

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

REGIONAL BENCH – COURT NO. 1

Service Tax Miscellaneous Application No. 75670 of 2024

In

Service Tax Appeal No. 76203 of 2016

(Arising out of Order-in-Original No. 60/Commr/ST-I/KOL/2015-16 dated 31.03.2016 passed by the Principal Commissioner of Service Tax-I Kendriya Utpad Shulk Bhawan, 180, Shantipally, Rajdanga Main Road Kolkata 700107)

M/s. Bengal Silver Spring Projects Limited, : **Appellant**
5, J.B.S. Halden Avenue,
Kolkata-700 105

VERSUS

Principal Commissioner of Service Tax-I : **Respondent**
Commissionerate,
Kendriya Utpad Shulk Bhawan,
180, Shantipally, Rajdanga Main Road Kolkata 700107

APPEARANCE:

Shri Narayan Kumar Agarwal, CA for the Appellant

Shri. Navin Kumar Agrawal, CA for the Appellant

Mrs K. Kalpana, Authorized Representative for the Respondent

CORAM:

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

MISCELLANEOUS ORDER NO. 75550/2024

FINAL ORDER NO. 77501/2024

DATE OF HEARING: 12.11.2024

DATE OF PRONOUNCEMENT: 14.11.2024

Order: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed by M/s Bengal Silver Spring Projects Ltd (herein after referred as the appellant) against the impugned Order-in-Original No. 60/Commr/ST-I/KOL/2015-16 dated 31.03.2016 passed by the Principal Commissioner of Service Tax-I, Kolkata, wherein the

Ld. Principal Commissioner has confirmed the demand of service tax of Rs. 1,61,40,150/- along with interest and imposed equal amount of tax as penalty under section 78 of the Finance Act, 1994.

2. Brief facts of the case are that the appellant had entered into an agreement with Kolkata Municipal Corporation (KMC in short) to develop and maintain 8-acres of land. As per the lease agreement with KMC, appellant is entitled to all the construction / erection / structure of any nature whatsoever as the absolute owner thereof and to enter into agreement for transfer of its leasehold rights together with the constructed areas belonging to it. Accordingly, the appellant sub-leased the properties to various parties. In respect of the land to be mutated by the sub-lessee in their name, the sub-lessee is deemed to be the lessee of the said plot and has to apply to KMC for renewal of lease after expiry of the 99 years lease period. After mutation, the full rights and title goes in favour of the sub-lessee, subject to renewal of the original deed after its expiry. Therefore, the appellant treated the said transaction as 'sale of leasehold rights' and not paid service tax on the outright transfer of lease hold rights. However, the department considered the transaction of long term lease undertaken by the appellant as a taxable service liable for service tax under the category of 'Renting of immovable property service'. The department considered the one time Premium/ Salami received by the appellant from the sub-lessee as consideration towards the taxable service namely, 'Renting of Immovable Property Service'. As the appellant has not paid any service tax on one time premium, SCN was issued

to the appellant demanding service tax of Rs. 2,99,92,851 (including cess) along with interest and penalty. On adjudication, the Ld. adjudicating authority confirmed the demand of service tax to the tune of Rs. 16140150/- along with interest and imposed equal amount of tax as penalty. Demand on one time lease premium was confirmed under 'Renting of Immovable Property Service' and demand on some other receipts was confirmed under 'Business Auxiliary Service'. Aggrieved against the confirmation of these demands, the appellant has filed this appeal.

3. The appellant submits that term of lease is for a longer period (99 years) and such long term lease is not covered under the definition of renting as defined in Section 65(90a) of the Finance Act, 1994. While entering in to Sub-lease agreement with buyers/Sub-lessee, Stamp duty has been levied and paid on the value of the property being leased. The appellant submits that the transactions which are leviable to stamp duty, cannot be considered as service since such transactions are considered as 'sale'.

3.1. The Appellant submits that as per the agreement, the lessee does not have any reversionary right of the property after the permanent transfer of their leasehold rights to the respective sub-lessee. It is only the assignees who have the right to get the lease renewed in their favour after completing the formalities directly with the KMC and the Appellant does not have any role in this regard. Accordingly, the appellant submits that by 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 sub-lessees. Since the leasehold right along with obligations are permanently transferred in favour of the sub-lessees 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". Accordingly, they prayed for setting aside the demands confirmed in the impugned order.

