CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Appeal No. ST/60476/2018

[Arising out of OIO-02-2018-ST dated 31.01.2018 passed by the Commissioner of Central Excise and Service Tax-Gurgaon I]

Dlf Commercial Projects Corporations : Appellant (s)
5th Floor, Gateway Towers, Dlf Cyber City,
Dlf Phase-iii, Gurugram, Haryana

Vs

Commissioner of Service Tax, Gurugram : Respondent (s)
Plot No. 36 & 37, Sector 32, Near Medanta Hospital
Gurgaon, Haryana 122001

APPEARANCE:
Shri P. K. Mittal, Advocate for the Appellant
Ms. Seema Arora, Authorised Representative for the Respondent

CORAM : HON'BLE Mr. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE Mr.BIJAY KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No. 60554/2019

Date of Hearing:18.02.2019

Date of Decision:22.05.2019

Per : Mr. Ashok Jindal

The appellant (DCPC in short) is in appeal against the impugned order wherein demand of service tax of Rs. 183,78,48,265/- alongwith interest and imposing the penalty of Rs. 137,66,55,912/-.

2. The appellant is engaged in the business of construction and development of integrated township and registered with the Service Tax department. On the basis of an information, the DGCEI searched the premises of the appellant on 21.07.2014 and various documents were resumed. Statement of Shri Kailash Chandra, Authorized Signatory and AGM (Commercial and Taxation) of DLF Group was
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recorded wherein he stated that DLF were in the business of developing integrated townships and have been provided other services, such as, renting of immovable property, maintenance & repair service, construction of residential complexes, construction of commercial complex etc, that they neither executed any sale deed nor did they pay any stamp duty to the State Government on their activity of transferring the land development rights and did not pay any service tax on the consideration received on account of transferring land development rights. On the basis of documents recovered it was revealed that various Land Owning Companies (LOCs) had executed Land Development Agreement or Memorandum of Understanding or both with DCPC regarding transfer of the land development rights. One such agreement entered with DLF Ltd on 02.08.2006 was examined and the terms of agreement are as under:-

5.1 The salient features of the said agreement dated 02.08.2006 are as under:

*a) DCPC have definitive arrangements with various landowners and are in the final stages of negotiations for acquisition of development rights in certain land situated in the State of Haryana in District Gurgaon, which is capable of being developed for the development and construction of commercial, residential, retail, industrial park, information technology parks, special economic zones and the like alongwith the rights, interests, and benefits appurtenant and attached hereto (**Development Rights)**;*

b) DCPC have represented to DLF that the Development Rights to be acquired by the DCPC are capable of further assignment. Relying on the said representations DCPC, DLF agree to purchase of the Development Rights from DCPC;

c) DCPC have agreed to assign the Development Rights to M/s DLF or any of their (DLF) affiliate, nominee(s) for consideration;

d) DLF shall grant advance of such amounts (Advance) to DCPC from time to time as may be mutually agreed upon;

e) DLF and DCPC agree that price payable by DLF for the Development Rights shall be first set-off/adjusted from the Advance given by DLF to DCPC and the balance price, if any shall be paid by DLF by way of a crossed cheque;

f) DCPC shall be responsible for obtaining requisite approvals, documents including power of attorney from land owners that DLF

may require form time to time for effectively carrying out the development of the said land;

g) DCPC will transfer, assign or nominate DLF in all the arrangements/agreements that DCPC will enter into with land owners for acquisition of Development Rights so as to enable DLF to enter upon the respective lands for the purposes of carrying out development of such land;

h) DCPC will not sell, assign or transfer or agree to sell, assign or transfer the Development Rights to any person other than DLF or their (DLF) nominee, in any manner whatsoever;

i) DCPC will comply with terms, conditions, obligations arising out of or in respect of the Development Rights and shall ensure that there was no restriction, prohibition etc. on the sales/assignment of the Development Rights in favour of DLF; and

j) DCPC will ensure that actual landowner's title, in respect of which Development Rights have been agreed to be sold by DCPC to DLF is clear and marketable and the land is capable of development and construction of commercial, residential, retail, industrial park, IT parks, SEZ and the like.

5.2. From the perusal of above agreement it can be discerned that-

(i) DLF would provide fund to DCPC for purchasing the development rights from land owning companies.

(ii) DCPC would purchase development rights from land owning companies and transfer those rights without any valuation addition to DLF.

(iii) Amount paid to land owning companies for purchase of development right would be adjusted against the ad hoc fund provided by DLF.

On the basis of the said agreement and various other agreements it was alleged that the appellant has transferred development rights, therefore, they are liable to pay service tax on the said activity. Accordingly, the show cause notice was issued to demand service tax and to impose penalty. The demand was confirmed against the appellant. Penalty was also imposed against the appellant. Against the said order, the appellant is before us.

3. The Ld. Counsel for the appellant submits as under:-

(i) A Show Cause Notice dated 16.11.2016 was issued covering the period 01.07.2012 to 31.03.2016 (substantial demand is beyond the normal

period of limitation) seeking to raise demand to the tune of Rs. 208,22,50,224/- on the allegations that the there was a transfer of development rights by various Companies (who owns land) to the Appellant and the Appellant, in turn, transferred the development rights either to M/s. DLF Limited and/or its associate or outside parties and also on account of renunciation of development rights.

(ii) M/s. DLF Limited as per agreement dated 02.08.2006 gave Business Advance of Rs. 1424.83 crores to the Appellant from time to time for the purpose of purchase of land/development rights. The Appellant, in turn, transferred the very same amount in the nature of Refundable Performance Deposit to various companies to enable them to purchase land (hereinafter called "Land Owning Companies"). The land owning Companies purchased the lands in the State of Haryana. It was the responsibility of the Appellant to obtain / arrange license from the Government of Haryana for the purpose of developing the land located in the State of Haryana.

(iii) The SCN was issued by the Department on the wrong and fallacious premise that the amount of Rs. 1424.83 Crores is nothing but the value of development rights and, therefore, the Service Tax is payable on the amount of Rs.1424.83 Crores and, therefore, demand of Rs.188,99,57,356 on this account. Further, a demand of Rs.19,22,92,868/- on account of alleged renunciation of right in favour of Third Party) and thus total demand Rs. 208,22,50,224/- was raised. The contention of Department rested on various clauses of " Business Development Agreement" dated 02.08.2006 between M/s. DLF Limited and the Appellant. The agreement permits the Appellant to pay the amount to various land owning Companies, who will acquire the land and either such land or "development rights" over such land shall be transferred to Appellant. After developmental activities have been carried out including obtaining license from the Government of Haryana, the Appellant shall either sell those land or sell the development rights to M/s. DLF Limited or its associate or third parties, as may be permitted under the agreement.

(iv) The perusal of the various clauses of "Business Development Agreement" dated 2.8.2006 between DLF Ltd and Appellant clearly says that the Appellant shall, in future, transfer the development rights and does not say that the Appellant has actually transferred the development rights. Further, the Agreement is futuristic in nature. In other words, the Service Tax would be payable only when there would be actual transfer of "Development Rights" in future. The case of the Appellant is that even on the "Development Rights" no "Service Tax" is payable. Further, no "Development Rights" have at all been transferred by the Appellant to either M/s. DLF Limited and/or its associate. This fact is duly certified by Chartered Accountant vide its Certificate dated 3.5.2016.

