

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH - COURT No. I

Service Tax Appeal No. 42073 of 2015

(Arising out of Order-in-Original CBE/ST/7/2015 - Commr dated 09/13.07.2015 passed by
Commissioner of C. Ex, Coimbatore)

M/s. Sabari Builders,

.... Appellant

No.63, 1st Floor, Lakshmi Building,
Raju Naidu Street, Sivananda Colony,
Coimbatore-641 012.

VERSUS

The Commissioner of GST & CE,

...Respondent

No.6/7, A.T.D. Street,
Race Course, Coimbatore-641 018.

APPEARANCE :

Shri S Rajagopalan, Advocate & Shri. R. Balachandar, Consultant for the Appellant
Shri Sanjay Kakkar, Authorised Representative for the Respondent

CORAM :

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

HON'BLE MR. AJAYAN T.V, MEMBER (JUDICIAL)

FINAL ORDER No.40777/2025

DATE OF HEARING: 07.04.2025
DATE OF DECISION:30.07.2025

Per Mr. Ajayan T.V.

M/s. Sabari Builders, the appellant herein, has challenged the impugned Order in Original Sl.No.CBE/ST/7/2015-Commr dated 09/13.07.2015 whereby a demand of service tax of Rs.51,29,851/- under proviso to Section 73(1) of the Finance Act, 1994, along with appropriate interest and imposing an equivalent penalty under Section 78 of the Act was confirmed together with a penalty of Rs.50,000/- imposed under Section 77(2) of the Act.

2. Brief facts are that the Appellant, is a proprietary concern engaged in the construction of residential, commercial, and industrial buildings and had obtained Service Tax registration in July 2014. Pursuant to intelligence gathered that the Appellant was engaged in providing taxable construction services without obtaining the requisite registration or discharging the applicable service tax liabilities under the Finance Act, 1994, the Department issued a letter dated 03.07.2014, followed by a reminder on 21.08.2014, calling for all relevant documents. In response, Shri N. Viswanathan, authorized Tax Consultant for the Appellant, appeared before the Superintendent and submitted documents such as Income Tax

Returns, Profit & Loss Accounts (FY 2009-10 to 2012-13), Form 26AS for 2013-14, and construction agreements with clients like M/s. SCAD Group Trust, Tirunelveli, and M/s. Sree Daksha Property Developers, Coimbatore. In his statement dated 21.08.2014, Shri Viswanathan deposed that the appellant started operations in 2007 and undertook works contract services inclusive of cost of construction materials, mainly for schools, colleges and charitable institutions; that no service tax was collected from clients nor paid to the Government as the Appellant believed that construction for educational/charitable institutions being not commercial/Industrial buildings as well as construction of single residential units were exempt from service tax, especially for the period prior to 01.07.2012. In his subsequent statement dated 30.09.2014 Shri Viswanathan, inter alia submitted a client-wise list of work undertaken along with their work classification and agreed to discharge the service tax liability with interest at the earliest.

3. Based on the statements and documents, it was concluded by the Department that the services rendered were classifiable as "Works Contract Services" and in as much as the appellant has neither paid service tax nor filed periodic ST-3 returns for the period from 01-04-2009 to 31-03-2014, it appeared that the Appellant had contravened Rules 4, 6, and 7 of the Service Tax Rules, 1994, and Sections 68, 69, and 70 of the Finance Act, 1994. The Department, being of the view that there was suppression of facts with intent to evade tax, thereby warranting invocation of the extended period under the proviso to Section 73(1), consequently, issued a Show Cause Notice No. 40/2014-Commr dated 17.10.2014 proposing recovery of service tax of Rs.51,29,851/-, comprising service tax and cess; interest under Section 75 and penalties under Sections 76, 77(2), and 78 of the Finance Act.
4. In reply filed during personal hearing, the Appellant submitted that:
 - i. Amounts totalling Rs.8,02,24,841/- pertained to construction for educational institutions and charitable trusts, which are not subject to service tax as per Board Circular No. 80/10/2004-ST and judicial precedents such as tribunal decisions in *Harsh Constructions Pvt Ltd*, 2014 (35) STR 617 and *Vishnu Saran & Co*, 2014 (35) STR 417.
 - ii. A sum of Rs.5,07,54,819/- related to sub-contract works for principal contractors who have already discharged service tax, and even if the appellant had paid service tax, it would be available as cenvat credit to