3.2. The applicant enclosed a written opinion on the terms of the sub-lease deed, from a Solicitor/Advocate firm M/s Kanodia & Co. which is on similar lines.

3.3. The applicant further states that in a similar case before the same division bench, the Hon'ble CESTAT, Kolkata has held that Permanent transfer of leasehold rights by appellant to business entities would not be termed as sub-lease to bring it under ambit of levy of Service Tax; it could only be termed as 'sale of leasehold rights' which was not liable to Service Tax. This judgement was passed in the case of Luxmi Township Ltd. Versus Commissioner CGST & C. Ex., Siliguri [2023 (79) G.S.T.L. 232 (Tri. - Kolkata)].

3.4. Regarding the demand of service tax confirmed in the impugned order under the category of 'Business Auxiliary Service (BAS in short), the appellant submits that out of the total turnover of Rs. 2460689/- on which service tax is confirmed in the impugned order under 'BAS', Rs.1923362/- is on account of electricity, Rs.170000/-- is on account of Legal Charges, Rs.307627/- is on account of Misc.

Charges and Rs.59700/- is on account of sundry balance written off. However, in the impugned order, the Ld. adjudicating authority has confirmed the demand of service tax on the entire amount under the category of BAS. The appellant submitted that up to 30.06.2012 when the positive list regime of service tax was in operation, each receipt has to be classified under a particular category of taxable service. In the impugned order, the demand on the aforesaid charges is confirmed under the category of 'Business Auxiliary Service' without identifying their nature of receipt and taxability. The appellant submits that electricity has been consistently held to be goods under State VAT as well as Central Excise Laws. Legal Charges are claimed on account of payments made to advocates and are in the nature of re-imbursements. Similarly, miscellaneous receipt is on account of re-imbursement of corporation tax paid by the appellant on behalf of sub-lessee. Sundry balances written off cannot be said to be connected with provision of any taxable service. Accordingly, the appellant submitted that the demand confirmed under the category of 'BAS' in the impugned order is not sustainable.

3.5. The appellant also contested the demands confirmed in the impugned order on the ground of limitation. The appellant submits that the Show Cause Notice issued after a period of 18 months was time barred, as there was no suppression of fact with intention to evade the tax established in this case. The appellant submits that the taxability on this issue is arguable and has been subject matter of dispute at various forum. Further, non disclosure of specified value in the ST-3 returns by reason of

non-admission of liability cannot form basis for invoking the extended period. Also it is a fact on record that the demand has been calculated from the audited financial statements. SCN itself reveals that **“for computing the notice’s gross tax liability in the capacity of a service provider against the various categories of taxable services, their audited financial statements and ledgers have been considered”**. In such circumstances, suppression cannot be alleged and extended period cannot be invoked as held in the following cases:

- *Kamal Auto Finance Ltd. [2012 (26) STR 46 (Tri.Delhi)]*
- *Hindalco Industries Ltd. [2003(161) ELT (Tri-Delhi)]*

3.6. Accordingly, the appellant contested the demand on merit as well as on limitation.

4. The Ld. A.R. reiterated the findings in the impugned order. She submitted that sub leasing of the property amounts to 'renting' as defined under Section 65 (90a) of the Finance Act, 1994. In support of her above contention, she cited the decision of the Tribunal, Delhi in the case of GREATER NOIDA INDL. DEVELOPMENT AUTHORITY Versus C.C.E. & S.T., NOIDA 2015 (38) S.T.R. 1062 (Tri. - Del.), wherein it has been held that consideration received towards sub-leasing is chargeable to service tax under the category of 'Renting of Immovable Property Service'.

Accordingly, she prayed for upholding the demands confirmed in the impugned order.

5. Heard both sides and perused the appeal documents.

6. We observe that the appellant had entered into an agreement with Kolkata Municipal Corporation (KMC in short) to develop and maintain 8-acres of land. To understand the nature of the transaction, it is required to analyse some of the Clauses in the agreement.