(v) The appellant filed specimen copies of letters written by the appellant to the various land owning companies and on the said letters, the land owning companies have certified that the "Refundable Performance Deposit" remitted to them is not a consideration towards transfer of "Development Rights" (as alleged by the Department). Further, the "Performance Deposit" shall be refundable in future as and when either the sale deed is executed for the land or agreement is executed for transfer of "Development Rights".

(vi) The Annual Accounts of the Appellant does not say that the development rights have been transferred by the Appellant to M/s. DLF Limited nor the Annual Account of M/s DLF say so. In addition, independent CA vide Certificate dated 30.4.2018 certified that the Appellant neither purchased the land nor purchased the "Development Rights". Further, the said certificate also says that the appellant had not transferred any "Development Rights" either to DLF Ltd or its associates.

(vii) The Annual Accounts of the Appellant for the year 2012-13, 2013-14, 2014-15, 2015-16 and 2016-2017 have been produced which show under the heading " Year ended March 31, 2012", the income of Rs.8,81,75,460/- has been shown as "Sale of Development Rights". This income does not appear under the "Year ended March 31, 2013". Likewise, no amount is appearing towards sale of "Development Rights" under "Year

ended 31.03.2014" and under the heading "Year ended March 31, 2015, no amount is appearing as "Sale of Development Rights" and further under the heading "Year ended 31.03.2016, no amount is shown towards "Sale of Development Rights". Further, under the heading "Year ended 31.03.2017" no income is appearing under the head "Sale of Development Rights".

(viii) It is, therefore, manifestly clear that except for the year 2012, for none of the subsequent years i.e. 2013-14, 2014-15, 2015-16, 2016-17, there is no sale of development rights as is apparent from the audited Balance Sheet and Profit and Loss Account of the Appellant's Company and, therefore, there is absolutely no doubt that there was no sale of "Development Rights" by the Appellant to M/s. DLF Limited for the aforesaid period.

(ix) The Department assumes and presumes that the entire amount of Rs. 1424.83 crores is nothing but the value of "Development Rights" and, therefore, the Service Tax is payable on the entire advance of Rs.1424.83 Crores which was given by DLF Ltd to Appellant and Appellant, in turn, gave to the Land Owning Companies and not a single paise has been retained by Appellant. In fact, the above amount is not a consideration for purchase of development rights but is only refundable performance deposit.

(x) The whole Show Cause Notice is perverse based on incorrect understanding of facts and law in view of the following reasons:-

a. The amount of Rs. 1424.83 crore has been provided by M/s. DLF Limited to the Appellant and the very same amount has been transferred to various land owning Companies and nothing is kept at the end of the Appellant;

b. The amount of Rs. 1424.83 crores represents the value of land and not the value of development rights since various land owning companies have purchased the land out of this amount.

(xi) M/s. Prem Arun Jain & Company, Chartered Accountants, have given a certificate dt.3.5.2016 clearly certifying that the amount of Rs.1424.83 had been paid by the appellant as "Performance Deposit" to various land owning companies. It has also been certified by the Chartered Accountants that the Appellant had neither purchased any land nor purchased any Development Rights from these land owning Companies. This certificate was filed along with the reply to the Show Cause Notice and the same has, completely, been ignored/overlooked by the learned AA. There is another Certificate dt.30.4.2018, which further says that neither land nor "Development Rights" had been acquired by Appellant nor, at the same time, any land or "Development Rights" had been transferred by Appellant either to DLF Ltd or its associates.

(xii) The fact of the matter is, as would be seen from the CA certificates, that neither the land has been sold by the land owning Companies nor there was transfer of any development rights by the said land owning Companies in favour of the Appellant. At the same time, there is also CA certificate dated 30.04.2018 certifying that Appellant had neither transferred any land nor "Development Rights" either to DLF Ltd or to its Associates. If at all, there would have been any transfer of "development rights" then SCN would have been issued to the land owning companies – this itself confirms, affirms and establishes that there was no "transfer of development rights" by these land owning companies.

(xiii) Further, the Appellant received Rs.1424.83 Crores from M/s. DLF Limited, from time to time, and the very same amount has been remitted to various land owning companies as "Performance Deposit". No fees, charges or compensation has been received by the Appellant from M/s. DLF Limited. Therefore, assuming, if any service has been rendered by the Appellant, though stoutly denied, such purported service was without any consideration and, therefore, no service tax was payable because no consideration has been received.

MEANING OF THE WORD 'BENEFIT ARISING OUT OF THE LAND

"Section 65B(44) 'service' means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include

(a) any 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)such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or

(iii)a transaction in money or actionable claim;"

(xiv) The benefits arising out of the land are also immovable property by virtue of Section 3 (sub-section 26) of the General Clauses Act. Admittedly and undisputedly, no Service Tax is payable on immovable property. In Order-in-Original para "a-3.14", it has been admitted in the Order-in-Original – Historically transfer of title of land also included transfer of benefits to arise out of land. These benefits have included the crops to be cultivated on the land, the trees that might be growing on the land, the fish that may be thriving on a pond that might exist on the land. The right to land includes all the above benefits arising out of land. However, the Order-in-Original in para a.3-18, it has been further observed that -

"The term benefit to arise out of land is, therefore, to be restricted to those, which directly arise out of land and are endemic to land".

(xv) Section 65B (44) (a) (i) says that transfer of title in goods or immovable property, by way of sale, gift or in any other manner. In other words, the transaction of transfer of title either in goods or in "immovable property" are excluded from the purview of "Service". A question then arises, what is the meaning of the word "immovable property". Immovable property has not been defined in Finance Act, 1994 but has been defined in Section 3(26) of General Clauses Act, 1987 in following words:-

(26) "immovable property" shall include land, <u>benefits to arise out of land</u>, and things attached to the earth, or permanently fastened to anything attached to the earth;

(xvi) The aforesaid definition clearly says that the immovable property includes not only "land" but also the benefits "arising out of land". Next, the question then arises whether transfer of development rights is a benefit arising out of land so as to fall under "immoveable property". The word 'benefit arising out of land, has been interpreted in the following judgments:-

a) Bahadur & other Vs.Sikandar MANU/UP/0016/1905
b) Ananda Behera Vs. State of Orissa AIR 1956 SC 17
c) SmtDropadi Devi Vs. Ram Das AIR 1974 All 473
d) Sadoday Builders (P) Ltd Vs. Jt Charity MANU/MH/07912011
e) Chheda Housing Development Corpn Vs. Bibijan Shaikh 2007 (2) Bom CR 587

(xvii) The authorization given to a "Developer" to develop the land and sell super-structure in perpetuity shall undisputedly fall within the words "benefit arising out of the land" and shall, therefore, be held to be "immovable property". Once there is a transaction in relation to immovable property, that shall, undisputedly, fall outside the purview of "Service" within the meaning of Section 65B(44) and consequently, no "Service Tax" shall be payable under Section 66.