the principal contractors, rendering the issue revenue-neutral. Reliance was placed on the decisions in NBCC Ltd, 2011 (23) STR 593 (Tri), Chandresh S Shas, 2014 (36) STR 972 Guj HC and Essar Projects Ltd, 2014 (36) STR 681 (Tri).

- iii. An amount of Rs.35,043/- was already discharged by M/s. Victoria Realtors on behalf of the Appellant.
 - iv. Rs.59,910/- was paid by the appellant on 19.05.2015 for services rendered to M/s. Seaforge Ltd and M/s. V.R. Nachimuthu.
 - v. No service tax was collected from clients and the Appellant operated under a bona fide belief that their activities were not taxable.
 - vi. The demand must be treated as cum-tax under Section 67(2).
 - vii. The invocation of extended limitation and imposition of penalties was unjustified, as the issue involved complex provisions of law and was highly debatable, relying on decisions such as *Hindustan Steel Ltd* and *Motor World*.
5. After due process of law, the Adjudicating Authority, vide the impugned order in original confirmed the demand, interest, and penalties vide the impugned Order in Original. Being aggrieved by the impugned order, the Appellant has preferred the present appeal challenging the legality, propriety, and correctness of the adjudication order.
6. Shri. S. Rajagopal, Advocate along with Shri. R. Balachandar, Advocate, appeared for the appellant and submissions were made as under:
- i. The Appellant contends that they genuinely believed their activities were not liable for service tax and therefore did not charge or collect it from clients. As such, there was no need to mention service tax in their agreements. The turnover details relied upon by the Department were based entirely on the Appellant's own records, which clearly indicated that the receipts were exclusive of any tax. Hence, the finding by the adjudicating authority regarding the absence of "cum-duty" documentation contradicts the evidence on record.
 - ii. Throughout the investigation and adjudication, the Appellant consistently maintained that service tax was not payable on the construction activities in question, particularly those related to educational and religious institutions. The Department has not demonstrated any intention of tax evasion by the Appellant, nor any evidence of suppression of facts, especially considering that any

misinterpretation was based on a bona fide belief supported by CBIC Circular No. 80/10/2004-ST dated 17.09.2004. The Department's invocation of the extended period for issuing the Show Cause Notice (SCN) is, therefore, unjustified. Furthermore, bunching multiple financial years in a single SCN violates the spirit and application of Section 73 of the Finance Act, 1994, which mandates separate limitation periods for each assessment year.

- iii. The Appellant relied on CBIC's clarification that constructions undertaken for charitable or non-profit educational and religious institutions are not taxable, as they are not commercial in nature. They cited the statement of their representative, who indicated that construction was done for entities like CSI St. Peter's Church and NR College of Architecture—both non-profit institutions. Moreover, the adjudicating authority overstepped by introducing arguments beyond the SCN and drawing conclusions based on irrelevant and outdated precedents, including a 1978 Supreme Court ruling that predates the introduction of service tax.
- iv. The Respondent's conclusion that such institutions are commercial lacks factual and legal basis. No enquiry was made into the true nature of these entities, and the Department did not challenge or disprove the Appellant's claim for exemption. The only agreement referenced in the SCN, relating to SCAD Group Trust, clearly identifies the construction as for a school under a non-profit trust. This underscores the Appellant's argument that the Department failed to investigate properly and instead relied on preconceived notions unsupported by evidence.
- v. Additionally, the Department's reliance on an Income Tax Appellate Tribunal decision involving a different party to characterize the institutions as profit-making was misplaced and not applicable. The Appellant emphasized that institutions like churches and non-profit colleges neither maintained statutory records required for commercial entities nor were subjected to income tax, further disproving any commercial character.
- vi. That reliance is placed on judicial precedents such as *Queen's Educational Society v. CIT* and *MCSARA Constructions v. CCE, Madurai* to argue that institutions primarily engaged in education do not lose their exempt status merely because they generate incidental surplus. Moreover, they cited recent CESTAT decisions—*R.R. Thulasi*

