

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 222 of 2012 - DB

(Arising out of OIA-46/2012/COMMR-A-/RBT/RAJ dated 02/02/2012 passed by
Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT)

Gujarat Adani Institute Of Medical SciencesAppellant

C/o, G K General Hospital,
Opp. Lotus Colony,
Bhuj, Gujarat

VERSUS

C.C.E. & S.T.-RajkotRespondent

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat - 360001

WITH

Service Tax Appeal No. 12007 of 2013 - DB

(Arising out of OIA-183/2013/RAJ/CE/AK/COMMR-A/AHD dated 25/04/2013 passed
Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT)

Gujarat Adani Institute Of Medical SciencesAppellant

C/o, G K General Hospital,
Opp. Lotus Colony,
Bhuj, Gujarat

VERSUS

C.C.E. & S.T.-RajkotRespondent

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat - 360001

APPEARANCE:

Shri Hardik Modh, Advocate for the Appellant
Shri P.K.Singh, Superintended (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

Final Order No. A/ 11309-11310 /2023

DATE OF HEARING: 06-04-2023
DATE OF DECISION: 22-06-2023

RAMESH NAIR

These appeals have been filed challenging the impugned Orders-In-Appeal dated 02-02-2012 and 25-04-2023 respectively passed by Commissioner (Appeals) of Central Excise & Customs, Ahmedabad by which the Learned Commissioner rejected appellant's appeals and upheld

the order of Adjudicating Authority rejecting the refund claims. Since the issue is common in both the appeals, we are deciding these appeals by this common order.

2. The facts of the case are that the appellant filed refund claim for refund of Service tax under Section 11-B of the Central Excise Act, 1944 paid to M/s Desai Construction Pvt. Ltd., Valsad for construction of the Medical College Building at Bhuj. During the Scrutiny of the refund claim revenue observed the discrepancies. The said observations culminated into issuance of show cause notice dated 18.04.2011 and 25.01.2012 wherein it was proposed to reject the refund claims under Section 11B of the Central Excise Act, 1944. The above show cause notices were adjudicated by the Lower Authority vide his Order-in-Originals dated 10.06.2011 and dated 31.03.2012. Being aggrieved with the aforesaid orders appellant filed appeals before the Commissioner (Appeals), who vide impugned orders-in-appeal upheld the orders passed by the lower Adjudicating Authority and rejected the appeals filed by the appellant. Being aggrieved by the said impugned orders-in-appeal, appellant filed the present appeals.

3. Shri, Hardik Modh, Learned Counsel appearing on behalf of the appellant submits that it is undisputed fact that the appellant has been registered as non-commercial entity. The appellant has neither declared dividend nor distributed surplus /profit to its shareholders, trustees and / or members but ploughs back the surplus for the purpose of an object of the organization would be charitable organization.

3.1 He also submits that both the lower authorities failed to appreciate the contents of the Resolution No. HSP/1007/3247/PARK-2/A dated 27.05.2009 passed by Government of Gujarat wherein following points are specifically mentioned.

- a. *Allocation of land for hospital and medical college;*
- b. *Fees and admission of the medical college;*
- c. *Enhancement of the bed capacity over a period of five years so that requirement of the Medical Council of India is fulfilled every year for the new incoming batch of students in the medical college;*
- d. *The appellant bears revenue and capital expenditure for the medical college;*
- e. *Income generate out of the medical college has to be spent only on the development of the hospital;*

Apart from many conditions imposed by the Government of Gujarat through the resolution, the relevant conditions related to the present case are as under.

(3) Gujarat Adani Institute of Medical Sciences will independently manage the affairs of the medical college without any interference by the Hospital Management Committee referred to above, as the fee and admission will be subject to control by the autonomous committee appointed by the Government.

8. Gujarat Adani Institute of medical Science will provide for all Capital & Revenue Expenditure for the medical college. All income generated out of the Medical College has to be spent only on the development of the hospital.

The above two paras show that any income generated out of medical college would be used only for development of the Hospital.

3.2 He further submits that both the lower authorities failed to appreciate contents of the Memorandum of Association framed under Act XXI of Registration of the 1860 for the registration of Literary, Scientific and Charitable Society. Relevant clauses of the Memorandum of Association clearly reveals that the object of the Appellant to run medical college is for non-commercial purpose.

3.3 He also submits that Ld. Commissioner (Appeals) held that since the appellant charged higher fees, the appellant would be considered as self finance college and therefore, it is held that the appellant is commercial entity. However merely charging higher fees, it would not make any institution a commercial institution. He placed reliance on the following decision.

