प्रधान आयुक्त का कार्यालय, केन्द्रीय जी.एस.टी ,अहमदाबाद – दक्षिण

७वी मंजिल, जी.एस.टी भवन ,पोलिटेकनिक के पास ,आंबावाडी ,अहमदाबाद -१५

OFFICE OF THE PRINCIPAL COMMISSIONER OF CENTRAL GST, AHMEDABAD-SOUTH

7th FLOOR, GST BHAVAN, NR. POLYTECHNIC, AMBAVADI, AHMEDABAD-380015

निबन्धित पावती डाक द्वारा / By REGISTERED POST A.D.

फा. सं./ F.No. STC/4-12/O&A/2017-18

आदेश की तारीख/Date of Order : 11.01.2019

जारी करने की तारीख/Date of Issue : 11.01.2019

द्वारा पारित/Passed by:- सुरेश नंदनवार, आयुक्त

SURESH NANDANWAR, COMMISSIONER

मूल आदेश संख्या / **Order-In-Original No. : AHM-EXCUS-001-COM-019-18-19 Dated 11.01.2019**

1. जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।
This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण, अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार, सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण, O-20, मेघाणीनगर, न्यु मेन्टल हॉस्पीटल कम्पाउन्ड, अहमदाबाद-380 016 को सम्बोधित होनी चाहिए।
Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

3. उक्त अपील प्रारुप सं. इ.ए.3 में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पद शुल्क (अपील) नियमावली, 2001 के नियम 3 के उप नियम (2) में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो, उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ (उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए)। अपील से सम्बंधित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।
The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैं, चार प्रतियों में दाखिल की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो, उसकी भी उतनी ही प्रतियाँ संलगन की जाएंगी (उनमें से कम से कम एक प्रमाणित प्रति होगी)।
The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।
The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35 बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।
The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. इस आदेश के विरूद्ध सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण में शुल्क के 7.5% जहां शुल्क अथवा शुल्क एवं जुरमाना का विवाद है अथवा जुरमाना जहां शीर्फ जुरमाना के बारेमे विवाद है उसका भुकतान करके अपील की जा शकती है।

An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute".

8. न्यायालय शुल्क अधिनियम, 1970 की अनुसूची-1, मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00 रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।
The copy of this order attached therein should bear a court fee stamp of Rs. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

9. अपील पर भी रु. 4.00 का न्यायालय शुल्क टिकट लगा होना चाहिए।
Appeal should also bear a court fee stamp of Rs. 4.00.

विषय:-

Sub : Show Cause Notice No. CEA/ST/15-01/C-IV(I)/AP-XVII/FAR 1036/RP 4/17-18 dt 30.05.2017 issued to M/s. Saumya Construction Pvt Ltd., Aditya 1st Floor, Aditya, Nr. Khadayata Colony,Mithakali Six Road, Ahmedabad-380006.

Brief facts of the case

M/s SAUMYA CONSTRUCTIONS PVT. LTD. situated at Aditya 1st Floor,Aditya,Nr. Khadayata Colony, Mithakhali Six Road, Ahmedabad-380006., (hereinafter referred to as "the assessee/service provider") is holding Service Registration No. AAFCS3523GST001 dated 13.09.2004 as amended on 21.01.2013 and registered under the categories of "Works Contract service, Renting of immovable property service, Transport of goods by road, legal Consultancy service & Manpower recruitment/ supply agency Service".

2. During the course of audit of the records of the said assessee for the period 2011-12 to 2013-14 and as detailed at Revenue Para 4 of the FAR No. 1036/2016-17 dated 24.05.2017, it was observed that the assessee had not discharged Service Tax liability on sale of FSI Rights (Development rights). Verification of records, of assessee revealed that they had booked an income of Rs. 32 crore during the period 2013-14 in their books of account. The records of the assessee indicated that they had entered into MOU/agreement dated 28.06.2013 with M/s JAS INFRA CON LLP under which they had had transferred their development rights for the land of balance and available FSI (without transfer of title of property) to M/s JAS INFRA CON LLP for development and construction of new project and market and dispose of the same. M/s JAS INFRA CON LLP had paid of Rs. 32 crore to the assessee as consideration towards such transfer of development right. The transaction and agreement in the instant case had been entered after 01.07.2012 i.e. on dated 28.06.2013.

