this, they relinquished their leasehold right on certain portion of the land and permanently assigned the same on long term lease in favour of the three companies vide three different Deeds of Assignment. Thus, the issue to be decided in the present appeal is whether this permanent assignment of land is covered under the definition of 'Renting of Immovable Property' as defined in Section 65(105)(zzzz) of the Finance Act,1994, after the amendment, with effect from 01.07.2010. For that, it is necessary to analyze the definition of 'Renting of immovable property service' as it existed prior to 01.07.2010 and thereafter. For the sake of ready reference the said definitions are reproduced below:

14. Section 65(105)(zzzz) of the erstwhile provisions of the act (effective till 30.06.2012) provided the definition of "Taxable service" which means any service provided or to be provided to any person, by any other person, by renting of immovable property or any other service in relation to such renting 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 hostels, boarding houses, holiday accommodation, tents, camping facilities.

Clause (v) of the Explanation-1 given hereinabove relating to leasing of vacant land has been included in the definition of 'immovable property' by the Finance Act, 2010, effective from 01.07.2010.

15. In the Negative List regime effective from 01.07.2012, Renting of immovable property has been included in the 'Declared List' of services, viz., Section 66E of the Finance Act, which specifically made 'Renting of

immovable property' as 'Declared Service'. The term "Renting of immovable property" has been defined under clause (41) of Section 65B of the Act and also under clause (f) of Rule 2 of the Service Tax Rules 1994. Rule 2(f) of the Service Tax Rules, 1994 defines "Renting of Immovable Property" means any service provided or agreed to be provided by renting of immovable property or any other service in relation to such renting.

Section 65B(41) of the Act defines 'renting' as allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly in an immovable property and includes letting, leasing, licensing or other similar arrangement in respect of immovable property.

16. We observe that the Revenue has inferred the term 'renting' from the above definitions and stated that it includes letting, leasing, licensing or other similar arrangement in respect of immovable property, which as per the clause (26) of the General Clauses Act, 1897 includes land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to earth which makes it clear that in the new regime, definition of renting is very wide in scope and covers almost everything with respect to transfer or any right/or possession to use an immovable property in any manner by one person to the other. Thus, the Revenue is of the view that prior to 01.07.2012, only renting of vacant land was subjected to service tax which would be used for construction of buildings for furtherance of business or commerce, whereas w.e.f.01.07.2012, the definition of renting of immovable property has been widened to include everything with respect to transfer or any right/possession to use an immovable property in any manner.

17. As per section 105 of the Transfer of Property Act, 1882 the term lease is defined as follows:-

A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of

crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined : The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

18. Thus, we observe that the issue to be decided here is whether the permanent transfer of the lease hold rights by the Appellant to the Business entities would be termed as ' sub-lease' to bring it under the ambit of levy of service tax or it can be termed as ' sale of leasehold rights' which is not liable to service tax. The Appellant submits that there is a minute difference between 'sub-lease' and 'assignment of lease'. In the 'sub-lease', the sub-lessor reserves a right of reversion, and in case of 'assignment of lease', the entirety of the rights being transferred to the assignee to the extent of the property covered thereby.

19. In this regard it is relevant to see the permission granted by the DLLRO for transfer of the rights of the Appellant to the said three business entities and the clarification issued by them to the department vide their letter dated 14.09.2014, the copies of which are scanned and reproduced below:

TOWNSHIP LTD. UTTORAYAN FAX NO. : 2571106

ANNEXURE - A/2

Apr. 30 2014 02:24 PM P1

196

Government of West Bengal
Office of the District Land & Land Reforms Office, Darjeeling
(Special Cell at BDO, Office at Shiv Mandir)

Memo No. 412 Special (Cell)/11

dated: 06/11/2012

From : The District Land & Land Reforms Officer
Darjeeling
To : The Director
M/s Luxmi Township Ltd
Kishore Bhawan, 17, R.N Mukhrjee Rd
Kol - 01
Sub : Transfer of leasehold Land.
Ref. : Your application dated 06.11.2012

With reference to his application dated 06.11.2012 permission is hereby accorded to the Lessee, to assign his lease hold right in respect 1.887 Acs of lease hold land to M/s Mega Builders, as detailed in the schedule below, for the unexpired period of lease on the same terms and conditions as mentioned in the original lease deed of Luxmi Township Limited in addition to the following terms and conditions.

