CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Service Tax Appeal No. 52845 of 2015-DB

(Arising out of order in original No. JAI-EXCUS-000-COM-05-15-16 dated 30.04.2015 passed by the Commissioner of Central Excise, Jaipur).

Rajasthan State Mines & Minerals Limited **Appellant**
Bhawan Khanij, Tilak Marg
Jaipur (Rajasthan).

VERSUS

Commissioner of Central Excise & Service Tax, **Respondent**
NCR Building, Statue Circle
C-Scheme, Jaipur.

APPEARANCE:

Shri Vishal Agarwal, Advocate for the appellant
Shri Vivek Pandey & Shri G. R. Singh, Authorised Representatives for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 51098/2019

DATE OF HEARING: 30.04.2019
DATE OF DECISION: 21.08.2019

BIJAY KUMAR:

The present appeal is filed by the appellant against Order-in-original dated 30.04.2015 by which a demand of Rs. 122.30 crore including Education Cess and Higher Education Cess alongwith equivalent amount of penalty has been confirmed, under Section 65(105)(zzz) and Section 65(105)(zzb) of Finance Act, 1994 ('Act' for short). The appellant have allegedly provided services to M/s

Barmer Lignite Mining Company Limited ('BLMCL' for short) during the period 2008, 2009 to 2012-13.

2. Briefly stated the facts of the case are that the appellant is Government of Rajasthan Undertaking formed under Companies Act, for development and extracting mines and minerals etc. in the State. Considering the acute power shortage in the State of Rajasthan, a policy decision was taken to set up thermal power plant, with Private Public Participation, and for which a bid was invited for setting up lignite (mining) based thermal power project, at Barmer. The Government of Rajasthan selected M/s Raj West Power Limited ('RWPL' for short) for setting up a 1000 MW Thermal Power Plant. The Rajasthan government also decided to allot lignite deposits at Kapurdi and Jalipa mines in Barmer to RWPL. Pursuant to the grant of bid, an Implementation Agreement (IA for short) was signed between Government of Rajasthan (GoR for short) and RWPL on 29.05.2006 for implementation, operation and maintenance of lignite based thermal power plant with associated facilities based on lignite available in Barmer District.

3. As per the IA, a separate company was to be formed as a Joint Venture unit (JV for short) between the appellant and RWPL, for carrying out lignite mining. The JV company was, therefore, formed by name and style of Barmer Lignite Mining Co. Limited (BLMCL for short), with appellant holding 51% of equity share and remaining 49% of stake was to be held by RWPL. As per the IA, at clause 5.2, it was contained that GoR shall allot the land to the RWPL/ JV company

for mining operation. The GoR was also supposed to assist the JV company (BLMCL) in procuring land, required for the project in accordance with Land Acquisition Act and make available to the JV company. The IA further provided in clause 6.22 that, if the Power Purchase Agreement (PPA for short), which was entered into for a period of thirty years and was not extended, then the RWPL/ JV company would surrender the acquired land to the GoR against return of consideration paid at the time of acquiring the land under Land Acquisition Act, or retain the said land by paying the GoR, the differential between current market price and amount already paid to the GoR. On such differential amount being paid RWPL / JV company would be free to use the land or transfer the land. The Ministry of Coal, Government of India allocated the Jalipa, Kapurdi, Shivkar and Sachha Sauda lignite block at Barmer to the appellant by letter dated 13.11.2006, which also mentioned that the lignite mining shall be carried out by the appellant through the JV company, BLMCL, with participation of the appellant. As per the IA between the appellant and RWPL all the investments required was to be made by RWPL, and all the payments required for the acquisition of land for the project were also to be made by RWPL by depositing the money in an escrow account, and the appellant would have no financial liability with the JV company, including for holding of 51% of equity share. As per the IA, the employee(s) required for implementation of the mining project was to be deputed by the appellant/ RWPL to the JV company, BLMCL. For the purpose of acquiring the land for the project, the GoR appointed a Land Acquisition Officer (LAO for short), who undertook

the land acquisition proceeding alongwith Collector, Barmer. The cost of purchase of land was distributed by LAO, by issuing the cheque from the said escrow Account, to the land owners. The following amount was paid by the LAO during the period 2008 to 2012 as indicated herein.

