

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.**

Service Tax Miscellaneous Application No.

85210 / 2019

(On behalf of appellant)

in

Service Tax Appeal No. 89766 / 2013

(Arising out of Order-in-Original No. 49/ST-II/RS/2013 dated 29.08.2013 passed by Commissioner of Service Tax, Mumbai-II)

**City and Industrial Development
Corporation of Maharashtra Ltd.**

Nirmal, 2nd floor,
Nariman Point,
Mumbai 400 021.

Appellant

Vs.

Commissioner of ST, Mumbai-II

4th floor, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

Respondent

WITH

Service Tax Appeal No. 88472 / 2014

(Arising out of Order-in-Original F. No. ST/II/Div.IV/Gr-V/CIDCO/12-13/3392 dated 06.05.2014 passed by Commissioner of Service Tax, Mumbai-II)

**City and Industrial Development
Corporation of Maharashtra Ltd.**

Nirmal, 2nd floor,
Nariman Point,
Mumbai 400 021.

Appellant

Vs.

Commissioner of ST, Mumbai-II

4th floor, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

Respondent

AND

Service Tax Appeal No. 86197 / 2015

(Arising out of Order-in-Original No. 43/ST-VII/RS/2014 dated 27.02.2015 passed by Commissioner of Service Tax, Mumbai-VII)

**City and Industrial Development
Corporation of Maharashtra Ltd.**

Nirmal, 2nd floor,
Nariman Point,
Mumbai 400 021.

Appellant

Vs.

Commissioner of ST, Mumbai-VII

Respondent

4th floor, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

AND

Service Tax Appeal No. 86274/2015

(Arising out of Order-in-Original F. No. ST.VII/Dn.IV/SCN/13/CIDCO/2014/1322 dated 23.03.2015 passed by Commissioner of Service Tax, Mumbai-VII)

City and Industrial Development Corporation of Maharashtra Ltd.

Appellant

Nirmal, 2nd floor,
Nariman Point,
Mumbai 400 021.

Vs.

Commissioner of ST, Mumbai-VII

Respondent

4th floor, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

AND

Service Tax Appeal No. 87442/2015

(Arising out of Order-in-Original No. 415/ST-VII/RS/COMMR/2015-16 dated 14.08.2015 passed by Commissioner of Service Tax, Mumbai-VII)

City and Industrial Development Corporation of Maharashtra Ltd.

Appellant

Nirmal, 2nd floor,
Nariman Point,
Mumbai 400 021.

Vs.

Commissioner of ST, Mumbai-VII

Respondent

4th floor, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

Appearance:

Shri V. Sridharan, Sr. Advocate with Shri Vinay Jain, C.A. for the Appellants
Shri Roopam Kapoor with Shri M.K. Sarangi, Authorised Representatives for the Respondent

CORAM:

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

FINAL ORDER NO. A/86348-86352/2019

Date of Hearing: 05.04.2019
Date of Decision: 05.08.2019

PER: SANJIV SRIVASTAVA

The application for early hearing is allowed. Appeals taken up for disposal.

2.1 The appeals detailed in table below are directed against the order/ demand notice as indicated.

Appeal No	ST/89766/13	ST/88472/14	ST/86197/15	ST/86274/15	ST/87442/15
SCN Date	19.10.2012				
Period of Dispute	01.06.2007 - 31.03.2012	01.04.2012 - 31.03.2013	01.04.2012 - 31.03.2013	01.04.2013 - 31.03.2014	01.04.2013 - 31.03.2014
OIO/ Demand Notice Date	29.08.2013	06.05.2014	27.02.2015	23.03.2015	14.08.2015
Demand Rs	1345600263	954881928	954881928	448081545	448081545
Interest Section 75	Not Quantified				
Section 76	Yes	No	No	No	No
Section 77	5000	No	No	No	No
Section 78	1345600263	No	No	No	No

2.2 Appellant is a limited company incorporated under Companies Act, 1956 as subsidiary of State Industrial and Investment Corporation of Maharashtra Limited which is wholly held owned by state of Maharashtra

2.3 The Government of Maharashtra acquired lands in the project area from land owners under Land Acquisition Act On such acquisition, the ownership of the land vested in the Government of Maharashtra vide Section 16 or

17(1) of Land Acquisition Act, 1894 and always continued to remain with the Government only. For the purposes of development of the project area, the Government placed the said land at their disposal. Appellants after following the procedure leased the land to various private persons.

2.4 For the purpose of leasing the land appellants first enter into an agreement to lease on payment of lease premium, thereafter on completion of the construction activity and after obtaining occupation certificate and satisfying the terms of agreement, they enter into a lease deed with the intending Lessee, whereby it leases the plot of land along with structure to the lessee for a term of 60 years for a yearly rental Rs 100/-.

2.5 Since the appellants were not paying service tax on the said transactions which as per the revenue were taxable under the category of ***“Renting of Immovable Party”*** a show cause notice dated 19.10.2012 was issued to the appellants demanding the Service Tax not paid during the period 1.06.2007 to 31.03.2012 along with interest and penalties.

2.6 After 01.07.2012 as per the revenue appellants were liable to pay service tax under Section 66B off the Finance Act, 194. For period. 01.04.2012 to 31.03.2013 a demand notice dated 06.05.2014 and for the period 1.04.2013 to 31.03.2014 demand notice dated 23.03.2015 has been issued to the appellants.

2.7 The show cause notice and demand notices have been adjudicated by the Commissioner in the manner as indicated in table in para 1, supra.

2.8 Aggrieved by the orders appellants have filed these appeals.

3.1 In their appeal appellants have challenged the impugned order stating that-

- i. Commissioner has treated the alleged transaction of grant of right in leasehold property as amounting to service.
- ii. The allotment of plots by them as an agent of the state is a statutory function which could be performed only by state and therefore does not amount to service.
- iii. They are only an agent of the state of Maharashtra and not the service provider.
- iv. The transactions don not amount to renting of immovable property.
- v. During the period of "Agreement to Lease" there is no lessor-lessee relationship hence the order of Commissioner confirming the demand cannot be sustained.
- vi. Commissioner has not given any exclusion on account of renting of vacant land.
- vii. The amounts received by them as lease premium is towards the grant of right and not towards rendition of service.
- viii. Demand has also been made in respect of plots meant for residential use and for hotels.
- ix. Cum Tax benefit has not been allowed while making the demand.
- x. Extended period of limitation for making the demand has been wrongly invoked, despite there being many reasons to show that there was no suppression.
- xi. Decisions of Tribunal in case of Greater Noida Industrial Development Authority [2013 TIOL 44 (T-Del)] Bombay High Court in Percival Joseph Pareira vs The Special Land Acquisition Officer, ITAT in their own case reported at {[2012] 25 taxmann.com 333 (Mum)]} and Hon'ble Supreme Court in case of U T Chandigarh Administration Vs Amarjeet Singh [2009 (4) SCC 660]have been ignored
- xii. Commissioner has relied on the law which was not applicable during the period in dispute.

- xiii. Alternative submissions have not been taken into account.
- xiv. Consequential interest and penalties have been wrongly imposed.

4.1 We have heard Shri V Sridharan, Sr. Advocate with Shri Vinay Jain, Chartered Accountant for the Appellants and Shri Roopam Kapoor, Principal Commissioner and Shri M K Sarangi, Additional Commissioner, Authorized Representatives for the revenue.

4.2 Arguing for the appellants learned counsel submitted-

- i. For the period prior to 01.07.2010 taxable service under Section 65(105)(zzzz) is renting of immovable property. Vacant Land is excluded from the definition of 'immovable property'. Thus no service tax is payable on lease premium received for leasing of vacant land. {Greater Noida Industrial Development Authority [2015 (38) STR 1062 (T-Del)], [2015 (40) STR 46 (ALL)], New Okhla Industrial Development Authority [2014-TIOL-67-CESTAT-Del]}
- ii. Even for the period 01.07.2010 to 30.06.2012, vacant land continues to be excluded from the definition of immovable property. Insertion of clause (v) in the definition of 'immovable property' does not alter the position. Contrary decisions in case of Greater Noida Industrial Development Authority [2015 (38) STR 1062 (T-Del)], New Okhla Industrial Development Authority [2014-TIOL-67-CESTAT-Del] does not take into the fact what has been rendered taxable after .1.07.2010 is the renting of vacant land given on lease or license of an immovable property. Thus renting of leased land has become taxable.
- iii. Service tax could not have been demanded in respect of the renting of the plots intended for residential use and hotels, in view of specific exclusion of the same as per clause (d) to explanation 1 to Section

65(105)(zzzz). Hence demands made in respect of the such plots needs to be excluded.

- iv. A lease consists of two elements. One transfer of a right to enjoy immovable property, for which the consideration is premium. Second, continued enjoyment or use of immovable property for which the consideration is periodical rental payments. What is taxable is consideration for continuous use or enjoyment of immovable property in the form of rent and not the consideration for transfer of right to enjoy the immovable property in form of lease premium. In case of A R Krishnamurthy [1982 (133) ITR 922 (Mad)] Madras High Court has after taking into account all the law on subject has held that the right of the owner to be in possession and enjoyment as such owner is a distinct right which can be transferred separately from the right to receive royalties or rents from tenants for a continued enjoyment of that right. The transfer of first right i.e. right to be in possession and enjoyment of the property is a transfer of immovable property and consideration for the same is lease premium. The decisions in case of RIICO [2018 (10) GSTL (T-Del)] Hobbs Brewers India Pvt Ltd [2016 (45) STR 60 (Tripura)] are not the law on the above contention that is being raised by the appellants herein. The contention of the Appellants is not that because the lease is long term, it is not included in the definition of renting of immovable property. It is also not their contention that the lease is a transfer of capital asset and thus not leviable to service tax. What is taxable under Section 65(105)(zzzz) read with Section 65(90a) is consideration for use of immovable property and not the consideration for transfer of immovable property (i.e lease premium). In case of Kagal Nagar Parishad [2018-TIOL-1760-CESTAT-Mum] by placing reliance on case of Greater Noida Industrial Development Authority, it has been held that one time premium is

not taxable. Hon'ble Tripura High Court has in case of Hobbs Breweries taken a contrary view. Decision of Tripura High Court has been followed in case of RIICO.

- v. The decision of Hon'ble Bombay High Court in case of Builder Association of India [2018 (12) GSTL 232 (Bom)] is rendered in the context of Goods and Service Tax, and does not hold that in the Service Tax regime, one time premium will be leviable to tax. This decision do not even remotely hold that one time lease premium is leviable to service tax under Finance Act, 1994.
- vi. For the period post 01.07.2012, by the definition of service under section 65B(44), any activity which constitutes merely a transfer of title in the goods or immovable property of sale, gift or in any other manner has been excluded. Lease of immovable property is an interest in immovable property. Salmond on Jurisprudence states that general rule is that the rights has the same quality as its subject matter. Thus all rights over immovable property are themselves immovable property. Reliance is also place d on the decision of Bombay high Court in case of Ramchandra vs Subraya AIR 1951 Bom 127.

Lease is also transfer of property, sale alone is not transfer of property, Mortgage is also a transfer of property. For making this preposition reliance placed on

- Mulla on Transfer of Property Act, (9th Edition) at page 71 & 73;
- Advanced Law Lexicon by P Ramanatha Aiyer (3rd Edition Reprint 2007)
- Salmond on Jurisprudence (Twelfth Edition) Chapter 11 'Titles'
- State of Madras v Pothuri Sirinivasulu Chetty [1954 (5) STC 202]
- Traders & Minesr vs CIT [1955 927) ITR 341 (Patna)]
- R K Palshikar (HUF) [1988 (3) SCC 549]

In view of the above authorities it is clear that lease of immovable property is transfer of title in immovable property. Thus lease, is not a service as per the definition of the term in section 65B(44), hence no service tax leviable on the same.

- vii. Appellant is carrying out functions listed under the twelfth schedule of the Constitution, as such is exempted from payment of service tax per S No 39 of Notification No 25/2012 dated 20.06.2012. Appellant qualify as governmental authority, being a body set up by an act of state legislature namely Maharashtra Regional and Town Planning Act, 1966 vide Section 113(3A) thereof and established with 100% control of Government of Maharashtra.
- viii. The amendment made in the definition of “governmental authority” as defined in notification 25/2012-ST by notification No 2/2014-ST w.e.f 30.01.2014 shall apply retrospectively. Any statute which is curative, classificatory and explanatory or merely declaratory of previous law; retrospective operation is intended. [Allied Motors Private Ltd [1997 (224) ITR 677 9SC)]
- ix. They are in any case entitled to exemption under Notification No 25/2012-ST after its amendment by Notification No 2/2014-ST w.e.f 30.01.2014. RIICO [2018 (10) GSTL 92 (T-Del)]
- x. Appellant is merely an agent of the Government of Maharashtra. {CIDCO vs Percival Joseph Pareira [2013 (4) Mh. L J-762] Land is owned by government. Consequently, lease premium also belongs to government. Article 289(1) exempts the property of State from Union Taxation. Thus no service tax is payable.
- xi. In case of New Delhi Municipal Corporation vs State of Punjab [1997 (7) SCC 339], a nine member bench of Hon’ble Apex Court held that granting of lease is not in

the nature of trade or business and such activity would be exempt from Union taxation.

- xii. Allotment of plots by Appellant (as an agent of the state of Maharashtra) is a statutory function qua the land owned by the government which could be performed only by the state and therefore does not amount to service. Reliance is placed on:-

- Circular No 89/7/2006-ST dated 18.12.2006
- Maharashtra Industrial Development Corporation [2014 (36) STR 1291 9T-Mum)], {2017-TIOL-2629-HC-MUM-ST]

- xiii. Extended Period of Limitation is not invocable in the present case. Further no penalty is leviable. In absence of any private gain or loss, it is not possible to contend that the alleged contravention of the provisions if any was with an intention to evade payment of service tax. The levy of service tax on renting of immovable property itself was under litigation and the entry as introduced with effect from 1.06.2007 was struck down by Delhi High Court in case of Home Solutions Retail Limited [2009 (14) STR 433 (Del HC)]. As result of this decision the entry was amended with retrospective effect in 2010. Thus to presume that there was suppression especially in such a scenario when the levy itself was in doubt is beyond comprehension. Since the issue involves interpretation of legal provisions and the appellants were under a bonafide belief that they were not subjected to levy. Hence invoking extended period in the present case may not be justified. In similar case demand made by invoking the extended period has been set aside in following case

- Greater Noida Industrial Development Authority [2015 (40) STR 1062 (T-Del)]
- RIICO [2018 (10) GSTL 92 (T-Del)]

Thus extended period of limitation for making the demands is not invocable and also penalties are not recoverable from them

- xiv. Interest is also not recoverable as the they are not liable to pay service tax

4.3 Arguing for revenue learned Authorized Representative submitted-

- i. The issue regarding the taxability of land leased out by Corporations of State Governments for business/commercial purpose is no longer res integra and has been decided by Hon'ble Allahabad High Court in case of Greater Noida Industrial Development Authority [2015 (40) STR 95 (ALL)] and Bombay High Court in case of Builder Association of Navi Mumbai [2018 (18) GSTL 232 (Bom)]
- ii. The issue that Appellant was performing sovereign functions has also been examined by the Chhattisgarh High Court in case of Chhattisgarh State Industrial Development Corporation Ltd [2018 (17) GSTL 593 (Chhattisgarh)] and it was held that they are liable to pay tax. Thus the sovereign functions are limited to the activities conducted by the state itself and not one of the entities of the state.
- iii. Nine Member Bench of Hon'ble Supreme Court [1964 (3) SCR 787] on the Presidential Reference considered the issue vis a vis Article 289 of Constitution and has held in favour of taxation of such transactions of state.
- iv. Appellants had not given the details of the case wherein the demand of service tax has been made in respect plots allocated for residential purpose.
- v. The counsel for appellant while submitting that tribunal has in various decision held that leasing of vacant land was taxable w.e.f 1.07.2010, he has only sought to raise a new issue to the effect that only the further leasing of already leased land alone is taxable from 1.07.2010. It is only twisting word of statue which

have been correctly interpreted by the court or tribunal.

