CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH,
COURT NO. I

Service Tax Appeal No. 53191 of 2014

[Arising out of the Order-in-Original No. 22/2013-14 dated 04/03/2014 passed by The Commissioner of Central Excise, Delhi – II, New Delhi.]

M/s MGF Event Management **Appellant**
MGF House, 17-B Asaf Ali Road,
New Delhi – 110 002.

VERSUS

Commissioner of Central Excise **Respondent**
C.R. Building, I.P. Estate,
Delhi – 110 109.

APPEARANCE

Shri A.K. Batra, Chartered Accountant and Ms. Vibha Narang, Advocate – for the appellant.

Shri V.P. Pandey, Authorized Representative (DR) – for the Respondent

CORAM: **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE SHRI C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50154/2020

DATE OF HEARING : 05/08/2019.
DATE OF DECISION : 03/02/2020.

C.L. MAHAR :-

The present appeal has been filed against the impugned Order-in-Original whereby the learned Commissioner has confirmed service tax demand of Rs. 2,47,31,755/- besides demanding interest and imposing penalties under different Sections 25, Section 78 of the Finance Act, 1994 respectively, arising out from three show cause notices, the details of which are given below: -

Show Cause Notice date	Period of demand	Amount of Demand in Rs.

21/04/2011	01/10/2005 to 31/03/2010	1,52,04,251/-
26/08/2011	01/04/2010 to 31/03/2011	44,22,031/-
20/09/2012	01/04/2011 to 31/03/2012	51,05,473/-

2. Brief facts of matter are that the appellant is operating parking areas in five Malls by way of providing parking to the patrons/visitors of shopping malls and collecting parking fees for which they have appointed an outside agency (herein after referred to as the Third Party Agency) for managing the parking area who is collecting "Parking Fees" on behalf of the appellants and remitting the proceeds to the appellant. The third-party agency raises the invoice for operating cost and its management fee and charges Service tax on these amounts and pays the remainder amount of gross collection on monthly basis after deducting its direct operating cost and management fee. The entire revenue generated by way of selling parking tickets belongs to the appellant. Parking income is recorded as revenue by the appellant in its books of accounts. The appellants claims that the income earned from parking fees belongs to appellants entirely and nothing is remitted to the mall owners from the collections made or otherwise. It is the claim of the appellant that it has no written contract with the Mall owners and is not paying any amount by way of rent or space allocation or by whatever name it may be called to the Mall owners for operating the parking area. The appellant asserts that the only interest of Mall owners is that there should be a hassle free parking and that the space available for parking should be utilized to the maximum possible extent so that there is adequate parking space for the vehicles, otherwise it will affect the popularity of the Mall and may cause traffic chaos in nearby areas of the Mall which may

affect the business of the shops located in the Mall and ultimately the Mall owners. No service tax was paid by the appellant on the income generated from the parking fees. An audit of the appellant was conducted by the service tax department and on the basis of the audit, the above three show cause notices were issued to the appellants alleging that the activity of the appellant amounted to 'management, maintenance or repairs' which was leviable to service tax as per the provisions of Finance Act, 1994. The allegations made in the show cause notice were confirmed vide the impugned Order-in-Original against which appellant is in appeal before the Tribunal.

3. In the appeal memorandum and submissions made during the course of hearing by Shri A.K. Batra, Chartered Accountant and Ms. Vibha Narang, Advocate, it has been submitted that the impugned activity of providing parking facility in the Malls was not taxable as Mall owners did not receive any payment or consideration and were not recording any transaction in their financial records. They are only concerned with the hassle free parking and are not charging any amount for providing the parking space to appellant. There is, therefore, no provision of services by the appellant to the mall owners and no service provider & recipient relationship existed between them. Appellant is a partnership firm and is operating the parking area of the malls as an independent business; there has been no arrangement or agreement to provide "Management, Maintenance or Repair Services"; they are working on principal to principal basis; there was no intention for provision of services in the nature of management, maintenance or repair services and the only essence was to provide a hassle free parking; no consideration flows from Mall owners to the appellant; the amount received from various vehicle owners as a consideration for parking cannot be taken for taxing the appellant for the alleged services