Fin. year	Amount deposited for Kapurdi	Amount deposited for Jalipa	Total amount deposited
2008-09	45,00,00,000	-	45,00,00,000
2009-10	222,56,52,000	-	222,56,52,000
2010-11	69,24,772	468,25,54,750	468,94,79,522
2011-12	-	241,00,00,000	241,00,00,000
Total	268,25,76,772	709,25,54,750	977,51,31,522

4. Due to the various policy decisions taken by the Government of India and GoR, the JV company was not given the title of the land. The Deputy Commissioner, GoR, vide his letter dated 14.09.2012 informed BLMCL, that their request for transfer of 17,323.5 bigha of land of Kapurdi Lignite Project was rejected alongwith Khatedari land. The JV company, BLMCL was also denied the permission to create the mortgage of mining lease in favour of lending institution. BLMCL had unilaterally, in its Board meeting on 13.12.2012, decided to record the payment made towards the acquisition of land, as having been made towards the 'grant of surface right' for Kapurdi and Jalipa land.

5. Pursuant to the investigation conducted by the Service Tax Department, a show cause notice was issued on 19.09.2014 treating the acquired land, as a service under the category of renting of immovable property service, on the alleged consideration of Rs.

989.92 crore for 'transfer of surface right' in favour of BLMCL. The notice further demanded service tax under 'Business Auxiliary Service' (BAS for short) on amount of Rs. 10.2 crore which represented 51% of equity, which the appellant held in the JV company. The Service Tax was also demanded on the amount of Rs. 2.21 crore recovered by the appellant for deputation of their employees to the JV company on the pretext of giving technical knowledge and other expertise also under the BAS. The show cause notice culminated into impugned order, which is the subject matter of appeal before us.

6. Learned Advocate appearing on behalf of the appellant submits that there is no renting of immovable property by the appellant to the JV company, so as to be taxable under 'renting of immovable property service'. The appellant was only a lessee under mining lease granted by the GoR, which was transferred by the assignment, in favour of BLMCL / JV company. The assignment lease was not in the nature of grant of sub-lease /license, but all the rights and obligations that were to be discharged by the appellant were performed by the BLMCL. It was a simple assignment deed by the appellant in favour of BLMCL. It was also stated by the learned Advocate that the right of mining lease is nothing but extraction of mining ore, underlying the surface of the earth. While granting such right, incidental rights over the mining area is also granted as the 'surface right', which the revenue failed to appreciate and treated that as the primary activities, which in fact was the incidental one. The deposit, which was made to the LAO, was not for the grant of surface right, but was rather for the

payment of land acquired from the Khatedar/ cultivator. After the acquisition of land the title of the land vested with the GoR, which is also evident from the mutation records. The mutation record showed the GoR as a land owner, but the same was mutated in favour of JV company for the purpose of conducting the required mining activities. Therefore, the renting of land acquired for mining activities, as has been perceived by the Department, is incorrect appreciation of the legal provision under the Act. It was also submitted that renting of vacant land for mining purposes was specifically excluded from the definition of renting of immovable property services. The Point of Taxation Rules, 2011, specifically mentions that no service tax can be demanded in a situation when the services had been rendered and payment were invoiced and made on a prior date from which the activity became taxable. It was further submitted that even the activities as alleged in the show cause notice and held in impugned order, is treated to be a taxable event then the appellant is required to be treated as pure agent, as no consideration amount has been retained by the appellant nor even any mark up has been done, while distributing the payment made towards the purchase of land by the LAO.

7. Regarding grant of 51% of equity to the appellant in the JV company, that cannot be treated as service, as the appellant had not done any promotion, marketing, sale, etc. for which they were liable to be covered under the BAS. The appellant further submitted that amount recovered from BLMCL towards the deputation of employees

and officials on actual basis, cannot be treated as 'service' under the category of BAS.

8. The appellant also pointed out that the demand is barred by limitation as the entire fact was within the knowledge of the Department. It is also a fact that the money was spent towards the acquisition of land by the JV company, however, transfer of land in their name was cancelled by the Government of India and the activity was therefore considered as surface right by the JV company, in their books of account. In such a situation, there was no justification to treat the amount spent towards the acquisition of land, as consideration for grant of surface right, with an intention to evade the payment of service tax. The demand thus was not fit to be covered under the extended period of limitation. The demand raised by the show cause notice dated 19.09.2014, for the impugned period has been issued beyond the normal period of limitation.

9. As per the direction of the Bench, appellant also submitted written submissions, which was by and large the repetition of whatever has been stated hereinabove.