- vi. Appellants are not correct in contending that issue in respect of taxability of vacant land has been decided by the Hon'ble High Court of Allahabad. The issue of one time premium as well as taxability prior to 2010 has been left open for the Commissioner to decide and the appellants were free to challenge the same by raising all legal as well as factual issues.
- vii. The issue of one time premium has not been decided by the Allahabad High Court but has been considered and decided by the Tripura High Court in case of Hobbs Brewer India Pvt Ltd [2016 (450 STR 60 (Tripura))] holding that one time premium is also leviable to service tax.
- viii. Decisions in case of Kagal Nagar Parishad [2018 TIOL 1760 CESTAST MUM] and RIICO Ltd [2018 (10) GSTL 92 (T-Del)] are distinguishable.
- ix. It is established from the manner of payment of lease premium that it is not one time payment but is collected over period of two to three years. The staggered payment of the same also indicates its nature in the form of rent.
- x. Submission that lease is a transfer of title of immovable property is not the case within the scope of decision in the instant case. If that be so then the service per se would have been declared as unconstitutional. These provisions have been challenged time and again in various High Courts and none of the High Courts have held that lease amount liable to be paid is not covered within the scope of taxable service of renting of immovable property.
- xi. Since Appellants have deliberately not disclosed the value in the ST-3 return so as to evade payment of tax. They did not approach the department for any clarification. They have also not place any evidence on record to show that during the period of dispute they

had consulted the experts on issue of valuation and that such non disclosure was on account of such expert opinion. Thus the actions of the appellant do not establish their bonafides. Bonafide belief is not a blind belief as has been held in case of Interspace [2006 (198) ELT 275 (T-Mum)]. Reliance is also placed on the following decisions

- a. Tata Steel [2016 (41) STR 689 (T-Mum)]
- b. Axis Bank [2015 (40) STR 993 (T-Mum)]

xii. It has been constantly held that for invoking the extended period of limitation, a public sector unit needs to be considered on par with other units. Reliance placed on decisions as follows:

- a. Oriental Insurance Co Ltd [2017 (50) STR 264 (Del)]
- b. Chennai Port Trust [2017 (5) GSTL 394 (T-Chennai)]
- c. Hindustan Petroleum Corporation [2015 (38) STR 131 (T-Mum)]

5.1 We have considered the impugned orders along with the appeals and submissions made during the course of hearing and in written submissions filed by both the parties.

5.2 The issues for consideration before us are s listed below:

- i. Whether in terms of the 65(105)(zzzz) Service Tax can be levied on the lease of vacant land given by the Appellants.
- ii. Whether the lease premium recovered from the lessee against agreement to lease entered into by appellants is subjected to service tax under the taxable category.
- iii. Whether the activities undertaken by the appellant qualify to be service as defined by Section 65B(44) of Finance Act, 1994 with effect from 1st July 2012

- iv. Whether appellants qualify to be the government authority for the purpose of exemption notification No 25/2012-ST.
- v. Whether the extended period of limitation can be invoked in the facts and circumstances of this case for making the demand of service.
- vi. Whether appellants are liable to pay interest on the service tax short paid/ not paid by them by the due date.
- vii. Whether penalties under Section 76, 77 and 78 are imposable on the appellants.
- viii. Levy of Service Tax on the plots leased and intended for residential use and for hotels.

5.3 Whether in terms of the 65(105)(zzzz) Service Tax can be levied on the lease of vacant land given by the Appellants:-

5.3.1 Appellants have divided the period for making the submission into three periods namely 1.06.2007 to 1.07.2010, 1.07.2010 to 30.06.2012 and 1.07.2012 onwards.

5.3.2 Taxable Services of renting of immovable property have been defined by Section 65(105)(zzzz) of the Finance Act, 1994. The Section as inserted by the Finance Act, 2007 is reproduced below:

“(zzzz) to any person, by any other person in relation to renting of immovable property for use in the course or 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, but does not include--*
 - (a) *vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;*
 - (b) *vacant land, whether or not having facilities clearly incidental to the use of such vacant land;*
 - (c) *land used for educational, sports, circus, entertainment and parking purposes; and*
 - (d) *building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.*

Explanation 2.--For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;”

5.3.3 This section was amended by the Section 76(A)(6)(h) of Finance Act, 2010 as indicated below:

“Section 76 Amendment of Act 32 of 1994

In the Finance Act, 1994,--

(A) in section 65, save as otherwise provided, with effect from such date as the Central Government may, by notification in the Official Gazette, appoint,--

(6) in clause (105),--

(h) in sub-clause (zzzz),--

(i) for the portion beginning with the words "to any person" and ending with the words "business or commerce", the following shall be substituted and shall be deemed to have been substituted with effect from the 1st day of June, 2007, namely:-

"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.";

(ii) in Explanation 1, after item (iv), the following item shall be inserted, namely:--

"(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;"

5.3.4 The section as amended was given retrospective effect by the validation provisions incorporated in section 77 of the Finance Act, 2010. This section is reproduced below:

"Section 77: Validation of Action Taken under sub clause (zzzz) of clause (105) of Section 65

Any action taken or anything done or omitted to be done or purported to have been taken or done or omitted to be done under sub-clause (zzzz) of clause (105) of section 65 of the Finance Act, 1994(32 of 1994), at any time during the period commencing on and from the 1st day of June, 2007 and ending with the day, the Finance Bill, 2010 receives the assent of the President, shall be deemed to be and deemed always to have been, for all purposes, as validly and effectively taken or done or omitted to be done as if the amendment made in sub-clause (zzzz) of clause (105) of section 65, by sub-item (i) of item (h) of sub-clause (5) of clause (A) of section

76 of the Finance Act, 2010 had been in force at all material times and, accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority,--

(a) any action taken or anything done or omitted to be taken or done in relation to the levy and collection of service tax during the said period on the taxable service of renting of immovable property, shall be deemed to be and deemed always to have been, as validly taken or done or omitted to be done as if the said amendment had been in force at all material times;

(b) no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for the levy and collection of such service tax and no enforcement shall be made by any court of any decree or order relating to such action taken or anything done or omitted to be done as if the said amendment had been in force at all material times;

(c) recovery shall be made of all such amounts of service tax, interest or penalty or fine or other charges which may not have been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be, would not have been refunded, as if the said amendment had been in force at all material times.

Explanation.--For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable had this amendment not come into force."

5.3.5 Tribunal has in case of Greater Noida Industrial Development Authority [2015 (38) STR 1062 (T)] held that after amendments made by the Finance Act, 2010, the activity of leasing/ renting of the vacant lands shall

fall within the taxable category as defined by Section 65(105)(zzzz). The said decision stated as follows:

“9. *Whether in respect of giving vacant land on lease or rent for construction of building or a temporary structure at a later stage to be used for furtherance of business or commerce would attract Service Tax under Section 65(105)(zzzz) read with Section 65(90a) from 1-6-2007, the date on which the Service Tax on renting of immovable property had become leviable or the same is chargeable w.e.f. 1-7-2010 when clause (v) was added to the inclusive portion of the definition of ‘immovable property’ in Section 65(105)(zzzz) and whether for this purpose, the long term leases of vacant land are excluded from the purview of Section 65(105)(zzzz) read with Section 65(90a) of the Act?*

9.1 *The question as to whether giving vacant land on lease, lease or rent for construction of a building or temporary structure at a later stage for furtherance of business or commerce is taxable from 1-6-2007, the date on which the Service Tax on renting of immovable property had been introduced or w.e.f. 1-7-2010 when Clause (v) had been added to the Explanation-I to Section 65(105)(zzzz) has been examined by this Tribunal in detail in its Final Order No. ST/A/58664/2013-CU(DB), dated 11-12-2013 in the case of New Okhla Industrial Development Authority v. Commissioner of Customs, Central Excise & Service Tax, Noida, wherein it was held that since prior to 1-7-2010, vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry and mining purposes”, “vacant land used for educational, sports, circus, entertainment and parking purposes” and “vacant land whether or not having facilities clearly incidental to the use of such vacant land” was excluded from the definition of term “immovable property” under the exclusion clause of Section 65(105)(zzzz) and since only w.e.f. 1-7-2010, a clause (v) was added to*

Explanation 1 defining the term “immovable property” and this newly introduced clause covered “vacant land given on lease or licence for construction of a building or a temporary structure at a later stage for furtherance of business”, the giving of vacant land on lease or licence for construction of a building or a temporary structure at a later stage to be used for furtherance of business or commerce would become taxable only w.e.f. 1-7-2010 and not during the period prior to 1-7-2010. In this regard paras 9, 10, 11, 12, 13, 14 and 15 are reproduced below :-

“9. The other substantive issue presented for analysis is whether renting of vacant land by the appellant to a third party, albeit for a business or commercial purpose falls within the ambit of the taxable service, prior to 1-7-2010 i.e. before introduction of clause (v) in Explanation (1) to Section 65(105)(zzzz). To answer this issue, it is necessary to consider the legislative dynamics of the provision. To the extent relevant and material for the purposes of this lis, suffice it notice that prior to 1-7-2010, clause (zzzz) of Section 65(105) read as follows : Taxable service is a 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, but does not include -

- (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;*
- (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;*
- (c) land used for educational, sports, circus, entertainment and parking purposes; and*
- (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.*

Explanation 2. - For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;

Section 75 of the Finance Act, 2010 introduced several amendments to Chapter V of the Act. In so far as Section 65(105)(zzzz), the 2010 amendments substituted the main provision of sub-clause (zzzz) and enjoined this substitution to operate with retrospective effect from 1-6-2007. Sub-clause (v) was also introduced, to Explanation (1) in the provision. This sub-clause reads :

“vacant land, given on lease or licence for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce”.

10. While the assessee contends that a lease of vacant land (for construction of a building or a temporary structure at a later stage to be used for furtherance of business or commerce) is a taxable service only since 1-7-2010; according to Revenue clause (v) in Explanation 1

merely clarifies the clear and implicit intent of clause (zzzz).

11. In our considered view, clause (zzzz) of Section 65(105), prior to 1-7-2010 does not embrace renting of land within scope of the enumerated taxable service. On true and fair construction of the main part of clause (zzzz) it is clear that renting of any immovable property for use in course for furtherance of business or commerce is the taxable service and this would clearly include a lease of vacant land as well. Explanation 1 to this clause (prior to the amendatory exercise in 2010) signalled, through the inclusionary clause various facets of transactions which would also amount to renting of “immovable property”. On established principles of statutory interpretation, normally an inclusionary clause does not limit the plentitude of an enacting provision couched in broad terms. Thus the illustrations of what are “immovable property”, set out in the inclusionary clause in Explanation 1 would not derogate from “vacant land” being comprehended within the expression “renting of immovable property”. However, clause (zzzz) has an exclusionary clause as well, enumerating the subjects excluded from the ambit of “immovable property”. Under this exclusionary dispensation; in sub-clause (a) vacant land solely used for agricultural, aquaculture farming, forestry, animal husbandry, mining purposes; in sub-clause (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land; and in sub-clause (c) land used for educational, sports, circus, entertainment and parking purpose, are excluded from the purview of “immovable property”. On a true and fair construction of the exclusionary clause, the legislative intent is compelling that vacant land whether having facilities clearly incidental to its use as such or otherwise does not constitute immovable property. As a consequence of the interplay between the enumeration of renting of immovable property

as the taxable event read with the inclusionary and exclusionary clauses (in particular sub-clause (b) of the exclusionary clause) in Section 65(105)(zzzz), renting of vacant land was clearly outside the purview of the taxable service, prior to 1-7-2010.

12. Introduction of sub-clause (v) in Explanation 1 has significantly altered and extended the scope of the taxable service, with effect from 1-7-2010 and consequently vacant land given on lease or licence, for construction of a building or a temporary structure, to be used at a later stage for furtherance of business or commerce, would be “immovable property” and renting of this immovable property would be the taxable service, since 1-7-2010.”

5.3.6 This decision of tribunal has been upheld by the Hon'ble Allahabad High Court at [2015 (40) STR 95 (ALL)] stating as follows:

“4. With effect from 1st June, 2007, Section-65(105)(zzzz) was introduced in Finance Act, 1994. The section provides for Service Tax to be levied on service provided to a person by any other person of renting of immovable property or any other service in relation of such renting for use in course of, or for furtherance of business or commerce. Explanation-I to Section-65(105)(zzzz) defines immovable property and it excluded -

“(a)”

5. However, w.e.f. 1-7-2010, clause (V) was added to the definition of immovable property and it now covers vacant land given on lease or licence for construction of a building or temporary structure at a later stage, to be used for furtherance of business or commerce. A notification was issued by the Research Unit of Central Board of Excise & Customs (Department of Revenue) dated 26-2-2010 whereunder it was clarified that suitable amendment in the definition of taxable service relating to renting of immovable property is being made so as to provide that

tax would be charged on rent of a vacant land if there is an agreement or contract between the lessor and the lessee that construction on such land is to be undertaken for furtherance of business or commerce during the tenure of the lease.

6. *The expression renting of immovable property is defined under Section-65(90a) which reads as follows :-*

“Renting, letting, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include :-

- i. renting of immovable property by a religious body or to a religious body; or*
- ii. renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.*

Explanation-I to Section-65(90a) clarified that - for the purpose of this clause, “for use in the course or furtherance of business or commerce” include use of immovable property as factories, office buildings, warehouse, theatre, exhibition halls and multiple use building.

Explanation-II to this Section clarifies that for the removal of doubts, it is hereby declared that for the purpose of this clause, renting of immovable property” include allowing of permitting the use of space in an immovable property, Irrespective of the transfer of possession or control of the said immovable property”.

14. *The present central excise appeal was entertained by the High Court under order dated 11th March, 2015 on following questions of law :*

“(i) Whether a second show cause notice for raising of demand of Service Tax is not permissible, once notice was already issued on this aspect despite the fact that second notice pertain the different period and different

items/transactions which were subject matter of Service Tax provided under first notice?

(ii) Whether long terms leases in respect of vacant land would be covered by “taxable service” under Section 65(105)(zzzz) of Finance Act, 1994?

(iii) Whether Greater Noida Industrial Development, Noida constituted under the Industrial Development Act, 1976 can be said to be a body discharging “sovereign functions” and outside the purview of Service Tax?

(iv) Whether the leases granted in respect of vacant land by appellant before 1-7-2010 would be taxable under the aforesaid statute?”

17. *Learned counsel for the appellant vehemently submitted before us that the activities assigned to the assessee were sovereign/public/statutory duties. It is their case that the long term lease of vacant land for 90 years or lease in perpetuity of vacant land was not taxable under Section 65(105)(zzzz) of the Finance Act, 1994 specifically in the circumstance when the Tribunal itself has come to a conclusion that the premium charged for such lease will not be taken into consideration for the purposes of determining the tax liability. It is their case that transactions cannot be held to be taxable for one part and not for the other. It is further contended that the second show cause notice dated 17th October, 2012 was non-est including the consequential adjudication inasmuch as the period mentioned in the second show cause notice included the entire period which was subject matter of the first show cause notice dated 22nd March, 2012. It has also been contended before us that since the assessee is discharging statutory duties, performing sovereign functions, it cannot be subjected to Service Tax.*

18. *The basic dispute giving rise to the present appeal is in respect of the payment of service tax on the rent which had been received in the matter of allotment of plots by*

the assessee to use for **construction** for business/commercial purposes during the terms of the lease.

19. The Explanation to Section 65(105)(zzzz) of the Finance Act defines immovable property, which includes vacant land. The Expression renting of immovable property as defined under Section 65(90a) means renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce. The Explanation to Section 65(90a) has further clarified the clause “for use in the course or furtherance of business or commerce” to include use of immovable property as factories, office buildings, warehouses etc. and it has been declared that “renting of immovable property” includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property.

