IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/87835/2014

[Arising out of Order-in-Original No: PUN-EXCUS-003-COM-048 & 049 dated passed by the Commissioner of Central Excise & Service Tax, Pune – III.]

Shapoorji Pallonji & Company Ltd …***Appellant***

versus

Commissioner of Central Excise & Service Tax
Pune – III ***…Respondent***

Appearance:

Shri S.S. Gupta, Chartered Accountant for appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for the respondent

CORAM:

Hon'ble Shri Ramesh Nair, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 26/02/2018
Date of decision: 13/04/2018

ORDER NO: A/86054 / 2018

Per: Ramesh Nair

The following issues are in dispute in the present appeal.

i) Whether the service provided for construction of hospital

which is run by the trust is liable to service tax under 'commercial or industrial construction';

ii) Whether the GTA service provided for construction of building for Tata Consultancy Service located in SEZ is liable for service tax;

iii) Whether the GTA service availed in connection with the construction of hospital is liable to service tax; and

iv) Whether the demand is hit by limitation.

2. Shri S.S. Gupta, Learned Chartered Accountant, appeared on behalf of the appellant submits that the construction of hospital building does not fall under the 'commercial or industrial construction service' for the reason that the hospital building is not used for commerce or industry as the hospital in the present case is run by a charitable trust. For this reason also the charitable trust is not a business or commerce hence the construction thereof does not fall within the definition of 'commercial or industrial construction service'. In this regard he place reliance on the following circulars and judgments.

i. CBEC Circular No. 80/10/2004-ST dated 17/09/2004

ii. CBEC Circular No. 86/4/2004-ST dated 01/11/2006

iii. *Commissioner of Service Tax – VII v. S M Sai Construction* 2016 (42) STR 716 (Tri.Mumbai);

iv. *G Ramamoorthi Constructions (I) P Ltd v. Commissioner (Adj.), Coimbatore* 2015 (40) STR 632 (Mad.)

v. *CST, New Delhi v. N S Associates Pvt Ltd* 2018 (2) TIMI 1041-CESTAT NEW DELHI

3. As regards the second issue is concerned i.e. service tax levy on GTA service availed and used for construction of building in special economic zone, he submits that as per SEZ Act, 2005, under Section 26(1)(e), the taxable service provided to a developer or a unit to carry on the authorized operations in a special economic zone is exempt. Therefore, GTA service which undisputedly provided for construction of building for Tata Consultancy Services in the special economic zone shall be exempt under clause (e) of Section 26(1) of SEZ Act, 2005. He further submits that, in any event, on the tax payable, the appellant is entitled for CENVAT credit even though the service provided is in SEZ is not liable to service tax but the input used are eligible for CENVAT credit under CENVAT Credit Rules 2004. In this context he refers to Rule 6(c) of CENVAT Credit Rules, 2004. Therefore, the exercise is revenue neutral and he place reliance on the following judgments.

i. *Jet Airways Ltd v. Commissioner of Service Tax, Mumbai* 2016 (44) STR 465 (Tri.-Mumbai)

ii. *Commissioner of Central Excise, Pune v. Coca-Cola India Pvt Ltd* 2007 (213) ELT 490 (SC)

iii. *Commissioner of Central Excise& Customs, Vadodara – II v. Indeos ABS Ltd* 2010 (254) ELT 628 (Guj.)

4. As regard the third issue, demand on GTA availed in construction of hospital, Deenanath Mangeshkar Hospital and Research Centre run by Lata Mangeshkar Medical Foundation, he submits that the show cause notice dated 31/12/2012 was issued for the period January 2011 to March 2012 which has invoked the extended period. Therefore, the same is time-barred. He submits that the entire transaction was recorded in the books of account, therefore, there is no suppression of facts on the part of the appellant and hence the show cause notice dated 31/12/2012 in respect of GTA service is time-barred.

5. As regard the show cause notice dated 14/10/2013 which was issued for the period April 2011 to March 2012, the period i.e. April 2011 to September 2011 is time-barred particularly for the reason that the appellant had provided all the information for issuance of show cause notice dated 31/12/2012. Therefore, in the second notice dated

14/10/2013 the extended period for demand should not have been invoked. Therefore, part of the demand is time-barred as held by the Hon'ble apex Court in *Nizam Sugar Factory v. Commissioner of Central Excise [2006 (197) ELT 465 (SC)]*.