10. Learned Authorised Representative submits that the entire transaction involves three parties i.e. GoR, the appellant (100% owned by the Government of Rajasthan), RWPL and BLMCL. Initially, the agreement between the appellant, RWPL and BLMCL was for the purpose of generation of power through lignite power plant and for which the land was acquired, but the transfer of title was

subsequently cancelled. The BLMCL treated the amount spent, for grant of surface right, which is a service to be classified under renting of immovable property service. As the transfer of surface right was reflected in the books of account of BLMCL on 30.12.2012, the transaction is required to be taken only from this date, which is after 1 July, 2012 (after introduction of negative tax regime) and hence taxable. Therefore, the limitation for raising the demand is required to be reckoned from that date, which is 30.12.2012, demand is well within the normal period of limitation. It was also impressed upon that the transaction got completed in September 2012, when Government of Rajasthan issued a clarification that the title of the land would not be transferred to BLMCL or even the same cannot be mortgaged for taking loan from financial institution. This activity got approved on 30.12.2012 in the Board meeting of BLMCL. It is, therefore, his submission that the entire activity of land acquisition, although initially intended for sale, has become service by the subsequent cancellation of transfer of land to the JV company and treating the amount spent towards the grant of surface right.

11. Learned Authorised Representative submits that the title of land remained with the JV company. The land has been transferred in the name of appellant, as evident from balance sheet of BLMCL for year ending 30.03.2012. Even otherwise the definition of taxable service under the renting of immovable property does not require the service provider to the owner of the land.

12. Learned Authorised Representative also drawn attention towards Rule 3 and Rule 5 of POTR, 2012. The point of taxation for this transaction before 01.07.2012, when the renting of vacant land solely used for mining purpose, was excluded from the definition of taxable service. It was submitted that Rule 5 of POTR, 2011, is applicable for payment of tax in case of new services which are taxed for first time. As the services in question was introduced in year 2007 itself, and hence Rule 5 was not to be applied.

13. Even otherwise, it was stated by learned Authorised Representative that the sub category of renting of vacant land solely for mining purposes, became taxable w.e.f. 01.07.2012 (with introduction of negative list), then also Rule 5 was not applicable as the said transaction has materialised in December, 2012 only. He, therefore, submitted that the POTR rule, which is applicable in this case, is Rule 3 only, which is the date of making adjustment in the account, by reflecting such transaction as "surface right", which is 13.12.2012. This date is required to be treated as date of invoice, and therefore point of taxation would be 13.12.12. Learned Authorised Representative placed reliance on following decisions:

i) Greater Noida Industrial Dev. Authority vs. Commr. of Cus. C. Ex. 2015 (40) STR 95 (All.)

ii) RIICO vs. Commissioner of C. Ex. Jaipur -2018 (10) GSTL 92 (Tri.Del.)

14. For rendition of service, as claimed by the learned Authorised Representative, the crucial date will be December, 2012 only and for which the reliance was placed on the following decisions:

i) Vistar Construction (P) Ltd. Vs. UoI -2013 (31) STR 129 (Del.)

ii) CST vs. Consulting Engineering Services (I) Pvt. Ltd.-2013 (30) STR 586 (Del.)
iii) CCE, Aurangabad vs. Chate Coaching (P) ltd.-2016 (46) STR 674 (Tri.Mum)
iv) CCE, Allahabad vs. Krishna Coaching Institute-2009 (14) STR 18 (Tri. Del.)
v) CCE, Allahabad vs. Ashok Singh Academy -2010 (17) STR 363 (Tri Del.)

15. We have gone through the submissions made by both the sides and also considered the appeal record. We have also considered the written submission made by both the sides subsequent to the hearing.

16. The issue to be decided in this case is as to,-

(i) Whether the acquisition of land made by the appellant for setting up of the thermal power plant by the JV company as per the agreement entered with RWPL is to be considered as service after the denial of permission of transfer of land, acquired by the JV company;

ii) Whether the 51% equity stake which has been granted to the appellant by the Implementation Agreement, in the JV company, could be treated as 'Business Auxiliary Service'; and

(iii) Whether deployment of officers in the JV company, would amount to rendition of service under the category of 'Business Auxiliary Service'.

17. As far as the acquisition of land by the appellant is concerned, it is on record that the same has been procured by the GoR and assigned to the appellant. The land was acquired from Khatedari land of GoR or the land belonging to the cultivator. In this regard, it will be worthwhile to refer to the provision under Mines and Minerals

(Development and Regulation) Act, which defines in Section 3C as under:-

> "3C. The mining lease means a lease granted for purpose of undertaking mining operations, and includes sub-lease granted for such purposes;
>
> As per the definition contained in 2(d) "mining operation" means any operation undertaken for the purpose of winning any mineral;
>
> As per Section 27 of the Act the mining lease shall be subjected to various conditions and sub-section (d) defines as under:
>
> > "(d) the lessee shall also pay, for the 'surface area' used by him for the purposes of mining operations, 'surface rent' and water rate at such rate, not exceeding the land revenue, water and cesses assessable on the land, as may be specified by the State Government".