Builders and URC Constructions upheld the continued validity of CBIC Circular No. 80/10/2004-ST and exempted similar construction services from service tax.

- vii. Given the absence of any proof of tax evasion, the availability of exemptions, and the bona fide nature of their belief supported by legal precedents and circulars, the Appellant submitted that the majority of the demand was unjust and time-barred. It was submitted that the recalculated actual liability is Rs.15,79,517, against which they had already paid Rs.13,89,339, leaving only Rs.1,90,178 outstanding. The Respondent failed to acknowledge this payment while wrongly demanding Rs.51,29,851 in tax and imposing equivalent penalties under Sections 78 of the Finance Act as well as penalty under Section 77.
 - viii. That the Appellant prayed for the setting aside of the impugned order in the interest of justice and for the appeal to be allowed, asserting that the demand, interest, and penalties imposed were legally untenable.
7. Shri. Sanjay Kakkar, Ld. Authorised Representative, reiterated the findings in the impugned Order in Original. Ld. A.R., emphasizing on the reliance placed by the adjudicating authority on the Supreme Court decision in *BWSSB v R. Rajappa & Others*, 1978 AIR 548. The Ld. A.R. also placed reliance on the decision in *Sole Trustee, Lok Shikshana Trust v CIT, Mysore*, (1976) 1 SCC 254, and contended that it is for the appellant to establish that the works contract service undertaken were for Educational Institutions that were being run without any profit motive. Ld. A.R contends that since it was the appellant who was claiming that such works contract were of buildings that are not meant primarily for commerce or industry, it has to be demonstrated by the appellant that the construction of these buildings were not ventures aimed at making profit. It is contended that in the present day scenario to assume that educational institutions are run without motive of profit would be far from truth.
 8. We have heard both sides, carefully perused the appeal records and the citations submitted as relied upon.
 9. We find that the issues to decided are :

- a) whether the demand made on works contract services of construction rendered to education institutions can be treated as construction of a new building or civil structure or a part thereof, primarily for the purposes of commerce or industry during the relevant period and the demand so made is tenable;
- b) Whether the demand of service tax on the works contract service rendered by the appellant as a sub contractor is tenable; and
- c) whether the demand is barred by limitation.

10. We note that for the period upto 01-07-2012, Section 65(105)(zzzza) stipulated that “taxable service” means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation. —For the purposes of this sub-clause, “works contract” means a contract wherein,—

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out,—
 - (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
 - (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; or
 - (c) construction of a new residential complex or a part thereof; or
 - (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
 - (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

11. We also notice that in Section 65B, inserted by the Finance Act 2012, with effect from 01-07-2012, under sub-section (54), works contract has been defined as under:

“65B(54) “works contract” means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;”