3. With effect from 01.07.2012 in the definition of service it has inserted vide Section 65B (44) of Finance Act, 1994. As follows-

"Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

a) an 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;

b) a provision of service by an employee to the employer in the course of or in relation to his employment;

c) Fees taken in any Court or tribunal established under any law for the time being in force. –

3.1 Point No. 2.6 & 2.6.1 of Education Guide of CBEC issued on 20-06-2012 which are also reproduced below:

2.6 Activity to be taxable should not constitute only a transfer in title of goods or immovable property by way of sale, gift or in any other manner

♦ *Mere transfer of title in goods or immovable property by way of sale, gift or in any other manner for a consideration does not constitute service.*

♦ *Goods has been defined in section 65B of the Act as 'every kind of moveable property other than actionable claims and money; and includes securities, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale'.*

♦ *Immovable property has not been defined in the Act. Therefore the definition of immovable property in the General Clauses Act, 1897 will be applicable which defines immovable property to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.*

2.6.1 What is the significance of the phrase 'transfer of title'?

Transfer of title' means change in ownership. Mere transfer of custody or possession over goods or immovable property where ownership is not transferred does not amount to transfer of title. For example giving the property on rent or goods for use on hire would not involve a transfer of title.

3.2 Since the transfer of development rights does not result in transfer of ownership from land owner to developer in absolute sense, thus the transfer of development rights is not a transfer of title in immovable property and hence it may be covered under the definition of Service. Further, the said transaction is not covered under the negative list of services under section 66D & Mega Exemption Notification No. 25/2012-ST dated 20-06-2012 and hence it appeared that the said Service is taxable.

3.3 The assessee did not agree with the above observation and submitted under their letter dated 15.04.2015 that sale of FSI is not service but was a sale of property. However, it appears that sale of development rights is not a sale of property as no stamp duty was paid in this case. Also the ownership of the land was retained with the society.

3.4 Accordingly, it appeared that the assessee is liable to pay service tax of Rs. 3,95,52,000/- on the income received from sale of development rights as detailed under:

Amt. In Rs.

FY	Amt. Involved	Service Tax Liability
2013-14	32,00,00,000/-	3,95,52,000/-

4. In view of the above it appeared that the assessee had contravened the provisions of:

a) Section 68 (1) of the Finance Act, 1994, read with Rule 6 of Service tax Rules 1994, in as much as they have failed to make the payment of Service Tax amounting to Rs. 3,95,52,000/- including Ed. Cess and Secondary higher education cess as explained in foregoing paras.

b) Section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994, in as much as they have failed to self-assess the tax due on the services provided and received by them as discussed supra.

Further it appeared that all the above acts of contravention on the part of the said assessee appears to have been committed by way of suppression of the facts by not assessing/declaring the correct value for the purpose of payment of Service Tax and thereby they have suppressed the facts and figures of an amount received/realized for providing taxable Services to the department with an intent to evade payment of Service Tax. Therefore, the Service Tax not paid is required to be demanded and recovered from them under the provision of Section 73(1) of the Finance Act, 1994 by invoking extended period of 5 years along with interest under section 75 of the Finance Act, 1994. All these acts of contravention of the provisions of Section 66, 68 & 70 of the Finance Act, 1994, appear to constitute offence of the nature and type as described in Section 76, 77 & 78 of the Finance Act, 1994.

