

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

Service Tax Appeal No. 54884 of 2014

(Arising out of Order-in-Original No. 10/COMMR/IND/ST/2014 dated 22.07.2014 passed by Commissioner of Central Excise-Indore)

**M/s. Mohak Hi Tech Speciality
Hospital**

.....Appellant

Saims Campus, Indore-Ujjain State Highway,
MR-10, Indore (MP)

Versus

**Commissioner of Central Excise,
Customs & Service Tax, Indore**

.....Respondent

Indore, MP

With

SERVICE TAX Appeal No. 51333 of 2016

(Arising out of Order-in-Original No. 15/PR.COMMR/ST/IND/2016 dated 26.02.2016 passed by Principal Commissioner of Central Excise, Customs & Service Tax-Indore)

**M/s. Mohak Hi Tech Speciality
Hospital**

.....Appellant

10/2/2 & 11/1/2, Saims Campus,
Bhawarsala, Indore-Ujjain State Highway,
MR-10, Indore (MP)

Versus

**Principal Commissioner of Central
Excise, Customs & Service Tax, Indore**

.....Respondent

Indore, MP

And

Service Tax Appeal No. 53111 of 2016

(Arising out of Order-in-Original No. 48/PR.COMMR/ST/IND/2016 dated 27.09.2016 passed by Principal Commissioner of Central Excise, Customs & Service Tax-Indore)

**M/s. Mohak Hi Tech Speciality
Hospital**

.....Appellant

10/2/2 & 11/1/2, Saims Campus,
Bhawarsala, Indore-Ujjain State Highway,
MR-10, Indore (MP)

Versus

**Principal Commissioner of Central
Excise, Customs & Service Tax, Indore**
Indore, MP

.....Respondent

APPEARANCE:

Shri B.L. Narasimhan and Shri. Narendra Kumar Singhvi, Advocates for the
Appellant

Shri R.K. Majhi, Authorised Representative for the Respondent

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

Date of Hearing: **September 09, 2020**

Date of Decision: **November 03, 2020**

FINAL ORDER No.: 51575-51577 / 2020

JUSTICE DILIP GUPTA

These three service tax appeals can be decided by this common order, as the issue involved in all the appeals is whether bariatric surgery which the appellant performs would be cosmetic surgery or plastic surgery so as to be taxable under section 65(105)(zzzzk) of the Finance Act, 1994¹.

2. The appellant is a part of Bhandari Hospital & Research Centre and claims to be engaged in performing bariatric surgery on patients suffering from morbid obesity coupled with life-taking diseases like Type-II diabetes and hypertension. According to the appellant, bariatric surgery is a gastro intestinal surgery carried out on the stomach in different manners like, by folding & stitching, by removing fat and cutting down, by insertion of outer bodies or by bonding the stomach. The appellant also claims that bariatric surgery is performed on morbidly obese individuals

1. the Finance Act

suffering from hypertension, Type-II diabetes, arthritis, lipid disorder or obstructed sleep apnea. The person selected for this surgery should also have a Body Mass Index² of above 32.5 with co-morbidities. The surgery is said to be performed as per the Asia Pacific International Federation of Surgical Obesity Guidelines endorsed by Obesity Surgical Society of India. The appellant, therefore, claims that since bariatric surgery is performed to treat obesity and other associated medical ailments, it will not be a cosmetic surgery or plastic surgery. It is for this reason that the appellant claims that it did not pay service tax.

3. However, a show cause notice dated October 4, 2013 was issued to the appellant requiring the appellant to explain why it did not pay service tax on the service provided through surgeries performed to cure obesity, which would be classifiable under cosmetic surgery or plastic surgery as defined in section 65(105)(zzzzk) of the Finance Act. It was alleged that surgeries were performed with the sole motive of weight reduction and had no relation with reconstruction or restoring anatomy or function of body affected due to congenital defects, development abnormalities, degenerative diseases, injury or trauma. Thereafter, two periodical show cause notices dated September 11, 2014 and July 5, 2016 were also issued to the appellant proposing demand of service tax with interest and penalty. The appellant filed detailed replies to the aforementioned show cause notices.

² **BMI**

4. The Commissioner/Principal Commissioner, however, confirmed the demands proposed in the three show cause notices with interest and penalties under section 65 (105)(zzzzk) of the Finance Act. This section is reproduced below :

"Section 65 (105) (zzzzk): "taxable service" means any service provided or to be provided to any person, by any other person, in relation to cosmetic surgery or plastic surgery, but does not include any surgery undertaken to restore or reconstruct anatomy or functions of body affected due to congenital defects, development abnormalities, degenerative disease, injury or trauma;"

5. The Commissioner analyzed the provisions of section 65 (105)(zzzzk) of the Finance Act in the following manner:

"The definition leaves no doubt to understand that the said service is taxable when it is provided in relation to cosmetic or plastic surgery exclusive of surgery performed to treat specified biological orders.