(xviii) Further, the Ld Commissioner in the OIO in the case of M/s DLF Limited) noted our submission to say that "In the present case, when the land-owning company transfers land development rights to the developers, the developers gets the right to not only to develop project on such land but also the right to sell such developed property along with undivided interest in the land underneath and to receive payments for such transfers from the buyers. Once the land-owning companies transfers the land development rights to developer for a consideration, it is obligated to transfer the undivided interest in the land in favour of developer's buyers for which no separate consideration is paid for it. In other words, such transfer of

undivided interest in the land by the land-owning company is in return of the initial consideration paid by the developer to it for transfer of land development rights only. Thus, it is the ownership of the land, which stands transferred effectively by the land-owning company in return of consideration payable by the developers. The moment it is either land or "benefits arise out of land", it goes outside the purview of "Service" as defined in Section 65B (44) of Finance Act, 1994.

(xix) Under the Development Agreement dated 05.12.2006, it is stated that there would be transfer of Development Rights in future and the Developer were permitted to carry out the developmental activities as per clause 2.2 of the Development Agreement, wherein the developer is permitted to enter the scheduled property for carrying out developmental activities. After the developmental activities have been carried out, sale deed is executed among the three parties namely Landowner, Developer and the Purchaser under which the title to the undivided portion of the land is transferred to the various vendees/purchasers from time to time as and when the Conveyance Deed/Sale Deed is executed in future.

(xx) It is submitted that it is not only the possession, which stood transferred with the right to use, enjoy and construct building/super structure, but, at the same time, undivided right, title and interest in the land also stand transferred under the Deed of Conveyance on which stamp duty has been paid and the Deed of Conveyance has been registered before the Sub-Registrar.

(xxi) In fact, in the Order-in-Original, the learned AA has reproduced certain clauses of Agreement dated 10.11.2006, the full text of the agreement, the effective date has been defined to mean the date of completion of the purchase of the scheduled property including the mutation thereof, NEPL in Revenue Records and the vesting of the right, title and interest in the scheduled property in favour of NEPL, which shall be communicated in writing to the developer of NEPL.

(xxii) There is an Apartment Buyer Agreement, which is entered into in all cases at the time of allotment of the flat/space wherein the word "foot

print" has been explained. "Foot Print" shall mean the precise land underneath the said building. Further in this very agreement, there is a clause No.1.17 (II), which clearly reads as under:-

II. The Allottee shall have the ownership of undivided proportionate shares/interest in the "foot print" of the said building calculated in the ratio of super area of the said agreement to the total super area of all apartments within the said building. The allottee acknowledges and understand that no other land(s) is/are forming part of this agreement and the allottee shall not have any right, title or interest of any kind whatsoever on any other land(s) whether inside or outside the said complex except to the extent of using only such general common areas and facilities within the said complex and precisely land in part-C of Annexure-IV, subject to timely payment of maintenance charges.

(xxiii) It impliedly means that the undivided portion of the land shall devolve in favour of the purchaser.

(xxiv) Further, in the Order-in-Original in para No.32, the learned AA has reproduced the reply to the Show Cause Notice and in Clause-VII therein, it is clearly stated that –

"This is more so when such rights are no less than those enjoyed by the typical owner of the immovable property".

(xxv) In the present case, when the land owning company transferred the land development rights to the developer, the developer gets the right to not only develop the project on such land but also the right to sell such developed property along with undivided interest in the land underneath and to receive payments for such transfer from the buyer. Once the land owning Company transfers the land development rights to developer for consideration, it is obligated to transfer the undivided interest in the land in favour of the developers buyer, for which, no separate consideration is paid to it. It is, in fact, transfer, alienation and conveying the immoveable property and hence, the same is outside the purview of levy of "Service Tax.

(xxvi) Para 17.2 of SCN, says that - DLF paid service tax in one case where they have received consideration for transferring/relinquishing the land development rights acquired by them due to sale of land by M/s. Panthia Builders and Developers Pvt. Ltd. who were the owner and title holder of the land to third party.

(xxvii) It is submitted that the regime of declared service has came into being w.e.f. 01.07.2012. The appellant booked an income of Rs.8,01,40,000/- on account of appreciation of value of land, to which, the Department is alleging that taxable service due to renunciation of development rights. The Appellant was in doubt as to whether any service tax is payable or not in view of the fact that previously Trade Association has written to Government seeking clarification as to whether Service Tax is payable or not on transfer of development rights. To all these communications, the Govt. never came forward to say any service tax is payable upon transfer of development rights. Consequently, on 15.02.2013, M/s. DLF Limited seeking clarification as to whether the Service Tax is payable on transfer of development rights. The Government did not say that any Service Tax is payable on transfer of development rights and, therefore, the period subsequent to 15.02.2013, M/s DLF did not pay Service Tax on the alleged renunciation of development rights. However, in relation to the booking income prior to 15.02.2013, the Appellant paid Service Tax of Rs. 99,05,304/- on 30.12.2013 and also paid interest thereon to the tune of Rs.15,39,432/. It would kindly be appreciated that after our letter dated 15.02.2013 to the Govt. seeking clarification as to whether the Service Tax is payable on transfer of development rights or not and receiving no response from the Government, the Appellant did not pay Service Tax on income arising due to capital appreciation, to which, the Department calls "Renunciation of Development Rights".

(xxviii) In para 17.1 of SCN, it is alleged that DCPC has transferred the land development rights in favour other persons/builders/developers without conferring the title of the land and for which transfers they had received monetary consideration. Once, there is transfer of title in land, then there

is no question of payment of Service Tax. But, in para 18 the Department has taken a stand that DCPC transferred the development rights to DLF Limited, which were acquired from various LOCs by virtue of Business Development Agreement dated 02.08.2006, as discussed, without any value addition. In para 17.1 of SCN, it is alleged that the Development Rights had been transferred to other persons/builders/developers and whereas in para 18, it is alleged that DCPC transferred "Development Rights" to DLF Limited. The fact of the matter is that "Development Rights" had not been transferred to anyone.

(xxix) Further, in the SCN, it is alleged that DCPC has transferred the land development rights to other persons/builders/developers during the period from 01.07.2012 to 31.03.2016 valued to Rs. 1572,96,65,544/- but did not pay Service Tax (including Education Cess and Swachh Bharat Cess as applicable) amounting to Rs. 208,22,50,224/-. But, in the Order-in-0riginal para No.30, finding is recorded to say that –

"Development rights so acquired by DCPC were either subsequently transferred to DLF Limited or relinquished to/ in favour of other persons/builders/developers for consideration under an agreement

(xxx) In para 5.2 of the show cause notice, it is alleged that DLF would provide funds to DCPC for purchasing the development rights from land owning companies. DCPC would purchase development rights from land owning companies and transfer those development rights without any value addition to DLF. The amount paid to the land owning companies for purchase of development rights would be adjusted against the ad-hoc funds provided by DLF.

(xxxi) In para 6 of the SCN, records as under:-

"Therefore, it is apparent that DCPC received funds from DLF to procure development rights from LOCs. DCPC utilizsed only part of the funds provided by DLF Limited to procure the development rights from LOCs. Thereafter, DCPC transferred the development rights to DLF Limited under the above said agreement dated 02.08.2006. "

(xxxii) The agreement dated 02.08.2006 is futuristic in nature in as much as it says that the development rights shall be transferred in future. None

of this Clause of this Agreement says that the "Development Rights" had been actually transferred.

(xxxiii) Para 4 (I) of the SCN, it is stated that:-

(I)" The DCPC provided development rights without transferring the title of land to DLF and for transfer of development rights received consideration from DLF but failed to pay Service Tax.