12. As regards the first issue, we find that the following aspects are not in dispute:

- 1) That the appellants have undertaken construction services for various educational institutions.
- 2) The SCN has asked the appellant to show cause as to why the said services rendered by them should not be assessed to tax under Section 65(105)(zzza) of the Act invoking the extended period of limitation, on the grounds inter alia that schools and colleges run by any organization cannot be strictly termed as non-commercial buildings and educational institutions are commercial buildings so long as fees/charges are collected for their activities and are not based on the ownership of the building. It was also contended that the definition of service has undergone drastic change with effect from 01-07-2012 and construction services attract levy of service tax irrespective of the fact whether it is commercial or non-commercial and thus it appears that all construction activities of the appellant for the period 01-04-2009 to 31.03.2014, including those for educational institutions and Trusts are taxable services liable for payment of service tax.
- 3) The SCN states that as the appellant has opted for payment of service tax under the composition scheme in their statement dated 30-09-2014, the service tax payable has been worked out accordingly for the period upto 30-06-2012 and for the period 01-07-2012 to 31-03-2014, in as much as the appellant has provided services in relation to works contract for execution of original works and have received consolidated payments from their clients towards provision of service and transfer of materials involved in the construction activity, service tax has been worked out on 40% of the total amount charged for the

works contract in terms of Rule 2A of Service Tax (Determination of Value) Rules, 2006. The SCN also states that while working out the above service tax liability, the gross amounts received by the appellant for construction of single residential units and construction of building for religious purpose have been excluded. The SCN further states that the appellant is entitled to pay 50% of the service tax payable under partial charge method with effect from 01-07-2012 for services rendered to a body corporate as per notification No.30/2012 ST dated 20-06-2012 and in case of service receivers other than "Body Corporate", the appellant has to discharge 100% service tax liability as the service provider.

- 4) The adjudicating authority has found that the Honourable Supreme Court has in *BWSSB v R. Rajappa & Others*, reported in 1978 AIR 548 has held that education can be and is in its institutional form an industry and that as regards charitable institutions it has been found that noble objectives, pious purposes, spiritual foundation and developmental projects are no reason not to implicate these institutions as industries. Reliance was also placed on the decision in case of *Rajah Sir Annamalai Chettiar Foundation v The Director of Income Tax(Exemptions)* ITA No.2927/MDS/2010 in this regard and finding that the service provided for construction of educational institutions are covered under the definition of commercial or industrial construction, the adjudicating authority has held that the definition of works contract service under 65(105)(zzza) of the Act is satisfied and the demand under works contract service is upheld for the period upto 30-06-2012. It was also held that the appellant has not produced any evidence to show that the educational institutions constructed by it are run without profit motive and rejected the appellant's contention to this effect. For the period from 01-07-2012 it was held that there is no requirement under the service portion in the execution of a works contract is a declared service under Section 66E and that under the new definition of service there is no requirement that the construction should be commercial or industrial and all types of constructions are taxable at the rates specified in Section 66B of the Act and therefore constructions carried out for schools and colleges from 01-07-2012 is liable to be charged to service tax.

13. We find that the adjudicating authority has misdirected himself in rendering the finding that it is for the appellant to show that educational institutions constructed by it are run without profit motive. Admittedly, the Department is seeking to tax the services of the appellant as "works contract service" under clause ii(b) of the explanation to Section 65(105)(zzzza), as being "construction of a new building primarily for the purposes of commerce or industry".

14. Unlike a statutory exemption notification issued in exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, prescribing conditions, the circulars issued by CBEC are under Sec. 37B of the Central Excise Act, 1944, as applicable for the purposes of service tax vide Sec. 83 of Finance Act, 1994 and are instructions and directions issued to the central excise officers for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties. In ***CCE v Parle Exports (P) Ltd, 1988 (38) ELT 741 (SC)***, the Apex Court has held that it is a well-settled principle of interpretation that courts in construing a statute or notification will give much weight to the interpretation put up on it at the time of enactment or issue, by those who have to construe, execute and apply the said enactments. They are in the nature of *contemporanea expositio*, furnishing legitimate aid the construction to the relevant provisions.