6. As regard the penalty, he submits that there is no *mala fide* intention for non-payment of service tax on the part of the appellant. Therefore, penalty under Section 78 should not be imposed. He places reliance on the following judgments.

i. *Cosmic Dye Chemical v. Collector of Central Excise, Bombay* 1995 (75) ELT 721 (SC);

ii. *Commissioner of Central Excise v. Chemphar Drug and Liniments 1989 (4) ELT 276 (SC)*

7. Shri Dilip Shinde, Learned Assistant Commissioner (AR), appearing on behalf of Revenue, reiterates the findings in the impugned order. He further submits that the construction of hospital fall under the category of 'commercial or industrial construction service' for the reason that hospital is also engaged in commercial activities. Therefore, the construction service provided for construction of hospital is liable to service tax.

8. As regard the GTA service provided in relation to the construction of building of SEZ, he submits that the appellant is the

recipient of the service who is only located in SEZ. Therefore, exemption provided for SEZ will not be available to the appellant. As regard the demand in respect of GTA service related to construction of hospital, with respect to the issue of time-bar, he claimed that the appellant have not provided the document in time and therefore, the second show cause got delayed to be issued hence the extended period was rightly invoked and non-providing of information amounts to suppression of facts.

9. We have heard both sides and carefully considered the submissions made by both the sides and perused the records.

10. As regard the issue whether the construction service in respect of the hospital is not for commercial or industrial construction, the hospital is run by the charitable organization and such activities are clarified by the Board in the circular dated 17/09/2004 (*supra*) wherein in paragraph 13.2, which reads as under.

> *'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'

11. From the above paragraph it is very clear that the building of civil construction which are fully used by charitable organisation for the purpose of providing treatment not taxable being non-commercial ventures. Identical issue was also clarified in the circular dated 01/11/2006, the relevant para 4 reads as under:

"4. The issue has been examined by the Board. A commercial concern is an institution/establishment that is primarily engaged in commercial activities, having profit as the primary aim. It is not one/few isolated activities which determine whether or not an institution is a commercial concern. It is the totality of its activity and the objective of its existence that determines the commercial nature of an institution as an 'entity' or a 'concern'. The principal activity of institutes like IITs or IIMs is to impart education without the objective of making profit. Therefore, these institutes cannot be called a commercial concern, even if on some of their activities (like holding campus interviews), they charge fee. Accordingly, these institutes were not liable to pay service tax prior to 1-5-2006 under the category of "manpower recruitment or supply service". As regards the period after 1-5-2006, decision should be taken after taking into account all material facts on case to case basis."

12. From the above clarification also it gets reinforced that construction of a building for non-commercial activity shall not be chargeable to service tax under 'commercial or industrial construction service'. This issue has been considered in various judgments. In the case of *G Ramamoorthi Constructions (I) P Ltd (supra)* the Hon'ble Madras High Court on the identical issue, the Court passed the following order:

> "7. A perusal of the impugned order, it appears that the first respondent has taken laborious efforts in order to make the petitioner ineligible to claim exemption of service tax in respect of constructions provided by them to the educational institutions by virtue of the Circular, dated 17-9-2004. It is not in dispute that the said Circular, dated 17-9-2004 provides exemption of service tax in respect of constructions which are for the use of organization or institutions being established solely for educational, religious, charitable, etc. However, according to the first respondent, the exemption of service tax can be claimed only in respect of construction services provided to the institutions which should solely impart education without any profit and if the institutions are earning profits, they cannot be construed as non-commercial, but only as industries. In such case, the exemption Circular cannot be made applicable. In the present case, after following the decision of the Hon'ble Apex Court in *"Bangalore Water Supply & Sewerage Board* v. *R. Rajappa & others"* reported in 1978 AIR 548 for the proposition of law that "educational institution, viz., a university, a college, a school or research institute is, an industry and not charitable and also following other relevant decisions, the first respondent has categorically held as under in Paras 20 and 21 :

> "20. The above decisions of various judicial for a clearly points to the fact that the educational institutions *per se* cannot be held as 'non-commercial' or 'non-profit industries. In this regard, I would like to emphasize on the fact that the quantum of fees collected by the private institutions alone (as compared to similar Government Institutions) is not a factor alone in determining a institution as commercial or profit oriented. The collection of higher fees could be for the reasons that they may be providing better infrastructural support and they may not be supported by any educational subsidy from the Government, which the Government institutions enjoy. The question to be answered is whether the private educational institutions irrespective of the fact whether they collect higher fees or not, are run on profit motive or doing philanthropic services. The moot question is the motive/purpose and not the field in which they are functioning. Any claim on non-profit and non-commercial nature of institutions has to be substantiated only by way of establishing the credentials of such an institutions and not by merely stating that they are in the field of education."

21. Therefore, I reject GRCIPL's claim that any educational institution automatically would mean that their activities would be beyond the pale of commerce or industry..... .... Coming back to the case on hand, GRCIPIL have failed to provide any evidence that the educational institutions to whom they provided the services of constructions had not been making systematic profits and that their sole aim is to serve the poor section of the public. Hence, I reject the claim that the educational services provided by GSET would be 'non-commercial' even when it is provided by charging fees from the beneficiaries."