6.1. The appellant submitted extracts of relevant clauses from the sub-lease agreement dated 24.09.2009 entered by them with one of the sub-lessee Mr. Kumbhan Das Mundhra. The relevant Clauses of the agreement are reproduced below:

Clause I:*The said lease Agreement also provided that the Sub Lessor Would be entitled to all the construction / erection / structure of any nature whatsoever as the absolute owner thereof and also further that the sub Lessor would be entitled to enter into agreement for transfer of its leasehold rights together with the constructed areas belonging to it and for the said purpose to sub-divide, sub-lease, sub-let and/or sub-demise, grant license in respect thereof, and also create mortgage or charge for obtaining finance or home loans on or after the execution of the said agreement, over or in respect of the said premises either in whole or parts or portions*

thereof as also to give on rent, sublease, licence or to sublet space, rooms, shops, restaurant and any other open or covered areas in the said premises or the buildings and facilities to be constructed and/or made therein at its sole discretion without being required to pay any further or other premium or rent or any other amount on any account whatsoever to the said KMC and also without requirement of any consent or permission from the said KMC;

And The Sub-lessee hereby declares confirms and covenants that:

.....

Clause e) *That the Sub Lessee herein shall obtain mutation from the Kolkata Municipal Corporation in respect of the said unit for which the Sub Lessor shall not have or raise any objection of any nature whatsoever and the sub Lessee shall bear and pay the taxes payable to the Kolkata Municipal Corporation fully in respect of the said unit and shall also bear and pay proportionately the expenses pertaining to the maintenance and common services and the municipal taxes for the common areas and all other outgoing in respect thereof from the date of this deed and shall keep the Sub Lessor and other owners / sub lessees / occupiers indemnified and harmless in that regard;*

And the Sub lessor and the sub lessee hereby jointly further confirm and covenant with each other as follows:

.....

Clause m) *The Sub Lessees and/or their respective transferee(s) shall be entitled to transfer, assign, mortgage, lease, sub-lease or let out or otherwise deal with their respective Units without any claim or obstruction from any other Sub Lessees. Notwithstanding the aforesaid, no transfer by the Sub Lessee shall be made or effected or caused to made or effected until such time the Sub Lessee pays and discharge all the dues and liabilities to the sub Lessor or the Maintenance Company in full and a no due certificate to that effect is issued / granted;*

.....

Clause o) *Before transferring, assigning, leasing or sub-leasing any Unit, 21 days notice of the intension to do so shall be given by the Sub Lessee to the Sub Lessor or the maintenance company. Provided however that nothing herein shall effect the absolute right of the Sub Lessees to transfer the unit to any person at such price as the Sub Lessee may choose;*

.....

6.2. On a perusal of the Clauses of the sub-lease agreement, it becomes clear that:

- Full rights and the Title hitherto available with the Lessor have been transferred to the sub-lessees.
- After the Deeds of sub-lease has been executed in favour of the sub-lessees, the land transferred has been mutated in the name of the respective sub-lessees.
- After the Deed of Assignment, the sub-lessee is deemed to be the lessee of the said plot.
- The sub-lessee is responsible for renewal of the lease deed after its expiry.

6.3. We observe that the Appellant does not have any reversionary right of the property after the permanent transfer of their leasehold rights to the respective sub-lessee. It is only the assignees who have the right to get the lease renewed in their favour after completing the formalities directly with the KMC and the Appellant does not have any role in this regard. We observe that once they received the one-time salami/premium from the said sub-lessees, the appellant cannot be said to be a 'lessor' of the said leasehold property for the purpose of levy of service tax. Since the leasehold right along with obligations are permanently assigned in favour of the assignees herein and the property would not come back to the Appellant, we hold that the transaction cannot be considered as sub-lease of property thereby attracting service tax liability under "Renting of immovable property". While entering in to Sub-lease agreement with

buyers/Sub-lessee, Stamp duty has been levied and paid on the value of the property being leased. We observe that the transactions which are leviable to stamp duty, cannot be considered as service and are primarily considered as sale. Accordingly, we hold that the lease is for a longer period (99 years) and cannot be covered under the definition of 'renting of immovable property service' as provided in Section 65(90a) of the Finance Act, 1994.