20. In view of the definition of expression of “renting of immovable property” read with Explanation, in our opinion, will include the lease of various plots allotted by the assessee for business/commercial purposes and rent charged/collected in respect of the lease so executed would necessarily be subjected to Service Tax.

21. We may record that the term/period of the lease whether it is for short duration or for 90 years or perpetuity makes absolutely no difference to the meaning of the expression “renting of immovable property”. The contention of the assessee that since long term lease of 90 years/perpetuity would virtually amounts to transfer of ownership of the land does not appeal to us especially in view of the simple meaning of the language use in the aforesaid sections.

22. The judgment of the Apex Court in the case of R.K. Palshikar (HUF) v. Commissioner of Income Tax reported in (1988) 3 SCC 594 relied upon by the assessee deals

with the transfer of property within the meaning of Section 12-B of the Income Tax Act and is, therefore, clearly distinguishable in the facts of the case.

23. *The Tribunal appears to be justified in recording that the letting of vacant land by way of lease or license irrespective of the duration or tenure for construction of building or temporary construction for use in the course or furtherance of business or commerce is taxable w.e.f. 1st July, 2010 in view of Clause (v) of Explanation 1 to Section 65(105)(zzzz) of the Finance Act, 1994.*

24. *So far as the term lease is concerned, it may be recorded that it has not been defined under the Finance Act, 1994. The term "lease" would cover a lease for any period including a lease in perpetuity, as will follow from simple reading of Section 65(90a). The Finance Act, 1994 does not carve out any distinction in the matter of long term lease/lease in perpetuity or lease for short duration, so far as the charging section is concerned.*

25. *The word "lease" as contemplated by the Transfer of Property Act, vis-a-vis 'license' has been explained by the Apex Court in the case of Associated Hotels of India Ltd. v. R.N. Kapoor reported in AIR (1959) SC 12262, Pr. 28, wherein it has been held that if the document creates an interest in the property, it is a lease and if it further goes on to show exclusive possession of the property, it would be a strong case for the same being treated as a lease. It has been held that under Section 105 of the Transfer of Property Act, transfer of a right to enjoy immovable property made for a certain time in consideration for a price paid or promised would be a lease.*

26. *Judged in the aforesaid background we do not find any illegality in the conclusions drawn by the Tribunal that the lease of immovable property under Section 65(105)(zzzz) would be covered for Service Tax, irrespective of the fact that the lease is short term or long term or lease in perpetuity.*

27.

28. We may record that under show cause notice dated 22nd March, 2012 demand of Service Tax including the Education Cess was made for the period between July, 2010 to May, 2011. So far as the second show cause notice dated 17th October, 2012 is concerned, Service Tax was demanded along with interest for the period between May, 2007 to March, 2012 on the following amounts :

- (a) one time premium amount;
- (b) annual lease rent;
- (c) fee charged for examination of the applications;
- (d) transfer charges;
- (e) rent received from the staff
- (f) other misc. income as compliance fees etc.
- (g) misc. income as malba charges etc.

29. We may not dilate any further on the said aspect, inasmuch as the Tribunal under the order impugned has already remanded the matter to the Commissioner to examine the challenge to the second show cause notice by de novo proceeding and to give a specific finding on the plea of overlapping raised by the assessee.

30. It is left open to the appellant to raise all such legal as well as factual issues in respect of the second show cause notice dated 17th October, 2012 during remand de novo proceedings.

The plea of the appellant that it is performing statutory duties and is a creation of a statute and therefore cannot be subjected to Service Tax does not appeal to us. Suffice is to mention that the Finance Act, 1994 makes no distinction between a statutory body i.e. a juristic person and an individual.

31. As far as the circular dated 23rd August, 2007 issued by the Government of India, which has been so heavily

relied upon by the appellant is concerned, we may record that under Clause 032.01, it has been provided that the Prasar Bharati Corporation (Doordarshan and All India Radio), which has been constituted under the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 is liable to pay Service Tax for broadcasting services.

32. *Similarly under Clause 999.01 with regard to the sovereign/public duties/functions, it has been clarified that activities assigned to and performed by the sovereign/public authorities under the provisions of any law are statutory duties. The fee or amount collected as per the provisions of the relevant statute for performing such functions is in the nature of a compulsory levy and are deposited into the Government account. Such activities are purely in public interest and are undertaken as mandatory and statutory functions. These are not to be treated as services provided for a consideration. Therefore, such activities assigned to be performed by a sovereign/public authority under the provisions of any law, do not constitute taxable services. Any amount/fee collected in such cases are not to be treated as consideration for the purposes of levy of Service Tax.*

33. *However, if a sovereign/public authority provides a services, which is not in the nature of an statutory activity and the same is undertaken for a consideration (not a statutory fee), then in such cases, Service Tax would be leviable as long as the activity undertaken falls within the scope of a taxable service as defined.*

34. *Letting of immovable property for consideration, which is determined on the basis of offers received from public at large by the assessee Greater Noida Industrial Development Authority is a service provided for consideration and not on payment of statutory fees, neither it is a statutory service performed by the assessee. It may be that the statute permits such activities of letting out of immovable property for augmenting its finances but*

the same cannot be termed as the service in public interest nor it is a mandatory or statutory functions of the Development Authority. Accordingly such activity of leasing do constitute a taxable service, in our opinion.”

5.3.7 In case of New Okhla Industrial Development Authority [] tribunal has held as follows:

“10. *While the assessee contends that a lease of vacant land (for construction of a building or a temporary structure at a later stage to be used for furtherance of business or commerce) is a taxable service only since 1-7-2010; according to Revenue clause (v) in Explanation 1 merely clarifies the clear and implicit intent of clause (zzzz).*

11. *In our considered view, clause (zzzz) of Section 65(105), prior to 1-7-2010 does not embrace renting of land within scope of the enumerated taxable service. On true and fair construction of the main part of clause (zzzz) it is clear that renting of any immovable property for use in course for furtherance of business or commerce is the taxable service and this would clearly include a lease of vacant land as well. Explanation 1 to this clause (prior to the amendatory exercise in 2010) signalled, through the inclusionary clause various facets of transactions which would also amount to renting of “immovable property”. On established principles of statutory interpretation, normally an inclusionary clause does not limit the plentitude of an enacting provision couched in broad terms. Thus the illustrations of what are “immovable property”, set out in the inclusionary clause in Explanation 1 would not derogate from “vacant land” being comprehended within the expression “renting of immovable property”. However, clause (zzzz) has an exclusionary clause as well, enumerating the subjects excluded from the ambit of “immovable property”. Under this exclusionary dispensation; in sub-clause (a) vacant land solely used for agricultural, aquaculture. farming, forestry, animal*

husbandry, mining purposes; in sub-clause (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land; and in sub-clause (c) land used for educational, sports, circus, entertainment and parking purpose, are excluded from the purview of “immovable property”. On a true and fair construction of the exclusionary clause, the legislative intent is compelling that vacant land whether having facilities clearly incidental to its use as such or otherwise does not constitute immovable property. As a consequence of the interplay between the enumeration of renting of immovable property as the taxable event read with the inclusionary and exclusionary clauses (in particular sub-clause (b) of the exclusionary clause) in Section 65(105)(zzzz), renting of vacant land was clearly outside the purview of the taxable service, prior to 1-7-2010.

12. *Introduction of sub-clause (v) in Explanation I has significantly altered and extended the scope of the taxable service, with effect from 1-7-2010 and consequently vacant land given on lease or licence, for construction of a building or a temporary structure, to be used at a later stage for furtherance of business or commerce, would be “immovable property” and renting of this immovable property would be the taxable service, since 1-7-2010.*

13. *In view of clear exclusion of vacant land from the ambit of immovable property prior to 1-7-2010 it cannot gainfully be contended by Revenue, that clause (v) to Explanation I (introduced in 2010), was a mere clarificatory endeavour, explicating the implicit and inherent meaning of Section 65(105)(zzzz). Clause (v) is clearly an amendment which expands the scope of the taxable service; and prospectively.”*

In para 10, while discussing the position prior to 01.07.2010, Tribunal has not taken the note of validation provisions introduced by the Section 77 of Finance Act, 2010. It was not by way of declaratory amendment or by

way of implication that amendments made in the Section 65 (105)(zzzz) were to be held as retrospective but was by way of the operation of statute that the amendments were made retrospective. In case of Hira Lal Ratan Lal vs State of Uttar Pradesh [1973 SCC (1) 216] Hon'ble Apex Court held as follows:

"The source of the legislative power to levy sales or purchase tax on goods is Entry 54 of the List II of the Constitution. It is well settled that subject to constitutional restrictions a power to legislate includes a power to legislate prospectively as well as retrospectively. In this regard legislative power to impose tax also includes within itself the power to tax retrospectively--see The Union of India v. Madan Gopal Kabra [1954] S. C. R. 541; M. P. Sundararamier & Co. v. The State of Andhra Pradesh and Anr. [1958] S. C. R. 1422; J. K. Jute Mills Co. Ltd. v. The State of Uttar Pradesh and Anr. 12. S.T.C. 429; Chhotabhai Jethabhai Patel and Co. v. The Union of India and Anr. [1962] Supp, (2) S.C.R. p. 1; Sri Ramkrishna & Ors. v. The State of Bihar. [1964] 1 S.C.R. 897.; In the last mentioned case it was specifically decided that where the legislature can make a valid law, it can provide not only for the prospective operation of the material provisions of the said law but it can also provide for the retrospective operation of the said provisions."

In case of Jyoti Traders [1999 (112) STC 277 (SC)] Hon'ble Supreme Court stated-

"26. The two decisions in the cases of The Ahmedabad Manufacturing & Calico Printing Co. Ltd. and Biswanath Jhunjhunwalla & Anr. are more closer to the issue involved in the present case before us. They laid down that it is the language of the provision that matters and when meaning is clear, it has to be given full effect. In both these cases this Court held that the proviso which amended the existing provision gave it retrospectivity. When the

provision of law is explicit, it has to operate fully and there could not be any limits to its operation. This Court in Biswanath Jhunhunwalla case said that if the language expressly so states or clearly implies, retrospectivity must be given to the provision.”

Hon’ble Supreme Court has in case of State of Karnataka & Others vs The Karnataka Pawn Broker Association [2018 (255) Taxmann 12 (SC)] held as follows;

“22. On analysis of the aforesaid judgments it can be said that the Legislature has the power to enact validating laws including the power to amend laws with retrospective effect. However, this can be done to remove causes of invalidity. When such a law is passed the Legislature basically corrects the errors which have been pointed out in a judicial pronouncement. Resultantly, it amends the law, by removing the mistakes committed in the earlier legislation, the effect of which is to remove the basis and foundation of the judgment. If this is done, the same does not amount to statutory overruling.”

5.3.8 Thus in view of the validation provisions introduced by Section 77 of the Finance Act, 2010, the amendments made in Section 65(105)(zzzz) have been given retrospective effect from the 1st June 2007. Accordingly the decision of the Tribunal in case of Greater Noida Industrial Authority, supra, upheld by the Hon’ble Allahabad High Court shall also have the effect from that date. Accordingly we conclude the issue holding that vacant land given on lease or licence, for construction of a building or a temporary structure, to be used at a later stage for furtherance of business or commerce, would be “immovable property” and renting of this immovable property would be the taxable service, since 1-6-2007.

5.4 Whether the lease premium recovered from the lessee against agreement to lease entered into by appellants is subjected to service tax under the taxable category.

5.4.1 Appellants have contended that no service tax could be levied on the lease premium, charged by them at the time of entering into “Agreement to Lease” with the lessee. It is submission of the appellant, that what could have been taxed under the category of “Renting of Immovable Property”, is only the lease rent and not the premium collected by them at time of entering into ‘Agreement to lease’. This agreement to lease is prior to entering into lease agreement and is permitting or granting the right to the prospective lessee to enter the land under-take various construction activities thereon. It is only after completion of construction activities and issuance of a completion certificate that lease deed is executed between them and the lessee. The lease deed prescribes the lease rent which alone can be subjected to service tax.

5.4.2 The value of taxable service provided is determined as per section 67 of Finance Act, 1994 which read as follows:

“67. (1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,—

- (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;*
- (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;*
- (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.*

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

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

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

Explanation.—For the purposes of this section,—

(a) “consideration” includes any amount that is payable for the taxable services provided or to be provided;

(b);

(c) ”

5.4.4 The determination of taxable value for the purpose of levy of tax, is mode for determination of measure of levy. Hon'ble Supreme Court has in case of Bombay Tyres International [1983 (14) ELT 1896 (SC)] enunciated the law on subject stating as follows:

“13.*We move on now to a different dimension, to the conceptual consideration of the measure of the tax. Section 3 of the Central Excises and Salt Act provides for the levy of the duty of excise. It creates the charge, and defines the nature of the charge. That it is a levy on excisable goods, produced or manufactured in India, is mentioned in terms in the section itself. Section 4 of the Act provides the measure by reference to which the charge is to be levied. The duty of excise is chargeable with reference to the value of the excisable goods, and the value is defined in express terms by that section. It has long been recognised that the measure employed for assessing a tax must not be confused with the nature of the tax. In Ralla Ram v. The Province of East Punjab -*

(1948) F.C.R. 207, the Federal Court held that a tax on buildings under Section 3 of the Punjab Urban Immovable Property Tax Act, 1940 measured by a percentage of the annual value of such buildings remained a tax on buildings under that Act even though the measure of annual value of a building was also adopted as a standard for determining income from property under the Income-tax Act. It was pointed out that although the same standard was adopted as a measure for the two levies, the levies remained separate and distinct imposts by virtue of their nature. In other words, the measure adopted could not be identified with the nature of the tax. The distinction was observed by a Special Bench of the Patna High Court in *Atma Ram Budhia v. State of Bihar* - AIR 1952 Patna 359, where a tax on passengers and goods assessed as a rate on the fares and freights payable by the owners of the motor vehicles. *Atma Ram Budhia* (supra) was referred to with approval by this Court in *M/s. Sainik Motors, Jodhpur and Others v. The State of Rajasthan* - (1962) 1 S.C.R. 517. This Court in that case repelled the contention that the levy was a tax upon income and not upon passengers and goods. It pointed out that "though the measure of the tax is furnished by the fares and freights it does not cease to be a tax on passengers and goods". The point was considered by this Court again in *D.C. Gouse and Co. etc. v. State of Kerala & Anr. etc.* - (1980) 1 S.C.R. 804, where reference was made to the measure adopted for the purpose of the levy of tax on buildings under the Kerala Building Tax Act. The Court examined the different modes available to the Legislature for measuring the levy, and upheld the action of the Legislature in linking the levy with the annual value of the building and prescribing a uniform formula for determining its capital value and for calculating the tax. In the course of its judgment, the Court cited with approval a passage from Seervai's Constitutional Law of India - Second Edition, Vol. 2 at page 1258.

“Another principle for reconciling apparently conflicting tax entries follows from the fact that a tax has two elements : the person, thing or activity on which the tax is imposed, and the amount of the tax. The amount may be measured in many ways; but decided cases establish a clear distinction between the subject-matter of a tax and the standard by which the amount of tax is measured. These two elements are described as the subject of a tax and the measure of a tax.”

It is, therefore, clear that the levy of a tax is defined by its nature, while the measure of the tax may be assessed by its own standard. It is true that the standard adopted as the measure of the levy may indicate the nature of the tax but it does not necessarily determine it. The relationship was aptly expressed by the Privy Council : In Re. A Reference under the Government of Ireland Act, 1920 and Section 3 of the Finance Act (Northern Ireland), 1934 - L.R. 1936 A.C. 352, when it said :-

“.....It is the essential characteristic of the particular tax charged that is to be regarded, and the nature of the machinery-often complicated-by which the tax is to be assessed is not of assistance, except in so far as it may throw light on the general character of the tax.”