8. It is pertinent to note that the petitioner has been claiming exemption from service tax towards the constructions provided for educational institutions and hospitals from October, 2008 to October, 2013 by filing ST-3 returns, which were also accepted by the department. However, in the year 2014, during the audit inspection, it was noticed that the petitioner provided construction services to various educational institutions, which according to the first

respondent, had been making profits and that would be construed as commercial and thereby, the exemption claimed by the petitioner under Circular No. 80, dated 17-9-2004 cannot be extended. Accordingly, a notice, dated 21-4-2014 has been issued to the petitioner and thereafter, ultimately, the impugned proceedings were issued. It is to be noted that the first respondent, by relying upon the ratio laid down by the Apex Court in *Bangalore Water Supply* case, he came to the conclusion that the educational institution is an industry and the petitioner provided construction services to the educational institutions are making systematic profits and as such, they are commercial in nature and thereby the exemption under the said Circular, dated 17-9-2004 cannot be availed by the petitioner. Though the first respondent has categorically mentioned in para 20 that "any claim on non-profit and non-commercial nature of institutions has to be substantiated only by way of establishing the credentials of such institutions and not by merely stating that they are in the field of education", however, considering the fact that the petitioner failed to provide any such evidence, the first respondent came to the conclusion that the educational institutions to whom the petitioner provided construction services, are making systematic profits and their sole aim is not to serve the poor section of the public and accordingly he rejected the claim of the petitioner.

9. Admittedly, as on the date of passing the impugned proceedings, there was no evidence available before the first respondent to hold that whether the educational institutions to whom the petitioner provided construction services, are profit-oriented or whether they are established solely for educational purpose without any profit, etc., While that being so, in the absence of any evidence, there is no justification on the part of the first respondent to hold contrary that too on

mere non-production of such evidence by the petitioner. In fact, till the impugned proceedings were passed by the first respondent, it was not known or expected by the petitioner that the first respondent would come to such a contrary conclusion. If at all the first respondent was of such view, he could have very well directed the petitioner by providing an opportunity to produce the relevant documentary evidence regarding the educational institutions to whom, the petitioner provided construction service and thereafter, he could have decided the issue. It is curious enough to note that the first respondent has gone to the extent of applying the definition of 'industry' under the Industrial Disputes Act and also followed the Apex Court decision in *Bangalore Water Supply* case, which in my opinion, is unnecessary and the first respondent has shown excess enthusiasm while dealing with the issue, inasmuch as the issue involved in the present writ petition is altogether different and ratio decided in the above said decision by the Hon'ble Apex Court regarding the definition 'industry' for the purpose of settling the industrial disputes, cannot be applied to the case on hand as the present subject matter relates to Finance Act, under which, the Circular dated 17-9-2004 has been issued pertaining to the exemption of Service Tax in respect of construction services. Even assuming that the educational institution is an industry, it does not take away the benefit of exemption provided under the said Circular, if it is established that the constructions provided by the petitioner are used or to be used either not for commerce or not for industry. Therefore, the analysis given by the first respondent that the educational institutions to whom the petitioner provided are profit earning concerns and cannot be construed as non-commercial and thereby, they would be fallen within the ambit of "construction of new building primarily for the purpose of commerce or industry

under Section 65(105)(ii)(b) of the Finance Act which defined, in my opinion, is fallacious and cannot be tenable.

10. In fact, the consistent version of the petitioner is that they were under *bona fide* impression that the service tax on the constructions provided to the educational institutions is exempted as per Circular No. 80, dated 17-9-2004 and that they only constructed classrooms, hostels, etc., which are primarily used for imparting education and not used either for commerce or industry and without deciding the issue that whether the construction provided by the petitioner to the educational institutions are used or to be used for commerce or industry in order to extend the benefit of exemption under the above said Circular, the first respondent has erroneously dealt with the issue holding that the educational institution to which the petitioner provided constructions, itself is an industry and running for profit. I find considerable force in the said contention made on behalf of the petitioner. It is also stated by the petitioner that if at all the first respondent suspected the usage of the buildings or civil structures provided by the petitioner were meant to use or to be used for the purpose of commerce or industry, he could have very well called for records from the Income tax Department for verification and that the petitioner had already given the complete details of the educational institutions for whom they provided constructions.

11. For the foregoing reasons, I am of the considered view that the impugned proceedings, dated 28-11-2014 of the first respondent are liable to be set aside and since the issue has not been dealt with properly in terms of the exemption Circular No. 80, dated 17-9-2004, the matter is required to be remitted back for fresh consideration.