The ASSIGNEE should get his name registered in the office of the DLLRO, Darjeeling within three calendar months after obtaining possession of the land and will possess and use the land and will bound by terms, covenants and conditions in such lease deed.

The ASSIGNEE shall pay such rent as may be determined by the DL&LRO, Darjeeling at the rate of 0.03 % of the land cost, within first 60 days of the year for which such rent is payable, in the office of the SDL&LRO, Siliguri.

The ASSIGNEE shall be entitled to take fresh lease after expiry of unexpired period of lease on such terms and conditions and on payment of such Salami and annual rent as the State Government may then fix in granting such fresh lease.

SCHEDULE

Dist	P.S	Mouza	J.L. No	Plot No	Area (In Sq Ft)
Darjeeling	Matigara	Ujjanu	39	297 /459(p) (RS)	1.807 Acs
		Gourcharan	81	817 (p) (LR)	
				148 (p) (RS) 377 (p) (LR)	0.08 Acs 1.887 Acs

District Land & Land Reforms Officer
Darjeeling.

dated: 06/11/2012

Memo No. _____ /1(1)/Spl.(Cell)/12

Copy forwarded for information to:-

- M/s Mega Builders, Swaika Centre, Room No 501, 5th Floor, 4A Pollock Street, Kol - 01. Uttorayan, Siliguri

District Land & Land Reforms Officer
Darjeeling.

TOWNSHIP LTD.UTTARAYON

FAX NO. :2571186

Apr. 30 2014 04:05PM P1

197

Government of West Bengal
Office of the District Land & Land Reforms Office, Darjeeling
(Special Cell at BDO, Office at Shiv Mandir)

Memo No. 31 / DLLRO/Spl (Cell)/11

dated: 14/11/2011.

From : The District Land & Land Reforms Office,
Darjeeling.

To : The Director
M/s Luxmi Township Ltd.
Kishore Bhawan, 17, R.N Mukherjee Rd
Kol -01

Sub : Transfer of Leasehold land

Ref. : Your application dated 21st September, 2011

With reference to his application dated 21st September, 2011 permission is hereby accorded to the Lessee, Luxmi Township Ltd. to assign his lease - hold right in respect of 6.61 acres of lease hold land to M/s M.L.A. OSI Developers (JV) for Group Housing, as detailed in the schedule below, for the unexpired period of lease on the same terms and conditions as mentioned in the original lease deed of Luxmi Township Limited in addition to the following terms and conditions.

The ASSIGNEE should get his name registered in the office of the DLLRO, Darjeeling within three calendar months after obtaining possession of the land and will possess and use the land and will bound by terms, covenants and conditions in such lease deed.

The ASSIGNEE shall pay such rent as may be determined by the DL&LRO, Darjeeling at the rate of 0.03 % of the land cost, within first 60 days of the year for which such rent is payable, in the office of the DL&LRO, Siliguri.

The ASSIGNEE shall be entitled to take fresh lease after expiry of unexpired period of lease on such terms and conditions and on payment of such Salami and annual rent as the State Government may then fix in granting such fresh lease.

SCHEDULE

Dist	P.S	Mouza	J.L. No	Plot No	Area (In Acs)
Darjeeling	Matigara	Gourcharan	81	129 (RS)	6.61 Acs
				375 (LR)	
				Total	6.61 Acs



14/11/2011
 District Land & Land Reforms Officer
 Darjeeling.