5. Show Cause Notice F.No. CEA-II/ST/15-01/C-IV(i)/AP-XVII/FAR 1036/ RP4/17-18 dated 30.05.2017 was issued wherein the assessee was called upon to show cause as to why:

(i) Service tax amounting to Rs. 3,95,52,000/- (including Ed. Cess & SHECess) should not be demanded and recovered from them under the proviso to Section 73 (1) of the Finance Act, 1994. by invoking extended period;

(ii) Interest at the appropriate rate on the amount of Rs. 3,95,52,000/- being service tax not paid should not be recovered from them under Section 75 of the Finance Act, 1994;

(iii) Penalty should not be imposed on them under Section 76 of the Finance Act, 1994 as they have failed to pay Service Tax within prescribed time limit as per Section 68 of Finance Act read with Rule 6 of Service Tax Rules 1994.

(iv) Penalty should not be imposed upon them Section 77(2) of the Finance Act, 1994, for not filing the correct ST-3 returns.

(v) Penalty should not be imposed on them under Sec. 78 of the Finance Act, 1994 as amended for suppressing and not disclosing the material facts before the department with intent to evade payment of service tax as mentioned above.

Written Submissions of the assessee

6. The assessee filed their written submissions under their letter dated 12.11.2018 wherein they contended that in terms of the provisions of Section 65B(44) of the Finance Act, 1994,The following ingredients should be satisfied for a transaction to qualify as 'service' :

i. It must be an activity
ii. It must be performed by a person for another person
iii. The activity is performed for a consideration

It was submitted that the dictionary meaning of the phrase 'carried out' would imply that an active action is involved which could be measured in terms of work completed. Any participation of passive nature would not be covered under the phrase 'activity carried out'. In the instant case, no activity has been carried out and as such there was no service. It was also contended that no activity had been performed by them for another person and therefore the transaction would not qualify as service in terms of Sec. 65 B (44) of the Finance Act,1994.

6.1 It was further contended that in terms of the provisions of Section 65B(44) of the Finanace Act, 1994, an activity which constitutes merely a transfer in title in goods or immovable property, by way of sale, gift or in any other manner is covered under the exclusion category from the term 'service' and is outside the purview of service tax. They contended that the term 'immovable property' had not been defined under the Finance Act, 1994 and as such the definition of the said term as per section 3(26) of General Clause Act, 1897 is required to be taken into consideration and the same reads as under:

> *"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."*

It was also contended that the term 'land' has been defined at Sec. 3(p) of the Land Acquisition, Rehabilitation and Resettlement Act, 2013 as under:

> *"land includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth"*

6.2 It was argued that the judiciary had consistently held that any right associated with an immovable property also partakes the nature of 'immovable property'. That the rights to develop property and avail benefits arising from such developed property were benefits arising out of land and as such the development rights qualified as 'immovable property'. They placed reliance on the following judgments:

i) Chheda Housing Development Corporation reported at 2007(3) Mh.L.J 402
ii) Sadoday Builders Pvt Ltd. – Writ Petition No. 4543 of 2010 in the High Court of Judicature at Bombay Nagpur Bench, Nagpur
iii) Titaghur Paper Mills Co. Ltd. reported at 1985 AIR 1293
iv) Shakti Insulated Wires Limited reported at 2003 87 ITD 56 Mum

It was submitted that in view of the ratio laid out in the above judgments, FSI is a benefit arising from the land and thus is 'immovable property'. Therefore, the transaction involving transfer of FSI amounted to sale of immovable property and out of the purview of service tax in terms of the exclusion clause at Section 65B(44) of the Finance Act, 1994.

Record of Personal Hearing

7. Personal hearing in the matter was held on 24.10.2018 wherein Shri Shreyansh Shah, CA appeared on behalf of the assessee and he stated that the written submissions in this regard would be filed before 30.10.2018.

Discussion and findings

8. I have carefully gone through the Show Cause Notice, relevant case records and the assessee's submissions both, in written and in person.