(II) In few cases, DCPC surrendered land development rights to third party other than DLF and in lieu of surrendering land development rights, received monetary consideration but failed to pay Service Tax.

(xxxiv) These observations are completely not supported by any evidence whatsoever. However, as regards the alleged surrendering of development rights, it is submitted that it is sharing of profit upon sale of land and, therefore, by no stretch of imagination, could be taxable as service.

(xxxv) As per the agreement it can be discerned that –

a. DLF would provide fund to DCPC for purchasing the development rights from land owning companies.

b. DCPC would purchase development rights from land owning companies and transfer those developments rights without any value addition to DLF.

c. Amount paid to land owning companies for purchase of development rights would be adjusted against the ad-hoc fund provided by DLF.

(xxxvi) It has been alleged in the SCN that the perusal of the balance sheet and profit and loss account of DCPC and other financial records shows that DCPC provided development rights to DLF under agreement dated 2nd August, 2006; were acquired from various land owning companies and development rights so acquired are shown under the head of 'inventory' in the balance sheet and transferred as such to DLF without any value addition. The value of development rights transferred to DLF is equal to the amount paid to land owning company by way of advance, amount paid to purchase land and to meet out other miscellaneous expenses such as registry charges, legal expenses and expenses regarding change of land

use. The land companies transferred the land development rights to DCPC without giving title of land in favour of DCPC. In turn, by virtue of above said agreement dated 2nd August, 2006 land development rights were transferred to DLF by DCPC without conferring the title of land as DCPC itself were not having the title of the land of which development rights were given to them by land owning companies. It appears that for transfer of such rights in lieu of consideration, DCPC were required to pay Service Tax on this account.

(xxxvii) That it is submitted that the word "Inventory" is appearing in the Balance Sheet. However, below the word "Inventory" there is a proper explanation, clarification, clearly saying that the "Development Rights" have not been transferred. Further, there is also a remark clearly and manifestly saying that the "Development Rights" have yet to be transferred.

(xxxviii) The Appellant submits that DLF Limited has given given advances of Rs. 1424.83 crores during the period i.e. 01.07.2012 to 31.03.2016, to various land owning companies by way of refundable performance deposit for the purpose of procurement of land. Further, it was submitted that the amount of Rs. 1424.83 crores was remitted by DLF Ltd. to DCPC and later on, DCPC has, transferred to various land owning Companies. Almost all land owning Companies have acquired the land out of the funds provided by DCPC. There is absolutely no documents, agreement or instrument to suggest that any development rights have been transferred by land owning companies to DCPC. To this effect, M/s. Prem Arun Jain & Co, Chartered Accountants has given a certificate dated 3.5.2016 and also M/s. Prem Arun Jain & Co, Chartered Accountants, have also given a certificate dated 30.4.2018 clearly stating that no development rights have been transferred by the land owning Companies to DCPC and similarly, DCPC have also not transferred any development rights to either DLF or any other person. Again, there is absolutely no document or instrument to suggest there was actual transfer of development rights by DCPC to DLF Limited.

(xxxix) Further, in the last five years, repeatedly, various Trade Forums including Confederation of Real Estate Developers Association of India, Northern Region, sent a representation dt.14.8.2014 to the Joint Secretary, Ministry of Finance, Government of India, New Delhi and one of the member of Big Fours CA Firms sent various communications to the Government seeking clarification/confirmation about the levy of "Service Tax" on "Development Right" and the Government never, in the past, viewed that the Service Tax is at all payable.

(xxxx) Hence, extended period cannot be invoked. The demand for the substantial period is barred by time.

4. On the other hand, the Ld. AR for the Revenue submits as under:-

<u>The taxable transactions are between M/s DCPC and M/s DLF</u>

(i) **M/s DCPC** has transferred the Development Rights (acquired from various land owners) to **M/s DLF**.

(ii) It is this transfer of Development Rights from M/s DCPC to M/s DLF which is the subject matter of taxability in the present case.

(iii) Regarding acquisition of development rights by M/s DCPC from various land owners, it is submitted that transactions between M/s DCPC and various land owners are not under dispute. Those are different transactions and are not the subject matter of present Appeal. Regarding taxability of those transactions that is between various land owners and M/s DCPC, it is different subject and factors based on *individual factual matrix, the location, the threshold exemption available for individual land owners etc* will govern the taxability of those transactions.

(iv) However, the present subject matter i.e. the taxability of the ***"transfer of the development rights by the M/s DCPC to M/s DLF against the specified consideratio***n***"*** has to be held ***"as an activity done by M/s DCPC for M/s DLF against consideration"*** and hence a taxable service as per section 65 B (44) of Finance Act 1994.

(v) Different transactions of transfer of development rights are taxable activities and have to be seen independently on the basis of different factors like consideration, threshold limit of exemption, other exemptions etc.

(vi) The two transactions which are independent and mutually exclusive should not be confused as one transaction.

Based on above it is submitted that the two transactions of transfer of development rights viz. ***"between various land owners and M/s DCPC "*** and ***" between M/s DCPC and M/s DLF "*** are, mutually exclusive, independent but separately taxable transactions and should not be confused as one. Further, in the present Appeals it is not only the transactions between M/s DCPC and M/s DLF which is under dispute and hence only the taxability of same should be adjudicated.

(vii) The submission made by the Appellant is incorrect. M/s DLF Limited (DLF) provided business advance or an ad-hoc fund to DCPC for procuring development rights from other companies. This business advance was given for specific purpose i.e. to acquire **Development Rights** which was other than the loan, provided by DLF to DCPC, for example the balance of such loan was Rs.247.83 crores as on 31.03.2015 and Rs.554.47 crore as on 31.03.2014. These loans carry an interest rate of 12% per annum. Whereas, the business advances were interest free. The accounts of DCPC show that many times a part of such business advance or ad hoc fund had been returned to DLF, if such fund was not used by DCPC for procuring development rights from other companies. In the show cause notice service tax has been demanded only on that amount which was used by DCPC (out of total

business advance or ad hoc fund) for procuring development rights from their companies.

(viii) It is correct that the Business Development Agreement dated 02.08.2006 permits the Appellant to pay the amount to various companies who will acquire the land and simultaneously development rights of such land shall be transferred to Appellant. The above said Agreement dated 02.08.2006 legally bounds the Appellant to provide all development rights procured by the Appellant to DLF or its nominee. This agreement does not permit the Appellant to sell the specified land because once the development rights had been acquired by the Appellant, **it is the DLF who became the owner of such rights by virtue** of above Agreement dated 02.08.2006. In the said agreement the Appellant has been warranted that "it shall not sell, assign or transfer or agree to sell assign or transfer the Development Rights to any person other than DLF, in any manner whatsoever." The above said Agreement does not permit the Appellant to sell the land as claimed in this para.

(ix) It is claimed that the above said agreement is futuristic in nature and the appellant has actually transferred the development rights to DLF and service tax shall be payable only when there is actual transfer of development rights in future. The annual financial statements indicate the practice of transfer of the development right acquired by DCPC. The perusal of the balance sheet of DCPC for the year 2014-15 shows the development rights held by DCPC are shown under the Schedule of "Inventories" which were valued to Rs.651.53 crores as on 31.03.2015 and Rs.1311.90 crores as on 31.03.2014. This shows declining trend to inventories of development rights indicating that some of development rights had been transferred by DCPC to DLF.