rendered to Mall owners and no consideration is paid or received from the mall owners; the income earned from parking fees belongs to assessee entirely and nothing is remitted to the mall owners from the collections made or otherwise; there is no privity of contract between the person who is paying the parking charges and the Mall owners; there should be a direct link between provision of services and consideration received; consideration of Service may be provided by the third party who is interested in the service to be provided to the participant i.e. consideration should either flow from beneficiary or from a third person on behalf of the beneficiary; they were conducting own business as they are operating the parking area by employing own resources and labour and they are bearing all the related expenses on their own account and booking the same as business expenses; they are not managing the parking facilities for the mall owners but rendering parking services to the visitors or customers of the mall. The "Management, Maintenance or Repair Services" has been rendered to self by the appellant in order to run the business of parking. The learned Counsel for the appellant further argued that Revenue cannot guide any person as to how it should conduct its business. That it was mall owner's discretion that they did not want to charge any consideration against providing parking space to the appellant. They relied upon the case law in **Hero Cycles (P) Ltd. versus C1T (Central), Ludhiana, 2015-TIOL-280 SC-IT** and **SA Builders Ltd. versus CIT (Appeals), Chandigarh & Anr., 2006-TIOL-179-SC-IT**. The learned Counsel further claimed that operation activity is different from management and that the appellant is operating the parking area and not managing the same for the mall owners. They are also in arrangement with the mall owners for operating, managing and letting out of kiosks, space etc. for the purpose of advertisements in the respective five malls i.e. :- (a)The Metropolitan, Gurgaon (b)The Plaza Gurgaon (c)MGF Megacity, Gurgaon (d)The Metropolitan, Saket, New Delhi and (e)The Metropolitan, Jaipur. Appellant have been paying monthly

charges to owner of Metropolitan Mall, Gurgaon and The Plaza Mall, Gurgaon only and no charges have been paid to the developers of the three malls towards temporary space utilized. They are paying service tax under taxable category "Sale of Space" and "Renting of immoveable property" which was duly accepted by the department hence, no allegation is made with regard to the above activity with respect to Malls from whom no monthly charges have been taken. Similarly, upon the parking charges, no Service Tax is being discharged as no amount is paid to the Mall owners and hence department adopted a biased approach and challenged the same commercial arrangement for creating demand on parking income under "Management, Maintenance or Repair Services". It is further added that dual approach of the department upon same commercial transaction is unjustified. They have further claimed that instances exist where the service provider not only provides the services on free of cost basis but also gives money or incentives to the service recipient to avail its services like in Computerized Reservation System (CRS) software provided by Galileo India, Amadeus India and Calleo Distribution to encourage their business. In fact they pay incentives to Air Cargo Agent or Travel Agents for using the software. Similarly, in the present case, the Mall owners also find it more commercial viable to give space to the appellant for managing the parking on its own, account instead of bearing the cost and expenses of the managing the parking space themselves. They claimed that renting of immovable property service more appropriately classify the transaction but as no consideration is charged under this category, they cannot be made liable for service tax.

4. The learned Departmental Representative, however, vehemently argued supporting the Order-in-Original and maintained that the services of the appellant was duly covered under the category of ‘management, maintenance or repairs’ and attracted levy of service tax in terms of the provisions of Section

65(105)(zzg) of the Finance Act, 1994. He has supported the impugned order and has submitted that it was highly improbable that there was no agreement between the appellant and the mall owners as no mall owner would allow unhindered activities at the will of the lessee/occupants of the premises without any preconditions and without any financial consideration. He further supported the finding that the appellant is engaged in providing the service of 'management, maintenance or repairs' of malls and in consideration thereof the appellant was given right of space, including parking area for collecting income earned from the parking fees. He further argued that it is admitted that parking space in the malls belong to the mall owners and it cannot be accepted that the applicant has been given permission to use such valuable space without any consideration. It is also an admitted fact that the applicant is incurring huge liabilities in managing and maintaining the parking space including the costs paid to the third party agency through which the appellant was managing the parking facilities. As the third party agency was paying service tax on the invoices issued to the appellant, the appellant in turn was also liable to pay service tax for the same service which it was providing to the mall owners for which the consideration was in terms of receipts of the parking fees collected from the visitors.