It is also a fact that the surgery is specifically and specially made to control obesity whether associated with any disease like arthritis, hypertension, type-II diabetes etc. or otherwise and bariatric surgery is not carried out to treat any type of disease but to curb only obesity or reduction of weight. It is also a fact that a person suffering from high obesity takes prior appointments with doctors. They are examined by the doctor, records are maintained, numerous test are conducted and then only it is decided to carry out the surgery keeping in mind the pre and post surgery complications. The fact cannot be denied that surgery is carried out not only by general surgeons but a bariatric surgeon which is a fact accepted by the Director of the Noticee in this statement dt. 25/09/2013 wherein with response to a specific question, he had categorically stated that "as a MS General surgeon and with special training in bariatric surgery and advance minimal access surgery I am entitled to perform bariatric surgery. Also the surgical review corporation of USA has endorsed myself as a bariatric surgeon of excellence and the centre as a centre of excellence in bariatric surgery". It is worthwhile to mention here that the statement is never retracted by the directors of the Noticee firm. These facts further leaves no doubt that the surgery performed is neither for cure of type II diabetes, hypertension, hypothyroidism, arthritis etc. as while carrying out the said surgery the specialized doctors treat diabetic patients, hypertension patients or orthopaedicians doctors specialized to treat arthritis have no role to play. Not only this, the basic requirement to carry out the surgery is BMI(Body Mass Index) and not the aforementioned diseases the person is afflicted with. The BMI is nothing but only a scale to decide the degree of a person obesity. **All these facts clearly establish that bariatric surgery is related to "weight reduction" by making a surgery and not a treatment of degenerative disease like diabetes, cancer, heart disease, arthritis etc."**

(emphasis supplied)

6. Thereafter, the Commissioner analyzed the meaning of the terms congenital defects, developmental abnormalities, degenerative diseases, injury or trauma. This was for the reason that surgeries undertaken to restore or reconstruct anatomy or functions of body affected due to these are not taxable under section 65(105)(zzzzk) of the Finance Act. The relevant observations are as follows :

“The Government while bringing the “Cosmetic or Plastic Surgery Services” under Service Tax net has taken utmost precautions and therefore while defining the taxable service has kept taxation on surgery undertaken to restore or reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, degenerative disease, injury or trauma out of purview of taxation. At this juncture before getting on any further with the matter it is paramount to have a clear understanding of the terms Congenital Defects, Developmental Abnormalities, Degenerative Diseases, Injury or Trauma.

The word congenital defect denotes a defect that is present by birth like absence eyelids, absence of pigmentation in eyes, hair or skin, sex organs having both male and female characteristics. Similarly, the word degenerative disease defines the disease in which the function or structure of affected tissue or organ progressively deteriorate over time. The best examples are cancer, Parkinson disease, diabetes, arthritis etc. The word “injury” means damage caused to body by an outside force like bruise, wounds, joint dislocation, fractures, burns, etc. The word “trauma” is defined as a body wound or shock due to accident or sudden physical injury mostly treated in specialized care centers termed as “trauma centers”. **From these definition it is also clear that it will be far fetched to ascribe any connection to Bariatric Surgery has got to Developmental abnormalities, injury or trauma and thus the bariatric surgery cannot be included in any surgery undertaken to restore or reconstruct anatomy or functions of body affected due to “developmental abnormalities” the Noticee has forwarded the argument that obesity as a medical condition is a result of “Developmental abnormality” and hence to be kept outside the scope of “Cosmetic and Plastic Surgery Services.”**

(emphasis supplied)

7. The Commissioner then analyzed the contents of the changes and clarification on service tax issued by the Government of India on the 2009-10 budget relating to cosmetic and plastic surgery service and the observations are reproduced below:

“This Noticee while arguing their case has tried to seek the help from MOF Letter no. DOF NO. 334/13/2009-TRU dt. 06.07.09

specially from para 2.4.3 which reads as under 2.4.3_ "However, any reconstructive surgery undertaken to restore one's appearance, anatomy or bodily functions affected due to congenital defects, developmental abnormalities, degenerative diseases, injury or trauma would be outside the scope of this service. These processes could be undertaken to correct impairment caused by burns, fractures or congenital abnormalities like cleft lip etc.-----Unquote". However, the Noticee while arguing their case on the strength of para 2.4.3 has made a mistake of not giving any credence to 2.4.2 of the same letter which reads as under:-

2.4.2 Some of the commonly known aesthetic/cosmetic surgeries are abdominoplasty, (tummy tuck); blepharoplasty (eyelid surgery); mammoplasty; buttock augmentation and lift; rhinoplasty (reshaping of nose); otoplasty (ear surgery); Rhytidectomy (facelift); liposuction (removal of fat from the body) brow lift; cheek augmentation; facial implants; lip augmentation; forehead lift; cosmetic dental surgery; orthodontics; aesthetic dentistry; laser skin surfacing etc.

This para of the same circular specifically mentions "liposuction" as a cosmetic surgery. The "liposuction" is nothing but a surgery with the sole purpose of removal of fat from body or in other words resulting in weight loss or reductions of morbid obesity. The same is the case with that of bariatric surgery here in carried out by the Noticee in their premises which is also with a sole purpose of weight loss or reduction of morbid obesity. Thus, when the sole purpose of both the surgeries is nothing but weight loss or reduction of morbid obesity and one i.e. namely liposuction has already got a place under "Cosmetic & Plastic Surgery Services" how the other one surgery named differently in medical terms as bariatric surgery but with the same purpose i.e. weight loss or reduction of morbid obesity can be termed as other than "Plastic & Cosmetic Surgery Services" and definitely the answer is nothing but to treat the bariatric surgery only and only as "plastic & cosmetic surgery services" liable to service tax and brought to service tax net with effect from 01/09/2009 vide the Finance Act, 2009.

Here, one should never forget that any rule/circular/letter cannot be read in parts or a part beneficial to assessee or revenue, should be taken in account as it always leads to absurd results, entering into a controversy giving rise to frivolous litigation whereas the complete reading of same will lead to the result for which the same is meant without any controversy. Therefore, when both parts are read together as a whole it is found that the objection raised by Noticee does not sustain."