15. Therefore, unlike an exemption notification with conditions stipulated therein to claim the exemption, the benefit of which when claimed puts the burden of proof on the claimant to satisfy firstly that it comes within the ambit of the exemption notification and then to satisfy that it had fulfilled the conditions stipulated therein to secure the benefits, there are no such requirements when the appellant contests taxability, on a belief stemming from the contents of Board Circular. On issues of taxability, to bring the prospective assessee within the ambit of the levy, the burden of proof is always on the revenue and that cannot be shifted onto the assessee. It is necessary to note the fundamental distinction between burden of proof and onus of proof. The burden of proof lies with the person who has to prove a fact and it never shifts, but the onus of proof shifts. Onus means the duty of adducing evidence. Thus, if the Revenue seeks to tax the assessee under " Works Contract Service" and particularly under clause (ii)(b) of the explanation, then the burden of proof is on the

Revenue to show at first that the construction which the assessee has undertaken is of a building or civil structure or part thereof, primarily for the purposes of commerce or industry. Once the Revenue is able to discharge its burden of proof, then if the assessee is contesting the taxability, the onus shifts on to the assessee to prove that it is not so. In the instant case when the appellant is under a belief that it is not within the ambit of the taxable service, unlike an exemption notification which has mandated conditions which the appellant would have the burden to prove that it has fulfilled, the burden of proof on the appellant is only to show wherefrom such belief has stemmed. Once the appellant discharges its burden of proof in this regard, then the onus would shift on the Revenue to prove that the belief of the appellant is incorrect.

16. Hence, when an assessee is under a belief that it does not come within the ambit of a definition of taxable service indicated in the statute, it only need to be shown wherefrom such a belief emanates and in this case demonstrably, the appellant has indicated that such a belief was premised on the Board's Circular No. 80/10/2004-S.T., dated 17-9-2004 issued soon after The Finance (No. 2) Bill, 2004 had been enacted on 10-9-2004. We have perused the said Circular and note that after listing out twelve new services, including Construction Services (commercial or industrial buildings or civil structures) in para 1(A) and detailing that the taxable services listed therein in para 1(B) get expanded, Para 2 of the said circular indicates that it is the scope of these changes that are explained in the subsequent paragraphs. The relevant portions are as under:

"13. Construction services (commercial and industrial buildings or civil structures) :

13.1 Services provided by a commercial concern in relation to construction, repairs, alteration or restoration of such buildings, civil structures or parts thereof which are used, occupied or engaged for the purposes of commerce and industry are covered under this new levy. In this case the service is essentially provided to a person who gets such constructions etc. done, by a building or civil contractor. Estate builders who construct buildings/civil structures for themselves (for their own use, renting it out or for selling it subsequently) are not taxable service providers. However, if such real estate owners hire contractor/contractors, the payment made to such contractor would be subjected to service tax under this head. The tax is limited only in case the service is provided by a commercial concern. Thus service provided

by a labourer engaged directly by the property owner or a contractor who does not have a business establishment would not be subject to service tax.

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 civic 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.

13.3 In case of multi-purpose buildings such as residential-cum-commercial construction, tax would be leviable in case such immovable property is treated as a commercial property under the local/municipal laws.

13.4 The definition of service specifically excludes construction of roads, airports, railway, transport terminals, bridge, tunnel, long distance pipelines and dams. In this regard it is clarified that any pipeline other than those running within an industrial and commercial establishment such as a factory, refinery and similar industrial establishments are long distance pipelines. Thus, construction of pipeline running within such an industrial and commercial establishment is within the scope of the levy.”
(emphasis supplied)

17. Therefore, when the instructions issued by CBEC, stipulate “**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.**”, it is sufficient for the appellant to harbour a belief that the buildings, the works contract of construction of which have been entrusted to it and such entrustment being made by a charitable trust established for the purposes enumerated supra, are not taxable as such constructions are found by CBEC to be non-commercial in nature. Further, the appellant has also contended that the only construction agreement relied upon in

the show cause notice related to SCAD group trust and also clearly indicate that the construction was for a non profit education trust and the building was for a school, duly mentioning even the size of the class rooms. We are therefore of the view that in the instant case while the appellant has discharged its burden of proof as regards its contention of non-taxability, the Revenue has not been able to adduce an iota of evidence that the buildings the construction of which the appellant has undertaken for these educational institutions are primarily for the purposes of commerce or industry, which burden was on it so to discharge. Thus, we find that the confirmation of demand on the works contract of construction services rendered by the appellant with respect to educational institutions for the period upto 01-07-2012 cannot sustain and is liable to be set aside.