5. We have carefully gone through the rival arguments and have perused the record of the appeal.

6. To begin with, we cannot accept the appellant's plea that huge parking space area was given to the appellant without any agreement with respect to financial consideration or without an agreement with respect to contingent liabilities with respect to theft, injuries, fire or other liabilities. It is difficult to believe that such an enormous responsibility was given without any agreement. Even otherwise, the activity of the appellant is covered within the definition of 'management, maintenance or repairs'. It is not necessary that the service recipient, which are

the mall owners in this case should receive any pecuniary consideration from the service. Even a service without any direct pecuniary benefit to the service recipient is also a service. Even if we take that the interest of the mall owners is that the appellant should provide a hassle free parking, it is a service to the mall owners by the appellant. Again, the plea of the appellant that no monetary consideration is being paid by the mall owners is without substance. The appellant has been allowed to use space and collected parking fee. This is a valid consideration in terms of the service tax provisions as it is not necessary that the consideration should always be directly in the form of money. If the consideration is in terms of some benefit to the service provider which can be measured or converted into money it will constitute a valid consideration. Reference can be made to the relevant provisions of Section 67 of the Finance Act, 1994 regarding valuation of the taxable service. It is as follow :

> **SECTION 67**. Valuation of taxable services for charging service tax. —
>
> (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —
> (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
> (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;
> (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

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

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

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

Explanation. — For the purposes of this section, —

(a)"consideration" includes — (i) any amount that is payable for the taxable services provided or to be provided;
(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;
(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.

7. Section 67(1)(i) clearly stipulates that where the consideration is not wholly or partly consisting of money, it would be such amount in money as, with the addition of service tax charged, is equivalent to the consideration. Further, in Section 67(1)(i) consideration has be taken as the gross amount charged

by the service provider. Thus, there is no doubt that the right to collect parking fees given by the mall owners is nothing but a consideration provided to the appellant by the mall owners and the measure of such consideration is the gross income generated through the parking fees.

8. We further find that the learned Counsel for the appellant has sought to repudiate the liability on the impugned activity by contending that they are merely operating the parking area which is different from the service of 'management maintenance and repairs'. We are not inclined to accept this distinction because as far as the business activity is concerned qua the appellant, it is operation of the parking area but when this activity is examined qua the mall owners they are providing the service of 'management, maintenance or repairs' to the mall owners.

9. We also find that the case laws cited by the appellant are not relevant in the light of these findings. However, we accept the additional plea of the learned Counsel of the appellant that such gross income will include service tax also and the taxable income has to be computed after abating the amount of service tax from the gross income in terms of Section 67(2) of the Finance Act. Therefore, the income shown in the balance sheet as parking fees will be considered as cum-tax value for determination of service tax. We also accept the argument of the learned Counsel of the appellant that they will be eligible to avail the Cenvat credit of the service tax paid on input services, which have been provided to the appellant by third party agency or any other service providers in providing the said service of 'management, maintenance and repairs' of the parking area.

10. However, we cannot accept the plea of the appellant that no extended period was invokable as there was no wilful suppression of facts on their part as they were submitting regular service tax returns to the department. We find that there was a clear mis-declaration and wilful suppression in as much as the

appellant has suppressed the income of parking fees in the relevant returns with an ulterior motive to evade the service tax. They have wilfully designed their mode of operation to evade the service tax. As such we find that the extended period is invokable in the case.

11. In view of entire above discussion we uphold the order-in-original so far as legality of levy of service tax on the activity under 'management, maintenance or repair service' is concerned. However, the appellant will be entitled to avail Cenvat credit of service tax paid by the service providers and cum duty benefit. The penalties under Section 78 of Finance Act, 1994 need to reworked accordingly.

12. In view of the above findings we remand the case to the Adjudicating Authority to re-determine the taxable demand, interest and penalties in the light of above findings. The appeal is, accordingly, allowed to the extent indicated above.

(Order pronounced in open court on 03/02/2020.)

(Justice Dilip Gupta)
President

(C.L. Mahar)
Member (Technical)

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