(emphasis supplied)

8. The dates of the impugned orders and the show cause notices, the period of dispute, the duty demanded and the amount of penalty imposed in the three appeals are contained in the table below:

Appeal Nos.	ST/54884/2014	ST/51333/2016	ST/53111/2016
Date of Orders	22.07.2014	26.02.2016	27.09.2016
Date of Show Cause Notices	04.10.2013	11.09.2014	05.07.2016
Period of Dispute	01.11.2011 to 07.03.2013	08.03.2013 to 31.03.2014	01.04.2014 to 31.03.2015
Duty Demanded	Rs. 81,92,416/-	Rs. 1,35,67,694/-	Rs. 1,53,35,526/-
Penalty imposed under the Finance Act	Section 77 - Rs. 10,000/- Section 78 - Rs. 40,96,208/-	Section 76 - Rs. 13,56,796/- Section 78 - Rs. 10,000/- Section 70 - late fee of Rs. 20,000/-	Section 76 - Rs. 15,33,552/- Section 78 - Rs. 10,000/- Section 70 - late fee of Rs. 20,000/-

9. Shri B.L. Narasimhan, learned Counsel for the appellant assisted by Shri N. Singhvi, made the following submissions:

- (i) The activities carried out by the appellant for the period from November 1, 2011 to June 30, 2012 are not taxable under section 66 of the Finance Act. The adjudicating authority has confirmed the demand of service tax by classifying the activities of the appellant under section 65(105)(zzzzk) of the Finance Act but the scope of this provision was clarified by Circular dated July 6, 2009 to provide that the cosmetic and plastic surgeries intended towards preservation or enhancement of physical appearance or beauty alone are covered within the scope of said section. The appellant has not carried out any cosmetic or plastic surgery. In any case, the surgeries carried out by the appellant are

specifically excluded from the definition of the aforesaid taxable service;

- (ii) For the period July 1, 2012 onwards, the appellant is exempted from payment of service tax on the subject activities. The show cause notice relies on the provisions applicable for the period prior to July 1, 2012 for proposing the demand for the period July 1, 2012 onwards and no allegations have been made in the show cause notice as to how the appellant is liable to pay service tax for the period commencing July 1, 2012;
- (iii) In any view of the matter, the subject activities are exempted from payment of service tax for the period July 1, 2012 onwards in terms of the Notification dated June 20, 2012 (serial number 2), since the appellant is carrying out diagnostic and treatment of illness/deformity/abnormality in recognized systems of medicines and thus, rendering "health care services". The activities of the appellant are also not in the nature of cosmetic surgery or plastic surgery and, therefore, are covered under the exception clause. Thus, the activities are exempted from payment of service tax for the period from July 1, 2012;
- (iv) It is clear that cosmetic surgery and plastic surgery undertaken to enhance physical appearance or beauty alone are chargeable to service tax and not health-care services. Further, even such cosmetic/plastic surgeries are not chargeable to service tax when they are undertaken for the specified purposes; and
- (v) The intention of the law makers is clearly to tax only the peripheral healthcare services, while keeping the core healthcare services out of service tax net. This legal position is applicable for the period prior to and from July 1, 2012.

10. Shri Vivek Pandey, learned Authorized Representative appearing for the Department, however, supported the impugned orders and made the following submissions:

- (i) In view of the definition of plastic surgery and cosmetic surgery, it can safely be said that all types of bariatric surgeries are plastic and cosmetic in nature;
- (ii) The activity undertaken by the appellant does not fall in the exclusion clause of surgeries contemplated under section 65(105)(zzzzk) of the Finance Act;
- (iii) The appellant is not justified in contending that the activity was undertaken to restore "developmental abnormalities"; and
- (iv) The discharge summary of five obese patients undergoing bariatric surgery does not indicate any condition caused by congenital defects, developmental abnormalities, degenerated diseases, injury or trauma.

11. The submissions advanced by learned counsel for the appellant and the learned Authorized Representative of the Department have been considered.

12. The appellant claims that it performs bariatric surgery on patients suffering from morbid obesity. **Morbid** has been defined in Oxford English Reference Dictionary (Indian Edition) as "of the nature of or indicative of disease". It has been defined in Webster's Third New International Dictionary as "relating to, or characteristic of disease." **Obesity** has been defined in the Webster's Third New International Dictionary to mean "a bodily condition marked by excessive generalized deposition and storage of fat". Thus, morbid obesity would be a disease relating to a

bodily condition marked by generalized deposition and storage of fat.

13. The period in the show cause notices is from November, 2011 upto March, 2015. Thus, the period before and after July 1, 2012 is covered by the three show cause notices.

14. For the period from November 1, 2011 upto June 30, 2012, the Commissioner has confirmed the demand of service tax by classifying the activities of the appellant under section 65 (105)(zzzzk) of the Finance Act. For the period subsequent to June 30, 2012, the show cause notices relies on the same provision. The appellant, however, claims that it does not perform any cosmetic or plastic surgery and that it is exempted from service tax for the period commencing July 1, 2012 in terms of serial number 2 of the Notification No. 25/2012-ST dated June 20, 2012 (Exemption Notification) as the activity falls under "health care services by a clinical establishment"

15. It is, therefore, appropriate to reproduce the relevant portion of the Exemption Notification dated June 20, 2012, and it is as follows.

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section(i) vide number G.S.R. 210(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely:-

1. *****
2. Health care services by a clinical establishment, an authorized medical practitioner or paramedics;

3. *****

16. Paragraph 2(t) of the said Notification defines "health care services" as follows:

(t) "health care services" means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma.