The case was referred to by a Constitution Bench of this Court in R.R. Engineering Co. v. Zila Parishad Bareilly & Anr. - (1980) 3 S.C.R. 1, where the relationship was succinctly described thus :-

“It may be, and is often so, that the tax on circumstances and property is levied on the basis of income which the assessee receives from his profession, trade, calling or property. That is, however, not conclusive on the nature of the tax. It is only as a matter of convenience that income is adopted as a yardstick or measure for assessing the tax. As pointed out In Re : A Reference under Govt. of Ireland Act (supra), the measure of the tax is not a true test of the nature of the tax. Therefore, while determining the nature

of a tax, though the standard on which the tax is levied may be a relevant consideration, it is not a conclusive consideration.”

The principle was reaffirmed by this Court in The Hingir-Rampur Coal Co. Ltd. and Others v. The State of Orissa and Others - (1961) 2 S.C.R. 537, where the form in which the levy was imposed was held to be an impermissible test for defining in itself the character of the levy. It was observed :-

“..... the mere fact that the levy imposed by the impugned Act had adopted the method of determining the rate of the levy by reference to the minerals produced by the mines would not by itself make the levy a duty of excise. The method thus adopted may be relevant in considering the character of the impost but its effect must be weighed along with and in the light of the other relevant circumstances.”

It is apparent, therefore, that when enacting a measure to serve as a standard for assessing the levy the Legislature need not contour it along lines which spell out the character of the levy itself. Viewed from this standpoint, it is not possible to accept the contention that because the levy of excise is a levy on goods manufactured or produced the value of an excisable article must be limited to the manufacturing cost plus the manufacturing profit. We are of opinion that a broader based standard of reference may be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy. In our opinion, the original Section 4 and the new Section 4 of the Central Excises and Salt Act satisfy this test.

14.*Section 4 envisages a method of collecting tax at the point of the first sale effected by the manufacturer. Under the old Section 4(a), the value of the excisable article was deemed to be the wholesale cash price for which an article*

of the like kind and quality was sold, or was capable of being sold, at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market did not exist for such article at such place, then delivery was envisaged at the nearest place where such market existed. Section 4(b) declared that where such price was not ascertainable, the value would be deemed to be the price at which an article of the like kind and quality was sold or was capable of being sold by the manufacturer or producer, or his agent, at the time of the removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production, and if such article was not sold or was not capable of being sold at such place, at any other place nearest thereto. Then there was an Explanation which declared that no abatement or deduction would be allowed except in respect of trade discount and the duty payable at the time of the removal of the article from the factory. The wholesale price was envisaged as a cash price in order to make it a uniform standard, because it was then a price freed from the burden of an increase on account of credit or other advantage allowed to a buyer, a factor which may vary from transaction to transaction and from buyer to buyer. The essential distinction between clause (a) and clause (b) of Section 4 appears to lie in this, that clause (a) is invoked when the wholesale cash price is ascertainable and clause (b) when the wholesale cash price cannot be ascertained.

15.*As we have said, it was open to the Legislature to specify the measure for assessing the levy. The Legislature has done so. In both the old Section 4 and the new Section 4, the price charged by the manufacturer on a sale by him represents the measure. Price and sale are related concepts, and price has a definite connotation. The “value”*

of the excisable article has to be computed with reference to the price charged by the manufacturer, the computation being made in accordance with the terms of Section 4.”

5.4.4 In accordance with the above Section 67, prescribes the mode for determining the measure of levy. From the perusal of section 67(1) it is evident that the section itself envisages that the entire consideration received for the provision of the service, either provided or to be provided should constitute the taxable value. Consideration itself has been defined inclusively to include all the amount paid or payable for the taxable service provided or to be provided. Appellants contended that lease premium has been received by them against the “Agreement to Lease” and is prior to entering into lease deed with the lessee and hence should not be part of the taxable value. On perusal of the sample copy of “Agreement to Lease”, on page 2, it is stated as follows:

Whereas

- (a) The Corporation is the New Town Development Authority declared for the area designated as a site for the new town of New Bombay by the Government of Maharashtra in exercise of its power under Sub Section (1) and (3A) of the Maharashtra Regional and Town Planning Act, 1966 (Maharashtra XXXVII of 1966 (herein after referred to as “the said Act”)*
- (b) The State Government is pursuant to Section 113(A) of the said Act, acquiring lands described therein and vesting such lands in the Corporation for development and disposal.*
- (c) The Licensee has by his application dated 12/2/07 requested the Corporation to grant a lease of a piece of or parcel of land so acquired and vested in the Corporation of the State Government and described hereinafter.*

(d) *The Corporation has considered to grant to the Licensee a lease of all that piece of or parcel of land described in the Schedule hereunder written and more particularly delineated on the plan annexed hereto shown thereon by red colour boundary line, and containing by measurement 10377.50 sq Mtrs or thereabout (hereinafter referred to as "the said land"), for the purpose of constructing a building or buildings for commercial user having a Star Hotel and has permitted the Licensee to occupy the said land from the date hereof on the terms and conditions hereinafter contained.*

(e) *The licensee has before the execution of this agreement paid on 12.12.07 to the Managing Director of the corporation hereinafter referred to as the Managing Director, which expression shall include any other officer of the Corporation as may be notified by the Corporation from time to time by a general or special order, a sum of Rs 82,70,89,050/- (Rupees Eighty Two Crores Seventy Lakhs Eighty Nine Thousand and Fifty only) being the full premium agreed to be paid by the Licensee to the Corporation."*

GRANT OF LEASE:

7. *As soon as the Town Planning Officer has certified that the building and works have been erected in accordance with the terms hereof and if the Licensee shall have observed all the stipulations and condition hereinbefore contained, the Corporation will grant and the Licensee will accept lease (which shall be executed by the parties in duplicate) of the said land and the building erected thereon for the term of 60 years from the date hereof at the yearly rent of Rupees One Hundred only.*

COMPLIANCE WITH THE MAHARASTRA REGIONAL AND TOWN PLANNING ACT, 1966 AND NAVI MUMBAI DISPOSAL OF LANDS REGULATIONS, 1975

7A It is hereby agreed and declared by and between parties hereto that the Corporation has agreed to lease the said land to the Licensee and the Licensee has agreed to have such lease upon the terms and conditions contained herein and subject to Section 118 and other applicable provisions of the Maharashtra Regional and Town Planning Act, 1966 (Maharashtra XXXVII of 1966) and rules and regulations made thereunder including the Navi Mumbai Disposal Of Lands Regulations, 1975 for the time being in force.”

5.4.5 From the above it is quite evident that amount shown to be paid as per the agreement is paid towards the plot of land to be leased out to the lessee. This amount is received as consideration for leasing out the plot of land identified in the agreement and is nothing other than that. The consideration against this agreement is received in two parts, namely full premium (specified in the recitals) and the amount specified in para 7 of the agreement. Since both the amount are received as consideration toward the leasing of the said plot, it is in terms of Section 67 of Finance Act, 1994, part of the taxable value of the service provided or to be provided by the appellants under the category of “Renting of Immovable Property”.

5.4.6 The arguments advanced by the appellants are identical to those advance before the Hon’ble Tripura High Court in case of Hobb Brewers [2016 (45) STR 60 (Tripura)] and were rejected by the High Court, stating as follows:

“4. We are not at all inclined to even issue notice in the writ petition. A perusal of Section 65(90a) and Section 65(105)(zzzz) of the Finance Act, 1994 as quoted in the letter dated 23-11-2015 clearly shows that “Renting of Immovable Property Service” includes renting, letting, leasing, licensing or other similar arrangements amounts to providing service and under Section 65(105)(zzzz) it is a taxable service.

5. *It is urged on behalf of the petitioner that what is taxable is the rent and not premium. This argument is without any basis whatsoever. What is taxable is the consideration for the transfer. Even if premium is charged that is like charging of one time rent and then rebate is given for the yearly rent to be paid. Premium is also part of the lease money. Therefore, the entire transaction both premium and rent are amenable to service tax and service tax will have to be paid on the same.*

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

5.4.3 The said decision of Tripura High Court has been followed by the Tribunal in case of RIICO holding as follows:

"15. *Admittedly, substantial part of the demand against the appellant in various proceedings, relate to their Service Tax liability on lump-sum premium amount, received by them from the allottees on allotment of land on long term basis. In view of the introduction of new Section 104 in the Finance Act, 1994 the appellant's liability on such consideration no longer exists. The one-time payment received for grant of long term lease of 30 years or more of industrial plot, is not liable to Service Tax for all the periods covered in the present proceedings. However, we hold that the appellants are liable to pay Service Tax in respect of such one-time amounts received in respect of lease granted for less than 30 years. We do not find any justification to consider the one-time payment on a different footing when compared to the regular lease rent, received in a periodical manner. We note that on identical set of facts, with reference to lease granted by Tripura Industrial Development Corporation, the Hon'ble High*

Court of Tripura in the case of Hobbs Brewers India Pvt. Ltd. v. Union of India reported in [2016 (45) S.T.R. 60 (Tripura)] held as below :

.....

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

5.4.4 Hence in view of the specific provisions as per Section 67 of Finance Act, 1994 and also the decision of the Apex Court in case of Bombay Tyres International, and decision of Tripura High Court in case of Hobb Brewers, we do not find any merits in the submission of the appellants that amount collected as lease premium should not form the part of taxable value..

5.5 Whether the activities undertaken by the appellant qualify to be service as defined by Section 65B(44) of Finance Act, 1994 with effect from 1st July 2012.

5.5.1 Appellants have contended that post 1st July 2012, the activity undertaken by do not qualify as service as defined by Section 65B(44) of the Finance Act, 1994 and hence cannot be subjected to service tax. Section 65B(44) of the Finance Act, 1994 with effect from 1st July 2012 is reproduced below:

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

- (a) an activity which constitutes merely,—*
 - (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
 - (ii) a transaction in money or actionable claim;*

(b) *a provision of service by an employee to the employer in the course of or in relation to his employment;*

(c) *fees taken in any Court or tribunal established under any law for the time being in force.*

Explanation 1.—

Explanation 2.—

Explanation 3.—;”

5.5.2 Appellants have argued that the activity undertaken by them is transfer of right to use immovable property. As per various authorities quoted by them in terms of the transfer of right in the immovable property amounts to the transfer of title in immovable property and hence shall fall in the exclusion category of definition of “service” as per section 65B(44).

5.5.3 Section 105 of the Transfer of Property Act, 1882 defines the lease 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.”

5.5.4 In none of the decisions relied upon by the appellant’s counsel have Supreme Court held that leasing of immovable property would amount to transfer of title in the immovable property so leased. What has been considered by the Hon’ble Apex Court in the said decisions is only vis a vis the issue in respect of acquisition of capital

assets, for the purpose Income Tax Act, 1961. In case of R K Palshikar [1988 (3) SCC 549] referred to by the learned counsel for appellants the issue for consideration before the Hon'ble Supreme Court was not in respect of transfer of title in immovable property. Hon'ble Apex Court has while approving the decision Patna High Court has observed as follows:

"The next question which we have to consider is whether the provisions of Section 12-B of the said Act can be brought into play, although, what was transferred was only lease hold interests in the lands in question. In this connection, it is significant that the leases are for a long period of 99 years and in all the transactions of lease premium has been charged by the assessee for the grant of the lease concerned. In Traders and Miners Ltd. v. Commissioner of Income Tax, Bihar and Orissa, [1955] 27 ITR p. 341 a case decided by a Division Bench of the Patna High Court, the assessee let on lease for 99 years a portion of a Zamindari acquired by it. The lease related to the surface right together with nine mica mines located in that area. The consideration for the lease was the payment of a 'salami' and a reserve rent per year. The Income-tax Officer determined the cost to the assessee of the mineral rights and after deducting this amount from the salami, he assessed the balance to tax as capital gains under Section 12-B of the said Act. It was held by the Patna High Court that the gains arising from the said transaction were rightly taxed. This decision has been cited without comment by Kanga and Palkhivala in their commentary on the Law of Income-tax (7th Edition) at page 550 and no contrary case has been cited in the said text book or has been brought to our attention. It is true that the decision of the Patna High Court relates to a case of mining lease, but to our mind, the principle laid down in that case can well be applied to the case before us. In the first place, the lease is for a long period,

namely, 99 years, hence it would appear held that under the leases in question the assessee has parted with an asset of an enduring nature, namely, the rights to possession and enjoyment to the properties leased for a period of 99 years subject to certain conditions on which the respective leases could be terminated. A premium has been charged by the assessee in all the leases. In these circumstances, we fail to see how it could be said that the provisions of Section 12-B of the said Act cannot be brought into play. The grant of the leases in question, in our view, amounts to a transfer of capital assets as contemplated under Section 12-B of the said Act."

5.5.5 In case of A R Krishnamurthy [1989 (1) SCC 754] a, again Hon'ble Supreme Court was not dealing with the issue in respect of transfer of title in immovable property. In the said decision Hon'ble Supreme Court held as follows:

"As regards the first contention, section 2(14) of the Act defines "capital asset" as "property of any kind held by an assessee". What is parted with under the terms of the lease-deed is the right to exploit the land by extracting clay which right directly flows from the ownership of the land. The said right evaluated in terms of money forms part of the cost of acquiring the land. In Traders and Mining Ltd. v. C.I.T., 27 ITR 341, a Division Bench of the Patna High Court, interpreting the expression "transfer of a capital asset" held as under:

"We think that the expression "transfer" in the section includes not only a permanent transfer but also a temporary transfer of title to the property in question and lease of mines for any period would fall within the ambit of section 12B of the Act. It was also contended by Mr. Dutt that a transaction of a lease was not tantamount to a transfer of a title but that a mere contractual right was created. We do not think that this argument is correct. A

lease of land is transfer of interest in the land and creates a right in rem: and there is a transfer of title in favour of the lessee though the lessor has right of reversion after the period of the lease terminates."

This decision has been referred to with approval by this Court in R.K. Palshikar (HUF) v. Commissioner of Income. Tax, M.P. Nagpur, [1988] 3 SCC 549. If transfer of capital asset in section 45 of the Act includes grant of Mining Lease for any period .then obviously the "cost of acquisition" of the land would include the "cost of acquisition" Of the Mining right under the lease. Undisputedly the grant of a lease being a transfer of an asset there is no escape from the conclusion that there is a live nexus between the "cost of acquisition" of the land and the rights granted under the lease. The amount of Rs.27,260 paid by the Assessee was not only the cost of acquiring the land but also of acquiring bundle of rights in the said land including the right to grant lease. There is, no force in the contention of the learned counsel that conceptually there is no "cost of acquisition" which is attributable to the right of limited enjoyment transferred by the grant of the lease. So far as the apportionment of the cost of acquisition is concerned it is a question of fact to be determined by the Income-Tax Officer in each case on the basis of evidence. The determination of the cost of the right to excavate clay in the land in terms of money may be difficult but is none-the-less of a money value and the best valuation possible must be made. Viscount Simon in Gold Coast Selection Trust Ltd. v. Inspector of Taxes, 17 ITR 19 (supp) observed "valuation is not an exact science. Mathematical certainty is not demanded, nor indeed is it possible." The Income-tax Officer in this case worked out the cost of lease hold interest by adopting the 5/8th ratio, though the Appellate Commissioner gave the benefit to the Assessee of the Full Price of the land paid by him. In Traders and Mines Ltd. v. Commissioner of

Income-tax, (supra) the Income-tax Officer had also determined the cost of the lease hold rights on proportionate basis. Once the cost of the lease-hold rights is determined then there is no difficulty in making apportionment. We, therefore, do not find any force in the first contention of Mr. Salve and reject the same."