18. We note that the Ld. A.R has emphasised on the reliance placed by the adjudicating authority on the decision of the Honourable Supreme Court in the Bangalore Water Supply & Sewerage Board case, wherein on the issue of whether charitable institutions are industries, while interpreting provisions of Industrial Disputes Act, 1947, it was held that noble objectives, pious purposes, spiritual foundation and developmental projects are no reason not to implicate these institutions as industries. However, we find that in the Judgement of the Honourable Supreme Court rendered in the case of ***T.M.A Pai Foundation & Others v. State of Karnataka & Others, (2002) 8 SCC 481***, the Honourable Apex Court while sitting as a bench of eleven judges, has in para 29 thereof, while noting the reliance placed on the aforesaid Bangalore Water Supply and Sewerage Board v. A. Rajappa, (1978) 2 SCC 213 wherein it was held that educational institutions would come within the expression "industry" in the Industrial Disputes Act, has cited with approval the distinguishing of the judgement made by Jeevan Reddy J., in the case of Unni Krishnan, J.P v. State of A.P (1993) 1 SCC 645, observing as under :

" But the applicability of this decision was distinguished by Jeevan Reddy J., observing (at SCCN p.753, para 200) that "we do not think the said observation (that education is an industry) in a different context has any application here."

19. Further we note that in the said decision in TMA Pai Case, in para 57 the Honourable Supreme Court has held as under:

" We, however, wish to emphasise one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institutions. Since the object of setting up an educational institution is by definition "charitable", it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution."
(emphasis supplied).

20. In light of the aforesaid decision of the Apex Court in TMA pai, we find the reliance placed by the Ld. Adjudicating Authority on the decision in BWSSB Case as well as the decision of the Income Tax Appellate Tribunal, distinguishable and inapplicable. For like reasons, we also find that the reliance placed by the Ld.A.R. on the decision of the Apex Court in Sole Trustee, Lok Shikshana Trust v CIT, Mysore, (1976) 1 SCC 254 also misplaced. In this regard, we find that in the decision relied upon by the Appellant in M/s. Queens Educational Society v CIT, the Honourable Apex Court has noted that the Apex Court has considered the aforesaid decision in Sole Trustee, Lok shikshana Trust as well as the decision in Indian Chamber of Commerce case (1976) 1 SCC 324 in its subsequent decision in CIT v Surat Art Silk Cloth Manufacturer's Asn, (1980) 121 ITR 1 and has held as under:

" Now we entirely agree with the learned Judges who decided these two cases that activity involved in carrying out the charitable purpose must not be motivated by a profit motive but it must be undertaken for the purpose of advancement or carrying out of the charitable purpose. But we find it difficult to accept their thesis that whenever an activity is carried on which yields profit, the inference must necessarily be drawn, in absence of some indication to the contrary, that the activity is for profit and the charitable purpose involves the carrying on of an activity for profit. We do not think the Court would be justified in drawing any such inference merely because the activity results in profit. It is in our opinion, not all necessary that there must be a provision in the constitution of the trust or institution that the activity shall be carried on no

profit no loss basis or that profit shall be proscribed. Even if there is no such express provision, the nature of the charitable purpose, the manner in which the activity for advancing the charitable purpose is being carried on and the surrounding circumstances may clearly indicate that the activity is not propelled by a dominant profit motive. What is necessary to be considered is whether having regards to all the facts and circumstances of the case, the dominant object of the activity is profit making or carrying out a charitable purpose. If it is the former, the purpose would not be a charitable purpose, but if it is the latter, the charitable character of the purpose would not be lost."

