

(2015) 04 AHC CK 0052

In the Allahabad High Court

Case No : Central Excise Appeal No. 54 of 2015

Greater Noida Industrial Development Auth.

APPELLANT

Vs

Commissioner of Customs, Central Excise and Others

RESPONDENT

Date of Decision : 10-04-2015

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzzz), 65(90a), 73, 73(1), 75
Transfer of Property Act, 1882 — Section 105

Citation : (2015) 40 STR 95

Hon'ble Judges : Arun Tandon, J; Satish Chandra, J

Bench : Division Bench

Advocate : Chandra Kumar Rai and J.K. Mittal, for the Appellant; Ashok Singh, Sr. S.C., Advocates for the Respondent

Judgement

1. Heard Sri J.K. Mittal assisted by Sri Chandra Kumar Rai on behalf of appellant and Sri Ashok Singh on behalf of department.

2. The present excise appeal has been filed by the Greater Noida Industrial Development Authority against the final order dated 28th August, 2014 passed by the Central Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as the "CESTAT") in Appeal Nos. ST/59067/2013 and ST/3256/2012. The Tribunal under the order impugned has confirmed the demand made vide order-in-original dated 19.07.2012 only for the normal limitation period and the matter has been remanded to the Commissioner, Central Excise for quantifying the same. The penalty imposed upon the appellant under Sections-77 and 78 of the Finance Act, 1994 has been set-aside. With regard to the order-in-original dated 30.04.2013, a direction has been issued to the Commissioner for de-novo adjudication in light of the direction issued in the order of the Tribunal.

3. The assessee before this Court claims to be a statutory body constituted under the U.P. Industrial Development Act, 1976. It is their case that they have been discharging statutory functions, while monitoring and carrying on the development of the areas within their territorial jurisdiction. The assessee was

registered for the purpose of the payment of service tax on renting of immovable properties, services and sale of space for advertisement since 01.06.2007. It has been making payment of service tax on the rent received from constructed immovable properties rented out by it for business or commerce. However, the assessee had not made payment of service tax on the rent which it had received in the matter of allotment of plots of vacant land to various persons on lease for industrial and commercial purposes.

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) 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) Land used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities."

5. However, w.e.f. 01.07.2010, 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 and Customs (Department of Revenue) dated 26.02.2010 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, theaters, 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."

7. The Director General of Central Excise on the material evidence collected found that the appellant before this Court has shown income from leasing of vacant land for the purpose of construction of commercial buildings, but they had not paid any service tax thereon. Accordingly, a show cause notice dated 19.03.2012 was issued to the appellant for the period 01.07.2010 to 31.05.2011, whereunder it was disclosed that the appellant received a total amount of Rs. 40,14,15,820/- as lease charges from the allotment of various plots of land for commercial purposes on which service tax was payable. The appellant was, therefore, called upon to pay service tax including education cess to the tune of Rs. 4,13,45,830/- alongwith interest. They were also called upon to explain as to why penalty under Section-77(1)(C) and Section-78 of the Finance Act, 1994 be not imposed.

8. The show cause notice was adjudicated upon by the Commissioner, Central Excise and Service Tax, Noida vide order-in-original dated 19.07.2012, the demand was confirmed alongwith interest thereon under Section-75. Penalty of equal amount was imposed on the appellant under Section-78 of the Finance Act, 1994. Another penalty of Rs. 200/- per day starting from the first day after the due date was imposed under Section-77(1)(c) upon the appellant, for failure to furnish the required information and to produce the documents.

9. Against the above order of the Commissioner, Appeal No. ST/3256/12 was filed before the Tribunal.

10. A second show cause notice was issued to the appellant on the basis of the enquiry conducted by the Additional Director of General, DGCEI, New Delhi dated 17.10.2012, it was reported that the appellant for the period between 01.06.2007 to 31.03.2012 had received a sum of Rs. 14,60,25,26,232/- under various heads from their customers/ allottees on which service tax was payable and had not been paid. The quantum of service tax was calculated as Rs. 1,40,74,64,342/- alongwith interest.

11. A second show cause notice dated 17.10.2012 was issued to the appellant for recovery of abovementioned amount. The appellant was also called upon to

show-cause as to why penalty under Sections-76, 77 and 78 of the Finance Act, 1994 be not imposed.

12. This show cause notice was adjudicated by the Commissioner, Central Excise and Service Tax, Noida vide order-in-original dated 30.04.2013. He confirmed the demand of service tax of Rs. 140,74,64,342/- against the appellant under provisio to Section-73(1) of the Finance Act alongwith interest. Penalty of equal amount under Section-78 and penalty of Rs. 200/- per day starting from the first day after the due date for failure was also imposed under Section-77 was also imposed. Against the said order of the Commissioner, Appeal No. ST/59067/2013 was filed before the Tribunal.

