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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
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POONA STREET, MASJID BUNDER (E), MUMBAI- 400 009.

From : The Assistant Registrar, CESTAT, MUMBAI.

Dated: **11/09/2020**

File No.:-**ST/87284/2013**

In the matter of :-

B.G. SHIRKE CONSTRUCTION
TECHNOLOGY PVT. LTD.
TECHNOLOGY PRIVATE LIMITED
NO.72/76INDUSTRIAL ESTATE
MUNDHWAPUNE Pin Code - 411 036

(Appellant)

Vs

CCE PUNE III
ICE HOUSE 41-A SASSON ROAD OPPOSITE
WADIA COLLEGEPUNE Pin Code - 411001

(Respondent)

I am directed to transmit herewith a certified copy of Order No. : **A/87495/2019** dated : **29/11/2019** passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

Assistant/ Deputy Registrar,
Service Tax Appeal Branch
CESTAT - MUMBAI

Copy To :-
1. Commissioner Customs & Central Excise (Appeal) :**Nil**
2. Master File
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5. M/s Company Law Institute Of India Pvt. Ltd.
6.TAXONGO Pvt. Ltd.
7.Advocate(s) / Consultant(s) / Representative:-

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DB-D

Prepared By :-

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No: 87284 of 2013

[Arising out of Order-in-Original No: 26/P-III/ST/COMMR/2012-13 dated 28th February 2013 passed by the Commissioner of Central Excise & Service Tax, Pune – III.]

BG Shirke Construction Technology Pvt Ltd
No. 72/76 Industraial Estate, Mundhwa, Pune – 411 036 ... *Appellant*

versus

Commissioner of Central Excise & Service Tax
Pune – III
41-A ICE House, Sassoon Road, Pune – 4121 001 ... *Respondent*

APPEARANCE:

Shri V Sridharan, Senior Advocate with Shri Jay Chedda, Chartered Accountant for the appellant

Shri Bidhan Chandra, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/87495/2019

DATE OF HEARING: 06/06/2019
DATE OF DECISION: 29/11/2019

PER: C J MATHEW

The issue for determination in this appeal is the scope available to the adjudicating authority for elaborating upon an expression in the

definition of the 'taxable service' in Finance Act, 1994 with intent to recover tax by qualifying such expression. The impugned activity undertaken by M/s BG Shirke Construction Technology Pvt Ltd is that of 'works contract' in pursuance of tenders invited by Bangalore Metropolitan Transport Corporation for constructing 'Traffic and Transit Management Centre' at Shantinagar under the Jawaharlal Nehru National Urban Renewal Mission (JNNURM). The answer can only be one and, that too, resoundingly in the negative as the constitutional prerogative accorded to the supreme legislature is beyond the scope of encroachment by tax administration. This is abundantly clear from the decision of the Hon'ble Supreme Court in *Commissioner of Sales Tax, Uttar Pradesh v. The Modi Sugar Mills Ltd [1961 AIR 1047 // 1961 SCR (2) 189]*

> *'10. ..... In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions'. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed it Cannot imply anything which is not expressed it cannot import provisions in the statutes so as to supply any assumed deficiency.'*

To paraphrase an old aphorism, which is sauce for the gander is also sauce for the gosling. It is, therefore, appropriate to ascertain the circumstances that prompted the adjudicating authority to embark upon such a venture.

2. The jurisdictional officers sought to subject the entire cost of the project to tax under Finance Act, 1994 which was vehemently objected to by the appellant on the ground that the activity undertaken could not be categorised as 'commercial or industrial construction', one of the enumerations in section 65 (105) (zzzza) of Finance Act, 1994, or any of the others therein and that, additionally, the exclusion available to 'transport terminals' precludes recovery of tax proposed in the show cause notice.

3. Not impressed with these submissions, Commissioner of Central Excise & Service Tax, Pune-III, *vide* order-in-original no. 26/P-III/ST/COMMR/2012-13 dated 28th February 2013, confirmed the demand of ₹ 9,03,74,501 under section 73 of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, besides imposing penalty of like amount under section 78 of Finance Act, 1994 leading to this appeal before us.

4. The contract was awarded to the appellant on 30th July 2009 for a total outlay of ₹ 1,07,21.63.815, as one of the many such across the city of Benguluru, and the demand pertains to the period up to August 2011. The project was conceived for generating built-up space of 67862 m^2 on a site area admeasuring 31862 m^2; of the constructed space, the operational area for bus handling was to be 1145 m^2, with the Corporation to occupy 10130 m^2 and the rest, admeasuring 56587 m^2,

to be leased out. Learned Authorised Representative pointed out that, according to the adjudicating authority, the substantial utilisation for commercial occupancy sufficed to bring the activity within the compass of

> *'(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry;'*

in section 65(105) (zzzza) and that the expression 'transport terminal' should be read in conjunction with the other activities that were similarly excluded from tax. Even the submission of the noticee that the parking area of 22662 m^2, if added to the built-up space occupied by the Corporation, would reduce the proportion of space intended to be leased out was found to be unacceptable as the parking facility was held to be a separate project. It was also held that airports, which are acknowledgably exclusions, cannot be compared with the impugned project even if comprising of space occupied by commercial tenants as access to airports is limited only to passengers.