The Apex Court had then in M/s. Queens Educational Society case, gone on to hold interalia that where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.

21. Thus, when the law of the land, as laid down in the Apex Court decision in TMA Pai, itself indicates that the object of setting up of an educational institution is by definition charitable, it only lends strength to the appellant's contention premised on the aforesaid Circular that the works contract services of construction of new building to educational institutions are non-commercial in nature. It is also pertinent that, unlike the assessee, who would, at best, be having a commercial engagement with the institution in the course of its business, and would be hard pressed to delve into the finances of the educational institution, much less an analysis thereof, the Department has no such constraints. We are of the view that the Department is in fact equipped with the wherewithal of statutory backing to embark on such an inquiry as to the credentials of these institutions and to examine whether or not these institutions are profiteering, rather than the reasonable revenue surplus that they can generate for the purpose of development of education and expansion of the institution and to establish whether these institutions are primarily for commerce or industry or otherwise. This would all the more be so as the Board's Circular No. 80/10/2004-S.T., dated 17-9-2004 was issued explaining the scope of the changes brought about consequent to the enactment of the Finance (No. 2) Bill, 2004 on 10-09-2004 and thus primarily providing instructions/guidance to the officers. It is also pertinent that the Board's circular continued to be in existence during the relevant period and was applicable upto 01-07-2012, the date with effect from

which the provisions of Section 65 of the said Act ceased to apply by virtue of Notification 20/2012-ST dated 05-06-2012 and thus the definition of works contract as defined under Section 65(105)(zzzza) ceased to be applicable.

22. Therefore, in view of our discussions supra, we hold that the demand of service tax on the works contract services rendered by the appellant to educational institutions upto 01-07-2012, which is part of the demand on works contract services rendered by the appellant that has been upheld in the impugned OIO, cannot sustain. The decisions in Harsh Constructions Pvt Ltd, Vishnu Sharan & Co, R.R. Thulsi Builders and URC Constructions relied upon by the appellant, as well as the reliance placed on the CBEC Circular No. 80/10/2004-S.T., dated 17-9-2004 in support of the contention that the construction of educational institutions, being construction not primarily for the purposes of commerce or industry, are therefore not exigible to service tax, will no doubt, support their case upto 01-07-2012. However, we are of the view that such reliance placed on these decisions as well as the reliance placed on the Circular will not carry their case beyond 01-07-2012 in view of the changes brought about in the Finance Act, 1994 by virtue of the new definition of "works contract" in Section 65B (54) as reproduced supra. We also note that the exemption given in the Mega Exemption Notification 25/2012-ST dated 20-06-2012, was also confined only to, inter-alia, construction of a structure meant predominantly for use as an educational establishment only for services provided to the Government, a local authority or a governmental authority, at Sl.No.12 of the notification *ibid*; which too remained only upto 01-04-2015. We are therefore of the considered view that for the period after 01-07-2012, in as much as the definition of "works contract" itself has been recast and does not hinge on whether the construction is primarily for commerce or industry, the appellant is exigible to tax under the said category of "works contract service" and demand made on the appellant for the period post 01-07-2012 for the services of "works contract" provided with respect to educational institutions on this count will sustain, subject to our findings on applicability of extended period stated *infra*.
23. Coming to the second issue of whether the demand of service tax on the works contract service rendered by the appellant as a sub-contractor is

tenable, we find that the issue need not detain us further in light of the decision of the Larger Bench of this Tribunal in ***Commissioner of S.T, New Delhi v. Melange Developers Pvt Ltd, 2020 (33) GSTL 116 (Tri-LB)***, wherein it has been held as under:

"29. The submission of the Learned Counsel for the Respondent regarding 'revenue neutrality' cannot also be accepted in view of the specific provisions of Section 66 and 68 of the Act. A sub-contractor has to discharge the Service Tax liability when he renders taxable service. The contractor can, as noticed above, take credit in the manner provided for in the Cenvat Credit Rules of 2004.