TOWNSHIP LTD.UTTARAYON

FAX NO. :2571106

Apr. 30 2014 04:03PM P1

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Government of West Bengal
Office of the District Land & Land Reforms Officer
Darjeeling

Memo No. 4 / DLLRO/ Spl Cell / Matigara

Dated 10.05.2011

To : The Director.
M/s Luxmi Township Ltd
Kishore Bhawan, 17, R.N. Mukherjee Road
Kolkata - 01

Sub : Transfer of leasehold land

Ref : Your letter dated LTL dated 05.04, 2011 in favour of M/s Choicest Enterprises Ltd., 216 A/C Bose Rd, Kol - 17.

With reference to his application dated 05.04, 2011, permission is hereby accorded to the Lessee Luxmi Township Limited, to assign his lease - hold right in respect of 3.036 acres of lease-hold land, as detailed in the schedule below, for the unexpired period of lease on the same terms and conditions as mentioned in the original lease deed of Luxmi Township Limited in addition to the followings terms and conditions to M/s Choicest Enterprises Limited, 216, A.J.C Bose Road, Kol - 17. It is also to be stated that the earlier permission granted by the SDL& LRO Siliguri vide Memo No 2058 dated 03.09.2008 in favour of the allottee M/S Green Emerald Hotel & Resort Co. Ltd has been cancelled as prayed by the allottee as stated vide your letter dated ref above

The ASSIGNEE should get his name registered in the office of the District Land & Land Reforms Officer, Darjeeling within three calendar months after obtaining possession of the land and will possess and use the land and will bound by terms, covenants and conditions in such lease deed.

The ASSIGNEE shall pay such rent as may be determined by the DL&LRO, Darjeeling at the rate of 0.3% of the land cost, within first 60 days of the year for which such rent is payable, in the office of the SDL&LRO, Siliguri

The ASSIGNEE shall be entitled to take fresh lease after expiry of unexpired period of lease on such terms and conditions and on payment of such Salami and annual rent as the State Government may then fix in granting such fresh lease.

Schedule

Dist	F.S	Mouza	J.L. No	Plot No	Area (In Acres)
Darjeeling	Matigara	Gourcharan Ujjani	31 86	173,174 (p) 74, 75 (p) RS 398,399, 144,145(LR)	1.185 0.382 0.784 0.685
Total					3.036

Additional District Magistrate
&
District Land & Land Reforms Officer
Darjeeling



ANNEXURE-A/6

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Government of West Bengal
Office of the District Land & Land Reforms Officer, Darjeeling
(Special Cell)

Memo No. 373 / Speical (Cell)/14dated: 14/9/2014

From : The District Land & Land Reforms Office,
Darjeeling.

To : The Commissioner of Customs
Central Excise & Service Tax
Siliguri Commissionerate,
Central Revenue Building, Haren Mukhrjee Road
Hakimpara, Siliguri - 734401

Sub : In the matter of M/s Luxmi Township Ltd. (LTL)

Ref : DOC No V(12) 26/ S. Tax / SIV/ Slg Comm/ 2013 14543 dated
11.09.2014.

31/8

As desire vide above ref memo, enclosed please find herewith the
parawise report which is as follows.

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1. The Sub-Lease is not valid as per law as communicated by the L & LR deptt vide No 1343 - GE (M) / 3M - 71/08 dated 12.03.2003. After the deptt has cancelled the deed of Sub-Lease and order for Deed of Assignment to the DLLRO vide No 3828/ GE (M) / 3M - 71-08 dated 14.12.2009 . It is also to be stated that the full rights & title as a lessor goes to the Assignee subject to the renewal of lease after the expiry of lease deed (Original) by the Assignee himself.
2. Yes , necessary permission is hereby granted for the followings . M/s Choicest Enterprises Ltd, Mega Builders & MLA- OSL Developers (JV) .
3. The obligations written in the original (Parent Lease) lease deed remains to the Luxmi Township Limited. The land transferred by the M/s LTL in favour of the assignees is mutated in the respective names of the Assignees.
4. From the date of execution of the said deed of Assignment, the Assignee is deemed to be the lessee of the said plot and the assignor has to apply for renewal of lease after the expiry of the lease deed period.

