

(2019) 03 BOM CK 0040

In the Bombay High Court

Case No : Central Excise Appeal No.186 Of 2017

Commissioner of Central Excise

APPELLANT

Vs

B.J.Shirke Construction Technology Pvt. Ltd

RESPONDENT

Date of Decision : 15-03-2019

Acts Referred:

Central Excise Act, 1944 — Section 35G(1)
Finance Act, 1994 — Section 65(25b), 75, 78

Citation : (2019) 03 BOM CK 0040

Hon'ble Judges : S.C.Dharmadhikari, J;M.S.Karnik, J

Bench : Division Bench

Advocate : Swapnil Bangur, Prakash Shah, Jas Sanghavi

Final Decision : Dismissed

Judgement

M.S.Karnik, J

1. The present Appeal is filed by the Commissioner of Central Excise & Service Tax, Pune - III under the provisions of Section 35-G(1) of the Central Excise Act, 1944 as amended by the Finance Act, 2003. The Appeal is filed against the order dated 13/06/2013 passed by Central Excise and Central Excise Appellate Tribunal ('CESTAT' for short) West Zone Bench, Mumbai. The CESTAT allowed the appeal filed by the respondent. The present Appeal is filed on the following question of law amongst others relevant for deciding this Appeal.

(a) Whether in the facts and circumstances of the case and in law, the construction of Shiv Chatrapati Sports Complex is commercial or industrial construction within the meaning of Section 65(25b) of the Finance Act ?

The brief facts of the case are as under:

2. It is the appellant's case that the respondent is engaged in providing taxable services, including 'commercial or industrial construction services' as defined under Section 65(25b) of the Finance Act, 1994. During the course of verification

of service tax payment, it was noticed that the respondent had provided services to the Directorate of Exports and Huge Services to the Government of Maharashtra for construction of new facilities and up-gradation of the existing facilities at Shiv Chatrapati Sports Complex situated at Mhalunge- Balewadi, Pune. It was observed that the services provided by the respondent at the aforesaid place are covered under the category of 'commercial or industrial construction services' as the said stadium/sports complex is used for commercial purposes. The respondent did not pay service tax though they are liable.

3. A show cause notice dated 22/03/2009 was issued to the respondent demanding service tax of Rs.10,21,11,459/- for the period from 2006-07 to 2008-09 along with interest. It also proposed to impose penalty and interest on the said evaded amount of service tax. This show cause notice was adjudicated by the Commissioner of Central Excise and Service Tax, Pune III who vide his order in original dated 15/09/2011, confirmed the demand, levied interest under Section 75 of the Finance Act and also imposed penalty equal to the service tax evaded by the respondent under Section 78 of the Finance Act. The respondent was informed that if the payment is made within 30 days of the communication of the order, the penalty shall be reduced by 25%.

4. Against the order in original passed by the Commissioner of Central Excise dated 15/09/2011, the respondent preferred an Appeal before the CESTAT. The CESTAT was allowed the Appeal of the respondent holding that the construction is non-commercial and therefore no service tax is payable. According to CESTAT the construction is not 'commercial or industrial construction services' within the meaning of the Act.

5. Learned Counsel for the Revenue would urge that the Tribunal committed an error in not appreciating the fact that 1/3rd of the area of the stadium is utilized for commercial purpose, other than sports, and hence, the construction comes within the scope of 'commercial and industrial construction'.

Learned Counsel urged that the Tribunal ought to have appreciated that the respondent has constructed a sports stadium complex for the Government of Maharashtra not on charitable basis but for commercial gains and therefore, the Tribunal is not at all justified in holding that the construction is not a commercial construction.

6. Learned Counsel would submit that the Tribunal has not properly appreciated the contract between the respondent and the Government of Maharashtra dated 10/01/2017, specially paragraph 27(1) which would clearly go to show that the construction being a sports stadium, VAT and Service Tax is payable. Learned Counsel would thereby urge that the contract agreement itself is a clear pointer to the construction being commercial construction rendering the respondent liable to pay VAT and Service Tax. Learned Counsel for the appellant would next submit that the findings of the CESTAT are not sustainable in the teeth of the clarifications of the Board dated 12/05/2008 and 05/09/2008 on the queries

raised by the Competent Authority of Government of Maharashtra, regarding leviability of service tax on the construction services availed for construction of sports stadium. In his submission, the Tribunal has failed to appreciate the materials brought on record indicating various rates specified for the user of different facilities in the sports complex. In his submission, the record clearly reveals that the construction is a commercial construction for which the appellant is justified in levying service tax.

7. Learned Counsel invited our attention to the findings given in the adjudication order by the adjudicating authority which clearly records that the rates are fixed for use of the stadium. He points out that in the rates quoted, there is a column for usage for commercial purposes which clearly reveals that the stadium is being allowed to be used for commercial purposes and separate rates are fixed for such usage. Learned Counsel by placing reliance on the Government Resolution which provides that the Committee shall be competent to use the area to the extent of 1/3rd of the total area for commercial purpose, that is to say, for private purpose, would submit that the stadium is used for commercial purpose and therefore the construction is to be considered as commercial construction.