13. The Tribunal under the order impugned dated 28th August, 2014 has confirmed the demand of the service tax under the order in original dated 19th July, 2012 only for the normal period of limitation period to be quantified by the Commissioner on remand. Penalty on the appellant under Sections 77 and 78 has been set aside. The order in original dated 30th April, 2013 has been set aside and the matter has been remanded to the Commissioner for de-novo adjudication in light of the order of Tribunal. The assessee being aggrieved has filed the present central excise appeal.

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?"

15. An application has been filed on behalf of the assessee dated 30th March, 2015 stating therein that the substantial question of law as framed by the High Court under order dated 11th March, 2015 may be corrected to read as follows:

"Whether the adjudicating proceeding on second show cause notice dated 17.10.2012 is illegal and non-est as it also covers the period, demand and the activity covered by the adjudicating proceeding of first show cause notice dated 22.03.2012 and second show cause notice dated 17.10.2012 is issued without analysis merely by picking up the figures from balance sheet?"

16. The applicant-appellant has also prayed for framing of additional substantial

question of law, which reads as follows:

"Whether demand for the normal period can be confirmed under sub-section (1) of section 73 when the demand was raised in SCNs on the allegation of ingredients under the proviso to Sub-section (1) of section 73, when it is held that allegation of ingredients under the proviso to Sub-section (1) of section 73 do not exist?"

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) Vs. Commissioner of Income Tax, M.P., Nagpur, AIR 1988 SC 1305 : (1988) 70 CTR 31 : (1988) 172 ITR 311 : (1988) 2 JT 266 : (1988) 1 SCALE 1128 : (1988) 3 SCC 594 : (1988) 3 SCR 989 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. (sic) 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-à-vis "license" has been explained by the Apex Court in the case of Associated Hotels of India Ltd. Vs. R.N. Kapoor, AIR 1959 SC 1262 : (1960) 1 SCR 368 , 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. So far as the overlapping of the period under first show cause notice dated 22nd March, 2012 i.e. July, 2010 to May, 2011 and the second show cause notice dated 17th October, 2012 for the period between May, 2007 to March, 2012 is concerned, the Tribunal has held that it is not clear as to whether service tax demanded under show-cause notice dated 22nd March, 2012 is included in the show cause notice dated 17th October, 2012 for want of cooperation from the assessee. It is for this purpose that the Tribunal has remanded the matter to the

Commissioner to examine the said plea by de-novo proceedings and to give a specific finding in that respect. The Tribunal has accordingly affirmed the demand as made under the order in original dated 19th July, 2012 only for the normal period of limitation to be quantified by the Commissioner.

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 given 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.

31. 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.

32. 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.

33. 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 an 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.

34. 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.

35. 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.

36. The judgment relied upon by the learned counsel for the petitioner in the case of Krishak Bharati Cooperative Ltd. v. Deputy Commissioner of Income Tax passed in Income Tax Appeal No. 205 of 2010 decided on 12th July, 2010 is clearly distinguishable in the facts of the present case. The other judgments referred to by the learned counsel for the petitioner i.e. (1) Commissioner of Income Tax, Assam etc. Vs. The Panbari Tea Co. Ltd., AIR 1965 SC 1871 : (1965) 57 ITR 422 : (1965) 3 SCR 811 , (2) Shanti Sharma and Others Vs. Ved Prabha and Others, AIR 1987 SC 2028 : (1987) 3 JT 409 : (1987) 2 SCALE 393 : (1987) 4 SCC 193 : (1987) 3 SCR 1075 , (3) R.K. Palshikar (HUF) Vs. Commissioner of Income Tax, M.P., Nagpur, AIR 1988 SC 1305 : (1988) 70 CTR 31 : (1988) 172 ITR 311 : (1988) 2 JT 266 : (1988) 1 SCALE 1128 : (1988) 3 SCC 594 : (1988) 3 SCR 989 , (4) Maharaja Chintamani Saran Nath Sah Deo Vs. The Commissioner of Income Tax, Bihar and Orissa, (1961) 2 SCR 790 , and (5) Associated Hotels of India Ltd. v. R.N. Kapoor (1959 AIR SC 12262) do not lay down anything contrary to what has been recorded by us herein above.

37. We may not enter into the issue as to whether premium paid along with rent fixed should form the total consideration for levy of service tax or not as no appeal has been filed by the Department against the order of the Tribunal. But at the same time if the Tribunal has held that only rent charged be considered for computation of service tax, it will not mean that the Tribunal has held that a part of the same transaction was taxable and part of it as not taxable. In our opinion,

the Tribunal has rightly held that the lease of open land for use as commercial/business purpose, as an taxable event, but what amount is to be taken into consideration for computation of service tax has been confined to the periodical rent only. The plea raised to the contrary by the learned counsel for the appellant has therefore, to be rejected.

38. For the reasons recorded above, the questions as raised by means of the present excise appeal are answered against the assessee and in favour of the department. We do not find any error in the order of the Tribunal.

39. The present central excise appeal lacks merit and is accordingly dismissed.