- Dr. Jivraj Mehta Smarak Health Foundation and Medical Centre Vs. C.C., Ahmedabad – 2004(176)ELT 638 (Tri, Mum)
- Ratan Das Gupta & Co. Vs. Commissioner of Central Excise – 2017 (3) GSTL 247 (T)
- Vij Construction Pvt. Ltd. Vs. CCE, New Delhi – 2008(11) GSTL 169 (Tri. Del)

3.4 He argued that merely charging fees does not make the entity as Commercial entity. The funds shall be used only for the development of hospital. The Ld. Commissioner (Appeals) ought to have appreciated that in terms of Clause 9 and 10 of Memorandum of Association, the money

credited to the fund shall be deposited in bank account and used for meeting the expenses of the society including expenses incurred in exercise of its power and discharge of its functions. He also placed reliance on the following judgments.

- B.G. Shirke Construction Technology Pvt. Ltd. Vs. CCE 2014 (33) STR 77 (Tri. Mumbai)
- Commissioner of Service tax Vs. S.M. Sai Construction -2016 (42)STR 716
- Institute of Banking personal Selection Vs. Commissioner of S.T. - 2007 (8) STR 579.

3.5 He also submits that the Ld. Commissioner (Appeals) erred in relying upon para 3 of the Resolution dated 27.05.2009 that the Government and Hospital Management Committee has no control and no interference relating to management affairs of the medical college. The Resolution reveals that the management would decide the fees and admission of the college subject to control of the autonomous committee appointment by the government. Further the fund generated out of the college would be exclusively used for the development of the hospital. It is undisputed fact that the appellant being registered as a non-commercial entity will not be in a position to distribute the profit and therefore, the entire fund would be used for development of hospital and college.

3.6 He further submits that the Ld. Commissioner (Appeals) erred in holding that income tax and service tax act are altogether different and therefore, the same cannot be equated with each other. The Ld. Commissioner (Appeals) ought to have appreciated that the Appellant relied upon the certificate issued by the Income Tax under Section 12AA registered as Charitable Trust and granted exemption from income. Apart from it, the appellant also referred to various registrations and certificates issued under various Act to show that the appellant was not registered to earn profit. Various decisions as referred hereinabove reveal that the entity would be considered as non-commercial entity if the same are registered under Section 12AA of the Income Tax Act, Bombay Public Trust act and registered under Societies Act.

3.7 He also submits that the Ld. Commissioner (Appeals) held that the appellant did not produce any evidence to show that the constructed

building was registered under the Bombay Trust Act. The Appellant referred to the certificate issued by Chartered Accountant on 23.07.2011 wherein it is certified that no property or fund of the trust were applied for any object or purpose other than the object or purpose of trust. Value of building has been declared in the Balance Sheet under the head of "Fixed Assets" in terms of the Bombay Public Trust.

3.8 He further submits that the Ld. Commissioner (Appeals) erred in holding that the contract price is inclusive of taxes and duty (but exclusive of the service tax chargeable under Finance Act, 1994). The contractor separately collected service tax from the Appellant and deposited with the Government as mentioned in the letter dated 29.11.2010 issued by the contractor. The Appellant claimed the said refund since the same was paid under mistaken belief of law and borne by the appellant.

4. Shri P.K. Singh, Learned Superintendent (Authorized Representative) appearing on behalf of the Revenue reiterates the findings of the impugned orders.

5. Heard both the sides and perused the records. We find that the refund claims was filed by the appellant for refund of the service tax paid on construction activity undertaken by M/s Desai Construction Pvt. Ltd. (Contractor). Appellant awarded the contract to the contractor for construction of medical college which have been used for providing medical education to the students. The appellant sought refund of tax claiming that this transaction was not liable to tax. The limited issue to be decided in the present appeals is whether the appellant, as recipient of service, is eligible for refund of service tax paid by service provider and whether the appellant can be termed as 'non-commercial organization.