8. Learned Counsel for the respondent on the other hand invited our attention to the order passed by the CESTAT and the findings recorded therein. Learned Counsel made submissions in support of the impugned order. He invited our attention to the definition of the term 'commercial or industrial construction services' is defined under Section 65(25b) of the Finance Act, 1994. In his submission, the construction of Shiv Chhatrapati Sports Complex cannot be regarded as 'commercial or industrial construction' with the meaning of the the definition under Section 65(25b) of the Finance Act, 1994. Learned Counsel would submit that the plot of land on which the stadium is constructed is owned by the Government of Maharashtra. The record would indicate that the said plot is for public welfare use and not for residential or commercial purpose. Learned Counsel invited our attention to the affidavit dated 09/09/2008 of the Director, Directorate of Sports and Youth Services, Pune where he deposed about holding of 3rd Commonwealth Youth Games 2008 and also a declaration that the stadium will be continued to be used for non-commercial purposes even after the Commonwealth Youth Games are over. Learned Counsel also relied on the Circular issued by the Board dated 17/09/2004 wherein it is clarified as under:

"13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is "used, or to be used" for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civil amenities. Thus, normally government constructions would not be taxable.

However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax."

9. Learned Counsel also relied on the Circular dated 10/02/2012 whereunder following clarifications are issued.

"2.4 Conversion Model: Conversion of any hitherto untaxed constructions/complex or part thereof into a building or civil structure to be used for commerce or industry, after lapse of a period of time.

Clarification : Mere change in use of the building does not involve any taxable service, unless conversion falls within the meaning of commercial or industrial construction service."

10. Learned Counsel would submit that even the records maintained by the local authorities would reveal that the stadium is not used for commercial purposes. Learned Counsel would submit that it is only when sports stadium is to be used primarily for the purpose of commercial or industrial use, it is only then the question of payment of service tax would arise.

11. We have heard learned Counsel for the parties.

We have gone through the Petition and the annexures.

12. To appreciate the controversy involved, it is material to refer to the definition of the term 'commercial or industrial construction service' as defined under Section 65(25b) of the Finance Act, 1994 which reads thus :

(25b) "commercial or industrial construction service" means -

a) construction of a new building or a civil structure or a part thereof; or

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing, plastering, painting, floor, and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is -

i) used, or to be used, primarily for ; or

ii) occupied, or to be occupied, primarily with ; or iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;

13. There is no dispute that the plot of land on which the stadium is constructed

is owned by Government of Maharashtra. The record maintained by the local authorities would indicate that the plot is for public welfare use and not for residential or commercial purpose. The question that arises for consideration is whether, user of the stadium area to the extent of 1/3 rd of the total area for commercial purpose would tantamount to 'commercial or industrial construction service' as defined by Section 65 (25)(b) of the Finance Act, 1994. It is not even the case of the appellant that the stadium is exclusively used for commercial purpose. Relying on materials which indicate that 1/3rd of the area of the stadium can be utilized for commercial purpose, other than sports, the appellant wants us to arrive at a conclusion that construction is commercial construction service as defined under Section 65(25b) of the Finance Act, 1994. No doubt, various rates are specified for different facilities in the sports complex. As observed earlier, it is not even the case of the appellant that sports complex is exclusively or even primarily used for commercial purpose.

14. It may be that various rates are specified for different facilities in the sports complex. This by itself is not sufficient to establish that the sports complex is exclusively or primarily used for commercial purpose. The agreement itself permits the Committee to use the area to the extent of 1/3rd of the total area for commercial purpose.

15. Let us consider the definition of the term 'commercial or industrial construction service' which is extracted hereinbefore. Clauses (a) to (d) of the definition provides for various types of construction and allied works including glazing, plastering, painting etc. and also repair, alteration, renovation etc on which service tax can be levied. This construction of the allied works ipso facto does not attract the levy of the service tax as further part of the definition would indicate. The said construction, in order to attract service tax, will also have to satisfy the conditions laid down by subsequent part of the definition i.e. i) used, or to be used, primarily for ; or

ii) occupied, or to be occupied, primarily with ; or

iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry..... (emphasis supplied by us)

16. The language employed in the definition clause is clear and unambiguous. The plain meaning as can be understood from the definition clause, more particularly, the clarification contained in clauses (i), (ii), (iii) is that the construction ipso facto is not leviable to service tax, but it is only when it is used, or to be used, primarily for "commerce" or "industry" or work intended for "commerce" or "industry" that service tax can be levied. Thus, it is only that construction which is to be used or primarily to be used for commerce that is subject to levy of service tax.

17. In the present facts, we find that dominant user of the sports complex is non-commercial. The definition uses the words "used or to be used primarily for commerce or industry" clearly indicating that the user is to be exclusively for

commercial purpose or at least it must be primarily for commercial purpose. The definition leaves us in no manner of doubt that if the predominant user of the "sports stadium" is not commercial, then the same cannot be subjected to levy of service tax. Thus, in the facts of the present case, though an area to the extent of 1/3rd is used for commercial purpose prescribing separate rates for such user, this by itself is not sufficient to attract service tax.

18. Even the circulars issued by the Board dated 17/09/2004 and 10/02/2012 would indicate that only if such constructions are for commercial purposes, like, local government bodies constructing shops for letting them out, such activities would be commercial and builders would be subjected to service tax. The Director of Sports and Youth Services, Pune in his Affidavit filed before the authorities on earlier occasion has deposed that the stadium will be continued to be used for the non-commercial purposes even after the Commonwealth Youth Games, 2008 are over. The materials on record do not satisfy the test that the stadium is used or used primarily for commercial purpose. It is the stand of the respondent that while pursuing their object of popularizing sports by selecting best available means, they incidentally charge for the usage and the said revenue will not convert the activities into commercial use. The stand is reasonable.

19. We therefore do not find this to be a fit case to interfere with the order passed by the CESTAT in exercise of our further Appellate jurisdiction. The order under challenge is neither perverse nor vitiated by an error apparent on the face of the record.

20. The Appeal is dismissed with no order as to costs.