5.5.6 In case of Ramchandra Vs Subraya [AIR 1951 Bom 127] also Hon'ble Bombay High Court has not laid down that transfer of certain interest in the property will amount to transfer of title in the immovable property. The observations made by the Bombay High Court are reproduced below:

"6. The next contention urged by Mr. Hattyangadi on behalf of the applt. was that according to Section 105, T. P. Act a lease of immoveable property was merely a transfer of a right to enjoy such property, that it was a transfer of a part of the rights which the owner of an immoveable property had in or over the same & that unless there was a transfer of the totality of the rights it could not be a transfer of immoveable property within the meaning of Section 53-A, T. P. Act. For the purpose of determining whether there is an agreement to transfer any immoveable property within the meaning of Section 53-A, T. P. Act, we have got to see what is the definition of 'immoveable property.' Immoveable property has been defined in S. S, T. P. Act, in a negative manner. There immoveable property is said not to include standing timber, growing crops or grass. The definition does not say what immoveable property is. For that one has got to go to the definition thereof contained in the General Clauses Act & the General Clauses Act defines "immoveable property" again in an inclusive manner. It says that immoveable property shall include land, benefits to arise out of land & things attached to the earth. Immoveable property is there defined as including not only land but also benefits to arise out of land. That is the immoveable property which can be

the subject-matter of transfer, & if there is a contract to transfer immoveable property comprised within this inclusive definition, that would come well within the meaning of Section 53-A, T. P. Act. **The benefit to arise out of land is an interest in land & therefore immoveable property. (Vide Sir Dinshah Mulla's commentary on Section 3, T. P. Act, p. 15.)** Merely because in the definition of a lease contained in Section 105, T. P. Act, we do not find it specifically stated that a lease of immoveable property is a transfer of an interest in such property, but it is defined as a transfer of a right to enjoy such property, it does not follow that the transfer of the benefit to arise out of land, viz., the right to enjoy the immoveable property, is not a transfer of an interest in immoveable property. An interest in immoveable property can be acquired by a person not only if he has the totality of the rights in & over such property; he can also have an interest in immoveable property if he has transferred to him certain rights in or over the property which would come within the definition of a benefit to arise out of land. If Mr. Hattayangadi's contention is correct, a mtgee. would not have an interest in the property because he has not got the totality of the proprietary rights therein. On an execution of a mtge. two interests are carved out in the property: (1) the mtgee's interest therein, (2) the mtgor's interest therein which is otherwise called the equity of redemption. Both these are interests in the property though they do not invest the owners of Such interests with the totality of rights hi or over the property the subject-matter of the mtge. Similar is the case of a lease. A lease is no doubt a transfer of a right to enjoy the immoveable property but by the execution of a lease again there are carved out two interests in the property: (1) the lessee's interest, viz., the interest in the land which is created by reason of the demise of the property in his

favour, & (2) the lessor's interest which is the reversion in the land which falls in after the lessee's interest therein has ceased or come to an end. That there are these interests in the property is well recognised in the following sections of the T, P. Act. It is provided in Section 108(j) that :"

5.5.7 In case of Suraj Lamp & Industries (P) Ltd. Vs. State of Haryana (2012) 1 SCC 656, Hon'ble Supreme Court held as follows.

"18. It is thus clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred.

19. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under section 53A of TP Act). According to the TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the TP Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter. xxx xxx xxx

24. We therefore reiterate that immovable property can be legally and lawfully transferred/ conveyed only by a registered deed of conveyance. Transactions of the nature of `GPA sales' or `SA/GPA/will transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognised as deeds

of title, except to the limited extent of Section 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in municipal or revenue records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered assignment of lease. It is time that an end is put to the pernicious practice of SA/GPA/will transactions known as GPA sales.”

5.5.8 Thus we are not in position to uphold the contentions of the appellant that by leasing of the land, there was an transfer in title of the immovable property so as to hold that the activities undertaken by the appellant will fall under exclusion clause of Section 65B(44). Further we find that in terms of Section 66E of the Finance Act, 1994, certain services have been declared to be taxable services, and “Renting of Immovable Property” falls within the category of declared of services. If the argument of the Appellant was to be accepted, then said declaration made by the 66E Of Finance Act, 1994 will be otiose. Section 65B(41) and Section 66E of the Finance Act, 1994 as introduced with effect from 1st July 2012 reads as follows:

“65B. In this Chapter, unless the context otherwise requires,—

(41) "renting" means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property;

66E. The following shall constitute declared services, namely:—

(a) renting of immovable property;

(b)”

5.5.9 Thus we are not in position to agree with the contentions raised by the appellant that the activity of leasing of immovable property by them is akin to transfer of title in the immovable property. Accordingly we hold that the activities undertaken by the appellant which have been held to fall under the category of “renting of immovable property” continue to fall in the same category and is a declared service as per section 66E of the Finance Act, 1994.

5.6 Whether appellants qualify to be the government authority for the purpose of exemption notification No 25/2012-ST.

5.6.1 Appellants have vehemently argued that they fall within the ambit of governmental authority as they have been created under the provisions of Section 113(3A) of Maharashtra Regional and Town Planning Act, 1966 (MRTP) with 100% government control.

5.6.2 Relevant extracts from the Notification 25/2012-ST, are reproduced below:

“In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012- Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210 (E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services leviable thereon under section 66B of the said Act, namely:-

1-38

39. Services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution.

2. *Definitions. - For the purpose of this notification, unless the context otherwise requires, -*

(s) "governmental authority" means a board, or an authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under article 243W of the Constitution;"

5.6.3 From the above extracts the issue that needs to be decided is whether the Appellants fall within the definition of "government authority" as defined by the notification. Appellants have contended that for the reason that they have been created under Section 113(3A) of MRTTP they qualify to be the government authority. Section 113 of MRTTP Act reads as follows:

113. Designation of site for new town:-

(1) If the State Government is satisfied that it is expedient in the public interest that any area should be developed as a site for a new town as reserved or designated in any draft or final Regional Plan it may, by notification in the Official Gazette, designate that area as a the site for the proposed new town. The new town shall be known by the name specified in the notification.

(2) After publication of the notification under sub-section (1) for the purpose of acquiring, developing and disposing of land in the area of a new town, the State Government shall by another notification in the Official Gazette constitute a New Town Development Authority. The New Town Development Authority shall consist of a Chairman, a Vice-Chairman, two member representing the local authorities functioning in the Region and such numbers of other members not exceeding seven as in the opinion of State Government have special knowledge or practical experience in matters relating to town and country planning, an officer to be called the Town Planning Officer

and Chief Executive Officer. The Chairman and the Vice-Chairman and all other members shall be appointed by the State Government.

(3) The Chief Executive Officer shall be the Secretary of the Development Authority constituted under sub-section (2).

(3A) Having regard to the complexity and magnitude of the work involved in developing any area as a site for the new town, the time required for setting up new machinery for undertaking and completing such work of development, and the comparative speed with which such work can be undertaken and completed in the public interest, if the work is done through the agency of a corporation including a company owned or controlled by the State as a new town, the State Government may, notwithstanding anything contained in sub-section (2), require the work of developing and disposing of land in the area of a new town to be done by any such corporation, company or subsidiary company aforesaid, as an agent of the State Government; and thereupon, such corporation or company shall, in relation to such area, be declared by the State Government, by notification in the Official Gazette, to be the New Town Development Authority for that area.

(4) Every Development Authority shall be a body corporate with perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, and contract and sue or be sued by such name as may be specified in the notification under subsection (2).

(5) On the constitution of, or on the declaration of any corporation or company as a Development Authority or any new town, the local authority or authorities functioning, within the area designated under this Act as a site for the new town, immediately before such constitution or declaration shall cease to exercise the powers and perform the functions and duties which the said Development

Authority is competent to exercise and perform under this Act.

(6) The provisions of sections 5, 6, 7, 8, 9, 10 and 11 shall apply mutatis mutandis to a Development Authority constituted under sub-section (2) as they apply in relation to a Regional Board.

(7) The Development Authority shall have its office at such place as the State Government may appoint in this behalf.

(8) A Development Authority shall have all the powers and shall carry out all the duties of a Planning Authority under this Act including all powers and duties under Chapters III and IV and also under other provisions of this Act as may be relevant for carrying out of its objects and all the provisions in respect of procedure under this Act shall apply so far as may be necessary in this behalf."

5.6.4 From the scheme of the Section 113 itself the difference between the Development Authority constituted under the MRTP Act, and those declared as an agent of the state government for the purposed of undertaking the work of development of new towns is quite evident. The development authorities get constituted in terms of subsection 2 of section 113, while agents of state government get declared under sub section 3A. Neither the constitution of the agent nor its functioning controlled as per the provisions of the said Act. In respect of Development Authority constituted under sub section 2 of Section 113 of MRTP, sub section 6 makes applicable certain provisions as enshrined in section 5, 6, 7, 8, 9, 10 & 11 *ibid* which relate to functioning of the Development Authority. These provisions are not made applicable to the State Agents declared under sub section 3A of Section 113.

5.6.5 Hence when the MRTP Act, itself makes the difference between the state agents declared under the Act and development authorities constituted under the same

act, we see no merits in the submissions of the appellant to the effect that that they have been constituted in terms of that Act, for the purpose of treating them as government authority for the purpose of Notification No 25/2012-ST.

5.6.6 It is now settled law by the decision of constitutional bench of Apex Court in case of Dilip Kumar & Co [2018 (361) ELT 577 (SC)] that exemption notifications need to be construed strictly and benefit of any ambiguity in the notification should be interpreted in favour of revenue. The law as stated by the Apex Court in this decision is reproduced below:

“52. To sum up, we answer the reference holding as under -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled.”

5.6.7 Hon'ble Bombay High Court has in case of Builders Association held as follows:

“13. What is heavily relied upon before us is the position of CIDCO. The CIDCO relies upon a notification issued under the MRTP Act. It may be designated as a New Town Development Authority for the purpose of the MRTP Act. For designation of a site as a new town and for development of any area as a site for the new town, sub-

section (3A) of Section 113 enables the State Government to require the work of developing and disposing of land in the area of new town by any such Corporation, company or subsidiary company as referred in sub-section (2) of Section 113 thereof. It could be declared, by a notification in a Official Gazette, to be the New Town Development Authority for that area. Pertinently, this notification, which is relied upon and which notifies the Navi Mumbai Disposal of Land (Amendment) Regulations, 2008 reinforces the position that by a final notification in Official Gazette, the CIDCO is constituted and designated as the New Town Development Authority.

14. On a plain reading of the GST Act, we do not see how we can agree with Mr. Nankani. Mr. Nankani also relies upon Schedule II, which is referable to Section 7. These are the activities to be treated as supply of goods or services. The substantive provision Section 7 in clearest terms says that the activities specified in Schedule I made or agreed to be made without a consideration and the activities to be treated as supply of goods or supply of services referred to in Schedule II would be included in the expression "supply". However, clause (a) of sub-section (1) of Section 7 includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. We referred to the definitions simply to reinforce our conclusion that the CIDCO is a person and in the course or in furtherance of its business, it disposes of lands by leasing them out for a consideration styled as one-time premium. Therefore, if one refers to Schedule II, Section 7, then, Item No. 2 styled as land and building and any lease, tenancy, licence to occupy land is a supply of service. Any lease or letting out of a building, including commercial, industrial or residential complex for business, either wholly or partly is a supply of service. It is

*settled law that such provisions in a taxing statute would have to be read together and harmoniously in order to understand the nature of the levy, the object and purpose of its imposition. No activity of the nature mentioned in the inclusive provision can thus be left out of the net of the tax. Once this law, in terms of the substantive provisions and the Schedule, treats the activity as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefor as a **premium/one-time premium is a measure on which the tax is levied, assessed and recovered. We cannot then probe into the legislation any further.***

15. The reliance placed on the judgment of the Hon'ble Supreme Court in the case of Panbari Tea Co. Ltd. (supra) is entirely misplaced. There, a registered lease deed by the assessee, under which two estates were leased out to a firm for a period of 10 years, was in issue. The lease was executed for a consideration as and by way of premium and annual rent to be paid by the lessee to Panbari. The premium was made payable as noted in the Hon'ble Supreme Court's judgment. What went before the Income Tax Officer is the issue of treatment to the installment paid towards the premium in the relevant accounting year. The Income Tax Officer treated this as a revenue receipt of the assessee. On appeal, this order was confirmed. On further appeal, the Tribunal also held that the premium was really the rent payable under the lease deed and, therefore, it was chargeable to income tax. After the matter was carried to the High Court, the assessee succeeded because the question posed for the High Court's consideration was answered by holding that this receipt is a capital receipt. The question that arose before the Hon'ble Supreme Court was whether this finding is correct. It is in that context and how to treat this income, whether as a revenue receipt or a capital receipt that all the further observations are made.

Even by terming the gain or income as Salami, what the Hon'ble Supreme Court was essentially concerned with is not the transaction or the nature thereof, but the income generated or derived from it. Its treatment, therefore, led to the Hon'ble Supreme Court referring to Section 105 of the Transfer of Property Act, 1882. In these circumstances, the opinion rendered is that the income was treated rightly as a capital receipt. In the context, a lease of immovable property is a transfer of right to enjoy the property as termed by the Transfer of Property Act, 1882 for a price paid. That is how it being a transfer that the income derived in relation to lease of immovable property was treated as above.

16. Similarly, in the case of R.K. Palshikar (supra), the agricultural land of the assessee was diverted to non-agricultural purpose by developing it as housing site several years ago and it was not disputed that the land in question constitutes a capital asset within the meaning of Section 2(4A) of the Income Tax Act, 1961. The question was whether Section 12B of that act can be brought in to play in this case as the transfer is of leasehold interest in immovable property for 99 years and not an outright sale or transfer of the complete interest of the transferor in the immovable property. The assessee was not agreeable to pay the tax as demanded and tried to escape the levy by urging that this was not a transaction which would invite or attract capital gain tax. In these circumstances, the question was answered by the Hon'ble Supreme Court and in that context, the observations heavily relied upon by Mr. Nankani are made. Once again, we cannot ignore that the observations are in the context of the provisions, and the interpretation to be placed thereon, but found in the Income Tax Act, 1961. That is an assessment of the tax on income. We are concerned here with the GST Act and the tax on supply of goods and services. It is not disputed that the position of the CIDCO for the purpose of orderly

planning and development will be of no assistance in the sense while developing a new township, the objective of the planning authority is not to earn money, but to develop the area so that the purpose of setting up a township is achieved by more people wanting to live in the area in lieu of the various amenities provided in the area. The CIDCO is one such authority. It is entirely for the legislature, therefore, to exercise the powers conferred by sub-section (2) of Section 7 of the GST Act and issue the requisite notification. Absent that notification, merely going by the status of the CIDCO, we cannot hold that the lease premium would not attract or invite the liability to pay tax in terms of the GST Act.

17. Even the judgment in the case of Shri Ramtanu Co-operative Housing Society Ltd. (supra) is of no assistance. There, the constitutional validity of the Maharashtra Industrial Development Act, 1962 was challenged. The argument was that this is not an enactment and in pith and substance referable to the constitutional entry, namely, Schedule VI List I, Entries 7 and 52, List II Entry 24 within the meaning of Article 246 of the Constitution of India. It is in this context that the functions and powers of the Maharashtra Industrial Development Corporation (MIDC) were referred and the court came to the conclusion that the Corporation is not a Government company and cannot be termed as a trading corporation as well. It provides amenities and facilities in industrial areas, when it allots industrial plots for setting up industries so as to achieve a balanced development and growth of industries. It is performing that function and which, therefore, enabled the Hon'ble Supreme Court to hold that the constitutional entries would not allow the power of competent legislature to make the law. This judgment is of no assistance.