M

District Land & Land Reforms Officer
Darjeeling.



20. To a query from the Bench regarding the difference between 'lease', 'sub-lease' and assignment, the Ld.Counsel for the appellant submitted as under:-

Assignments and subleases are terms for situation in which a tenant in possession of property transfers his or her right to possess that property to a third party. If the lessee transfers his or her entire remaining interest in the tenancy, then the transfer is known as an assignment . If the lessee transfers only part of his or her interest, then the transfer is known as a sublease.

There are two forms of relationship between every landlord and tenant. There is contractual relationship that took effect and exists by virtue of lease agreement itself. That relationship is known as "private of contract".

In addition, there is a property ownership relationship, by virtue of their sharing of the ownership of the property. That relationship is known as "privity of estate". "Privity of estate" exists between two parties when those two parties have successive ownerships in the same property (i.e., one holds a present interest while the other holds a future interest or they both hold future interests, one after another).

The Assignment

An assignment is a full transfer of the lease between the tenant and the assignee. Therefore, since the tenant no longer has any ownership interest in the property, there is no longer any relationship between the landlord and the tenant as far as the property ownership is concerned. Therefore, there is no longer "privity of estate" between the landlord and the tenant. On the other hand, there now is privity of estate between the landlord and the assignee. This is because the assignee now owns the present interest in the property. This present interest will end only at the end of the lease when it will go back to the landlord. Since the landlord's right to possession is now successive to the possession of the assignee, the landlord and assignee are in privity of estate.

Privity of contract, on the other hand, still exists between the landlord and the tenant. This is because the original contract that existed

between the landlord and the tenant is still fully valid even after the assignment. In other words, the landlord does not give up his or her right to enforce the lease agreement with the tenant just because the tenant transfers his or her interest to the third party. There is no privity of contract, of course, between the landlord and the assignee because those two parties never agreed to anything between themselves.

The Sublease

The sublease is only a partial transfer of interest from the tenant to the sublessee. The tenant is transferring part of his or her interest in time to the sublessee. Therefore, there is no privity of contract or privity of estate between the landlord and the sublessee in a sublease. The reason that there is no privity of estate between the landlord and the sublessee is that the landlord's right to possession of the property does not follow the sublessee's right to possession. Instead, it still follows the tenant's right of possession. The landlord is, however, still in both privity of estate and the privity of contract is still applicable for the same reason as with the assignment (the landlord and the tenant agreed on the terms of the original lease). In addition, there is privity of estate between the landlord and the tenant because the right to possession of the landlord still follows the right of possession of the tenant.

21. A perusal of the permission granted and the clarification issued by the DLLRO produced above reveal the following.

- (i) Full rights and the Title hitherto available with the Lessor has been transferred to the Assignees.
- (ii) After the Deeds of Assignment has been executed in favour of the three Business Entities, the land transferred has been mutated in the name of the respective Assignees.
- (iii) After the Deed of Assignment, the Assignee is deemed to be the lessee of the said plot.
- (iv) The Assignee is responsible for renewal of the lease deed after its expiry.
- (v) The Assignee is responsible for payment of 'rent' fixed by the Government.

22. From the above it is evident that the State Government considers only the Assignee as the lessee of the plots transferred in their names. In a normal lease, the lessor retains the reversionary rights and the property is returned back to them after the lease period. The Title of the property is never transferred to the lessee. Thus, we observe that the terms and conditions of the Deeds of Assignment clearly indicate that it is not a lease or sub-lease as alleged in the impugned order. In the instant cases, from the Deed of Assignment, we observe that the Appellant does not have any reversionary right of the property after the after the permanent transfer of their leasehold rights to the three Business Entities. It is only the assignees who have the right to get the lease renewed in their favour after completing the formalities directly with the Govt. of West Bengal and the Appellant does not have any role in this regard.

