

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL MUMBAI**

WEST ZONAL BENCH

SERVICE TAX APPEAL NO. 86225 OF 2015

(Arising out of Order-in-Original No: GOA-EXCUS-000-COM-026-2014-15 dated 18th March 2015 passed by the Commissioner of Central Excise & Service Tax, Goa)

RBS Candiaparcar

Anant Smriti, Behind Post Office, Ponda
Goa – 403 401

...Appellant

Versus

Commissioner of Central Excise

ICE House, EDC Complex, Patto Plaza
Panaji, Goa – 403001

...Respondent

APPEARANCE:

Shri Bharat Raichandani, Advocate for the appellant

Shri Adeeb Pathan, Assistant Commissioner for the respondent

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

DATE OF HEARING/DECISION: 22.02.2024

FINAL ORDER NO: 85220/2024

JUSTICE DILIP GUPTA:

This appeal seeks the quashing of the order dated 18.03.2015 passed by the Commissioner classifying the service rendered by the appellant for development of a market at Biocholim and Ponda for the Goa State Urban Development Agency¹ under the category of 'works contract service' made taxable under section 65(105)(zzzza) of the Finance Act, 1994² and confirming part of the demand with interest and penalty.

2. The appellant is a contractor. Goa Development Agency floated tenders for development of a market at Biocholim and a

1. **Goa Development Agency**
2. **the Finance Act**

market Ponda and other Miscellaneous Works at Ponda. The appellant was awarded the contract.

3. A show cause notice dated 22.10.2013 was issued to the appellant alleging therein that the shops/space in the market complex had been allotted to various business entities by Ponda and Biocholim Municipal Council for a consideration to be used by them for commercial purpose. Thus, it appeared to the department that the said activity of renovation/restoration of old market complex at Ponda and Biocholim Municipal Council by the appellant to build new market complexes, which were further meant to be used for commercial purpose would be a taxable service under section 65(105)(zzzza) of the Finance Act.

4. The appellant submitted a detailed reply denying the allegations made in the show cause notice. Ultimately, by the impugned order dated 18.03.2015, the Commissioner confirmed the demand of service tax for the works awarded under the contract for Ponda and Biocholim and the findings are:

"34. I find that the scope of "Works Contract Service" is much wider than "Commercial or Industrial Construction Service". Construction of a new building or civil structure primarily for the purpose of commerce or industry is one part of the "Works Contract Service" as provided in sub-clause (b) above. Any contract which involves transfer of property in goods as well as service will fall under the category of "Works Contract Service". Such contract may be for various purposes. Constructing a new building or civil structure or part thereof for commercial or industrial purpose is one such service that can be categorized as "Works Contract Service". As stated above, any construction service wherein sale of material is involved can be categorized as "Works Contract Service". **It is a fact on record that the construction of market places at**

Ponda/Bicholim or the development of road at Ponda and Shantadurga Temple Complex involves both supply of material as well as construction service. Investigations conducted by the Department confirmed that VAT has been deducted by GSUDA in the RA Bills and the said amount has been paid by GSUDA into the Government Treasury by way of challans. Therefore, by virtue of said payment of VAT made by GSUDA, the condition (i) to the Explanation of "Works of Contract" as defined in terms of Section 65 (105)(zzzza) of the Finance Act, 1994, has been fulfilled. **The agreements executed between the Noticee and GSUDA and subsequent RA Bills raised in this regard also confirms that the renovation and restoration works undertaken by the Noticee would fall under these scope of condition (ii) (d) to the Explanation of "Works Contract" as defined in terms of Section 65 (105)(zzzza) of the Finance Act, 1994. Thus, I find that there is no merit in the argument of the Noticee that the service cannot be considered as "Commercial or Industrial Construction Service" as the proposal in the Notice is not to classify the service under the category of "Commercial or Industrial Construction Service". Hence, I hold that the service rendered by the Noticee is appropriately classifiable under "Works Contract Service".**

35. In their reply, the Noticee stated that the allegations made in the Show Cause Notice are vague. The Show Cause Notice has not explained the nature of service rendered. Accordingly, they claimed that the service rendered by them does not fall within the scope of clause (ii)(b) or clause (ii)(d) of the Explanation to "Works Contract Service". Hence, they contended that the service of repair / renovation of market complex is not liable to Service Tax. I find the argument of the Noticee not tenable. The Explanation to the definition of "works Contract Service" gives the meaning of "Works Contract". Clause (b), (c) and (d) of the Explanation reads as under:

- (b) Construction of a new building or a civil structure or a part thereof or of a pipeline or conduit, primarily for the purpose of commerce or industry.
- (c) Construction of a new residential complex or a part thereof.
- (d) Completion and finishing service repair, alteration, renovation or restoration of a similar service in relation to (b) and (c).