18. *In the case of Commissioner of Central Excise, Nashik (supra), the demand of service tax was in issue. The Finance Act, 1994 and particularly Section 65 Clause (64) was relied upon to urge that the service charges collected by the MIDC from the allottees of the plots are in relation to services provided by the MIDC to the plot holders and the same is covered by the category "maintenance, management and repairs" under Clause (64) of Section 65 of the Act. It is in relation to such a controversy that the Hon'ble Supreme Court's judgment in the case of Shri Ramtanu Co-operative Housing Society Ltd. (supra) outlining the legal position and the status of the Corporation is referred by the Division Bench. The issue raised related to collection of service charges, but whether the services rendered are taxable services or not. The Division Bench noted that this consideration is an amount received for the facilities and amenities provided. That is a statutory function. It is in these circumstances that the Revenue's appeal was dismissed. All the observations in the paragraphs relied upon must be seen in the backdrop of the essential controversy noted above. With respect, it cannot be said that the activities performed by sovereign or public authorities under the provisions of law, which are in the nature of statutory obligations are excluded from the purview of the present enactment. Pertinently, the dividing line between governmental and non-governmental, sovereign and regal functions and otherwise is not very thin and post globalization, liberalization and privatization. In that context, a useful reference can be made to a judgment of the Hon'ble Supreme Court in the case of N. Nagendra Rao and Co. v. State of Andhra Pradesh - AIR 1994 SC 2663. The observations in Paras 23 and 24 are extremely relevant. These paragraphs read as under :-*

"23. In the modem sense the distinction between sovereign or non-sovereign power thus does not exist. It all depends on the nature of power and manner of its

exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be ultra vires, but since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government in exercise of its executive action be sued for its decision on political or policy matters. It is in public interest that for acts performed by the State either in its legislative or executive capacity it should not be answerable in torts. That would be illogical and impractical. It would be in conflict with even modern notions of sovereignty. One of the tests to determine if the legislative or executive function is sovereign in nature is whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matter is impliedly barred.

24. But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State

as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the "financial instability of the infant American States rather than to the stability of the doctrine's theoretical foundation", or because of "logical and practical ground", or that "there could be no legal right as against the State which made the law" gradually gave way to the movement from, "State irresponsibility to State responsibility". In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary

and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in Viscount Canterbury (supra). But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State.”

19. To the similar effect are the findings in the later judgment of the Hon'ble Supreme Court in the case of *Agricultural Produce Market Committee v. Ashok Hari Kuni* - AIR 2000 SC 3116 (see Paras 22 and 31 to 33).

20. In the passing, we are of the opinion that the High Court of Judicature of Allahabad, while considering the demand, not arising out of the GST, but under the Finance Act in relation to the services of renting of immovable property of Greater Noida, has rightly arrived at the conclusion that the same was a taxable service and on the consideration received, the service tax could have been levied and demanded. Once we agree with the reasoning of the Division Bench, then, we do not feel it necessary to reproduce the paragraphs in the Division Bench judgment. We are not in agreement with the Learned Senior Counsel appearing for the petitioners that the demand is contrary to law or unfair, unjust and unreasonable in any manner.”

5.6.8 Appellants have contended that they were acting only as agent of Maharashtra Government, for

leasing out the land actually owned by Maharashtra Government. The consideration including the lease premium belongs to government. Article 289 (1) exempts the property of State from Union Taxation. Thus no service tax is payable. In our view the fallacy in the argument of the appellant is self evident. Service Tax being indirect tax is tax on the consumer of property i.e. the tax on enjoyment of property and is not the tax on the property of the state government. Hence the claim of protection under Article 289(1) of the Constitution in respect of the consideration received for provision of taxable service cannot be sustained. This issue was considered in respect of indirect taxes such as Custom and Excise duties, by a nine member bench of Apex Court on presidential reference and court held as follows (as reported at [1963 AIR1760])

"The main question, on this reference by the President of India under Art. 143 (1) of 792 the Constitution, depends upon the true scope and interpretation of Art. 289 of the Constitution relating to the immunity of States from Union taxation. On receipt of the reference notices were issued to the Attorney General of India and to the Advocates General of the States. In pursuance of that the case of the Union Government has been placed before us by the learned Solicitor-General and that of the States of Andhra Pradesh, Assam, Bihar, Gujarat, Kerala, Madhya Pradesh, Madras, Maharashtra, Mysore, Orissa, Punjab and West Bengal was presented to us by their respective counsel. On the date the hearing of this case started, an application was made on behalf of the State of Uttar Pradesh also to be heard, but no statement of case had been put in on behalf of that State, and as no grounds were made out for condoning the delay, we refused the application.

The reference is in these terms

"Whereas sub-section (1) of section 20 of the Sea Customs Act, 1878 (Act 8 of 1878), provides for the levy of customs

duties on goods imported or exported by sea to the extent and in the manner specified in the said sub-section ;

And whereas sub-section (2) of section 20 of the said Act applies the provisions of sub-section (1) of that section in respect of all goods belonging to the Government of a State and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods not belonging to any Government;

And whereas it is proposed to amend sub-section (2) of section 20 of the said Act so as to apply the provisions of sub-section (1) of that section in respect of all goods belonging to the Government of a State; 793 irrespective of whether such goods are used or not for the purposes set out in the said subsection (2) as at present in force;

And whereas sub-section (1) of section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944), provides for the levy of duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into any part of India in the manner specified in the said sub-section;

And whereas sub-section (IA) of section 3 of the said Act applies the provisions of sub-section (1) of that section in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, the Government of a State and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods which are not produced or manufactured by any Government;

And whereas it is proposed to amend sub-section (IA) of section 3 of the said Act so as to apply the provisions of

sub section (1) of that section in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of the Government of a State, irrespective of whether such goods are used or not for the purposes set out in the said sub-section (IA) as at present in force;

And whereas it is proposed to introduce in Parliament a Bill, the draft of which is annexed here to and marked "Annexure", to amend for the purpose aforesaid sub-section (2) of section 20 of the Sea Customs Act, 1878 (Act 8 of 1878) and sub-section -(IA) of section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944);

And whereas Governments of certain States have expressed, the view that the amendments as proposed in the said draft of the Bill may not be constitutionally valid as the provisions of article 289 read with the definitions of 'taxation' and -tax' in clause (28) of article 366 of the Constitution of India preclude the Union from imposing or authorising the imposition of any tax, including customs duties and excise duties; or in relation to any property of a State except to the extent permitted by clause (2) read with clause (3) of the said article 289;

And whereas the Government of India is on the other hand inclined to the view

(i) that the exemption from Union taxation granted by clause (1) of article 289 is restricted to Union taxes on the property of a State and does not extend to Union taxes in relation to the property of a State and that clauses (2) and (3) of that article have also to be construed accordingly;

(ii) that customs duties are taxes on the import or export of property and not taxes on property as such and further that excise duties are taxes on the production or manufacture of property and not taxes on property as such; and

(iii) that the union is not precluded by the provisions of article 289 of the Constitution of India from imposing or authorising the imposition of customs duties on the import or export of the property of a State and other Union taxes on the property of a State which are not taxes on property as such;

And whereas doubts have arisen as to the true interpretation and scope of article 289 of the Constitution of India and, in particular, as to the constitutional validity of the amendments to the Sea Customs 795 Act. 1878 (Act 8 of 1878) and the Central Excises and Salt Act, 1944 (Act 1 of 1944) as proposed in the aforesaid draft Bill;

And whereas in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out have arisen and are of such a nature and are of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;

Now, therefore, in exercise of the powers conferred upon me by clause (1) of article 143 of the Constitution of India, I, Rajendra Prasad, President of India, hereby refer the following question to the Supreme Court of India for consideration and report of its opinion thereon;

"(1) Do the provisions of article 289 of the Constitution preclude the Union from imposing, or authorising the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that article?

(2) Do the provisions of article 289 of the Constitution of India preclude the Union from imposing, or authorising the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that article ?

(3) Will sub section (2) of section 20 of the Sea Customs Act, 1878 (Act 8 of 1878) and subsection (IA) of section 3

of the Central Excises and Salt Act, 1944 (Act 1 of 1944) as amended by the Bill set out in the Annexure be inconsistent with the provisions of article 289 of the Constitution of India

New Delhi

sd/-

Dated the 19-4-1962

*Rajendra Prasad,
President of India.*

35. But it is contended on behalf of the States that in the scheme of our Constitution no distinction has been made between direct and indirect tax and therefore this distinction is not relevant to the present controversy. It is true that no such express distinction has been made under our Constitution; even so taxes in the shape of duties of customs (including export duties) and excise, particularly with a view to regulating trade and commerce in so far as such matters are within the competence of Parliament and are covered by various entries in List I to which reference has already been made, cannot be called taxes on property; they are imposts with reference to the movement of property by way or import or export or with reference to production or manufacture of goods. Therefore even though our Constitution does not make a clear distinction between direct and indirect taxes, there is no doubt that the exemption provided in Art. 289(1) from Union taxation to property must refer to what are known to economists as direct taxes on property and not to indirect taxes like duties of customs and excise which are in their essence trading taxes and not taxes on property.

36. It is also contended on behalf of the States that the narrower construction suggested on behalf of the Union would very seriously and adversely affect activities of the States. This argument does not take into account the more serious consequences that would follow if the wider interpretation suggested on behalf of the States were to be adopted. For example, a State may decide to embark upon trade and commerce with foreign countries on a large scale

in respect of different commodities. On the interpretation put forward by the States, the Union Parliament would be powerless to regulate such trade and commerce by the use of the power of taxation conferred on it by entry 83 of List I, thus largely nullifying the exclusive power of Parliament to legislate in respect of international trade and commerce, including the power to tax such trade. Trade and commerce with foreign countries, export and import across the customs frontiers and inter-State trade and commerce are all within the exclusive jurisdiction of the Union Parliament. This Court naturally will not adopt a construction of Art. 289(1) which will lead to such a startling result as to nullify the exclusive power of Parliament in these matters.

37. Lastly, it is urged on behalf of the States that s. 20 of the Sea Customs Act was recast and amended by Act. XLV of 1951 and that sub-s. (2) thereof has borrowed most of its words from the provisions of clause (2) of Art. 289, and therefore, Parliament itself had understood clause (2) of Art. 289 in the sense in which the States are contending that it should be interpreted. But that in our opinion does not conclude the matter, for we have to construe the provisions of the Constitution in their proper setting and we are entitled to come to the conclusion that Parliament may not have been correct in so interpreting the words of clause (2) of Art. 289.

38. For the reasons given above, it must be held that the immunity granted to the States in respect of Union taxation does not extend to duties of customs including export duties or duties of excise. The answer to the three questions referred to us must therefore, be in the negative. Let the opinion of this Court be reported to the President accordingly.

By Court: In view of the opinion of the majority the answer to the three questions referred to is in the negative.

Questions answered accordingly.”

In view of the decision of Hon'ble Apex Court referred above we do not find any merits in the submissions made by the Appellants in this respect.

5.6.9 The appellants have contended that the allotment of plots by them as an agent of State of Maharashtra is a statutory function qua the land owned by the government which could be performed only by the state and therefore is not a service. Thus in view of the Circular 89/7/2006-ST dated 18.12.2006 no service tax could have been levied upon them. They also rely upon the decision of Tribunal in case of Maharashtra Industrial Development Corporation [2014 (36) STR 1291 9T-Mum)]. The decision rendered in case of Maharashtra Industrial Development Corporation (MIDC) is clearly distinguishable as MIDC is statutorily constituted under the Maharashtra Industrial Development Act, 1962. Section 3 of this Act reads as follows:

“(1) For the purpose of securing and assisting in the rapid and orderly establishment and organisation of industries in industrial areas and industrial estates in the State of Maharashtra, there shall be established by the State Government by notification in the Official Gazette, a Corporation by the name of Maharashtra Industrial Development Corporation.

(2) The said Corporation shall be a body corporate with perpetual succession and a common seal, and may sue and be sued in its corporate name, and shall be competent to acquire, hold and dispose of property, both moveable and immoveable, and to contract, and do all things necessary for the purposes of this Act.”

The said corporation so established is collecting certain fees for various statutory functions assigned to it under the statute and these fees have been held to statutory levies not in respect of any particular service and hence not subjected to service tax. The difference in the constitution of the appellant from MIDC, makes the case of MIDC referred distinguishable. While MIDC being a statutory authority was collecting certain statutory fees, Appellants are not public/ statutory authorities on the same footing and were providing the taxable services as an agent of states. Hence the decision of tribunal and that of Bombay High Court in case of MIDC is distinguishable.

5.6.10 The arguments advanced by the Appellant have been considered by the tribunal in case of Chhattisgarh State Industrial Development Corporation [2016 (44) STR 642 (T-Del)] holding as follows:

“6. The appellant is a limited company registered under the Companies Act, 1956, which was leasing the Govt. land and also collecting charges for maintenance of street light and repair and maintenance of roads, etc. from the entrepreneur-allottees of the land. Even if these charges are statutorily prescribed, they remain a consideration for rendition of service. There is nothing in Section 66 of the Finance Act, 1994 which implies that if charges for rendition of taxable service are statutorily prescribed the same would not be liable to Service Tax. Similarly, there is nothing in Section 65 ibid to imply or even suggest that a service rendered as part of statutory duty/obligation will not be treated as taxable service even if it satisfied the definition of any of the taxable services enumerated therein. When the service rendered is a taxable service as defined in Section 65 ibid, there is no inherent exemption from levy of service tax merely on the ground that the service provider is “Government” or “Government Agency”, nor is there any exemption from the levy of service tax merely because service recipient is Govt. or Govt. agency.

If such services are exempted under an exemption Notification issued under Section 93 ibid, that is a separate issue. The appellant cited CESTAT judgment in the case of Maharashtra Industrial Development Corporation (MIDC) v. CCE, Nasik [2014-TIOL-2022-CESTAT-MUM = 2014 (36) S.T.R. 1291 (Tri.)] and [2015-TIOL-CESTAT-Mumbai] in its support, wherein CESTAT in effect held that based on MID Act, 1961 of Maharashtra Government, the activities undertaken by MIDC are in the nature of mandatory and statutory functions and relied upon the C.B.E. & C. Circular No. 89/7/2006, dated 18-12-2006 to decide in favour of the assessee. While C.B.E. & C. clarifications are not binding precedents for CESTAT, even so, we reproduce the said C.B.E. & C. circular below :-

*“Circular No. 89/7/2006-S.T., dated 18-12-2006
F. No. 255/1/2006-CX.4
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi*

Subject : Applicability of Service tax on fee collected by Public Authorities while performing statutory functions/duties under the provisions of a law - Regarding.

A number of sovereign/public authorities (i.e. an agency constituted/set up by government) perform certain functions/duties, which are statutory in nature. These functions are performed in terms of specific responsibility assigned to them under the law in force. For examples, the Regional Reference Standards Laboratories (RRSL) undertake verification, approval and calibration of weighing and measuring instruments; the Regional Transport Officer (RTO) issues fitness certificate to the vehicles; the Directorate of Boilers inspects and issues certificate for boilers; or Explosive Department inspects and issues certificate for petroleum storage tank, LPG/CNG tank in terms of provisions of the relevant laws. Fee as prescribed is charged and the same is ultimately deposited into the Government Treasury. A doubt has arisen whether such

activities provided by a sovereign/public authority required to be provided under a statute can be considered as 'provision of service' for the purpose of levy of service tax.

2. The issue has been examined. The Board is of the view that the activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute, and it is deposited into the Government Treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authority under the provisions of law does not constitute provision of taxable service to a person and, therefore, no service tax is leviable on such activities.

3. However, if such authority performs a service, which is not in the nature of statutory activity and the same is undertaken for a consideration not in the nature of statutory fee/levy, then in such cases, service tax would be leviable, if the activity undertaken falls within the ambit of a taxable service.

4. Trade and field formations may be advised accordingly.

5. Hindi version will follow.

It is clear that even as per the above C.B.E. & C. circular dated 18-12-2006, service tax was not to be charged on activities performed by sovereign or public authorities under provisions of law in the nature of statutory obligation when the fee collected for such activities is in the nature of compulsory/statutory levy and is deposited into Govt. treasury. In the present case, the appellant is a

corporate entity and is therefore can scarcely be called sovereign or public authority and also indisputably the charges collected by it were not deposited in the Govt. treasury. Therefore, even the said C.B.E. & C. circular (non-binding as it is on CESTAT) does not come to the appellant's rescue. Here, it is pertinent to mention that vide Exemption Notification No. 23/2016, dated 13-4-2016, the Govt. has inter alia exempted services rendered by Govt. or local authorities to other Govt. or local authorities and services rendered by Govt. or local authority by way of issuance of passport, driving licence, birth/death certificate, etc. This clearly shows that unless there is an exemption Notification the taxable services rendered by the Govt. or local bodies are liable to service tax. This clearly implies that the taxable service provided by Govt. or local authority is not exempt from service tax merely because it is provided by Govt. or local authority rendering the proposition that taxable service rendered by Govt./public authority as statutory mandate/obligation is exempt merely because it is so rendered by Govt./public authority totally devoid of any legal basis. Indeed, C.B.E. & C. Circular No. 192/62/2016-S.T., dated 13-4-2016 (at Srl. No. 5 of the table contained therein) clearly states that "It is clarified that any activity undertaken by Government or a local authority against a consideration constitutes a service and the amount charged for performing such activities is liable to Service Tax. It is immaterial whether such activities are undertaken as a statutory or mandatory requirement under the law and irrespective of whether the amount charged for such service is laid down in a statute or not...." Thus, the CESTAT judgment in the case of Maharashtra Industrial Development Corporation (MIDC) v. CCE, Nasik (supra) does not have the strength to rescue the appellant."