23. The contention of the Appellant is that either prior to 01.07.2012 or after that, the transaction would come under the purview of 'Renting of immovable property, only if the transaction is first classifiable as 'leasing' or 'sub-leasing'. The Appellant stated that they have executed a Deed with the State Government and acquired 393.25 acres of land for a period of 99 years, with effect from 23.04.2002. Out of this, they relinquished their leasehold right on certain portion of the land and permanently assigned the same on long term lease on favour of the said three companies vide three different Deeds of Assignment. The permanent assignment of land cannot be called as 'lease' and hence it would not fall under the definition of taxable service as defined under Section 65(105)(zzzz) of the Finance Act, 1994. We observe that once the Appellant executed the Deed of Assignment in favour of the three business entities, the 'Title' of the land which has been assigned to them has been transferred in the name of the said three parties. Subsequently, lands have also been mutated in the name of the respective parties. Therefore, the transaction must be treated as 'sale of leasehold rights' and service tax would not be applicable on the outright transfer of rights. Further, after the transfer, the 'rent' was

payable by the three Business Entities directly to the DLLRO and not to the Appellant. The Appellant have not received any consideration as 'rent'. The amount they received as one time payment as 'premium or Salami' is meant for the developmental activities undertaken by them on the land received from the State Government. After permanent transfer of the leasehold rights to the three Business Entities , they have no right on the land. For any further activity on the land, the said Business Entities have to deal directly with the DLLRO/State Government, except renewal after expiry of the original lease of 99 years. Thus, we hold that that the transaction undertaken by the Appellant cannot be termed as 'lease' or 'sub-lease' for the purpose of levy of service tax.

24. The Appellant cited the decision of the the Hon'ble High Court at Kolkata in their own case in respect of the same property while allowing the W.P. 13645 (W) of 2013 held that :

"sub-lease or transfer of rights effected by the petitioner company in favour of any third party in respect of any area in what is known as Luxmy Township would be regarded as an assignment of the petitioner rights under the original lease in respect thereof."

On the basis of the above decision of the Hon'ble High Court, the Appellant contended that at any stretch of imagination they cannot be said to be a 'lessor' of said leasehold property for the purpose of levy of service tax once they received the one time salami/premium from the said assignees. The department would have made out a case , had it been a situation where the property would have come back to the sub-lessor after expiry of the lease. Since the leasehold right alongwith obligations are permanently assigned in favour of the assignees herein and the property would not come back to the Appellant, it cannot be considered as sub-lease of property thereby attracting the service tax liability under "Renting of immovable property".

25. We observe that the impugned order has alleged that the Appellant exercises some sort of control even after assignment of the said land. In this context, the Ld.Commissioner referred to some of the obligations of the assignees as mentioned in the Deed of Assignment

wherein prior intimation is required to be given to the Appellant by the assignee to perform certain acts in respect of the land. In this regard, the Appellant submits that the control as has been alleged is nothing but the obligation which the Appellant is required to fulfill with the Govt. of West Bengal, as per the original lease agreement. For example, with respect to the Uttorayon Township agreement, it has been specifically stated in clause (19) of the Obligations of Assignee contained in the Deed of Assignment that all common areas, services and facilities such as roads, water system, drainage, garbage disposal, landscape, sewerage system, etc., in the Township shall remain the property of the Appellant. As the Appellant is responsible for the maintenance and management of the common areas and facilities which has been developed by them in 'Uttorayon Township' for a period of 18 months from the date of handing over the physical possession of the said plot to the Assignee and subsequent to the expiry of 18 months the maintenance of common areas will be the responsibility of the Township Management Company to be formed or engaged by the Assignor or by the body to be constituted by the allottees of different plots in the Uttorayon Towhship and the common maintenance charges for the common areas will be paid by the Assignee to such Company or body, as the case may be. Thus, the Assignee is required to intimate/obtain permission of the Appellant or any other agency set up by the Appellant in some circumstances for the limited purpose of management and maintenance of the common areas which is the property of the Appellant and in no way this kind of intimation/obtaining permission of the Appellant can be said to be 'exercise of control' by the Appellant over the said three companies/assignees as alleged in the impugned order.