6.4. We observe that a similar view has been taken by this bench in the case of **Luxmi Township Ltd. Versus Commissioner CGST & C. Ex., Siliguri [2023 (79) G.S.T.L. 232 (Tri. - Kolkata)]**., wherein on similar facts and circumstances this Tribunal has held as under:

33. In view of the decisions mentioned above, it is clear that consideration, i.e. 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 v. Commissioner of Central Excise and Service Tax, Noida

6.4. In this case, we observe that the appellant has only received the one time premium as the consideration. There was no periodical rent payment. Accordingly, we hold that the permanent transfer of lease hold right by appellant to various parties would not be liable to Service Tax.

6.5. 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 v. Commissioner of Income Tax, Madras, (1982) 133 ITR 922 (Mad.)***. From the decision cited above, we observe 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 Applicant has received only a one-time payment as Premium and hence by relying on the above decision it becomes clear that the Premium received by the Appellant cannot be called as 'rent'.

6.6. The difference between the 'Premium' and 'Rent' has been highlighted in the Judgment of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax v. The Panbari Tea Co. Ltd., (1965) 57 ITR 422 (SC)***. From the aforesaid judgement, we observe that consideration, i.e. 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, the Applicant has not received any 'rent' from the sub-lessees. Accordingly, the premium or salami paid to the Applicant for transfer of right in the property, should not be exigible to the service tax.

6.7. In the impugned order we find that the Ld. adjudicating authority has relied upon the case of *GREATER NOIDA INDL. DEVELOPMENT AUTHORITY Versus C.C.E. & S.T., NOIDA 2015 (38) S.T.R. 1062 (Tri. - Del.)*. Ld. A.R also cited this decision in support of her contention. However, we find that the said decision is in favour of the appellant in this case as far as one time lease premium is concerned. In this decision, the Tribunal, Delhi has held that only lease rent is chargeable to service tax and not the one-time lease premium/salami. In this case, the appellant has collected only one time lease premium and not rent. Relevant para of the judgment is re-produced 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.

6.8 Thus, we hold that the one time Premium/ Salami received by the appellant from the sub-lessee is not a consideration towards the taxable service of 'Renting of Immovable Property'. Accordingly, we set aside the demand of service tax confirmed in the impugned order under the category of 'Renting of Immovable Property Service'.

6.9. Regarding the demand of service tax confirmed in the impugned order under the category of 'Business Auxiliary Service (BAS in short), we observe that the adjudicating authority has not given any specific finding regarding the liability of service tax under this category. We observe that up to 30.06.2012, when the positive list regime of service tax was in operation, each receipt has to be classified under a particular category of taxable service. In this case, the impugned order has not specifically categorized the liability under any of the seven categories listed in the definition of 'BAS'. We observe that the appellant has given the breakup of the total turnover of Rs. 2460689/- shown under BAS on which service tax is confirmed in the impugned order. As per the break up given by the appellant, Rs.1923362/- is on account of electricity, Rs.170000/-- is on account of Legal Charges, Rs.307627/- is on account of Misc. Charges and Rs.59700/- is on account of sundry balance written off. The appellant submitted that electricity has been consistently held to be goods under State VAT as well as Central Excise Laws. The appellant further submitted that Legal Charges are claimed on

account of payments made to advocates and are in the nature of re-imbursements. Similarly, they claimed that miscellaneous receipts are on account of re-imbursement of corporation tax paid by the appellant on behalf of sub-lessee. Sundry balances written off cannot be said to be connected with provision of any taxable service. However, we observe that the impugned Order does not specify under which clause of "BAS" the aforesaid charges would fall. Accordingly, we hold that demand of service tax confirmed under the category of 'BAS' is not sustainable without specifying the particular Clause under the definition of 'BAS'. Accordingly, we hold that the demand confirmed under the category of 'BAS' in the impugned order is not sustainable.

6.10. The appellant also contested the demands confirmed in the impugned order on the ground of limitation. We observe that in this case, the Show Cause Notice was issued after a period of 18 months. We also observe that the taxability on this issue has been subject matter of dispute at various forums. Also, it is a fact on record that the demand has been calculated from the audited financial statements. Thus, we hold that there is no suppression of fact with intention to evade the tax established in this case. Accordingly, we hold that the demand is also barred by limitation.

6.11. Since, the demand of service tax is not sustainable, the question of demanding interest and imposing penalty does not arise and accordingly, we set aside the same.

7. In view of the above discussions, we set aside the impugned order on merits as well as on limitation and allow the appeal filed by the appellant.

(Order Pronounced in Open Court on 14.11.2024)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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