9. The issue before me for discussion is whether the transaction of transfer of development rights is a service within the ambit of Section 65B(44) of the Finance Act, 1994 or otherwise. For the purpose of

ascertaining the same, it is of vital importance to understand what is meant by 'Transfer of Development Rights'. Transferable Development Rights have been defined in the Online Free Dictionary by Farlex as under:

> *A zoning and land planning tool often used to preserve undeveloped or culturally significant areas. Typically, the local government will identify an area it wants to retain in a natural state, such as farmland, called the sending area. Government will also identify an area in need of development, usually through rehabilitation, called the receiving area. To meet those two goals—preservation one place,development in another—government will buy development rights from the farmers, for example. The farmers will agree to restrict their land so it cannot be developed. In return, they will receive something in the nature of credits that allow zoning variances in the receiving area.The farmer may sell those credits to a developer who wishes to build or renovate something in the receiving area.The farmer gets cash, the developer gets its variance,some land is preserved,and other land is rehabilitated,all with a minimum of bureaucratic involvement along each step of the way.*

A definition of Transferable Development Rights is also available in Resolution No. PRC/102013/783/TH dated 18.7.2013 (para 8) issued by the Government of Gujarat, Urban Development and Urban Housing Department and the same reads as under:

> ***Transferable Developmental rights:***
>
> *9.1 Transferable Developmental rights means transfer/trade/sale of developmental rights from one land to another land. Such rights will be given in the form of certificates showing time-limit and price by Local Self-government or Development authority. Such rights will be given according to building byelaws or guidelines issued by the State Government from time to time in this regard.*

Thus the, Transfer of Development Rights (TDR for short) means making available certain amount of additional built up area in lieu of the area relinquished or surrendered by the owner of the land, so that he can use extra built up area either himself or transfer it to another in need of the extra built up area for an agreed sum of money.

10. The assessee have contended that they have sold FSI/ Development Rights which is immovable property and as such the said transaction would not fall within the ambit of the term 'service'. For the purpose of examining the veracity of the assessee's contention it the necessity to define the term ' immovable property' arises. The said term has not been defined under Chapter V of the Finance Act,1994 and as such the definition of the said term has to be derived at from other sources. The term 'immovable property' has been defined at Section 3 (26) of the General Clauses Act,1897 as under :

> *"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."*

Further, 'immovable property' has been defined at Section 2(6) of the Registration Act, 1908 as under:

(6) "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass;

The above definitions and the rulings of the Bombay High Court clearly indicate that TDR is an immovable property.

10.1 Further, it is to mention that in terms of the Gujarat State Stamp Act, 1958, stamp duty at the stipulated rates is required to be paid on sale of immovable property. Thus, one of the yardstick to determine whether TDR is immovable property or otherwise would be its liability to stamp duty. Here it would be pertinent to refer to the Resolution No. PRC/102013/783/TH dated 18.7.2013 (para 8) issued by the Government of Gujarat, Urban Development and Urban Housing Department of which the relevant text reads as under:

Transferable Developmental rights:

10.1.1 Transferable Developmental rights means transfer/trade/sale of developmental rights from one land to another land. Such rights will be given in the form of certificates showing time-limit and price by Local Self-government or Development authority. Such rights will be given according to building byelaws or guidelines issued by the State Government from time to time in this regard.

10.1.2 _____

_____ __

10.1.12 Transferable developmental rights will be exempted from stamp duty.

The above resolution has specifically exempted the TDR connected to the said scheme from payment of stamp duty. The natural corollary that follows is that stamp duty is otherwise leviable on sale of TDR unless exempted. Since the stamp duty is leviable on sale of TDR, the same would be construed as 'immovable property'. The very fact that the need to exempt stamp duty has arisen in the above specific situation indicates that stamp duty is leviable on sale of TDR. In view of the above it can be safely inferred that stamp duty would be leviable on sale of TDR unless a situation specific exemption has been granted under the provisions of relevant law.

10.2 The High Court Of Bombay has considered the aspect of TDR in the case of M/s Chheda Housing Development Corporation reported at 2007(3) Mh.L.J 402 and relevant portion of the findings are reproduced 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 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. v. 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. v. Hanuman Prasad and Ors. AIR 1940 Oudh 409 also held, that bazar dues, constitute a benefit arising out of the land and therefore a lease of bazar 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 v. Ram Das and Ors. 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 Bombay High Court has amply observed that FSI/ TDR is a benefit arising out of land and accordingly the same is immovable property.