5.1 In the present matter disputed service tax amount after recovered from the appellant paid by the contractor to the Government account and said fact has not been disputed by the department. The fact that the recipient of the service is also entitled to file a claim for refund is no longer *res Integra*. With regard to the issue, as to whether, the service recipient can claim refund of service tax, the Hon'ble Allahabad High Court, in the case of *Indian Farmers Fertilizers Coop Limited* 2014 (35) S.T.R. 492 (All.)(Supra), have ruled in affirmative. The relevant paragraph is extracted below :

“15. The Tribunal was clearly, in our respectful view, correct and justified in following this principle. The assessee is the recipient of the taxable service provided by RGTIL and had borne the incidence of service tax. Hence, the assessee is entitled to claim a refund of excess service tax paid consequent upon the downward revision of the transmission charges payable by the assessee to RGTIL in terms of the determination made by the Regulatory Board.”

5.2 Further, we also noticed the Section 11B(2)(e) of the Central Excise Act, 1944 permit the person who has borne the tax, can file the refund claim. The case laws cited by the learned Advocate strengthen the view that it is not necessary that the refund claim should be filed only by the service provider /manufacturer. The person who has borne the duty burden can also claim the refund. There is absolutely no restriction in the provision of law. In the present matter contractor collected the service tax separately from the Appellant and deposited to the Central Government Account. Since the Service tax has been borne by the Appellant, they have rightly lodged the refund claim.

5.3 We also find that in view of the various documentary evidence and certificates and registrations of the Appellants and analysis thereof and also considering the observations of the Id. Commissioner (Appeals) on this, there is no doubt that building constructed by the Contractor is medical college building. From the Resolution No. HSP/1007/3247/PARK-2/A dated 27.05.2009, issued by the Government of Gujarat, Certificate dated 26.05.2009 issued by the Registrar under the Registration of the Societies Act, 1860, Certificate dated 26.05.2009 issued under the Bombay Public Trust Act, 1950, Registration under Section 12AA of the Income Tax Act, 1961 and Memorandum of Association framed under the Act XXI of the Registration of the 1860 for the registration of Literary Scientific and Charitable Society it is clear that the construction of building for which refund claim has been filed is used for educational purpose and the object of the use of the building is not for commercial purpose. The certificates and registrations produced by the Appellant clearly established that Appellant i.e M/s Gujarat Adani Institute of Medical Sciences is a charitable trust registered with public trust under the Bombay Public Trust Act, 1950. With all these facts, it is clear that building constructed by the Appellant is not commercial and industrial construction, therefore does not fall under the category of taxable services, as the same is not used for commercial and industry but it is used for providing education. We also noticed that the Appellant have

been granted registration of Trust under Section 12AA of the Income Tax Act which shows that Appellant have been registered for non-commercial purpose. Since the organization of the appellant itself is non-profit purpose, it cannot be said that the building is used for commercial activity. Therefore we do not agree with the finding of the Ld. Commissioner that the activity of running medical college is nothing but a commercial one and same cannot be construed as non-commercial activity/ organization.

5.4 The appellant also argued that, whether, the building is for commercial or otherwise the primary use of such building is required to be seen. We find that this argument is convincing as the similar issue has been considered by this Tribunal in the case of B.G. Shirke Construction Technology Pvt. Ltd. Vs. C.C.E. 2014 (33) S.T.R. 77 (Tribunal – Mumbai), wherein it was held that merely because some amount is charged for using the facility of this stadium the same cannot be commercial construction. The said decision was upheld by the Hon'ble Bombay High Court reported in 2019 (25) GSTL 8 (Bom). The similar issue has been considered in the case of Commissioner of Service Tax Vs. S.M. Sai Construction – 2016 (42) STR 716 wherein the service recipient was charitable trust registered under the Bombay Public Trust Act, 1950. The Tribunal Held that the building constructed was not commercial construction and therefore, Service Tax paid by the recipient was refundable. In an another identical case of Institute of Banking Personal Selection Vs. Commissioner of Service Tax – 2007 (8) STR 579, it was held that an organization does not declare dividend or distribute surplus/profits to its shareholders, trustees and /or members but ploughs back the surplus for the purpose of an object of the organization would be considered as charitable organization. Accordingly, Service Tax would not be charged. It is further held that merely charging of fees will not make position that the appellant institute is not a non-commercial concern.

5.5. In view of the above judgment it is settled that merely by charging fees or higher fees an institution which otherwise, belongs to a Charitable Trust cannot lose its identity as non-commercial entity.