17. The reasons given by the Commissioner for confirming the demand of service tax are briefly summarized as under:

- (i) Bariatric surgery is carried out to control obesity, whether associated with any disease like arthritis, hypertension, Type-II diabetes or not, and is not carried out to treat any type of disease.
- (ii) Bariatric surgery is carried out by surgeons specializing in bariatric surgery only and not by surgeons specializing in cure of Type-II diabetes, hypertension or arthritis. The basic requirement to carry out the surgery is BMI and not the aforementioned diseases.
- (iii) As per the brochures published by Ethicon Endo-surgery, Johnson & Johnson Medical, it is clear that bariatric surgery is singularly for weight loss, irrespective of its association with any disease.
- (iv) Obesity cannot be termed as developmental abnormalities, as developmental abnormalities are manifest at the natal stage of human being.
- (v) Liposuction has been termed as cosmetic surgery from July 6, 2009. Thus, bariatric surgery comes under the purview of cosmetic surgery.
- (vi) Reliance placed by the appellant on Central Government Health Scheme is misplaced as it is under a different statute.

18. A bare perusal of section 65(105)(zzzzk) of the Finance Act indicates that it is divided into two parts, namely, the 'means part' and the 'exclusion part'. Under the 'means part', taxable service would mean any service provided or to be provided to any person, by any other person, in relation to cosmetic surgery or plastic surgery. The 'exclusion part' excludes any surgery undertaken to restore or reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormality, degenerative disease, injury or trauma.

19. The first issue that would arise for consideration is whether the surgery undertaken by the appellant is in relation to cosmetic surgery or plastic surgery. The appellant claims that it has only been performing bariatric surgery on patients suffering from morbid obesity coupled with life taking disease and it does not perform any cosmetic surgery or plastic surgery. The appellant, therefore, contends that independent of the exclusion clause, it would not be liable to pay service tax under section 65(105)(zzzzk) of the Finance Act, since it does not perform cosmetic surgery or plastic surgery.

20. It would, therefore, be necessary to understand what precisely is bariatric surgery and whether it is different from cosmetic surgery or plastic surgery.

21. According to the appellant, it is engaged in performing bariatric surgery on patients suffering from morbid obesity coupled with life taking diseases like Type-II diabetes, hypertension and that bariatric surgery is a gastro intestinal surgery carried out on the stomach in different manners, like by

folding and stitching, by removing fat and cutting down, by insertion of outer bodies or by bonding stomach.

22. The appellant contends that bariatric surgery is carried out only on morbidly obese people, inasmuch as morbid obesity is a harbinger of many diseases that affect essentially every organ system, like cardiovascular, respiratory, metabolic, musculoskeletal or gastrointestinal.

23. The relationship between obesity and other diseases has been highlighted in the **NIH Consensus Conference Statement**, and it is reproduced below :

"Conclusion: The evidence is now overwhelming that obesity, defined as excessive storage of energy in the form of fat, has adverse effects on health and longevity. Obesity is clearly associated with hypertension, hypercholesterolemia, NIDDM, and excess of certain cancers and other medical problems. Height and weight tables based on mortality data or the body mass index are helpful measures to determine the presence of obesity and the need for treatment. Thirty-four million adult Americans have a body mass index greater than 27.8 (men) or 27.3 (women). At this level of obesity, which is very close to a weight increase of 20 percent above desirable, treatment is strongly advised. When diabetes, hypertension, or a family history for these diseases is present, treatment will lead to benefits even when lesser degrees obesity are present.

Obesity research efforts should be directed toward elucidation of biologic markers, factors regulating the regional distribution of fat, studies on energy regulation, and studies utilizing the techniques of anthropology, psychiatry, and the social sciences."

(emphasis supplied)

24. It has also been submitted that bariatric surgery, which may also be referred to as metabolic surgery, is a surgery performed on the stomach and/or intestines with the intent of resolution of metabolic syndrome i.e. Obesity, Type-II diabetes mellitus (DM), hypertension or dyslipidemia. The number of ways in which this surgery is performed can be summarized in the following manner:

- (i) Adjustable Gastric Banding-**Involves placing a silastic 'belt' around the upper part of stomach

which separates the stomach into two parts. Due to surgery, the patients feel 'belt' with smaller amount of food. It is a slow and steady way of excess weight loss.

- (ii) **Sleeve Gastrectomy** – About 75 percent of the stomach is removed, leaving a narrow gastric tube or 'sleeve'. No intestines are removed or bypassed. It offers a shorter operative time and is advantageous for patients with severe heart and lung diseases. It works by reducing the size of the stomach, not by decreased absorption of nutrients at intestines.
- (iii) **Roux-en-Y Gastric Bypass** – Done through a single long incision (open) or through a series of small incisions. It divides the stomach into two separate stomach, creating a small proximal pouch and large excluded lower remnant pouch. It then bypasses part of the small intestine and thereafter, the bypassed intestine is attached to the proximal pouch. Through this procedure, the patients feel 'full' or 'satisfied' in smaller meals as the smaller pouch holds smaller portions.
- (iv) **Biliopancreatic Diversion with Duodenal Switch** – Based on smaller stomach and combines a lower restriction and a high level of malabsorption. Here, the outer margin of the stomach (around two third) is removed and intestines are rearranged in a way that the food mixes with the digestive juices for a very short duration, resulting in increased weight loss.

25. It is, therefore, clear that bariatric surgery is a procedure, through which the intake capacity of the patient is restricted, resulting in weight loss for control of obesity related diseases. It is an effective treatment option for severely obese patients for

whom weight loss has been problematic with conventional pharmacotherapy.