From the definition, it is clear that the surface right, which Revenue is contemplating as service, emerges out from the activity of mining operation, as incidental activity. The main activity remains the mining activity, which is nothing but benefit arising out of the land. Therefore, the same cannot be held to be the service per se. It is also on record that initially appellant has only acquired the land for purpose of making it available to the JV company, for the setting up of the power plant to meet acute shortage thereof in the remote area of State of Rajasthan, in the Barmer District. The entire amount of Rs.989.92 crore spent on the acquisition of land was deposited by M/s RWPL, in an escrow account with the bank. The State Government also appointed LAO and the Collector, Barmer, has acquired the land from the land holder, and also from Government. The cost of acquisition of land was paid to the owner of the land from the said Escrow account by cheque. The land holder has, therefore, sold the land, much before the year, 2012, which is period involved in the impugned show cause notice. The sale was complete in the year of acquisition itself and there is no dispute on this fact. In the

circumstances, if due to change of policy of Government of India and State Government, the transfer of land acquired was denied mutation to the JV company, by the appellant, will not retrospectively convert the sale into services of renting of immovable property.

18. The argument of learned Authorised Representative that the relevant date is the entry of the transaction, in the books of account of JV company, is not correct as the transaction has already been completed and the land has been transferred to the State Government/ JV company, much before 13.12.2012. The record produced before us is amply clear on that issue. Learned Authorised Representative has misunderstood that the land has not been transferred to the State Government, but only mutated in favour of the JV company, is incorrect and also improper appreciation of land records. The sale of the land was completed when the LAO had made the payment to the cultivator. In that situation, there is no question of treating the activities undertaken by the appellant by way of acquisition of land from the land holder, for the project, to be treated as service rendered respectively, so as to charge service tax. This will be entirely contrary to the provisions of the Finance Act. The provisions of Mines and Minerals Act, clearly states that the element of surface right is not the main activity in the mining operation, but it is only incidental to that. In such a situation, the incidental activity cannot be treated as a main activity, which is mining and benefit arising out of law, to be an independent service under the category of renting of immovable property service. Even if it is presumed that

surface right is activity which could be construed as renting of immovable property, the entire sale consideration could not be treated towards the value of service provided by the appellant. The Revenue has not taken pain to segregate as to what is the value of the service component involved in the transaction. The treatment of entire amount that has been spent towards the acquisition of land, by no stretch of imagination, can be treated as value towards the alleged service. The Revenue has also failed to find out the actual value for the alleged services rendered for grant of surface right, even though not acceptable, to us in view of our findings as mentioned above. In this regard, we find that the identical issue has come up for consideration though in different context regarding sale of 'developmental right' in case of **DLF Commercial Project vs. Commissioner of Service Tax, Gurgaon-2019-TIOL-1514-CESTAT, CHD**, wherein it has been held that the development right is benefit arising out of land and therefore, the same is not chargeable to service tax. The relevant paragraphs of the decision are extracted as under:-

> "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 can be equated to 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 Bahudur and Others vs. Sikandar and Other 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 judgments 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 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 : AIR1974All473 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 not 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."

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 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".

19. Similar view has been expressed by the Coordinate Bench of this Tribunal in the case of **Mormugao Port Trust vs. Commissioner of Cus., C. Ex. & S.T. Goa -2017 (48) STR 69 (Tri. Mumbai)**. The relevant paragraphs of the order which is relevant is reproduced as under:

"20. We may mention here that there are situations where a co-venturer or a partner may render a taxable service to the joint venture or the firm. This may happen if, for instance, the partner in individual capacity enters into a separate contract with the joint venture/ partnership for providing a specific service in lieu of a separate specific consideration. Such consideration for specific services provided under an independent contract between a co-venture/ partner and joint venture / partnership can be taxable, as such contracts are executed by the partners not in their capacity of the partners but as independent contractors and such a relationship is governed by a separate contract independent of the partnership/ joint venture agreement. To illustrate, a partner in a partnership firm may enter into a separate lease agreement with the firm for renting out his private property to the Partnership firm for a monthly rent in this situation, the partner will be liable to pay service tax on the renting service rendered by him to the firm. On the other hand, if the partner chooses to grant the firm a right to use his office premises and regards this as his contribution to the hotch-potch of the partnership firm, the reward by way of profits which such partner may earn upon the success of the partnership venture will not be taxable as the profit earned by the partner in such circumstances is not a consideration for the service of renting out the property to the partnership firm. By placing the office at the disposal of the firm to conduct is business the partner agrees to receive only a share of profit which is contingent upon the firm earning profits in the first place. If the venture fails and the firm does not earn any profit, the partner may not receive anything in return for the contribution made by him. On the other hand, if the firm's venture is successful, the partner may earn profit which may be much more than the normal rent that he would have earned by simply leasing out the office to the firm for a fixed rent. The profits which the partner will earn in such circumstances is a reward due to an entrepreneur for the risk that he take sand cannot be regarded as a consideration for the renting of the office to the firm.

....

23. We are accordingly of the view that there is no service that has been rendered by the Appellant. Much less the taxable service of renting of immovable property. The money flow to the Assessee from SWPL, under the nomenclature of Royalty, is not a consideration for rendition of any services but in fact represents the Appellant's share of revenue arising out of the Joint Venture being carried on by the Assessee and SWPL.

24. Since we are allowing the party's appeal on merits the other contention to the aspect to time-bar are not being gone into. The Revenues appeal challenging the non-imposition of penalty does not survive as the

> demand of service tax itself is not sustainable. Consequently, the party's appeal is allowed and the Revenue's appeal is dismissed."

20. Appeal against this order was dismissed by the Supreme Court**.**

21. In the circumstances, we find that there is no element of service involved in the transaction, undertaken by the appellant while acquiring the land and transferring the same to the JV company, for setting up of the power plant.

22. Regarding the second issue about the treatment of 51% of equity held by the appellant in the JV company towards consideration for rendering 'Business Auxiliary Service' (BAS), we find that the Commissioner has not given any category under this it is to be treated as service. We find that the activity of grant of 51% share in JV is not covered in any of the sub heading under the 'Business Auxiliary Service', as defined in Section 65(105) of the Finance Act. It is also not clear from the impugned order or from the submission made by the learned Authorised Representative as to whether this grant of equity to the appellant will be covered under definition of the BAS, under the Act. Even by assuming that the grant of 51% of equity is considered as consideration, for rending of service, the same was granted in year, 2008-09, while the notice has been issued on 18.03.2015, this is even beyond the limit of five years, therefore, the show cause notice could not have been issued on this count. The demand is, therefore, not sustainable. On merit, also we find that similar issue regarding the 'royalty' to be treated as value for the purpose of renting of immovable property services in case of

Mormugao Port Trust v. Commissioner -2017 (48) STR 69 (Tri. Mum.) wherein it is held that amount received as royalty was not consideration for rendition of any services including renting/ leasing land and waterfront but in fact was the assessee's share of revenue arising out of joint venture between assessee and SWPL and thus, was not liable to Service Tax. The appeal against this order, the Hon'ble Supreme Court in case of **Commissioner v. Mormugao Port Trust -2018 (19) GSTL J118 (S.C.)** dismissed the appeal filed by the Department on the ground of delay as well as on merits.

23. Regarding the expenses recovered by the appellant on actual basis from BLMCL, the JV company, towards deputation of their employee and related expenses, cannot be categorised under the BAS. Even otherwise the deputation of employee in the JV company cannot be treated as BAS. Relying on the decision of this Tribunal in the case of **Punj Llyod Ltd. Vs. CST, Delhi -2019 (22) GSTL 85 (Tri. Del.),** the relevant paragraph is as under:

> "9. On the second issue, we note that the appellants have deputed some of their employees to their subsidiary group company. For such deputed employees, they have got consideration on actual basis reimbursed by the said subsidiary unit. The appellants have recovered cost for such deputation on actual basis without any mark up. We note that the appellant is not engaged in manpower recruitment or supply and are not to be considered as manpower supply agency. Even otherwise, we note that the decision cited and relied upon by the appellant on this issue herein above as well as the decision of the Tribunal in airbus Group India Pvt. Ltd. -2016 (45) STR 120 (Tri. Del.), settles the issue in favour of appellant. We find deputing employees to group company cannot be considered as supply of manpower. The appellants categorically asserted that they continued to control the deputed employees and have only got reimbursement of actual cost for such deputation. We find following the ratio of decided cases mentioned above, the Service tax liability on appellant on this issue cannot be sustained".