5.7 Whether the extended period of limitation can be invoked in the facts and circumstances of this case for making the demand of service.

5.7.1 On the issue of limitation appellants have relied upon number of decisions of various authorities to argue that their case is not covered by the proviso to Section 73(1) of the Finance Act, 1994, as they have not suppressed anything with the intention to evade payment of taxes. However they have failed to establish the relevance of these decisions in the facts and circumstances of this case. Commissioner appeal has discussed the issue for invocation of extended period of limitation in para 45 to 54 of the impugned order.

“45. The Noticee have also argued that the Show Cause Noticee is time barred. It is contended that for invoking the proviso to sub-section (1) of Section 73 of the Finance Act, 1994, an intention to evade payment of Service Tax is a must. The recovery mechanism provided in proviso clause to Section 73(1) of the Finance Act, 1994, as it existed at the material time, provides for demanding Service Tax short paid or not paid during the period upto five years, “by reason of –

- (a) fraud; or*
- (b) collusion; or*
- (c) wilful mis-statement; or*
- (d) suppression of facts; or*
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of Service Tax”.*

46. Thus, each of the sub-clauses getting covered by (a) to (e) of Section 73(1) are independent of each other and existence of any/each one of the individual situation is good enough to attract demand of Service Tax for extended period under the proviso clause to Section 73(1). In the present case, the Noticee have suppressed the material facts regarding the provision of ‘Renting of

Immovable Property Services' by way of leasing of commercial plots together with building/premises. The Noticee are holding Service Tax Registration right since 2003-04 for other services. Thus, the Noticee was familiar with the provisions of the Service Tax law and the procedures thereof. Admittedly, the Noticee were discharging Service Tax on services like 'Technical Inspection and Certification services', 'Mandap Keeper's services', 'Membership of Club or Association services' and 'Management, Maintenance or Repair Services'. Once the Noticee are exigible to Service Tax on the aforementioned services, then how can they claim not exigible to the 'Renting of Immovable Property Services', when their status remains the same and no specific exemption is granted to the 'Renting of Immovable Property Services'. This clearly indicates that the suppression of the material facts, as above, was deliberate and with intent to evade payment of appropriate Service Tax.

47. Requirement under law to file proper ST3 returns with full disclosure is not a mere procedural formality but a statutory requirement. Under the statute, the assessee was under an obligation to file ST-3 returns declaring therein the correct nature of services provided and correct value of services. Any failure to declare information required to be declared in statutory returns leading to non-payment of appropriate Service Tax thereon, has to be taken as Service Tax not paid by reason of suppression of facts. Therefore, each non-filing of ST-3 return or filing of ST-3 return without furnishing the information/data required to be declared under the aforestated columns, during the entire period covered by the Show Cause Notice dated 19.10.2012, amounts to repeated suppression of facts.

48. Section 73 ibid does not speak specifically about the knowledge gained by the Department. What is relevant for invoking the proviso clause to Section 73(1), as it stood at the material time, is whether the Service Tax which had

not been levied, short levied, etc., and been so (not paid) by reason of fraud or collusion or wilful misstatement or suppression of facts', etc. In other words, for invoking extended period clause, what is relevant is whether at the material time when the Service Tax leviable under law, was not paid, this fact remained to come to the notice of the department because relevant facts were misstated or not stated (suppressed) before the department. In the instant case, as already discussed above, the Noticee had deliberately suppressed the material facts from the department with intent to evade payment of Service Tax. Hence the department is justified in demanding Service Tax for extended period.

49. It is further contended that they are a Government company and the payment or otherwise of Service Tax does not result in any loss or gain for a particular person or a group of persons. It is also contended that being a Government company, the intent to evade payment of Service Tax is absent and, therefore, the extended period of limitation cannot be invoked. In this regard, I find that the Special Bench of Hon'ble Tribunal, New Delhi, in the case of Hindustan Aeronautics Ltd. vs. Collector of Customs, reported in 1984 (16) ELT 544 (T), had held that Public Sector undertakings/companies which are incorporated under the Companies Act are separate entities and cannot be considered as Government. Further, the Hon'ble Tribunal in the case of Housing & Development Corporation Ltd. (HUDCO) vs. C.S.T., Ahmedabad – 2012 (26) STR 531 (T), had upheld the invocation of extended period due to suppression of facts. Para 20 of the aforesaid judgment reads as under –

“20. It was submitted on behalf of the appellant that the appellant is wholly owned Government Company and therefore there cannot be mala fide intention on their part to evade payment of Service Tax. Revenue relied upon the decision of the Tribunal in the case of Bharat Petro

Corporation Ltd. v. CCE, Nasik 2009 (242) E.L.T. 358 (Tri.-Mum.), wherein the Tribunal upheld the submission that BPCL is a Government owned company had suppressed the fact and therefore, just because it is wholly owned Govt. company, it cannot be said that bona fide can be presumed. He also submitted that blind belief cannot be a ground for non-payment of taxes. In this case, we find that the appellants have treated the amount of prepayment charges as additional interest and reset charges as additional interest from 2005-2006. It was also submitted that Income Tax Department has accepted such treatment given by them. The fact remains that after definition of lending was amended, and the service tax definition included in the activity in relation to lending for liability to Service Tax, appellant should have intimated the fact to the Department and checked up whether such collection of amount in relation to lending would be liable to tax or not. It is settled law that Government company is not Government and it has to be taken note that even Government departments make the payments for the services received from another department. Telecommunication department used to provide telecommunication services to other departments and other departments paid for the telecom services rendered and even for the services rendered by Railways, Postal and other departments, payments are made. Therefore, the fact that the appellant is a wholly owned government company, does not mean that they need not have to follow the law of land or take it lightly and plead ignorance of law or being a wholly government company, seek differential treatment. The fact remains that the appellant was required to declare the income received once the law was amended and they were required to seek clarification, if there was doubt. Even if they felt that the activity did not attract Service Tax, ST-3 returns should have been filed/or Department addressed intimating that these services are not liable to tax. In this case, the submission made by the

Id. A.R. that plea of bona fide has to be considered in the light of decision of the Tribunal in the case of SPIE CAPAG S.A. v. CCE Mumbai - 2009 (243) E.L.T. 50 (Tri.-Mum.), is appropriate. In that case, while dealing with the plea of bona fide belief, the Tribunal observed that “the least that was expected of the appellant to discharge the plea of bona fide belief was to make enquiries from Central Excise authorities or some reputed legal firm regarding dutiability of items manufactured by it.” Therefore, we find ourselves in agreement with the submissions that the appellant could not have interpreted the law according to their understanding without taking sufficient care for their interpretation, is correct. In the absence of any evidence to show that the appellant had intimated the Department or had obtained legal opinion, invocation of extended period on the ground of suppression of facts has to be upheld.”

50. *There is nothing on record that the Noticee had even remotely made any enquiries with the Department or had sought any legal opinion vis-a-vis the taxability of the services provided, viz. leasing of commercial plots along with the building/premises, though the levy of Service Tax on ‘Renting of Immovable Property services’ had been introduced since 01.06.2007. It is relevant to note that when the levy of Service Tax on the impugned service was introduced the Noticee was already holding he Service Tax Registration for other services and were discharging the Service Tax liability and hence the question of treating the impugned service differently does not arise. As such, the only possible view here is that the Noticee had indeed suppressed the material facts, which has led to non-payment of Service Tax to the extent of Rs.136,5600,263/-, therefore, the invocation of the extended period in this case is justified.*

51. *The Noticee have relied on the decisions in the case of Continental Foundation Jt. Venture, Pushpam*

Pharmaceuticals, Chennai Petroleum Corpn. Ltd., KPTCL, Executive Engineer Tubewell Division, Centre for Development of Advance Computing, ONGC and Indian Institute of Chemical Technology (Supra). The facts involved in these cases are entirely different and distinguishable and hence, the decisions in these cases cannot be made applicable as it is to the instant case as those decisions have been rendered in the particular facts and circumstances of the cases so decided and cannot be made applicable universally. Further, the reliance place on the decisions in Hindalco Industries Ltd. And Franch Express Network (supra) is also totally misplaced, as the present case is not based on the Balance Sheet. Besides, in the case of HML Agencies (P) Ltd., P.J. Margo Pvt Ltd., PT Education & Training Service Ltd., Tirupati Paints, Delux Colour Lab Pvt. Ltd. and Yokogawa Blue Star, relied by the Noticee, either the facts were declared to the department in some or the other manner or the facts are entirely different and cannot be equated with the facts and circumstances of the present case. Therefore, even the ratio in these case cannot be applied.

52. *Further, relying of the decisions in Bharat Aluminium Co. Ltd. and Homa Engineering(Supra), it is contended by the Noticee that in cases where dispute of interpretation of statute is involved, extended period of limitation cannot be invoked. However, they have not pointed out any such dispute so far as the provisions of "Renting of Immovable Property service' is concerned except claiming that confusion in interpretation is observed in context of the levy of Service Tax on the receipts of premiums against licensing of vacant land prior to 01.07.2010, receipts of premiums and rent for commercial plots of land. I do not find any such confusion existed, as claimed by the Noticee. Even if it is presumed, without admitting, that the confusion was cleared in 01.07.2010, then why the Noticee did not pay any Service Tax on the impugned service even*

thereafter. Thus, there is no justification or merit in the submission of the Noticee.

53. The reliance placed on the case laws in *Rolex Logistics*, *Zandu Pharmaceuticals*, *HMM Ltd.* and *Karvy Consultants (supra)* is also not relevant, as the Noticee had never declared their activity of providing 'Renting of Immovable Property service' in any manner to the department, not even in their ST-3 Returns. Therefore, gaining knowledge of the said activity is out of question. It was only after DGCEI initiated the investigations against the Noticee that they submitted the relevant documents. Nevertheless, the Hon'ble Gujarat High Court in the case of *CCE vs. Neminath Fabrics Pvt. Ltd. – 2010 (256) ELT 369 (Guj)*, had held that proviso to Section 11A(i) of Central Excise Act, 1944 provides for a situation whereunder provisions of sub-section (i) *ibid* recast by legislature extending period within which SCN issued. The proviso cannot be read to mean that because there is knowledge, suppression which stands established disappears. Concept of knowledge, by no stretch of imagination, can be read into the provisions. Suppression not obliterated, merely because Department acquired knowledge of irregularities. What has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of Section 11A, stands extended to five years from the relevant date. The Hon'ble High Court further held that period of limitation cannot by reason of any decision of court or even by subordinate legislation be either curtailed or enhanced. Importing the concept of knowledge in sub-section (1) of Section 11A of Central Excise Act, 1944 tantamount to rewriting statutory provisions and not open to superior court/Tribunal either to add or substitute words in Statute. The provisions of Section 11A(1) of the Central Excise Act, 1944 are *pari material* to the provisions of Section 73(1) of the Finance Act, 1994, as they existed during the relevant period of

time. Therefore, even the ratio of decisions if Institute of Chartered Fin. Analyst of India, Able Adds Pvt. Ltd. and Precious Publication Pvt. Ltd. (supra) relied by the Noticee, cannot be applied to the present case.

54. Even the claim of bonafide belief that the impugned services were not liable to tax is not acceptable as the basis of the bonafide belief is neither elaborated nor supported by the Noticee with evidence. Therefore, the ratio of the decision in the case of Firepro Systems (supra) cannot be applied to the instant case.”

5.7.2 We do not find any reason to differ with the findings of the Commissioner as appellant had never disclosed the relevant facts to the department. Also they had failed to take registration and file the relevant ST-3 returns as required under law. Further we also agree with the Commissioner that there can be dispute in the matter of interpretation of the taxing statute, but their cannot be dispute against the levy itself. When a tax levied by the Act of parliament, it is the levied and cannot be disputed on the ground of interpretation. The taxing statute can be challenged but not the levy till the time it is truck down by the court of law having power to do so. Since the issue in respect of nonpayment of tax levied, came to light only after the investigation undertaken by the revenue (Director General Central Excise Intelligence), and appellants submitted the documents thereafter the charge of suppression giants the appellants is well justified and sufficient to invoke the extended period of limitation provided for as per section 73 of the Finance Act, 1994.

5.8 Whether appellants are liable to pay interest on the service tax short paid/ not paid by them by the due date.

5.8.1 Since the demand of tax has been upheld the demand for interest will follow. It is now settled law that interest under Section 75, is for delay in the payment of tax from the date when it was due. Since appellants have

failed to pay the said Service Tax by the due date interest demanded cannot be faulted. In case of P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)] Hon'ble Bombay High Court has stated as follows:

“10. So far as interest u/s. 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the Official Gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable u/s. 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest u/s. 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied/short paid/non-levied/unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of sub-section (1) of Section 11, which runs thus :

“Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under sub-section (2) or has paid the duty under sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate”

The terminal part in the quotation above, which is couched with the words “shall” and “be liable” clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections

11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional.”

5.8.2 Similar views have been expressed in the following decisions:

- a) Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]
- b) TCP Limited [2006 (1) STR 134 (T-Ahd)]
- c) Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]
- d) Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)]

5.8.3 Thus we uphold the demand of interest made under Section 75 of the Finance Act, 1994.

5.9 Whether penalties under Section 76, 77 and 78 are imposable on the appellants.

5.9.1 Commissioner has imposed penalty under Section 76, 77 and 78 on the Appellants. In respect of the Show Cause Notice dated 19.10.2012, for the period of dispute starting from 1.06.2007 to 31.03.2012, the penalties have been imposed under all the three sections whereas in respect of other two demand notices penalties under Section 76 and Section 77 have been imposed.

5.9.2 It is now settled position in law that penalty under section 78 can be imposed only if the ingredients specified in the said section are present. The ingredients specified for invoking the Section 78 are identical to those specified for invoking the extended period of limitation as provided by Section 73 *ibid*. Since in respect of show cause notice dated 31.03.2012, we hold that demand could have been made by invoking the extended period of limitation as provided by Section 73, we uphold the penalties imposed under Section 78 of The Finance Act, 1994. Hon'ble Supreme Court has in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)] held as follows:

“23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.”

5.9.3 In view of various decisions of High Court/ Tribunal holding that penalty under Section 76 and 78 can be imposed simultaneously till the amendment of Section 78, with effect from 10.05.2008, we uphold the penalties imposed by the Commissioner under in case of SCN dated 19.10.2012, upto 10.05.2008. Commissioner has himself not imposed any penalty after that date under Section 76 as second proviso to Section 78 specifically read as follows:

“Provided also that if the penalty is payable under this section, the provisions of section 76 shall not apply.”

5.9.4 Penalties under Section 76 and 77 of Finance Act, 1994 are in nature of civil penalties and are imposed in cases where the person who by his act of omission or commission has failed to fulfill the obligations cast on him under the statute. Hon'ble Supreme Court has in case of Gujarat Travancore Agency [1989 (42) ELT 350 (SC)] held as follows:

“4. Learned Counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under Section 271(1)(a) of the Act involves the element of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in order to demonstrate that the proceedings by way of penalty under Section 271(1)(a) of the Act are quasi criminal in nature and that, therefore, the element of mens rea is a

mandatory requirement before a penalty can be imposed under Section 271(1)(a). We are relieved of the necessity of referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what it intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mensrea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which

requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum Volume 85, page 580, Paragraph 1023 :

“A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.”