26. To highlight that bariatric surgery and the plastic/cosmetic surgery are not the same surgical procedures but different, reference has been made by learned counsel for the Appellant to the following medical Dictionary sources:

S. No.	Relevant Resource	Definition of Bariatrics	Definition of Plastic Surgery	Definition of Cosmetic Surgery
1.	Dorland’s Medical Dictionary	A field of medicine encompassing the study of overweight, its cause, prevention, and treatment	Surgery concerned with the restoration, reconstruction, correction, or improvement in the shape and appearance of body structures that are defective, damaged, or misshapen by injury, disease, or growth and development.	That department of plastic surgery which deals with procedures designed to improve the patient’s appearance by plastics restoration, correction, removal of blemishes etc.
2.	Encyclopaedia and Dictionary of Medicine	A field of medicine encompassing the study of overweight, its cause, prevention, and treatment.	Surgery concerned with the restoration, reconstruction, correction, or improvement in the shape and appearance of body structure that are defective, damaged, or misshapened by injury, disease, or anomalous growth and development.	
3.	Butterworth’s Dictionary (1978)		That branch of surgery which deals with the reconstruction, or with the correction, of deformities of soft tissues	That branch of plastics surgery which deals mainly with attempt to improve the appearance especially of face, hands and breast.

27. Thus, according to the appellant bariatric surgery is aimed at providing a permanent solution to obesity which causes various life taking diseases, unlike other weight loss methods/ procedures/ surgeries which merely aim at body contouring causing changes in physical appearance more than any health benefits. The appellant has also pointed out that the aim of

liposuction is only to remove the excess fat of the body from specific target areas where fat is deposited through suctioning process so as to improve the shape and contour of the body. This is in contradistinction to the aim and objective of the bariatric surgery, which is to cure the state of morbid obesity and related diseases. The appellant, therefore, contends that bariatric surgery is clearly distinguishable from plastic or cosmetic surgery inasmuch as it is intended to reduce the weight of an excessively obese person and thus, the treatment and prevention of various diseases related thereto, whereas plastic or cosmetic surgery is intended to improve the outer shape and appearance of the body.

28. The appellant has also highlighted the difference between bariatric surgery and plastic/cosmetic surgery in the following manner:

(i) The appellant claims to carry out bariatric surgery only if the BMI of a patient is more than 32.5, which is an indicator of diseases such as Type-II diabetes or hypertension. WHO has also classified that Obese Class-II patients with BMI 35.0 to 39.9 are a severe risk of co-morbidity. There is no such requirement in plastic or cosmetic surgery as it can be conducted on any person wanting betterment or beautification of any part or organ of the body.

(ii) The said bariatric surgeries are undertaken by the appellant on only those patients, who are diagnosed with morbid obesity (which itself is a disease), along with co-morbidities such as Type-II diabetes, Hypertension or Heart-related diseases, as evident from the OT Notes/ Discharge summary of patients of the Appellant. All such patients suffer from comorbidities, which is a life-

threatening situation, and have BMI ranging from 37.5 to 49.4 Kg/M2. Thus, these surgeries are not undertaken for enhancement of physical appearance or beauty but only as a cure for a serious disease associated with severe complications and as a lifesaving surgery.

(iii) It is important to also understand the anatomy of a human body and the degenerative deformities resulting in obesity and comorbidities. In the normal digestive process, as food moves along the digestive tract, digestive juices and enzymes digest and absorb calories and nutrients. After chewing and swallowing, the food moves down the esophagus to the stomach, where a strong acid continues the digestive process. The stomach can hold about 3 pints of food at one time. When the stomach contents move to the duodenum (the first part of the small intestine), bile and pancreatic juice speed up digestion. Most of the iron and calcium in the food is absorbed there. The other two parts of the nearly 20 feet small intestine absorb nearly all of the remaining calories and nutrients. The food particles that cannot be digested in the small intestine reside in the large intestine until eliminated. The body needs a certain amount of energy (calories) from food to keep up basic life functions. Body weight tends to remain the same, when the number of calories eaten equals the number of calories the body uses/burns. Over the time, when the calories consumed are more than the calories that could be burnt, such unused calories convert into fat, tipping towards weight gain, overweight, and obesity. Overweight and obesity lead to various diseases such as Type-II diabetes, heart disease, high blood pressure, nonalcoholic fatty liver disease, osteoarthritis and some types of cancer.

(iv) When the root cause of disease is taken care of, the disease will automatically be treated. It is with this purpose that the appellant undertakes bariatric surgery. The procedure carried out by the appellant in these surgeries is with a purpose to reduce the size of the stomach so as to lower the food intake of the patient. With consistent lower food intake, there is a consistent loss of weight, improving

associated conditions, whereby the comorbidities get treated in the natural course. The purpose of surgery is not to improve the appearance/beauty, but to treat the root cause of the disease. Bariatric surgeries are undertaken by the appellant as life saving surgeries and as a cure and treatment for life threatening disease. The same are in the nature of "health care services", which are not taxable under the Finance Act, both prior to and after July 1, 2012.

29. Having noted the aforesaid facts pointed out by the appellant, it would also be necessary to refer to certain other important factors.

30. The Central Board of Excise and Customs, New Delhi in its Circular dated July 6, 2009 explained the changes and clarification on service tax in the 2009-10 budget and the same is reproduced below.

