

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Service Tax Appeal No. 86258 of 2016

(Arising out of Order-in-Original No. 27/ST-VII/RK/2015-16 dated 29.12.2015 passed by the Commissioner of Service Tax-VII, Mumbai)

M/s. Hiranandani Builders

Olympia, Hiranandani Gardens,
IIT Powai, Mumbai 400 076.

Appellant

Vs.

Commissioner of Service Tax-VII, Mumbai

115, New Central Excise Building,
M.K. Road, Churchgate, Mumbai 400 020.

Respondent

Appearance:

Shri S.S. Gupta, Chartered Accountant, for the Appellant

Shri Prabhakar Sharma, Superintendent, Authorised Representative for
the Respondent

CORAM:

**HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER
(TECHNICAL)**

Date of Hearing: 13.07.2023

Date of Decision: 28.08.2023

FINAL ORDER No. 86240/2023

PER: ANIL G. SHAKKARWAR

Above stated appeal is directed against Order-in-Original
No. 27/ST-VII/RK/2015-16 dated 29.12.2015.

2. Brief facts of the case are that the appellant is registered with Service Tax. Therefore, the records of the appellant were subjected to audit by Revenue. During the course of audit, it was noticed by Revenue that the appellant was receiving some amounts towards lease rent and maintenance. Therefore, the financial accounts of the appellant were further scrutinized by Revenue for the period from October 2007 to March 2012 and it was noticed that the appellant was receiving amounts for

providing renting of immovable property and maintenance or repair services to various units which were categorized into three categories, viz. units which were not having SEZ status, units which did not have approved list of services and units availing services before the approval was accorded. It appeared to Revenue that the appellant had violated conditions of Notification No. 04/2004-ST dated 31.03.2004 and subsequently conditions specified under Notification No. 09/2009-ST dated 03.03.2009 and afterwards conditions of Notification No. 17/2011-ST dated 01.03.2011 and thereby the appellant was not entitled for any exemption and as a result, the appellant was required to pay service tax of Rs.25,90,96,248/- for the period from October 2007 to March 2012 on renting of immovable property service provided by the appellant to the units as classified herein above. Therefore, appellant was issued with a show cause notice dated 22.03.2013 demanding service tax of above stated amount with proposal to recover interest. The demand was raised by invoking proviso to sub-section (1) of Section 73 of Finance Act, 1994. The said show cause notice also had proposal for imposition of penalties under Sections 76, 77 and 78 of Finance Act, 1994. Appellant submitted their reply to the show cause notice through a letter dated 07.08.2013 *inter alia* stating that the Central Government vide Notification dated 13.04.2007 granted permission to the appellant to develop an SEZ area at Powai village in Mumbai and, therefore, the amounts received from service receivers towards providing premises on lease and for installation of ATM machine and tower were not liable to service tax. They have also further relied on the provisions of Section 26 and Section 51 of Special Economic Zone Act, 2005. The original authority adjudicated the above stated show cause notice through the impugned order-in-original. Through the impugned order-in-original, the original authority has confirmed the demand of service tax of Rs.25,90,96,248/- and further ordered the appellant to pay interest on the said amount as provided by Section 75 of Finance Act, 1994. Under the provisions of Section 78 of Finance Act, 1994, a penalty of equal

amount was imposed on the appellant. Further, a penalty of Rs.10,000/- was imposed on the appellant under Section 77 of Finance Act, 1994 on the appellant. Aggrieved by the said order, appellant is before this Tribunal.

3. Heard the learned Chartered Accountant on behalf of the appellant. Learned Chartered Accountant has submitted that the appellant is an SEZ developer and the Government of India through a Notification dated 13.04.2007 has accorded approval for development and operation of the sector specific special economic zone for information technology and information technology enabled services at Powai village in Mumbai and as a result, the appellant is an SEZ developer since 13.04.2007. He has further submitted that as per Rule 11 of SEZ Rules, 2006, a developer cannot sell the land in SEZ and can allot the land on lease basis to a person desiring to create infrastructure facilities for use by prospective units. Accordingly the developer, i.e. the appellant, has leased the land to various units for creating infrastructure facilities including facilities for mobile towers and ATM. The amount received from service receivers towards providing premises on lease is not liable to service tax since the appellant is SEZ developer. He has further submitted that the original authority has confirmed the demand for the reason that the units to whom services were provided did not obtain approval of Development Commissioner for procuring said services. In respect of the same, he has submitted that Section 51 read with Section 26 of SEZ Act, 2005 has overriding effect on granting of exemptions. Further, he has submitted that Hon'ble Andhra Pradesh High Court in the case of GMR Aerospace Engineering Ltd. reported at 2019 (31) GSTL 596 (AP has held to the said effect. He has further submitted that the departmental appeal against the said order has been dismissed by Hon'ble Supreme Court. He has further submitted that the original authority in para 15 of the impugned order has observed that the developer and the units in SEZ are entitled to receive tax free goods and services and that the original authority has