It is relevant to refer the note given in the above annual financial statement which explains that "The advances given by the firm to the LOCs in pursuance of the development agreements entered into with them, are classified as inventory where the LOC has confirmed that it has either already acquired the land or is in an advance stage of acquiring the same as on the balance sheet date. All other advances are classified as loan advances." The note in the

above said Balance sheet explains that "The Firm has entered into development agreements with various land owning companies ("LOCs") wherein the firm has acquired sole irrecoverable development rights in land which has been acquired by (LOCs). Further, the firm has entered into agreement with DLF Limited (one of its partners) wherein the Firm has agreed to assign or transfer all the development rights so acquired from the LOCs to DLF Ltd.", therefore, it indicate that DCPC received advances from DLF to procure Development Right and transferred the development rights to DLF.

(x) The above said Business Development Agreement dated 02.08.2006 shows that DCPC **agreed to provide development rights to DLF**. The provisions of the Finance Act, 1994 ('Act') and rules made thereunder provides that service provider is liable to pay service tax on the consideration received against the services agreed to be provided inasmuch as Section 67(1) of the Act which is for valuation of taxable services for charging service tax, provides that 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 for the purposes of this section "consideration" includes any amount that is payable for the taxable services provided or to be provided**. Further, Rule 3 of the Point of Taxation Rules, 2011 provides as under-

For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be,-

(a) The time when the invoice for the service provided or agreed to be provided is issued:

(b) "Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service."

(a) In a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment.

(xi) In view of above, it is very much clear that service provider is required to pay service tax on the advance amount received against the

services **agreed to be provided** and in the present case DCPC agreed to provide the services of development rights and received advance payment which was chargeable to service tax. It is again clarified that demand has been raised only to the extent DCPC used that amount for procuring development rights from the total advance amount or ad hoc fund available with them.

(xii) The GM (Indirect Taxation) of DLF Group, in his statement recorded on 23.05.2016 under Section 14 of the Central Excise Act, 1944, as made applicable to the like matters of service tax, vide Section 83 of the Finance Act, 1994 informed that the amount given to land owning companies for acquiring land development rights are given under the head of "Inventory" in the Balance Sheet of DCPC. The development rights to the extent of the amount given to the land owning had been transferred to DLF by virtue of the above said agreement dated 02.08.2006 and the consideration received from DLF had been adjusted from the business advance received from DLF. On being asked, he provided the yearwise (w.e.f. 01/07/2012 to 31/03/2016) details of amount utilized and adjusted towards value of development rights transferred against development rights procured from land owning companies.

(xiii) If there was transfer of title of the specified land along with the transfer of land development rights then appropriate stamp duty would have been paid to the State. Neither DCPC nor DLF paid such stamp duty on impugned transfer of development rights. The agreements discussed in paras 5 and 8 of SCN indicate that acquiring or transferring the development rights to develop and carry out construction, does not involve transfer of title in land. The Business Development Agreement dated 02.08.2006, discussed in paras 5 of SCN, under which DCPC transferred the development rights to DLF or under sale deeds to other real estate developers but did not transfer the title of land along with development rights to recipients of service at any point of time. The Development Agreement dated 05.12.2006, under which DCPC had acquired the land development rights, the para 2.2 of the agreement (RUD-9 to SCN), specifically mentioned as under:

> "The parties agree that nothing contained herein shall be construed as delivery of possession in part performance of any agreement of sale, under Section 53A of the Transfer of Property Act, and/or such other

> applicable law for the time being in force. It is clarified that M/s Red Topaz Real Estate Private Ltd. (PREPL) shall be the owner of the Scheduled Property only for carrying out the development activities."

5. Heard the parties and considered the submissions.

6. On hearing the parties, the sole issue emerges before us is whether the appellant has transferred any land development right in favour of M/s DLF Ltd. or not?

To decide the issue, we have to go to the facts of the case, we find that as per the business module of M/s DLF Ltd. they are engaged in the business of Real Estate Development of integrated township and construction. As per their business module, they appointed the appellant to purchase the land on their behalf and thereafter to obtain certain permissions from various Govt. Department and to handover the land to DLF Ltd. as per agreement dated 02.08.2006 for further development and thereafter to transfer the same to the appellant for construction and sale the flats/properties developed by M/s DLF Ltd to various prospective buyers. At the time of transferring the constructed property to prospective buyers, there is a tri-pirate agreement between the land owning company, M/s DLF Ltd. and the prospective buyers and documents of transfer of title were executed at that time. It shows that in the entire transaction, the LOCs remain the owner of the land and as per the agreement, the development activities is taken place and thereafter developed property was sold by M/s DLF Ltd as per tri-pirate agreement to the prospective buyers upon execution of sale deed of land by the LOCs.

7. In this background, as per the facts, which are not in dispute that M/s DLF Ltd have given a sum of Rs. 1423.83 Crores to the

appellant for purchase of land and the said amount has been paid by the appellant to various land owning company (LOCs). It is also a fact on record that the land owning company remained the owner of the land and have not transferred the land in the name of the appellant unless and until if the appellant become the owner of land, how the appellant can transferred development right in favour of the DLF Ltd.

8. Admittedly, from the facts of the case, it emerges that the advance to purchase of land given by M/s DLF Ltd to the appellant which has been further given to the LOCs to purchase the land who ultimately purchased the land. The activity of the appellant would have been started only after acquisition of land and thereafter to procure NOC from the various Govt. Authorities and thereafter development activities on the land. The agreement which is based in this case dated 02.08.2006 does not say that the appellant have actually transferred the development rights. In fact, the said agreement is futuristic in nature which says that in further on acquisition of land, the appellant shall transfer the development rights to M/s DLF Ltd, it means that when the appellant never remain the owner of the land at the time of receiving the advance from M/s DLF Ltd. against purchase of land by the appellant, how can be the appellant transfer the land development right to M/s DLF Ltd.

9. We also take a note of the fact that the Ld. AR disputed that the amount received by the appellant is paid by DLF Ltd. to the appellant for acquisition of development rights. It is a fact on record that the appellant is not the owner of the land, therefore, how can he transfer development rights to M/s DLF Ltd. and as per the records, the amount given by M/s DLF Ltd. has been transferred by the appellant

to various LOCs for purchase of the land. Therefore, it is mere transaction of the sale and purchase of land or purchase of land by the appellant for DLF Ltd. for further development. As appellant did not get any ownership of the land, in that circumstances, transfer of development right does not arises. There is no such agreement placed on record that any LOCs (who are the owner of the land) has transferred any development rights to the appellant. If so, how much the consideration paid by the appellant and in that circumstances, the land owning company (LOCs) are liable to pay service tax. Admittedly, LOCs were never issued show cause notice and nor made the party to the show cause notice in question. In such a situation, the question of transfer of development right by the appellant does not arise. These findings are on the factual aspect of the case.