Circular: 334/13/2009- TRU dated 06-Jul-2009

Budget 2009-10 – Changes and Clarification on Service Tax

2.4 Cosmetic and Plastic Surgery service:-

2.4.1 Beauty treatment service provided by saloons, beauty parlors and beauticians are taxable since 2002. **The service now proposed to be taxed is cosmetic surgery and plastic surgery undertaken to preserve or enhance physical appearance or beauty.** As per common definition, surgery is a medical technology consisting of a physical intervention on tissues. As a general rule, a procedure is considered surgical when it involves cutting of a patient's tissues or closure of a previously sustained wound. Commonly surgery is performed in a sterile environment with anesthesia and antiseptic conditions using surgical instruments. It also includes 'non-invasive' surgery.

2.4.2. **Some of the commonly known aesthetic/cosmetic surgeries are** abdominoplasty (tummy tuck); blepharoplasty (eyelid surgery); mammoplasty, buttock augmentation and lift; rhinoplasty (reshaping of nose); otoplasty (ear surgery); Rhytidectomy (face lift); **liposuction (removal of fat from body)**; brow lift; cheek augmentation; facial implants; lip augmentation; forehead lift; cosmetic dental surgery; orthodontics; aesthetic dentistry; laser skin surfacing etc.

2.4.3. **However, any reconstructive surgery undertaken to restore one's appearance, anatomy or bodily functions affected due to congenital defects, developmental abnormalities, degenerative disease, injury or trauma would be outside the scope of this service.** These processes could be undertaken to correct impairment caused by burns, fractures or congenital abnormalities like cleft lip etc.

(emphasis supplied)

31. A bare perusal of the aforesaid Circular shows that the services proposed to be taxed in the 2009-10 budget are cosmetic surgery and plastic surgery undertaken to preserve or enhance physical appearance or beauty. Out of the commonly known cosmetic surgery, reference has also been made to liposuction. The Circular also specifically mentions that any reconstructive surgery undertaken to restore one's appearance, anatomy or bodily functions affected due to congenital defects, developmental abnormalities, degenerative disease, injury or trauma would be outside the scope of this service.

32. It will also be pertinent to refer to the minutes of the meeting of the Postgraduate Medical Education Committee held on July 25, 2014 in regard to the guidance issued for the nature of laparoscopic bariatric surgery. The Medical Council approved that bariatric surgery is a gastrointestinal non cosmetic surgery under the rubric of surgical gastroenterology and is not plastic surgery. The minutes are reproduced below:

MEDICAL COUNCIL OF INDIA
POSTGRADUATE MEDICAL EDUCATION COMMITTEE

Minutes of the Postgraduate Medical Education Committee held on 25th July, 2014 at 10.30 AM. in the Council Office, Sector-VIII, Pocket-14, Dwarka, New Delhi.

160. Guidance with request to the nature of Laparoscopic Bariatric Surgery.

Read: the letter dt. 28.01.2014 from Dr. S.D. Joshi Dean, Sri Aurobindo Medical College & PG Institute SAIMS Hospital with regard to the nature of Laparoscopic Bariatric Surgery.

The Postgraduate Committee considered the letter dt. 28.01.2014 from Dr. S.D. Joshi Dean, Sri Aurobindo Medical College & Pg Institute SAIMS Hospital alongwith recommendations of the Chairman, Academic Cell/Sub-Committee with regard to the nature of Laparoscopic Bariatric Surgery and decided to approve the following:-

"....Bariatric Surgery is a Gastrointestinal non Cosmetic Surgery under the rubric of surgical gastroenterology and not plastic surgery".

33. At this stage it will also be pertinent to refer to the letter dated May 6, 2014 sent by the President of the Indian Medical Association wherein, after making reference to the resolution of the American Medical Associations, he has stated that the cosmetic surgery is done to improve the looks of a person, but bariatric surgery is done to correct the metabolic and hormonal state of the diseased body along with weight loss. The letter is reproduced below:

INDIAN MEDICAL ASSOCIATION
INDORE BRANCH-2013-14

Dear Dr. Bhandari,

With Reference to you letter DT. 05-05-2014, we would like to state that as per

World health organization International Code of Diseases 10 version 2010 (ICD 10) IV -Endocrine, Nutritional & metabolic diseases Obesity is included At "E66-Obesity & E66.8- Morbid Obesity".

The American Medical Association has also passed the resolution pushed by American Association of Clinical Endocrinologists, the American College of Cardiology & others. The resolution argued that Obesity was a "multimetabolic & hormonal disease state" that leads to unfavorable outcomes like Type 2 Diabetes and Cardiovascular diseases.

"The Suggestion that Obesity is not a diseases but rather a consequence of a Chosen lifestyle exemplified by overeating and / or inactivity is equivalent to suggesting that Lung Cancer is not a disease because it was brought about by individual choice to smoke cigarettes", the resolution said.

The cosmetic surgery is done to improve the looks of a person, but bariatric surgery is done to correct the metabolic and hormonal state of the diseased body along with weight loss.

May 6, 2014

President-IMA, Indore, Br.
Dr. Surendra Bapat
M.B.M.S. FAIS, FIAGES, MAMASI, MACRSI
MBA (HA), LLB (HONOURS), MA (SOCIOLOGY)
B.J.D.Y.E.