Similar view has been taken by this Tribunal in the case of **Franco Indian Pharmaceutical Pvt. Limited vs. CST, Mumbai -**

2016 (42) STR 1057 (Tri. Mum.). The relevant paragraph is as under:

"**7.** We can reach the same conclusion by viewing this matter from a different perspective. By legislative design, services rendered in the course of employment have been kept outside the purview of service tax levy. This is true not only for the period under consideration but even at present under the new Negative List Regime of taxation post-2002. Whether such service are rendered by an employee to one employer or to many, as in the case of joint employment, cannot make any difference to the tax treatment of the emoluments earned by the employee. We find support for this conclusion from a Draft Circular of the Board dated 27-7-2012 which deals with the cases of "joint employment". Though a final Circular does not seem to have been issued till date, we find ourselves in total agreement with the reasons given in this Draft Circular, whose Paras 5 and 6 read thus :

"Joint Employment

5. There can also be cases where staff is employed by one or more employers who normally share the cost of such employment. The services provided by such employee will be covered by the exclusion provided in the definition of service. However, if the staff has been engaged by one employer and only made available to other for a consideration, it shall not be a case of joint employment.

6. Another arrangement could be where one entity pays the salary and other expenses of the staff on behalf of other joint employers which are later (sic) from the other employers on an agreed basis on actual. Such recoveries will not be liable to service tax as it is merely a case of cost reimbursement."

7.1 We find that in the present case, the revenue would have had no objection if the contract of employment with the employees had been signed jointly by all the employer-companies, and if these employer-companies were paying their respective share of salary to the employees directly. The problem in the present case has arisen only because instead of the employer companies signing the appointment letter jointly, only one of them has signed the same and then shown the employees as lent or deputed to other companies for their work. The reason for entering into such an arrangement is not difficult to see as employees may not be willing to sign contracts with several employer-companies who collectively do not even constitute a separate legal entity. Not only for this reason, but even for the sake of convenience in contracting and accounting, contracts of such joint employment may be signed by only one employer-company and not by all. This, however, cannot make a difference to the taxability or otherwise of the employment contract. No doubt, an employee who signs a contract of employment with one company can legitimately refuse to work for another company, either on deputation or on secondment, if such employment contract is silent on the employer's right to depute or second the employee. However, if such an employee consents to such deputation or secondment to another company and willingly works for other employer-companies for long periods of time, knowing fully well that his emoluments are being paid by such other companies, his contract of employment with a single employer will, by virtue of the parties conduct, transform itself into a contract of joint employment with several employers. In the present case too, employees have been working for many years with several group companies who have, in terms of a pre-existing understanding amongst themselves, been sharing the actual cost of employment on an agreed basis. The collective conduct of the employees and the employer-companies for long period of time has the

> effect of establishing that the contract of employment is one of the joint employment.
>
> **7.2** Even otherwise, by its very nature, a situation where employer-companies have a preexisting agreement to hire employees on joint basis and agree to share the cost of employment on actual by dividing it amongst themselves in such a manner that each employer bears only his part of the cost indicates that there was no intention amongst the employer-companies to render any service to each other. It indeed the intention of the parties would have been otherwise, the employer-company which takes the trouble of hiring an employee in its own rolls would have insisted on some mark-up or margin being given to it, over and above the actual cost. In the absence of such a mark-up/margin, the payments received against debit notes by one employer-company upon the other employer-companies, will not partake the character of consideration for any service, but will merely represent reimbursement of shared costs."

24. In view of the above, the deputation of the employee to the JV company cannot be held to be service. Thus service tax is to be charged.

25. We also find that the entire activity of acquiring of the land by the appellant, on behalf of the JV company, was known to the Department before issue of the show cause notice. We also find that the entire issue of non transfer of land by the appellant to the JV company, was taken by the Government of India and by the State of Rajasthan, subsequent to the acquisition of land, can be considered only as a change of opinion in the subsequent periods. Therefore, there is no case of suppression of facts, so as to invoke larger period of limitation, for raising the demand, is not available to the Department and thus the demand is not sustainable. We also find that there is no intent to evade payment of duty, which is *sine qua non* for invoking proviso under Section 73A of the Act, not apparent from record. In such circumstances, we also hold that the demand is time barred.

26. Accordingly, we set aside the impugned order and allow the appeal with consequential relief, in accordance with law.

(Order pronounced on 21.08.2019).

(Anil Choudhary)
Member (Judicial)

(**Bijay Kumar**)
Member (Technical)

Pant