10.3 The above judgment has been given due cognizance by the Charity Commissioner, Mumbai and Circular No. 338 dated 20.6.2008 has been issued wherein the necessary instructions in light of the repercussion thereof have been issued and the relevant text of the said circular is reproduced under:

"2. Off late, Our Hon'ble High Court in a case of Chhada Housing Development Corporation v. Bibijan Shaikh Farid reported in 2007(3) Mah. L. J., P. 402 was pleased to lay down that "the expression TDR, is transfer of development rights, which enables the FSI to be used on any other plot of land generated from some other plot and can be used in terms of DC Regulations in force. It is the benefit arising out of land and is immovable property. TDR may be owned by the holder but not the land on which TDR was generated. It can only be used on the owners property in terms of DC Regulations. Therefore it is the FSI of entire property including of RG and D.E roads which alone in terms of agreement prima facie can be enforced."

3. Once it is held by Our Hon'ble High Court in the above referred judgment, that TDR is the immovable property and is transferable in the terms of DC Regulations, it is required to be recorded with concerned regional office of Charity Commissioner, on reporting the change in that regard by the trustees of the trust. No doubt, acquiring authority is expected to inform Assistant Charity Commissioner, for short 'ACC' or Deputy Charity Commissioner, for short 'DyCC', concerned within his jurisdiction in the event of acquisition of the property and generation of TDR pursuant to acquisition of land of the trust. It is however, obligatory on the part of the trustees to report the change and get TDR recorded in Schedule – I by filing appropriate Change Report."

10.4 In the case of M/s Sadoday Builders Pvt. Ltd. (Writ Petition No. 4543 of 2010), the question as to whether FSI/ TDR can be considered movable property cropped up before the Bombay High Court and the answer to the same has been given in negative and the High Court has held that FSI/ TDR is an immovable property. The relevant text of the said judgment is reproduced 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 JitendraBhimshiShah ..vs.. MuljiNarparDedhia 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."

10.5 The above definitions and the rulings of the Bombay High Court and leviability of stamp duty on sale of TDR clearly indicate that TDR is an immovable property.

11. In light of the nature of the transaction under the Transfer of Development Rights, I proceed to examine its exigency to service tax. The term 'service' has been defined at Section 65B(44) of the Finance Act, 1994 as under:

"Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—
a) an 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

The above clearly indicates that the term 'service' comprises of the following components as pointed out at Guidance Note 2 of the Service Tax Education Guide

- any activity
- for consideration
- carried out by a person for another
- and includes a declared service.

Thus, the first and foremost requirement for a transaction to be termed as 'service' would require an activity being carried out by a person for another. In the instant case, the transaction involves Transfer of Development Rights/ Sale of Floor Space Index (FSI). Thus, the only activity undertaken in the transaction at hand can be said to be Transfer of Development Rights. The second question for examination is whether the activity has been carried out by a person for another? The phrase 'carried out by a person for another' would mean that the activity should be carried out for another person. To illustrate, Mr. X is needs to get his car repaired and Mr. Y is willing to repair Mr. X's car, the activity of repairing the car by Mr. Y of another person viz. Mr. X falls within the ambit of the phrase '*activity carried out by a person for another*'. In the instant case, I find that the assessee are in possession of Development Rights and they have transferred the said rights on their own accord. Thus, it cannot be said that the assessee have sold the FSI/ transferred the development rights for another person. It is what belonged to the assessee that has been sold by the assessee and as such the activity of selling of FSI/ Transfer of Development Rights cannot be said to be an activity carried out by the assessee for another person. Accordingly, the transaction is not covered within the definition of the term 'service'.