(emphasis supplied)

34. It is evident from the aforesaid that bariatric surgery is distinct from the plastic or cosmetic surgery. Bariatric surgery is a procedure through which the intake capacity of the patient is restricted, thereby resulting in weight loss which is necessary for control of obesity related diseases, while plastic or cosmetic surgery is intended to improve the outer shape and appearance of the body. Bariatric surgery is undertaken only on those patients who are diagnosed with morbid obesity, which itself is a disease, with other co-morbidities and on such patients who have a BMI of over 32.5. The Central Board of Excise and Customs has also clarified that the service proposed to be taxed were cosmetic surgery and plastic surgery undertaken to preserve or enhance physical appearance or beauty. Liposuction has been mentioned to a commonly known cosmetic surgery. Liposuction, however, is not bariatric surgery. The aim of liposuction is only to remove the excess fat of the body from specific target areas through suctioning so as to improve the shape and contour of the body, but the aim and object of bariatric surgery is to cure the state of morbid obesity and related disease. The Medical Council of India, in its meeting held on July 25, 2014, also noted that bariatric surgery is not cosmetic or plastic surgery. The President of the Indian Medical Association in a letter dated May 6, 2014 also wrote that cosmetic surgery is done to improve the looks of a

person, but bariatric surgery is done to correct the metabolic and hormonal state of the diseased body along with weight loss.

35. Learned Authorized Representative of the Department has, however, placed emphasis on the discharge summary of five obese patients undergoing bariatric surgery to contend that it does reflect any condition caused by congenital defects, developmental abnormalities, degenerated diseases, injury or trauma.

36. The discharge summary of the patients has been enclosed Annexure-5 to the appeal memo. The 'diagnosis' and the 'summary of the case' in all the 'discharge summary' mentions morbid obesity with one or more life-taking disease of the nature referred to by the appellant. It is, therefore, not possible to conclude from the 'discharge summary' that the patients undergoing bariatric surgery did not suffer from morbid obesity coupled with such diseases.

37. It is also not possible, for the reasons stated above, to accept the submission of learned Authorized Representative for the Department that all types of bariatric surgeries are plastic or cosmetic surgery.

38. It is also not necessary to examine the contention of the learned Authorized Representative of the Department that the activity undertaken by the appellant does not fall in the exclusion clause of surgeries contemplated under section 65(105)(zzzzk) of the Finance Act, since the appellant is not performing plastic surgery or cosmetic surgery and, therefore, the surgery would not

fall in the 'main part' of the definition of taxable service under section 65(105)(zzzzk) of the Finance Act.

39. The factual position pointed out by the appellant has also been noted with approval by the Additional Commissioner in an order dated February 22, 2016 by which the proceedings initiated by the show cause notice dated August 11, 2015 issued to M/s. Asian Bariatrics, Rajkot were dropped. The show cause notice proposed to tax the bariatric surgery performed by M/s. Asian Bariatric under section 65 (105)(zzzzk) of the Finance Act. The Additional Commissioner noticed that the issue that was required to be decided was whether bariatric surgery was taxable under the aforesaid section of the Finance Act. After referring to the Circular dated July 6, 2009, the Exemption Notification dated June 30, 2012, the literature provided by the appellant therein relating to bariatrics, the letter of the Medical Council of India, the Additional Commissioner found as a fact that bariatric surgery cannot be considered as cosmetic or plastic surgery and was, therefore, not taxable under section 65(105)(zzzzk) of the Finance Act. The relevant portion of the order passed by the Additional Commissioner is reproduced below:

"4.2 **I find that the limited issue to be decided in the present case is whether the Bariatric Surgery performed by them is liable to be considered as taxable service under the category of "Cosmetic or Plastic Surgery" classifiable under Section 65(105)(zzzzk)** and whether the Noticee is liable to pay Service Tax on the same, along with interest as applicable and consequent imposition of penalties under various provisions of Finance Act, 1994, as proposed in the present show cause notice.

4.5 On careful reading of the definition of Cosmetic Surgery and the clarification given by the Board, mentioned hereinabove, I find that that reconstructive surgeries undertaken to restore one's appearance, anatomy or bodily functions affected due to congenital defects developmental abnormalities, degenerative diseases, injuries or trauma would be outside the scope of cosmetic and plastic surgery as these processes could be

undertaken to correct impairment caused by burns fractures or congenital abnormalities.

- 4.6 **I find that the Noticee in their written submissions has explained in detail the necessity of Bariatric Surgery performed on the patients and the difference between Bariatric Surgery and a Cosmetic Surgery,** where in they have stated that Bariatric Surgery is a Gastrointestinal Surgery (G.I.) which leads to hormonal changes in the patient; that the key difference between a cosmetic surgery and bariatric surgery is that a cosmetic surgery leads to immediate impact on the person, as physical appearance changes immediately whereas in the case of Bariatric Surgery the impact appeared after long period of 12 to 18 months that the Bariatric Surgery in a complex surgery leading to slow but proven improvement of the overall functioning of human body and it is better known as metabolic surgery; that it is performed with intent to resolution of any metabolic syndrome which is the combination of obesity and type 2 diabetes mellitus and/or hypertension and/or dyslipidaemia; it is performed to reduce persons desire to eat and it cannot be compared with the Cosmetic or Plastic Surgery; that Bariatric Surgery is covered under 'health care services' provided by a clinical establishment an authorized medical practitioner or para-medics and hence the same are exempted under Notification No. 25/2012-ST dated 30-06-2012. I find that the definition of 'health care service', as prescribed under para 2(t) of the Notification No. 25/2012-ST dated 30-06-2012 reads as under:

"health care services" means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma;"