5. According to Learned Counsel, the contract awarded to the appellant was clearly beyond the scope of taxability as 'works contract service' and that VAT liability had been discharged on the material supplied for the project thereby limiting the scope of applicability of Finance Act, 1994. The submissions made before the adjudicating authority were reiterated besides drawing attention to the computational

error of not excluding the 'material' component of the contract value as well as the declining of the benefit of 'composition'. It was also contended that a substantial portion of the demand would fail on grounds of limitation.

6. The decision of the Tribunal in *BG Shirke Construction Technology Pvt Ltd v. Commissioner of Central Excise, Pune-III [2014 (33) STR 77 (Tri-Mumbai)]* that

> *'6. We have carefully considered the rival submissions.*
>
> *6.1 The question involved herein is whether the Sports Complex Stadium constructed for the purpose of holding games can be considered as a commercial or industrial construction, merely on the ground that the stadium is allowed to be used by the public and others later on, on payment of user charges. In our view, the Sports Stadia is a public facility for the recreation of the public and it does not come under the category of commercial or industrial construction.*
>
> *6.2 In the case of B.B. Nirman Sahakari Samiti v. State of Rajasthan - AIR 1979 Raj. 209, a question arose as to what is a Public Utility? The Hon'ble High Court held that 'public utility' means any work, project which is going to be useful to the members of the public at large. The public benefit aided at or intended to be secured need not be to the whole community but to a considerable number of people. In American Law, the word 'Public facility' has been defined as under :-*
>
> > *" 'Public facility' means the following facilities owned by a State or local government, such as :-*
> >
> > *(a) Any flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water*

supply and distribution, watershed development, or airport facility.

(b) Any other Federal and street road or highway.

(c) Any other public building, structure, or system, including those used for educational, recreational, or cultural purposes.

(d) Any park."

6.3 The Sports Stadia is used for public purpose. Merely because some amount is charged for using the facility, it cannot become a commercial or industrial construction. Even in a Children's Park, entry fee may be levied for maintenance of the Park. Merely because some amount is charged for using the Park, it cannot be said that it is a commercial or industrial construction. Adopting the same logic, the Sports Stadia in the present case is also a non-commercial construction for use by the public. Therefore, we are of the considered view that the Sports Stadium constructed for conducting Commonwealth Games, is a non-commercial construction.'

makes it abundantly clear that charging of rentals does not bring an activity within the purview of 'construction for commerce or industry' and, as pointed out by Learned Counsel, a similar demand sought to be fastened on M/s Consolidated Construction Consortium Ltd, in relation to identical projects at ITPL, Whitefield and Koramangala, in the city of Benguluru, was dropped by the adjudicating authority *vide* order dated 27th December 2012.

7. The generic expression 'transport terminal' must be read in the context of its usage for servicing means of public transport. While 'airports' may have been enumerated separately in the exclusions

within the taxable entry, it too is a transport terminal as the distinguishing characteristic of such facilities is connectivity, interface and buffer. It is for the last of these, *viz*., buffer for stepping-up or stepping down to capacity of the next level of interface, that space is constructed to offer a bouquet of services and goods to passengers during the waiting time. Therefore, the utilisation of built-up space by commercial entities does not detract from the essential purpose of such terminals and, traditionally, every bus terminal has outlets serving the passengers. In the absence of legislative intent or legislative delegation, an artificial delineation of space, at the discretion of tax authorities, is not acceptable. It is also specious to argue that absence or limits of security restrict ons, unlike that elaborately designed, for obvious reasons at airports, should disentitle bus terminal from application as exclusion. Thus, 'terminals', such as the one impugned before us, are, in the absence of express legislative intent to limit application on the basis of scale of use or scale of access, within the ambit of exclusion from tax.

8. In view of the above, we find that the demand in the impugned order fails the test of law and must be set aside. The appeal is allowed.

(Order pronounced in the open court on 25/11/2019)

S D

(Ajay Sharma)
Member (Judicial)
**/as20022002*

S D

(C J Mathew)
Member (Technical)

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सहायक रजिस्ट्रार
Assistant Registrar
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सेवाशुल्क अपील अधिकरण
Customs Excise & Service Tax
Appellate Tribunal

Customs Excise & Service Tax Appellate Tribunal
सत्यमेव जयते
Mumbai
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4 SEP 2020