10. We further find that in this case, when the land-owning company transfers land development rights to the developers, the developers gets the right to not only to develop project on such land but also the right to sell such developed property along with undivided interest in the land underneath and to receive payments for such transfers from the buyers. Once the land-owning companies transfers the land development rights to developer for a consideration, it is obligated to transfer the undivided interest in the land in favour of developer's buyers for which no separate consideration is paid for it. In other words, such transfer of undivided interest in the land by the land-owning company is in return of the initial consideration paid by the developer to it for transfer of land development rights only. Thus, it is the ownership of the land, which stands transferred effectively by the land-owning company in return of consideration payable by the

developers. The moment it is either land or "benefits arise out of land", it goes outside the purview of "Service" as defined in Section 65B (44) of Finance Act, 1994. Under the Development Agreement dated 05.12.2006, it is stated that there would be transfer of Development Rights in future and the Developer were permitted to carry out the developmental activities as per clause 2.2 of the Development Agreement, wherein the developer is permitted to enter the scheduled property for carrying out developmental activities. After the developmental activities have been carried out, sale deed is executed among the three parties namely Landowner, Developer and the Purchaser under which the title to the undivided portion of the land is transferred to the various vendees/purchasers from time to time as and when the Conveyance Deed/Sale Deed is executed in future. We further observe that it is not only the possession, which stood transferred with the right to use, enjoy and construct building/super structure, but, at the same time, undivided right, title and interest in the land also stand transferred under the Deed of Conveyance on which stamp duty has been paid and the Deed of Conveyance has been registered before the Sub-Registrar.

11. From the above, it is a factual aspect of the case that the amount remitted by M/s DLF Ltd to the appellant is towards the acquisition of land by the LOCs which the said payment received from M/s DLF. Ltd was transferred to LOCs for acquisition of land. Further, no physical acquisition of land was taken over by the appellant. Consequently, the appellant have no right to transfer land development to M/s DLF Ltd.

12. From the above, it is clear that the appellant has not transferred any land development right to M/s DLF Ltd. or its subsidiary nominees etc.

13. We also take a note of the fact that similar facts enumerate from the case of Premium Real Estate Developers vs. CST-Service Tax, Delhi in Appeal No. ST/50103-50104/2014 wherein the facts of the case are as under:-

2. The appellant 'Premium Real Estate Developers', New Delhi is a partnership firm and is in the business of real estate trade. The main objective of the partnership firm is to carry on the business of purchase, sale, develop, take and exchange or otherwise, whether for investment or sale in any real estate includinglands to carry on the business of builders, contractors, dealers in land, building and any other activity in connection therewith and incidental thereto.

3. Sahara India Commercial Corporation Ltd.('Sahara India' for short) was interested in acquiring large parcels of land for setting up townships. Accordingly Sahara India entered into three separate but similar memorandum of understanding with the appellant firm for acquiring three large parcels of land at three different locations as follows;

Name of the Associate	*Place/Sites*	*Date of the MOU*	*Area of the land(in acre intended to acquire*	*Average rate per acre (in Rs.)*
M/s Premium Real Estate Developers	*Kanpur*	*09.08.2003*	*100*	*8,50,000/-*
	Lalitpur	*15.11.2003*	*100*	*5,75,000/-*
	Raeberalli	*16.05.2005*	*125*	*7,50,000/-*

4. Under the MOU, Sahara India, had agreed to pay an average rate per acre of land to be purchased by Sahara India, which land would be identified, divided and demarcated by the appellant firm together with necessary documents and other formalities. The MOU for each site specifically provided the obligations of both the parties. It specifies that Sahara India had agreed to procure land at the aformentioned locations, at the fixed average rate per acre, which included all the cost of land, development expenses (items). The obligations of the appellant under the MOU were- (a) divide and demarcate the entire land into the blocks of 20 to 30 acres, (b) purchase the land in contiguity block wise, (c) furnish title papers and other necessary documents for the land to be purchased (d) obtain the permission and approval from the concerned authority for transfer of land and the expenses incurred in this regard, would be borne by the appellant firm, (e) bring the owners of the land for the purposes of negotiating, registration, etc , to the relevant places and bear all the expenses involved on these. The MOU further provided that the other expenses like stamp duty/registration charges, mutation charges would be borne by Sahara India. On satisfaction by Sahara

India about the fitness of deal(s) for the land, appellant firm shall organise the registration in the name of Sahara India, after making the payment to the owners of land, from the advance amount given to them for the purchase of land. The difference, if any, between the amount actually paid to the owners of land and the average rate per acre settled between the parties as indicated, would be payable to the appellant firm, as their margin or profit. Further Sahara India had reserved its right to withhold 50 per cent of the amount (out of margin) to ensure that the obligations on the developer/appellant are fully discharged in terms of the MOU, and in case there was any serious default on the part of the appellant, the same could be made good by way of forfeiture of such amount, so withheld.

5. Pursuant to the MOU, the appellant firm received advance amount from Sahara India for each site. Substantial part of such amount was used by the appellant to pay to the seller or the prospective seller of the land, for agreeing tosell land to Sahara India. The details of such amount based on the payment made by Sahara India, are as follows;

Place/Site	*Amount paid under land purchase head to appellant*	*Area of land transferred in the name of Sahara (in acres)*	*Amount as per sale deeds in Rs.*	*Amount under development head*
Kanpur	*8,98,00,000/-*	*38.85*	*2,66,99,800/-*	*NIL*
Lalitpur	*5,50,00,000/-*	*77.96*	*4,22,01,779/-*	*NIL*
Raebarelli	*6,75,00,000/-*	*89.91*	*1,69,20,822/-*	*NIL*

6. For the purpose of reference we refer to Memorandum of Understanding (MOU) dated 15th November 1983, related to Lalitpur town, entered between Sahara India and the appellant, wherein Sahara India was interested to purchase 100 acres of land for developing residential township in and around the city of Lalitpur. The appellant assured to make available 100 acres of land situated in the village Rora, Distt. Lalitpur U.P.,with direct opening or acess of at least 1000 feet on the National highway. The salient features of the agreement are;

6.1 The process of land purchase shall be in a compact contiguous, adjacent and plot wise or block wise manner starting from the roadside.

6.2 The appellant shall furnish the title papers and all other necessary documents with reference to the land proposed, within 15 days from the date of signing of the MOU.

6.3 Thereafter the appellant shall obtain and furnish, each and every other necessary permission/ approval from the Government body/competent authority, or other regulatory authority, required for transfer of the land proposed, and further arrange for the purchase of land proposed under the MOU, at the average agreed rate per acre, within two months or within such further time at the discretion of Sahara India.

6.4 All expenses for obtaining proof of title and approval (except for ULC clearance) required for the transfer of title in the land shall be borne by second party, that is the appellant, and all the supporting documents furnished in respect thereof shall reflect the latest position of the ownership of land.

6.5 Thereafter scrutinising the papers relating to title, the first party-Sahara India shall enter into an agreement of sale with the owners of the

land, after payment of advance/signing amount, in favour of the cultivators/owner of the land.

6.6 Thereafter having completed and covered the entire land(area) under the MOU through agreement(s) to sell, the appellant shall thereafter get the sale deed(s) executed by the cultivators/ownersof land in favour of Sahara India or its nominees, after payment of remaining amount towards purchase. Where there are several coowners in a 'Khata' (entry in the land record) the second party/appellant shall ensure that all the co owners execute the document (sale deed) at one time. In no case shall any document be executed by part co owners. That in the case the land is owned by minor, lunatic or an insane person, appellant will get appropriate guardianship certificate from the competent court/authority and agreement to sell shall be executed only with such guardian. In case any dispute is pending before any civil court or revenue Court, regarding title, share or for partition of the property, the appellant will try its best to get the settlement arrived among the co sharers/co owners and agreement to sell shall be executed accordingly.