26. The Appellant further submits that in response to the clarification sought by the Department from the DLLRO, Darjeeling, it has been clarified by the DLLRO that full rights and title as lessor goes to Assignee under the Deed of Assignments which clearly indicates that this is the case of perpetual assignment of leasehold right and not 'sub-

lease' as alleged in the impugned order. In the Deed of Assignment it is categorically mentioned that all the rights, title and interest has been transferred by the Appellant in favour of the Assignee and the Assignee would be deemed to be the Lessee of the plot as if the Lease had been executed by the State Government in favour of the assignee. Further, the letter of permission accorded to the Appellant by the DLLRO clearly states that the assignee would be deemed to be the Lessee of the plot as if the lease has been executed by the State Government in favour of the assignee. Further, the letter of permission accorded by the DLLRO to assign the leasehold right in favour of the assignee stated inter-alia that assignee shall pay such rent as may be determined by the DLLRO, Darjeeling @ 0.03% of the land cost within first 60 days of the year for which such rent is payable in the office of the DLLRO. The clause regarding payment of rent to the DLLRO by the assignee has also been spelt out in the Deed of Assignment. Thus, if the Deed of Assignment is to be regarded as Lease Agreement, then it should be regarded as a Lease Agreement which is to be read with Letter of Permission accorded to the Appellant by the DLLRO between the State of West Bengal and the assignee for which the consideration is payable in the form of rent to the State of West Bengal through DLLRO.

27. We observe that the Appellant has acquired 393.25 acres of land for a period of 99 years from the State Government, under a lease deed. Out of this, they have relinquished their leasehold right only on certain portion of the land and permanently and assigned the same on long term lease on favour of the said three companies vide three different Deeds of Assignment. The Appellant is responsible for the maintenance of all common areas, services and facilities such as roads, water system, drainage, garbage disposal, landscape, sewerage system, etc., in the Township, for a period of 18 months from the date of handing over the physical possession of the said plot to the Assignee and subsequent to the expiry of 18 months the maintenance of common areas will be the responsibility of the Township Management Company to be formed or engaged by the Assignor. Thus, we observe

that the responsibility of maintenance of the common areas remain with the Appellant. This is as per their agreement in the original lease deed with the State Government. In order to honour the commitments as agreed with the State Government in the original lease deed, the Appellant has reserved certain rights with them. As the Appellant is responsible for the maintenance and management of the common areas and facilities, certain specific Clauses have been brought in the Deeds of Assignment to perform the functions which have been assigned to them by the State Government ,in the original lease deed.. Accordingly, we observe that the Deeds of Assignment signed with the three Bussiness Entities are different from the normal lease agreements. In any lease agreement , the consideration is payable by the lesse to the lessor. In this Deed of Assignment the rent @ 0.03% of the land cost is payable by the Assignee in the office of the DLLRO within first 60 days of the year for which such rent is payable. The one time premium received by the Appellant is meant for compensating the developmental activities undertaken by the Appellant in the land acquired from the State Government. As per their lease agreement with the State government/DLLRO, they are still responsible for maintenance of the common areas and the areas which are not assigned and under their control. Accordingly, we hold that these Clauses are incorporated in the Assignment deed only to enable them to perform the functions as per the original deed, which would no way infringe any of the rights permanently transferred to the Assignees.

28. We observe that after the execution of Deeds of Assignment and permanent transfer of leasehold rights by the Appellant in favour of the Assignees, the Title of the land which has been assigned to the Appellant has also been transferred in the name of the said three parties and lands have already been mutated in the name of the respective parties. This is evident from the clarification issued by the DLLRO. Therefore, we hold that the transaction must be treated as 'sale of leasehold rights' and service tax would not be applicable on the outright transfer of rights for a period of 99 years.