5.6 We note that C.B.E. & C. had issued Circular No. 80/10/2004-S.T., dated 17-9-2004 and in Para 13.2 clarified that the leviability of Service Tax was primarily dependent upon the use of the building or civil

structure. Further, it clarified that it was to be ascertained where building or civil structure was used or to be used for commercial or industrial purpose and further required to gather the information as to whether the buildings or civil structures were being used or to be used for the purpose of making profit or not and clarified that if the building or civil structure was used or to be used not for the purposes of profit then the same are not taxable. When the property in question is not used by Appellant for commercial purpose then it cannot be liable for payment of service tax as is apparent from Circular dated 17-09-2004. It is apparent that C.B.E. & C. circular considered the use of the said property as non-commercial in nature. In these circumstances service tax on construction of said building / property cannot be levied.

5.7 The Lower Authorities have also discarded the status of the appellant as Charitable Trust on the ground that the institution has charged higher fees. We find that merely on the basis of the quantum of fees the status of a charitable institution shall not be altered and the institution which is otherwise statutorily, a charitable trust cannot lose its identity as Charitable Trust. On this basis it cannot be construed that the institution is a commercial institution. This issue has been considered in the following Judgments:

- Dr, Jivraj Mehta Smarak Health Foundation and Medical Centre Vs. Ahmedabad -2004 (176) ELT 638 (Tri. Mum.)

“5. We have heard both sides. The appellants have clearly established that they are a Research Institution carrying out research in the field of cardiac diseases and disorder. They are registered as Research Institution with Ministry of Science and Technology, Department of Scientific & Industrial Research. We, therefore, agree with the appellants that there has been no contravention of the Notifications in so far as it relates to import by Research Institute. Regarding recovery of charges by the appellants, as held by the Tribunal in the case of Collector of Customs v. Murugappa Chettiar Research Centre [1998 (100) E.L.T. 439 (Tri.)], merely because some fee is charged for the service, it would not make any Institution a Commercial Institution, as commercial activity has distinct connotation. It cannot be stated that the appellants are engaged in any commercial activity, particularly when they clearly stated that their Institution is running on “no profit no loss” basis. We, therefore, hold that the benefit of the above Notifications is available to the appellants, set aside the impugned orders and allow the appeals.”

- Ratan Das Gupta & Co. Vs. Commissioner Of Central Excise - 2017 (3) GSTL 247 (T) (para 4)

“4. We have heard both the sides and perused the appeal records. For tax liability under “commercial or industrial construction service”, the building constructed should be used primarily for commerce or industry. In the present case, we note that the buildings are for educational institutes recognized to provide education in college/school level. This fact is not

disputed. The quantum of fee collected cannot be the criteria to decide the commercial or non-commercial nature of a building. The building for college or school, recognized by competent authority to provide education, are to be considered as non-commercial building. We find that the lower authorities heavily relied on the fee structure stating that collection of high fee will make the institute/building as commercial. We are not in agreement with the said proposition. Recognized educational institutions are governed by the concerned Regulatory Authority which includes the terms for fee collection also. In any case, collection of fee for providing education, per se, cannot make the educational institute as a commercial institute or the building as a commercial building. No other issue is raised in this appeal for decision."

- **Vij Construction Pvt. Ltd. Vs. C.C.E, New Delhi – 2018 (11) GSTL 169 (Tr. Del.)**

"5. Regarding the Headquarter building of National Rifle Association of India, we find that the said association is an official representative of Rifle Sports, which are duly recognized by the Ministry of Youth Affairs and Sports and affiliated to Indian Olympic Association. They are engaged in recognized sports activities and their headquarter is situated in the said building. We are of the considered view that the building cannot be considered as commercial building for service tax purposes.

6. With reference to building in the campus of ICFAI University, Dehardun, it is clear that the said building is for use by a recognized university for education. The same also cannot be considered as commercial building. We note that the impugned original order proceeded to hold these as commercial building only on the basis of fees collected for the activities or participation in Rifle Association as well as by the university. We note that collection of fees for promoting or allowing the person to use the facility by these bodies will not make the building commercial. Considering the nature of occupants' activities carried out in the building, we are of the view that both these activities cannot be considered as resulting in construction of commercial building. Accordingly, we set aside the impugned order and allow the appeal of the appellants."

In view of the above Judgments it is settled that merely by charging a higher fees an institution cannot be treated as commercial institute accordingly the reasoning on this count of the Lower Authority is absolutely illegal and incorrect.

6. In the result, the impugned orders are set aside. The appeals are allowed with consequential relief, if any.

(Pronounced in the open court on 22.06.2023)

**(RAMESH NAIR)
MEMBER (JUDICIAL)**

**(C L MAHAR)
MEMBER (TECHNICAL)**