6.7 That it is the responsibility of the appellant for bringing the cultivators/land owners to the Registrar office along with the necessary documents and photograph and to witness execution/registration of the documents.

6.8 That all payments to the Kashtkar/land owners, shall be made through pay orders/demand drafts/account payee cheques. That the difference, if any, of the amount being actually paid to the cultivators /owner of land and the average rate, shall be payable to the appellant. Such payment of difference to the appellant shall be regulated in such amanner so as to ensure the performance of the terms and conditions of the MOU. The first party Sahara India may under discretion withhold maximum up to 10 per cent of the amount payable to the second party/appellant to ensure peaceful/proper demarcation and possession, mutation and construction of the boundary wall of the entire land. In case, the appellant fails to fulfil its obligations as stipulated in the terms of the contract/MOU, the same can be terminated by Sahara India and the withheld amount is liable to be forfeited. All expenses for registration of documents relating to the transfer or agreement of sale, etc., shall be borne by Sahara India. Further all expenses of mutation of land in the office of the concerned Revenue authority shall be borne by Sahara India and the appellant shall be required to coordinate and to do the work of Pairvi in respect thereof in the concerned offices and shall provide to Sahara India all necessary help so as to get the work of mutation completed.

7. It appeared to Revenue that the appellant was liable to pay the service tax under the classification 'Real Estate Agent Service' (introduced with effect from 1 st October,2004) under section 65(88) of the Finance Act which defines a 'real estate agent' as a person who is engaged in rendering any service in relation to sale, purchase, leasing and renting, of real estate and includes a real estate consultant.

In the above stated facts which are similar to facts of this case, this Tribunal vide Final Order No. 53322-53323/2018 dated 27.11.2018 observed as under:-

28. From the perusal of Memorandum of Understanding (MoU) between the appellant and M/s Sahara India Ltd. It is very obvious that MoU is not only for providing purely service for acquisition of the land but involves many other function such as verification of the title deeds of the persons from whom the lands are to be acquired and obtaining necessary rights for development of the land from the Competent Authority. The remuneration or payment for providing this activity has actually not being quantified in the MoU. The MoU provides that "the difference, if any, of the amount being actually paid to the owner of the land and the average rate shall be payable to the second party (appellant). It is veryclear from the provision of the MoU that the amount payable to the appellant is not quantified and it is more of the nature of a margin and share in the profit of the deal in purchase of land. We feel that for levy of service tax, a specific amount has to be agreed between the service recipient and the service provider. As no fixed amount has been agreed in the MoU which have been signed between the parties, the amount of the remuneration for service, if any is not clear in this case. In this regard, we also take shelter of this Tribunal's decision in the case of Mormugao Port Trust vs. CC, CE&ST, Goa – 2017 (48) S.T.R. 69 (Tri. – Mumbai). The relevant extract is reproduced here below :-

> *"18. In our view, in order to render a transaction liable for service tax, the nexus between the consideration agreed and the service activity to be undertaken should be direct and clear. Unless it can be established that a specific amount has been agreed upon as a quid pro quo for undertaking any particular activity by a partner, it cannot be assumed that there was a consideration agreed upon for any specific activity so as to constitute a service. In Cricket Club of India v. Commissioner of Service Tax, reported in 2015 (40) S.T.R. 973 it was held that mere money flow from one person to another cannot be considered as a consideration for a service. The relevant observations of the Tribunal in this regard are extracted below :*
>
> > *"11. …Consideration is, undoubtedly, an essential ingredient of all economic transactions and it is certainly consideration that forms the basis for computation of service tax. However, existence of consideration cannot be presumed in every money flow. … The factual matrix of the existence of a monetary flow combined with convergence of two entities for such flow cannot be moulded by tax authorities into a taxable event without identifying the specific activity that links the provider to the recipient.*
> >
> > *12. … Unless the existence of provision of a service can be established, the question of taxing an attendant monetary transaction will not arise. Contributions for the discharge of liabilitiesor for meeting common expenses of a group of persons aggregating for identified common objectives will not meet the criteria of taxation under Finance Act, 1994 in the absence of identifiable service that benefits an identified individual or individuals who make the contribution in return for the benefit so derived.*
> >
> > *13. … Neither can monetary contribution of the individuals that is not attributable to an identifiable activity be deemed to be a consideration that is liable to be taxed merely because a "club or association" is the recipient of that contribution.*
> >
> > *14. … To the extent that any of these collections are directly attributable to an identified activity, such fees or charges will conform to the charging section for taxability and, to the extent that they are not so attributable,*

> *provision of a taxable service cannot be imagined or presumed. Recovery of service tax should hang on that very nail. Each category of fee or charge, therefore, needs to be examined severally to determine whether the payments are indeed recompense for a service before ascertaining whether that identified service is taxable."*

29. We feel that since the specific remuneration has not been fixed in the deal for acquisition of the land we are of the view that both the parties have worked more as a partner in the deal rather than as an agent and the principle, therefore we are of view that taxable value itself has not acquired finality in this case.

30. It is also seen that some of the MoUs were not fully executed at the time of the issue of the show cause notice for example, in the case of MoU dated 15/11/2003 entered between Sahara India Ltd. and the appellant, the agreement is for provisioning of 100 acres of land at Village Rora, Distt. Lalitpur, U.P. and for this purpose an amount of Rs. 6,75,00,000/- have been remitted for land cost andan amount of Rs. 1,66,50,000/- have been remitted for the purpose of stamp duty and registration. Thus, a total amount of Rs. 8,41,50,000/- have been remitted to the appellant out of which a total amount of Rs. 3,66,32,000/- have been spent by the appellant for procurement and registration of land. Thus, an amount of Rs. 4,75,18,000/- still remain unspent with the appellant. It is to be seen that out of the above amount though the MoU was for 100 acres of land till the issue of the show cause notice only 77.96 acres of land could only be acquired and thus the remaining amount still was to be used for procurement/acquisition of balance land. This indicates that firstly; the MoU has not been executed fully and therefore the actual remuneration to the appellant have not got finalized and therefore we feel that issuing the show cause notice in such a stage was premature and unwarranted.

31. As discussed above, since the exact amount of remuneration for providing any service, if any, has not been quantified at the same time since most of the MoU remained to be fully executed and therefore the exact amount of remuneration, which was the difference in amount paid to the seller of land and average price decided in MoU, could not be finalized and therefore we feel that taxable value has not reached finality and therefore demanding service tax on the entire amount paid to the appellant for acquisition of land is not sustainable in law in view of the discussion in the preceding paras.

32. Further we find that the issue relates to interpretation, and there is no malafide on the part of the appellant. The transaction is duly recorded in the books of accounts maintained by the appellant. Further there is no suppression of information from the revenue. Accordingly, we hold that the extended period of limitation is not applicable.

14. Now, we deal with the legal aspect of the case. Section 65B(44) of the Finance Act, 1994 defines the services and excluded certain activities which are as under:-

> any 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) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or

(iii) a transaction in money or actionable claim;"

As per the said provisions, the transfer of title in goods or immovable property, by way of sale, gift or in any other manner is not a service and no service tax is payable thereon.