29. We observe that the one time Premium received by the Appellant cannot be equated with rent payable on regular intervals for continuous use of the property . The difference between the Premium or salami and the lease rent as envisaged in Section 105 of the Transfer of Property Act, 1882, has been dealt in the decision of the Hon'ble High Court in the case of A R Krishnamurthy and A R Rajagopalan vs Commissioner of Income Tax, Madras (1982) 133 ITR 922 (Mad). The relevant portion of the decision is reproduced below:

"Section 105 of the Transfer of Property Act defines a lease of immovable property as "a transfer of a right to enjoy such property, made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium and the money, share, service or other thing to be so rendered is called the rent". A lease thus consists of a right to the possession and use of the property owned by some other person. It is an outcome of the separation of ownership and possession. The lessor of the land is the who owned and possessed it, but has transferred the possession of it to another. The price paid for the transfer of possession or the right to enjoy the property is called the premium under Section 105 of the Transfer of Property Act. The periodical payments made for the continuous enjoyment of the benefits under the lease are called rents or royalties."

30. From the decision cited above, it is observed that the price paid for transfer of possession or the right to enjoy the property is called the 'Premium or Salami' and the periodical payments made for continuous use of the property under lease is called 'rent'. The Appellant has received only a one time payment as Premium and hence by relying on the above decision we hold that the Premium received by the Appellant cannot be called as 'rent'.

31. The difference between the 'Premium' and 'Rent' has been highlighted in the Judgement of the Hon'ble supreme Court in the cse of

Commissioner of Income Tax vs The Panbari Tea Co. Ltd. 1965 (57) ITR 422 (SC), the relevant para of the decision is reproduced below:

"Under section 105 of the Transfer of Property Act, a lease of immovable property is a transfer of a right to enjoy the property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent. The section, therefore, brings out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and the latter a revenue receipt. There may be circumstances where the parties may camouflage the real nature of the transaction by using clever phraseology. In some cases, the so-called premium is a fact advance rent and in others rent is deferred price. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive but it helps the court, having regard to the other circumstances, to ascertain the intention of the parties.

Bearing the said principles in mind let us scrutinize the lease deed dated March 31, 1950. Under that document interest in two large tea estates comprising 320 acres and 305 acres respectively under tea, along with the bungalows, factory buildings, houses, godowns, cooly lines and other erections and structures, was parted by the lessor to the lessee for a period of 10 years; and during that period the lessee could enjoy the said tea estates in the manner prescribed in the document. Under the document, therefore, there was a transfer of substantive interest of the lessor in the estates to the lessee and a conferment of a right on the lessee to use the said estates by exploiting the same. Under clause 4 of the lease deed for the transfer of the right

a premium of Rs.2,25,000/- had to be paid to the lessor and for using the estates the lessee had to pay an annual rent of Rs.54,000/-. Both the premium and the rent were payable in instalments in the manner provided in the document. The parties were businessmen presumably well-versed in the working of tea estates. They must be assumed to have known the difference between the two expressions "premium" and "rent"; and they had designedly used those two expressions to connote two different payments. The annual rent fixed was a considerable sum of Rs.54,000 and the premium, when spread over 10 years, would work out to Rs.22,500 a year. There is no reason, therefore, to assume that the parties camouflaged their real intention and fixed a part of the rent in the shape of premium. The mere fact that the premium was made payable in instalments cannot obviously be decisive of the question, for that might have been to accommodate the lessee."

32. We observe that the Tribunal in the case of Greater Noida Industrial Development authority vs Commissioner of Central Excise and Service Tax, Noida (2014) 51 Taxman.com 73 (New Delhi-CESTAT), held that the 'Salami or Premium' received in respect of lease of immovable property is not exigible to service tax. The relevant portion of the said decision is reproduced below:

"10. *Whether the Service Tax is chargeable only on the lease rent or also on one time premium amount charged in respect of long term leases?*