30. Thus, for all the reasons stated above, it is not possible to accept the contention of the Learned Counsel for the Respondent that a sub-contractor is not required to discharge Service Tax liability if the main contractor has discharged liability on the work assigned to the sub-contractor. All decisions, including those referred to in this order, taking a contrary view stand overruled.

31. The reference is, accordingly, answered in the following terms :

"A sub-contractor would be liable to pay Service Tax even if the main contractor has discharged Service Tax liability on the activity undertaken by the sub-contractor in pursuance of the contract."

We further note that the decisions in NBCC Ltd relied on by the appellant, is thus overruled by the aforesaid decision in Melange Developers. The reliance placed by the appellant on the decisions in Essar Projects Ltd and Chandresh C Shah, 2014 (36) STR Guj HC, is misconceived as the facts and circumstances of the said case are different from the instant case. We also note that in the decision in ***Jay Yushin Ltd v CCE, New Delhi, 2000 (119) E.L.T. 718 (Tribunal - LB)***, the Larger Bench of this Tribunal has held that it has to be shown that the revenue neutral situation comes about in relation to the credit available to the assessee himself, which is not the situation in the instant case. Therefore, respectfully, following the said decision in Melange Developers, we hold that the demand of service tax on the works contract service rendered by the appellant as a sub-contractor is tenable and the demand on this count will sustain, subject to our findings on applicability of extended period stated infra.

24. Lastly, on the aspect of invoking of extended period of limitation, we find that the appellant has submitted that they have not collected any service tax from their clients during the material period as they were under the bonafide belief that they are not liable to pay service tax on the activities undertaken by them being works contract service of construction of educational institutions, single residential units, construction of building for religious purpose etc. We note that the show cause notice too while alleging that the appellant has not registered with the department, not discharged the service tax liability and not filed the ST-3 returns and that but for the action initiated by the Department the irregularities would not have come to light; has not alleged any deliberate act of wilful suppression or misstatement of facts with intent to evade payment of duty. We have also held that the appellant's belief as to the non exigibility to tax of the services rendered stemming from the Department's Circular is plausible. In such circumstances, we are of the considered view that the Department is not justified in invoking the extended period of limitation. We therefore hold that only the demand on the services rendered by the appellant that would come within the normal period, as per the demands upheld by us in our discussions supra, would sustain.
25. In these facts and circumstances and for the aforesaid reasons, we are also of the view that the penalties imposed on the appellant under Section 78 and Section 77(2) of the Finance Act, 1994 are unsustainable and set aside the same.
26. In sum, except for the demand of works contract of construction of educational institutions for the period upto 30-06-2012 which will not sustain, the rest of the demand on the services of works contract on the appellant, including the works contract services provided as a sub-contractor, restricted to the normal period, is tenable and the appellant is liable to pay such demand of service tax along with the interest due thereon. We also hold that the appellant is to be extended the claim for cum tax benefit, while computing such duty liability.
27. In light of our discussions above, we modify the impugned Order in Original to the extent of setting aside the service tax demand and penalties as per our discussions above, while upholding the demand of

service tax payable within the normal period, along with the interest due thereon. We remit the matter back to the jurisdictional adjudicating authority solely for computing the duty liability of the appellant within the normal period afresh. The adjudicating authority is required to put the appellant to notice of the quantification so arrived at and also adhere to principles of natural justice during the denovo adjudication proceedings, which are directed to be completed within ninety days of receipt of this order. The appellant is also directed to cooperate with the denovo adjudication proceedings.

With these directions, the appeal that has been partly allowed, is disposed of.

(Order pronounced in open court on 30.07.2025)

(AJAYAN T.V.)
Member (Judicial)

(VASA SESHAGIRI RAO)
Member (Technical)

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