- 4.7 **I find that the Noticee in support of their above explanation of Bariatric Surgery submitted various nationally and internationally acclaimed study reports and research materials.** On perusal of these reports and research materials, I find in "guidelines for Bariatrics (Metabolic) Surgery for Indian Population" (Section 25 Surgery, Chapter 172, published by P. Praveen Raj, C Palanivelu, Author for Medical Books) indicate Bariatric Surgery referred to as metabolic surgery and is performed on the stomach and/or intestines with the intent of resolution of metabolic syndrome [obesity, Type 2 diabetes mellitus (DM), hypertension, dyslipidemia]. On perusal of copy of "The New England Journal of Medicine", published in December 23, 2004, Vol.351 No. 26, page 2683, I find that the Article under heading "Lifestyle, Diabetes, and Cardiovascular Risk Factors 10 years after Bariatric Surgery" concluded "As compared with conventional therapy, bariatric surgery appeared to be a viable option for treatment of severe obesity, resulting in long term weight loss, improved lifestyle, and, except for hypercholesterolemia, amelioration in risk factors that were elevated at baseline." Further, on perusal of copy of 'fact sheet' published by the American Society for Metabolic & Bariatric Surgery (ASMBS), I find that the Medical and Government groups supported Bariatric Surgery which resulted in long term weight loss and significant reductions in cardiac and other risk factors

for some severely obese adults. I further find that the Medical Council of India, which is a regulating/controlling authority for medical, profession in India, vide their letter No. MCI-23(1)/2014/Med./26765 dated 02-8-2014, addressed to the Dean, Sri Aurobindo Medical College & PG Institute, Indore has clarified that "Bariatric Surgery is a Gastrointestinal non Cosmetic Surgery under the rubric of surgical gastroenterology and not plastic surgery."

4.8 **Thus, from the explanation given by the Noticee in their written submission regarding Bariatric Surgery and perusal of the above mentioned documentary evidence submitted by the Noticee along with the clarification issued by the CBEC vide letter dated 06-09-2009, I am of a considered view that Bariatric Surgery cannot be considered as a Cosmetic or Plastic Surgery, and hence the same is not a taxable service within the meaning of clause (105) (zzzzk) of Section 65 of the Finance Act, 1994 and consequently the Noticee is not liable to pay Service Tax on the said service.**

4.9 **I find that since Bariatric Surgery is not a Cosmetic or Plastic Surgery it does not fall under Section 65(105)(zzzzk) ibid and therefore, it is not a taxable service.** I find that the Noticee, vide their letter dated 21-05-2015, addressed to the Range Superintendent of Service Tax, Rajkot and also vide letter dated 12-02-2016, have provided details of the surgeries performed by them, which include date of surgery, name of the patient type of surgery and amount received by them. On scrutiny of this information I find that the Noticee has performed Bariatric Surgery during the period from March-2014 to March-2015. Since the Noticee has performed Bariatric Surgery and since Bariatric Surgery does not cover under the definition of Cosmetic or Plastic Surgery, as defined under Section 65(105)(zzzzk), as discussed in length in preceding paras, I hold that the Noticee is not liable to pay Service Tax amounting to Rs.21,72,888/- demanded from them vide Show Cause Notice No. V.ST/AR-1-RJT/43/ADC(BKS)/2015 dated 11-08-2015, in respect of Bariatric Surgeries performed during the period from March 2014 to March 2015, as the same is not a taxable service, as the same is not legally sustainable and therefore, liable to be dropped and consequently the proposal for recovery of interest and imposition of penalties on the Noticee."

(emphasis supplied)

40. The aforesaid order of the Additional Commissioner was accepted by the Department, which fact is clear from the information supplied under the Right to Information Act. The information is reproduced below:

"The required information as sought for by the applicant is as under;

The Order-in-Original No. 33/ADC/PV/2015-16 dated 22.02.2016 in the case of M/s. Asian Bariatrics, Rajkot passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot has been accepted by the Principal Commissioner on 04.05.2016."

41. Thus, when the Department itself accepted the findings of the Additional Commissioner in the aforesaid order dated February 22, 2016 that bariatric surgery is not cosmetic surgery or plastic surgery, it is not open to the Department to now contend that bariatric surgery is cosmetic surgery or plastic surgery. The confirmation of demand in the impugned order for this reason cannot be sustained.

42. In coming to this conclusion, reliance can be placed on the decision of the Tribunal in **Shri Niraj Prasad vs. Commissioner of Central Excise and Service Tax, Kanpur**³. A similar issue had arisen for consideration. In one matter, the demand of service tax under "business auxiliary service" by a similarly situated assessee had been set aside by the Commissioner and that order had attained finality. The Division Bench of the Tribunal held that when the Department had permitted that order to attain finality, it cannot be permitted to urge in the case of the appellant that the appellant should pay service tax under "business auxiliary service", In coming to this conclusion, reliance was placed by the Division Bench on the decision of the Supreme Court in **Damodar J. Malpani vs. Collector of Central Excise**⁴.

43. The inevitable conclusion, therefore, that follows from the aforesaid discussion is that bariatric surgery performed by the appellant on patients suffering from morbid obesity coupled with life-taking diseases like Type-II diabetes and Hypertension, arthritis, lipid disorder or obstructed sleep apnea or disease of a

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4. 2002(146) E.L.T 483 (S.C.)

like nature, cannot not be subjected to service tax under section 65(105)(zzzzk) of the Finance Act.

45. Thus, for all the reasons stated above, the impugned orders dated July 22, 2014, February 26, 2016 and September 27, 2016 are set aside and Service Tax Appeal No. 54884 of 2014, Service Tax Appeal No. 51333 of 2016 and Service Tax Appeal No. 53111 of 2016 are **allowed**.

(Order pronounced in the open Court on **November 3, 2020**.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Babita/JB