36. A plain reading of the above three clauses indicate that all services related to construction involving sale of material is covered within the "Works Contract Service". The words "primarily for commerce or industry" figuring in clause (b) of the Explanation does not mean that if the construction is not meant for commerce or industry, it would not fall within the scope of "Work Contract Service". In this case the construction related work undertaken at Ponda market which was gutted by fire would fall within the scope of renovation and restoration work mentioned in clause (d) of the Explanation. Similarly the construction service undertaken at the existing market place at Bicholim would also squarely fall within the ambit of clause (d) to the Explanation."

(emphasis supplied)

5. However, with regard to roadwork at Ponda Municipal Council and roadwork at Shantadurga Temple, the demands proposed in the show cause notice were dropped.

6. Shri Bharat Raichandani, learned counsel for the appellant submitted that in the absence of any finding recorded by the Commissioner in the impugned order that the activity undertaken by the appellant involved any element of 'commerce or industry', the demand could not have been confirmed under section 65(105)(zzzza) of the Finance Act. Learned counsel also submitted that the extended

period of limitation contemplated under the first proviso to section 73(1) of the Finance Act could not have been invoked in the facts and circumstances of the case.

7. Shri Adeeb Pathan, learned authorised representative appearing for the department, however, supported the impugned order and submitted that there can be no doubts that an element of commerce was involved in the nature of the activity undertaken by the appellant and so there is no error in the order passed by the Commissioner. Learned authorised representative also submitted that the extended period of limitation was correctly invoked.

8. The submissions advanced by the learned counsel appearing for the appellant and the learned authorised representative appearing for the department have been considered.

9. In order to appreciate the contentions, it would be appropriate to reproduce section 65(105)(zzzza) of the Finance Act and it is as follows:

“Section 65(105)(zzzza) ‘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-condition 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;”

(emphasis supplied)

10. In the instant case, though it was the contention of the appellant that a new building had been constructed and renovation or restoration was not carried out, but this aspect has not been considered by the Commissioner in the impugned order and the Commissioner proceeded to examine the issue by considering the activity as one of restoration or renovation.

11. Even if it is assumed that the appellant had carried out renovation or restoration work, then too clause (d) of Explanation clearly provides that the activity should in relation to '(b)' and '(c)'. Thus, such activity has to be primarily for the purpose of commerce or industry. According to the Commissioner, the words 'primarily for commerce or industry' figuring in clause (b) of the Explanation would

not mean that if the construction is not meant for 'commerce or industry', it would not fall within the scope renovation or restoration work mentioned in clause (d) of the Explanation.

12. It is not possible to accept this finding recorded by the Commissioner as the words 'primarily for commerce or industry' obviously mean that the renovation or restoration has to be mainly for the purpose of commerce or industry. If the building is not used primarily for commerce or industry, the construction would not be taxable under section 65(105)(zzzza) of the Finance Act.

13. Even if, as contended by the appellant that the activity carried out by the appellant is one of construction of a new building, is accepted, then too the requirement of 'primarily for the purpose of commerce or industry' has to be satisfied.

14. In the absence of any finding recorded by the Commissioner that the construction was primarily for the purpose of 'commerce or industry', it is not possible to sustain the demand under section 65(105)(zzzza) of the Finance Act. For this reason alone, the order dated 18.03.2015 passed by the Commissioner deserves to be set aside.

15. The contention of the learned authorised representative appearing for the department that the it is more than apparent that the building was raised for the purpose of commerce, therefore, cannot be accepted as such a finding has not been given by the Commissioner and it is well settled that an order cannot be defended on a ground not considered in the order.

16. It would, therefore, not be necessary to examine the contention raised by the learned counsel for the appellant that the extended period of limitation should not have been invoked in the

facts and circumstances of the case.

17. The order dated 18.03.2015 passed by the Commissioner is, accordingly, set aside and the appeal is allowed.

(Dictated and Pronounced in Open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J. MATHEW)
MEMBER (TECHNICAL)

*/as/Shreya/Jyoti