5. *Accordingly, we hold that the element of mensrea was not required to be proved in the proceedings taken by the Income Tax Officer under Section 271(1)(a) of the Income-tax Act against the assessee for the assessment years 1965-66 and 1966-67.”*

In Chairman, SEBI v. Shriram Mutual Fund [2006-TI0L-72-SC-SEBI] the Hon'ble Apex Court held that mensrea is not an essential element for imposing penalty for breach of civil obligations.

‘A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.’

5.9.5 Penalty under Section 76 of the Act is imposed for failure to pay Service Tax by the due date. Kerala High Court has in case of Krishna Poduval {2006 (1) STR 185 (Ker)} held follows:

“11. *The penalty imposable under S. 76 is for failure to pay service tax by the person liable to pay the same in accordance with the provisions of S. 68 and the Rules made thereunder, whereas S. 78 relates to penalty for suppression of the value of taxable service. Of course these two offences may arise in the course of the same transaction, or from the same act of the person concerned. But we are of opinion that the incidents of imposition of*

penalty are distinct and separate and even if the offences are committed in the course of same transaction or arises out of the same act, the penalty is imposable for ingredients of both the offences. There can be a situation where even without suppressing value of taxable service, the person liable to pay service tax fails to pay. Therefore, penalty can certainly be imposed on erring persons under both the above Sections, especially since the ingredients of the two offences are distinct and separate. Perhaps invoking powers under S. 80 of the Finance Act, the appropriate authority could have decided not to impose penalty on the assessee if the assessee proved that there was reasonable cause for the said failure in respect of one or both of the offences. However, no circumstances are either pleaded or proved for invocation of the said Section also. In any event we are not satisfied that an assessee who is guilty of suppression deserves such sympathy. As such, we are of opinion that the learned Single Judge was not correct in directing the 1st appellant to modify the demand withdrawing penalty under S. 76. Therefore, the judgment of the learned Single Judge, to the extent it directs the first appellant to modify Ext. P1 by withdrawing penalty levied under S. 76, is liable to be set aside and we do so. The cumulative result of the above findings would be that the Writ Petitions are liable to be dismissed and we do so. However, we do not make any order as to costs."

Same view was again expressed by Kerala High Court in case of Lawson Travel and Tours (I)(P) Ltd [2015 (37) ELT 183 (Ker)] as follows:

"5. *What we notice is, the liability to pay Service Tax is in accordance with the Finance Act, 1994, as the taxable services involved in the matter was for the period from April, 2000 to March, 2004. The decision of this High Court referred above in Krishna Poduval's case (supra) was also prior to Finance Act, 2008, which made a remarkable distinction between Sections 76 and 78 of Service Tax Act.*

As the period in question relates prior to Finance Act, 2008, the assessing authority and later the Tribunal were justified in placing reliance on Krishna Poduval's case (supra) by the High Court of Kerala.

6. *We find no good reason to opine that both Sections 76 and 78 are not applicable to the case of the appellant. On the other hand, we find, at the relevant point of time prior to Finance Act, 2008, penalty could be imposed under both the provisions and it is for appellant/assessee to convince authorities concerned by evidence that they are not liable to pay Service Tax and that there is justification in the defence raised by them regarding refund of the amounts. Accordingly, the appeal is dismissed."*

Tribunal has in case of Checkmate Industries Services [2016 (44) STR 290 (T-Mum)] held as follows:

"5.4 *With regard to penalties imposed on the appellant, penalty under Section 76 is imposed for default in payment of tax and, no mensrea is required to be proved for imposing such penalty. For mere default and delay in payment of tax, the liability to penalty arises. The Hon'ble High Court of Kerala in the case of Asst. Commissioner of Central Excise v. Krishna Poduval - 2006 (1) S.T.R. 185 (Ker.) has held that penalty under Section 76 of the Finance Act, 1994 can be imposed for mere default/delay in payment of Service Tax in addition to the penalty under Section 78 and these penalties are mutually exclusive and even if offences are committed in the course of same transaction or arise out of same act, penalty is imposable for ingredients of both offences."*

5.9.6 By not filing the ST-3 returns in respect of the "renting of Immovable Property Services" as required under Section 70 of Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994, appellant have made themselves liable to penalty under Section 77 *ibid*. Hence the penalties imposed upon by the adjudicating authority under this section are upheld.

5.10 Levy of Service Tax on the plots leased and intended for residential use and for hotels.

5.10.1 Appellants have claimed that while making the demand for service tax certain cases where the plot of land were leased out for residential purpose have been included. Revenue had contested the same by stating that appellant failed to provide the information in respect of these claims. In their written submissions appellants have given certain details in respect of the amounts received from M/s PVP Ventures P Ltd and M/s Metropolis Hotels. Since these details have been made available only at the stage of arguments of the appeal we are not having any views in this respect from the revenue.

5.10.2 Hence in respect of these claims we have no option but to remand the matter back to adjudicating authority to consider these claims made by the appellant on merits.

5.11.1 Moreover by Finance Act, 2017, a new Section 104 in the Finance Act dated 31.3.2017 has been introduced, which reads as follows:-

“104. Special provision for exemption in certain cases relating to long-term lease of industrial plots.

Notwithstanding anything contained in section 66, as it stood prior to the 1st day of July, 2012, or in section 66B, no service tax, leviable on one time upfront amount (premium, salami, cost, price, development charge or by whatever name called) in respect of taxable service provided or agreed to be provided by a State Government industrial development corporation or undertaking to industrial units by way of grant of long-term lease of thirty years or more of industrial plots, shall be levied or collected during the period commencing from the 1st day of September 2016 (both days inclusive).

2) Refund shall be made of all such service tax which has been collected, but which would not have been so collected, had sub-section (1) been in force at all material times.

3) Notwithstanding anything contained in this chapter, an application for claim of refund

of service tax shall be made within a period of six months from the date on which the Finance Bill, 2017 receives the assent of the President.”

5.11.2 Admittedly appellant is an Industrial Development Corporation of Govt. of Maharashtra and the objective of resolution of Govt. of Maharashtra dt. 18-3-1970 which has brought the Appellant into existence, Appellant is covered under the newly introduced Section 104 of the Finance Act 1994 since the relevant objective, as found in the said resolution reads;

“ with the growing support that the Central Government is giving to export oriented industries, the contemplated new town development in the above areas will not only provide relief to Bombay City but will also accelerate the promotion of industries in the State and open cut and speed up industrial development of the Konkan region. Decongestion of industrial and office concentration in Bombay has now become an urgent problem and the proposed development of the above new township, if undertaken quickly could save the situation even one from getting out of control, . The project is of such a character that it involves planning and development of all sectors including commerce, trade, housing, etc., to combine into a well-balanced and well planned township”.

(Underlined to emphasise)

5.11.3 Section 104 covers the period of dispute concerning the Appellant and the duty demand has not been confirmed since it has not attained finality and under litigation before this Forum. Therefore, in my consider view Service Tax demand on the Appellant on “long term leasing of immovable property” is not maintainable and the order passed by Commissioner in confirming such demand, interest and penalty under different provision of Finance Act is required to be set aside.

5.12 Thus in view of our discussions as above we summarize our findings as indicated in table below:

Whether in terms of the 65(105)(zzzz) Service Tax can be levied on the lease of vacant land given by the Appellants.	Yes
Whether the lease premium recovered from the lessee against agreement to lease entered into by appellants is subjected to service tax under the taxable category of Renting of Immovable Property	Yes, to be considered with Section 104 of Finance Act, 1994
Whether the activities undertaken by the appellant qualify to be service as defined by Section 65B(44) of Finance Act, 1994 with effect from 1 st July 2012	Yes
Whether the extended period of limitation can be invoked in the facts and circumstances of this case for making the demand of service.	Yes
Whether appellants are liable to pay interest on the service tax short paid/ not paid by them by the due date.	Yes
Whether penalties under Section 76, 77 and 78 are imposable on the appellants	Yes
Levy of Service Tax on the plots leased and intended for residential use and for hotels.	Matter remanded

6.1 In view of discussions as above we uphold the impugned orders and dismiss the appeals (ST/89766/13, ST/86197/15, ST/87442/15 filed by the appellant on all counts except for re-quantification of the demands after considering the claim of the appellants in respect plot of land intended for residential use and hotels.

6.2 Since the issue is being remanded for consideration of the claim of the appellants in respect of plot of lands for residential use and hotels we have not considered the admissibility of such claim either on merits or on quantification. Adjudicating authority should consider the said claims both on ground of admissibility and quantum, after allowing opportunity of hearing to the appellants.

6.3 On the basis of such quantification of demands adjudicating authority will re-determine the penalty under

Section 78 of Finance Act, 1994 taking into account the complexity of the legal issues involved and the ingredient of the provisions vis-à-vis the standing of the appellant.

6.4 Since the matter involves substantial revenue and is also quite old adjudicating authority should decide the matter in remand within a period of four months from the date of receipt of this order.

6.5 Appeals No ST/88472/14 and ST/86274/15 filed against the demand notice are dismissed as infructuous.

(Order pronounced in the open court on 05.08.2019)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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PER: SUVENDU KUMAR PATI

7. I have the occasion to go through the draft order prepared by my learned brother Shri Sanjiv Srivastava, Member (Technical) and I appreciate the reasoning and rationality of the order. However, I have got certain reservation in respect to the definition of “leasing of immovable property” that has been brought into the purview of “renting of immovable property” as defined in Section 65(90a) of the Finance Act, 1994 w.e.f. 01.06.2007. I also have reservation on imposition of tax by Central Government against “lease of land” by the State Government or its agency for which I consider it proper to record a difference of opinion on the findings of my learned brother.

8. To start with my views, I would like to reproduce entry No. 45 in list-II, contained in schedule 7 of the Constitution of India dealing with State list on which the State Government is alone empowered legislate.

Entry 49:- taxes on land & building

Entry 18 also reads “land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

8.1 Therefore, on land related matters which are stated to be within the territorial boundaries of federal units are

excluded from the purview of taxation by the Central Government except where indirect tax is imposable as per provision contemplated in Section 289 of the Constitution of India, as has been held in the presidential reference noted by my learned brother. Service Tax being in the nature of indirect tax, though was not in existence at the time when presidential reference was answered by the Hon'ble Supreme Court, has been stretched into the purview of Article 289 for which duty demand is held to be justified since appellant acted on behalf of the State Government in "renting the immovable property".

9. At this juncture, I would like refer to Article 274 of the Constitution of India which reads as here under:-

" 274. (1) No Bill or amendment which imposes or varies any tax or duty in which States are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian income-tax, or which affects the principles on which under any of the foregoing provisions of this Chapter moneys are or may be distributable to States, or which imposes any such surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) in this article, the expression "tax or duty in which States are interested" means –

(a) a tax or duty the whole or part of the net proceeds whereof are assigned to any State; or

(b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State."

A plain reading of Article 274 would mean that no bill for amendment imposing tax or duty can be introduced or made on the subject in which States are interested and to do so, before introduction of bill in either House of the Parliament, same has to be recommended by the President. Subject on which States are interested is explained in Clause 2 are those in which the duty component is assigned to the States or payable to the States. With the above provision in mind, it is now required to examine the term “leasing” which is included within the definition of renting in Sec-65 90a of the Finance Act.

10. Section 105 of Transfer of Property Act defined the term lease of immoveable property and it says that it is a transfer of right to enjoy such property, may for a certain time which could extend to perpetuity even. Likewise Section 106 Clause 1 defines the “duration of lease” and says if there is no contract or local law or usage in force, lease of immovable property for agriculture or manufacturing process shall be deemed to be a lease for year to year and for other purpose lease tenure is for month to month. In the appeal before us, the lease was admittedly given for 60 years with one time “lease premium” for the said 60 years payable in 2 to 3 instalments and “lease rent” to be calculated and collected yearly. Therefore, the lease rental which is determined on yearly basis should have been calculated for the purpose of Service Tax as

defined under Section 65(105)(zzz) of the Finance Act, 1994 since by the time Section 65(90a) containing definition of “renting of immovable property” was drafted in 2007, Clause 5 that deals with leasing of vacant land for construction of building or temporary structure at a later stage was not brought into the Service Tax purview, which became effective from 01.07.2010.

11. It would be not out of place to mention that Transfer of Property Act deals with transfer of “right” and “interest” over the property which can be effected through several means like sale, mortgage, lease, gift, exchange and the like and going by its text, the word “title” over the property is absent in all these modes of transfer as given in the transfer of Property Act, on which several decisions are relied upon to justify that lease does not transfer immovable property to any other person, contrary to the provision of Transfer of Property Act such transfer, sometimes “right” and always “interest” over the property is being transferred. In the appeal before us, such lease was granted for 60 years that would amount to permanent transfer since going by the Indian Limitation Act dealing with recovery of possession of immovable property contemplated in Section 65, 66 & 67 read with schedule and Annexures to the said act, even a Govt. cannot sue another person for recovery of possession over immovable property after laps of 30 years.

12. We have heard arguments on status of appellant as to if it can be covered under notification no. 25/2012- ST so as to qualify to be Government authority and in this regard section 113(3A) vis a vis exemption notification no. 25A/2012-ST has been analyzed in the body of this judgment. Admittedly with 100% Govt. control, Appellant is functioning and the notification above requires 90% or more participation by way of "equity" or "control" by the Govt. to term the Agency as Govt. Authority. Sub clause 3(A) of section 113 of MRTP, which has been reproduced above justifies the stand of the Appellant that it is a Govt. Authority. I consider it proper to reproduce relevant portion of sub clause 3(A) which reads as follows.

"... if the work is done through the Agency of a corporation including a company owned or controlled by State as new town, the State Govt. may, notwithstanding anything contained in sub-section(2), require the work of developing and disposing of land in the area of a new town to be done by any such corporation, company, subsidiary company aforesaid, as an agent of the State Govt., and thereupon, such corporation or company shall, in relation of such area, be declared by the State Govt., by notification in the official Gazette, to be the New Town Development Authority for that area."

13. Going by the resolution of Govt. of Maharashtra dt. 18th March 2017 (Annexure A), it can be found from para 2 of the said resolution that the acquired land shall be entrusted to the subsidiary company (Appellant) which would act as an "Agent" of the Govt. for the development of the area with a view to secure of the objective of its formation. Therefore, it is immaterial if provisions of

section 5 to 11 which are applicable to “development authority” can also to applicable to the Appellant or not which is a Corporation of the State Govt. since it has been expressly declared under sub-section 3(A) to be equivalent with Govt. Authority.

14. To summarize my above discussion point-wise, I am of the considered view that firstly, ‘land’ and ‘its development’ as well as ‘Management’ are State subjects on which union cannot impose tax-in whatever form except as per sub clause 2 of Article 289 which can only be done if any “trade” or “business” of any kind is carried on by or on behalf of Govt. of State except on property since the entire nature of transaction appears to be incidentally to the ordinary functioning of State Govt. and Annex.- A as referred above, i.e. the Resolution of Govt. of Maharashtra and its ‘objectives’ which will be reproduced below would substantiate the same. My 2nd contention is that leasing a land for above 30 years amounts to permanent transfer since no suite is maintainable for recovery of possession of land by owner/ Lessor after 30 years in view of operation section 65 & 67 of the transfer of Property Act. Therefore, lease premium collected on long term leasing of immovable property it is not a service which can be equated with renting of immovable property which can be taxed by the Central Govt. by invoking provisions of Finance Act 1994. The third observation is that Appellant’s acted as an Agent of the Govt. of Maharashtra which has

been assigned with the task belonging to its own jurisdiction by the State Govt. and it would amount to imposition of tax on the State Govt. by the union without following procedure containing in Article 274 of the Constitution of India.

15. With the above observation, I agree with the order proposed by learned Member (Technical).

(Dr. Suvendu Kumar Pati)
Member (Judicial)