15. As immovable property has not been defined in the Finance Act, 1994, therefore, as per Section 3 (26) of the General Clauses Act, 1897, the immovable property means as under:-

(26) "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

16. On going through the said definition, the immovable property includes land benefit arising out of land. In the case of transfer of development rights of the land, therefore, it is to be seen in the legal aspect whether the benefit arising out of land can be equated to transfer of development rights of land or not?

The said issue has been examined by the Hon'ble Allahabad High Court in the case of Bahadur and Others vs. Sikandar and Others wherein the Hon'ble Apex Court observed as under:-

> *"Therefore, the principal question we have to consider is whether the right to collect dues upon a given piece of land, the property of the alleged lessor, is a benefit to arise out of land within the purview of Section 3 of the Registration Act. In our opinion, the right to collect dues upon a given spot is such a benefit, and therefore, we are constrained to find that the document in question purported to convey that which falls within the definition of immovable property. The so-called lease being an unregistered instrument, it could not effect the transfer and could not be admissible in evidence. We are therefore of opinion that the Court of first instance was right. We set aside the order of the*

lower appellate Court and restore the decree of the Court of first instance with costs in all courts."

Further, in the case of Chheda Housing Development Corporation vs. Bibijan Shaikh Farid, the Hon'ble High of Bombay observed as under:-

15. The question is whether on account of the term in the clause which permits acquisition of slum TDR the appellants in so far as the additional FSI is concerned, are not entitled for an injunction to that extent. An immovable property under the General Clauses Act, 1897 under Section 3(26) has been defined as under:-

(26) "immovable property' shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." If, therefore, any benefit arises out of the land, then it is immovable peruperty. Considering Section 10 of the Specific Relief Act, such a benefit can be specifically enforced unless the respondents establish the compensation in money would be an adequate relief.

Can FSI/TDR be said to be a benefit arising from the land. Before answering that issue we may refer to some judgements for that purpose. In Sikandar and Ors. Vs. Bahadur and Ors. 27 ILR 462 a Division Bench of the Allahabad High court held that right to collect market dues upon a given piece of land is a benefit arising out of land within the meaning of Section 3 of the India Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by resitered instrument. A Division Bench of the Oudh High Court in Ram Jiawan and Anr. V. Hanuman Prasad and Ors. AIR 1940 Oud 409 also held, that bazaar dues, constitute a benefit arising out of the land and therefore a lease of bazaar dues is a lease of immovable Allahabad High court in Smt. Dropadi Devi v. Ram Das and Ors. MANU/UP/0120/1974 : AIR1974AII473 on a consideration of Section 3 (26) of General Clauses Act. From these judgments what appears is that a benefit arising from the land is immovable property. FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property and an Agreement for use of TDR consequently can be specifically enforced, unless it is established that compensation in money would be an adequate relief. "

Further, the issue was examined by the Hon'ble High Court of Bombay again in the case of Shadoday Builders Private Ltd. and Ors. Vs. Jt. Charity Commissioner and Ors (supra) wherein the issue was in respect of sale of transferrable development right is immovable property or not?

The Hon'ble High Court observed as under:-

"5. The principal issue which arose before the learned Joint Charity Commissioner as to whether the TDR could be termed as a movable property, is concluded and is no more res integra in view of the judgment of the Division Bench of this court reported in 2007(3) Mh.L.J. 402 in the matter of Chheda Housing Development Corporation ..vs.. Bibijan Shaikh Farid and ors.Para no.15 of the said judgment is material and is reproduced hereunder.

15. The question is whether on account of the term in the clause which permits acquisition of slum TDR the appellants insofar as the additional F.S.I. is concerned, are not entitled for an injunction to that extent. An immovable property under the General Clauses Act, 1897 under section 3(26) has been defined as under : -

(26). "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

If, therefore, any benefit arises out of the land, then it is immovable property. Considering section 10 of the Specific Relief Act, such a benefit can be specifically enforced unless the respondents establish that compensation in money would be an adequate relief.

Can FSI/TDR be said to be a benefit arising from the land. Before answering that issue we may refer to some judgments for that purpose. In Sikandar and ors. .vs. Bahadur and ors., XXVII Indian Law Reporter, 462, a Division Bench of the Allahabad High Court held that right to collect market dues upon a given piece of land is a benefit arising out of land within the meaning of section 3 of the Indian Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument. A Division Bench of the Oudh High Court in Ram Jiawan and anr. .vs.

Hanuman Prasad and ors., AIR 1940 Oudh 409 also held, that bazaar dues, constitute a benefit arising out of the land and therefore a lease of bazaar dues is a lease of immovable property. A similar view has been taken by another Division Bench of the Allahabad High Court in Smt.Dropadi Devi vs. Ram Das and ors., AIR 1974 Allahabad 473 on a consideration of section 3(26) of General Clauses Act. From these judgments what appears is that a benefit arising from the land is immovable property. FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property and an Agreement for use of TDR consequently can be specifically enforced, unless it is established that compensation in money would be an adequate relief."

6. The Division Bench has held that since TDR is a benefit arising from the land, the same would be immoveable property and therefore, an agreement for use of TDR can be specifically enforced. The said dictum of the Division Bench is later on followed by a learned single Judge of this court in 2009(4) Mh.L.J.533 in the matter of Jitendra Bhimshi Shah ..vs.. Mulji Narpar Dedhia HUF and Pranay Investment and ors. The learned judge relying upon the judgment of the Division Bench in Chheda Housing Development Corporation (supra) has held that the TDR being an immovable property, all the incidents of immovable property would be attached to such an agreement to use TDR. In view of the judgments of this court (supra), in my view, the order of the Charity Commissioner that no permission under Section 36 is required as TDR is a movable property cannot be

> *sustained and therefore, the application filed by the respondent no.2 - Trust under Section 36 of the said Act would have to be considered on the touch stone of the said Section 36 and also on the touch stone of the principles applicable to such a sale by a Trust."*

As the Hon'ble High Court observed in the case of Sadoday Builders Private Ltd. and Ors. (supra) that transferrable development right is immovable property, therefore, the transfer of development rights in the case in hand is termed as immovable property in terms of Section 3 (26) of General Clauses Act, 1897 and no service tax is payable as per the exclusion in terms of Section 65B(44) of the Finance Act, 1994.

17. We also take a note of the fact that from time to time the query was made to the Revenue by the trade organization as well as M/s DLF Ltd whether they are liable to pay service tax on transfer of development right of land or not and the same was not answered till yet which means revenue itself is not clear whether the said activity is taxable service or not. In that circumstances, we hold that the extended period of limitation is not invokable and it cannot be said that the appellant did not pay service tax with malafide intentions.

18. We also take a note of the fact that the land owning company have not transferred any development right in favour of the appellant form the facts before us. Therefore, it cannot be said that the appellant has transferred any development right of land to M/s DLF Ltd.

19. In view of above discussions, we hold that the activity in question which is only acquisition of land, therefore, no service tax is payable by the appellant in terms of Section 65B(44) of the Finance

Act. Therefore, whole of the demand against the appellant is not sustainable. Consequently, the impugned order is set-aside.

20. In result, the appeal is allowed with consequential relief, if any.

(Order pronounced in the Court on 22.05.2019)

(Ashok Jindal)
Member (Judicial)

(Bijay Kumar)
Member (Technical)

G.Y.