distinguished the services provided by the developer with the services received by the developer. He has further emphasized that the appellant is providing services and not receiving the services. He has submitted that as per clause (e) of Section 26(1) of SEZ Act, 2005, a unit under SEZ is entitled to receive services without payment of tax. In respect of such units which were not having approval for the list of services, he has submitted that the approval was granted subsequently to the various units and that the notification does not require prior approval and relied on the judgment of the Tribunal in the case of Essar Oil Ltd. reported at 2006 (197) ELT 450 (Tri.-Mumbai). Further, he has submitted that the above show cause notice is time barred. First show cause notice was issued on 27.03.2013 invoking extended period of limitation whereas the appellant's service tax registration was repeatedly audited by Revenue.

4. Heard the learned AR. Learned AR has submitted that sub-section (2) of Section 26 of said SEZ Act, 2005 provides that the provisions of sub-section (1) of Section 26 of said Act are applicable only when the conditions prescribed under said sub-section (2) are complied with. He has further submitted that as held by the original authority, various conditions of the notification were not complied by the appellant and, therefore, the appellant is not entitled for the benefit under the provisions under sub-section (1) of Section 26 of SEZ Act, 2005.

5. We have carefully gone through the record of the case and the submissions made by both sides. On perusal of the said show cause notice dated 22.03.2013 through which a demand of service tax of around Rs.25 crores was raised on the appellant, we notice that the said show cause notice discusses about three Notifications, viz. 04/2004-ST dated 31.03.2004, 09/2009-ST dated 03.03.2009 and 17/2011 dated 01.03.2011. We note that Notification No. 04/2004 exempts taxable services provided to a developer of SEZ or a unit of SEZ by any service provider. Notification No. 09/2009 dated 31.03.2009 exempts taxable

services which are provided in relation to authorized operations in an SEZ and received by a developer or units of an SEZ. Notification No. 17/2011 exempts taxable service received by a unit located in an SEZ or received by a developer of SEZ. Contention of Revenue is that the conditions of the said notifications were violated by the appellant and, therefore, the appellant was not entitled for the benefits provided under sub-section (1) of Section 26 of SEZ Act, 2005. We note that clause (e) of sub-section (1) of Section 26 of SEZ Act, 2005 provides that every developer and the entrepreneur shall be entitled to the exemption from service tax under Chapter V of Finance Act, 1994 on taxable services provided to a developer or units to carry on authorized operations in a special economic zone. The said provision is subject to the provisions of sub-section (2) of same section. Sub-section (2) provides that the Central Government may prescribe the manner in which the terms and conditions subject to which the exemptions, concessions and drawback or other benefits shall be granted to developer entrepreneur under said sub-section (1). Plain reading of above two sub-sections provides that whenever any services are provided to a unit under a special economic zone, the said services are exempted from payment of service tax, provided no conditions imposed under said sub-section (2) are violated. During the entire proceedings including hearing, Revenue could not place on record as to which are the conditions that are prescribed by the Central Government under sub-section (2) of Section 26 of SEZ Act, 2005. Further, we note that the said Notifications such as 04/2004, 09/2009 and 17/2011 are providing exemptions to the units under SEZ. Here the question is which provision requires the appellant who is a developer of SEZ to pay service tax. The conditions under the said notifications either decide entitlement of the units for exemption, but the provisions under said Section 26 provide that the units are exempted from levy of service tax when they receive services. So, clear interpretation provides that when the present appellant has provided services only to the units under SEZ, the

said services were covered by the provisions of sub-section (1) of Section 26 of SEZ Act, 2005. Further the said three notifications are not issued under sub-section (2) of said Section 26. Revenue could not place on record any conditions prescribed under sub-section (2) of Section 26 *ibid*. Therefore, we hold that the issue is covered by the provisions of sub-section (1) of Section 26 *ibid*. Therefore, Revenue does not have authority of law to collect service tax on services provided by SEZ developer to units in SEZ. We, therefore, hold that the impugned order is not in accordance with the provisions of law.

6. We, therefore, set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 28.08.2023)

(Anil G. Shakkarwar)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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