11.1 While coming to the conclusion that the said transaction is a service the only logic applied is at para 2.1 of the SCN which reads as under:

Since the transfer of development rights does not result in transfer of ownership from land owner to developer in absolute sense, thus the transfer of development rights is not a transfer of title in immovable property and hence it may be covered under the definition of Service.

The above indicates that there is no transfer in ownership from land owner to developer and as such the same is not a transfer of title in immovable property. Thus, it can be inferred that the revenue has issued the show cause notice on the analogy that the transaction is a service since the same is not covered under the exclusion category in the definition of 'service'. The said interpretation of a statuette taken by revenue is not permissible in the eyes of the law. The general principles of interpretation of a statuette demand that the transaction be first examined from the view point of the definitive part of the statuette and not from the view point of exhausting the exclusion list of the definition. The definitive part of the term 'service' as defined at Section 65B(44) of the Finance Act, 1994 demands that it is of utmost importance that an activity should have been carried out by a person for another and the show cause notice is absolutely silent on this aspect as to what activity has been carried out by the assessee for another person. The concept of transfer of title in immovable property has been drafted in from the exclusion clause of the definition of 'service' and by saying that the transaction is not covered in the exclusion clause it cannot be said that the transaction is a service. Although in above stated paras it is discussed at length that TDR is immovable property and sale of immovable property is covered under the exclusion clause of definition of service. The law of interpretation lays down that the transaction should inevitably satisfy the defining part of the term 'service'.

11.2 The above said discussions at paras 10 to 10.2 above clearly indicate that TDR/ FSI is immovable property. In the instant case, it is an undisputed fact that the assessee have transferred development rights/ sold FSI for a sum of Rs. 32 crores. Thus, the transaction is nothing but a sale of immovable property. The show cause notice alleges that the ownership of land has not been transferred and as such there is no transfer of title in immovable property. However, in the instant case, the TDR/ FSI itself is an immovable property and by virtue of MOU dated 28.6.2013, the immovable property has been sold by the assessee. The title of such immovable property viz. FSI/ TDR is also transferred to the acquirer and the same is apparent from clause appearing at page 8 of the MOU which is reproduced under for ease of reference:

> *"SCPL – Developer will not be responsible for sanction of the Development Plans and will not be liable to refund the amount though the Development Plans are not sanctioned with such excess FSI. Upon payment of amount towards development rights for excess FSI as aforesaid, without any further act, deed, matter or thing on the part of Society and SCPL – Developer, Jas – Developer will be entitled to actually utilize the same,* ***and the same shall absolutely vest with and belong to it.***"

The above clause clearly indicates that the title of FSI has been transferred to Jas – Developer and the same no longer rests with the assessee.. Thus, the present transaction involves a transfer of title in immovable property by sale and as such is covered under the exclusion clause of the term 'service' as defined at Section 65B(44) of the Finance Act, 1994. Thus, the very basis of the show cause notice as emanating from para 2.1 of the SCN, is found to be unsustainable.

11.3 In view of the above, I have no hesitation in holding that the transaction of transfer of development rights is not a 'service' in terms of Section 65B(44) in as much as the show cause notice has failed to assign any sort of activity which has been carried out by the assessee for another person and also if the same is considered as an activity, the same is covered under the exclusion clause (i) of the definition of 'service' under Sec. 65B(44). In a nutshell, the allegation leveled in the show cause notice fails on both the counts.

12. In view of my above findings, I pass the following order:

ORDER

I vacate the charges leveled against the assessee under Show Cause Notice F. No. CEA-II/ST/15-01/C-IV(i)/AP-XVII/FAR 1036/ RP4/17-18 dated 30.05.2017.

(Suresh Nandanwar)
Commissioner
CGST SOUTH,AHMEDABAD

Place: Ahmedabad Date : 11 /0 1/2019

F. No. STC/4-12/O&A/2017-18

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4. The Superintendent, C.G.S.T., Range-I, Division-VI , Ahmedabad South
5. The Superintendent (Systems), C.G.S.T., Ahmedabad South
6. Guard File