10.1 *A lease is a transaction, which has to be supported by consideration. The consideration may be either premium or rent or both. The consideration which is paid periodically is called rent. As regards premium, the Apex Court in the case of Commissioner of Income Tax, Assam and Manipur v. Panbari Tea Co. Ltd. reported in (1965) 3 SCR 811 has made a distinction between premium and rent observing that when the interest of the lessor is parted with for a price, the price paid is premium or salami, but the periodical payments for continuous enjoyment are in the nature of rent, the former is a Capital Income and the latter is the revenue receipt. Thus, the*

premium is the price paid for obtaining the lease of an immovable property. While rent, on the other hand, is the payment made for use and occupation of the immovable property leased. Since taxing event under Section 65(105)(zzzz) read with Section 65(90a) is renting of immovable property, Service Tax would be leviable only on the element of rent i.e. the payments made for continuous enjoyment under lease which are in the nature of the rent irrespective of whether this rent is collected periodically or in advance in lump sum. Service Tax under Section 65(105)(zzzz) read with Section 65(90a) cannot be charged on the "premium" or 'salami' paid by the lessee to the lessor for transfer of interest in the property from the lessor to the lessee as this amount is not for continued enjoyment of the property leased. Since the levy of Service Tax is on renting of immovable property, not on transfer of interest in property from lessor to lessee, Service Tax would be chargeable only on the rent whether it is charged periodically or at a time in advance. In these appeals, in the show cause notice dated 19-3-2012 issued by the Addl. Director, DGCEI, New Delhi, Service Tax has been demanded only on the lease rent and not on the premium amount while in the subsequent show cause notice dated 17-10-2012 issued by the Commissioner of Central Excise and Service Tax, Noida, the amount of premium has also been included in the lease rent for the purpose of charging of Service Tax for which no valid reasons have been given. Therefore, the Order-in-Original dated 30-4-2013 confirming the Service Tax demand on the premium amount is not correct and to this extent, the Service Tax demand would not be sustainable."

33. In view of the decisions mentioned above, it is clear that consideration, ie one time payment, in the form of Premium or Salami and consideration in the form of 'rent' connotes two different types of consideration. In the instant case, we observe that the Appellant has not received any 'rent' from the assignees and the rent is payable by the assignees to the state of West Bengal through DLLRO. Accordingly, we hold that the premium or salami paid to the Appellant for transfer of interest in the property, is not exigible to the service tax as held by the

Tribunal in the case of Greater Noida Industrial Development authority vs Commissioner of Central Excise and Service Tax, Noida.

34. The Appellant stated that the entire demand is barred by limitation. They contended that they were registered with service tax department under the category of 'Renting of immovable property' and were paying service tax regularly. They have file ST-3 returns regularly. The department has alleged that they have received the considerations in the Financial Years 2010-11, 2011-12 and 2012-13. The details of the considerations received by them in the respective Financial years are available in their profit and loss account. Accordingly, they contended that they have not suppressed any information from the department and extended period not invocable to demand service tax. We find merit in the argument of the Appellant. The department has initiated the investigation for the first time vide letter dated 13.08.2013. The Appellant has furnished all information regarding the Deeds of assignment executed by them vide letter dated 26.08.2013. The Notice was issued on 11.06.2015, more than two years after all information was furnished by them to the investigating officers. Even otherwise, all information regarding the receipts from the said Business Entities are available in their profit and loss account. They were filing returns regularly and disclosed the rent income in which they have paid service tax. If the department has any doubt about the service tax paid by them, they could have clarified the same with the Appellant. Even after knowing the details, the officers took almost two years to issue the Notice. In view of the above, we hold that there is no suppression involved in this case and the entire demand issued in this case is barred by limitation. Accordingly, we hold that the demand is not sustainable on the ground of limitation also.

35. In view of the above discussion, we hold that the demands of duty along with interest and imposition of penalty in the impugned order is

not sustainable. Accordingly, we set aside the impugned order and allow the appeal filed by the Appellant. Service Tax Cross Objection No.75046 of 2017 filed by the Respondent, also gets disposed of.

(Order pronounced in the open court on 18.10.2023.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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