> 12. Accordingly, the impugned proceedings, dated 28-11-2014 of the first respondent are hereby set aside and the matter is remitted back to the first respondent to deal with the issue in terms of the exemption Circular No. 80, dated 17-9-2004, as to whether the constructions provided by the petitioner to the educational institutions were meant to use or to be used for academic purpose or for commercial purpose, on consideration of the relevant evidence thereof and whether the petitioner is entitled to exemption. The first respondent shall pass fresh orders within a period of four weeks from the date of receipt of copy of this order, after providing an opportunity to the petitioner. The petitioner is permitted to produce all relevant documents and also raise further objections if any, which shall be considered by the first respondent while passing the orders.
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> 13. With the above observation, the writ petition is disposed of. No costs. Consequently, connected MP is closed."

13. A similar view was taken by the Tribunal in the case of *SM Sai Construction (supra)* wherein this Tribunal passed the following order

> "6. We find that in view of the various documentary evidence and analysis thereof and also considering the observations of the ld. Commissioner (Appeals) on this, there is no doubt that building constructed by the respondent is college building which is carrying out Technical Education and same is approved by AICTE, Technical and Higher Education Department of Government of Maharashtra. The recipient of the service namely Vidya Prasarak Mandal, undisputedly a charitable trust registered with Bombay Public Trust Act, 1950. Respondent also produced the building plan. With all these facts, it is clear that building constructed by the respondent 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. Therefore service tax paid by the respondent is liable to be refunded. On going through the grounds of appeal, we observe that there is no dispute raised as regard the facts that the respondent by issuing credit note pot collected the service tax from the service recipient. On going through judgments cited by the respondent, we find that some of the judgments had directly on the issue of construction of Educational institute and the ratio of the judgments are applicable in the present case. We also gone through findings of the ld. Commissioner (Appeals) who has given very elaborate findings which extracted below :-

> "8. I further observe that the Appellants are provider of construction service and had undertaken works to construct college building. The service recipient have constructed building which was used as college to be named as "VPM's Maharshi Parshuram College of Engineering, Velneshwar' at Velneshwar, Ratnagiri for Vidya Prasarak Mandal, which is Public trust registered under Bombay Public Trust Act, 1950. The said service recipient has been formed and registered to carry out the object of providing education facilities to general public. It is, therefore, evident that the building whose construction services are rendered by appellants is to be utilized for educational purpose and not for any commercial or industrial purpose.
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> 9. It is pertinent to mention that, Letter of Approval from 'All India Council for Technical Education' which is statutory body under Ministry of HRD, Government of India read with letter of approval from 'Technical & Higher Education Department, Government of Maharashtra' conveys the approval of statutory bodies to said service recipient for commencing the engineering courses in college instituted at building constructed by the appellant i.e. VPM's Maharshi Parshuram College of Engineering, Velneshwar'(supra). Perusal of this letters establishes that constructed building is being used for educational purpose and not for the purposes of commerce or industry. Constitution of said service recipient lays the object and rules and regulation governing the trust. Para 5 of such constitution demonstrates that the only object of said service recipient is to provide various educational facilities to general public and undertake other activities helpful for education. Such sole object of said service recipient

justifies that college building constructed by the appellant is to be used for the sole purpose of education and not for any commercial or industrial purposes. Attention is also invited to para 38 of constitution of the said trust which restricts the trust to apply any surplus for any purpose other than object of said service recipient, prevents said service recipient to indulge in any activity other than for the purpose of its educational object. Consequently, building constructed by appellant would never be used, occupied or engaged in any commerce or industry. It is noteworthy to mention that 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 was gathered from the approved plan of the building. The original approved plan of the building submitted by the appellant clearly proved that the building was to be used for non-commercial purpose. Circular No. 80/10/2004, dated 19-9-2004 in para 13.2 has also made it clear that such trust will not be subjected to service tax. In this regard attention is drawn to Section 2(13) of Bombay Public Trust Act, 1950 which reads as :

> "Public Trust" means an express or constructive trust for either a public, religious or charitable purpose or both and includes a temple, a math, a wakf, church, synagogue, agiary or other place of public religious worship, a dharmada or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860".

10. In view of the above, it is amply clear that, any entity which is either having object of involving in commercial or industrial activities or involved in such activities will never be registered as trust. It is therefore clear from the fact the service recipient is involved in non-profit making activities, and services received by said service recipient was utilized for its sole educational purposes and not for the purposes of profit. Therefore, services of constructing college building rendered by appellant to said Service recipient falls outside the scope of taxable services namely "Commercial and Industrial Construction services" and tax on those services was wrongly paid by the appellant.

11. It is pertinent to mention that the amount of service tax and interest thereon was refunded to said service recipient by the appellant by crediting such amount to their account and thereby adjusting it with the amount receivable for the entire works from said service recipient. Therefore, though the letter conveying above accounting effect/adjustment to said service recipient was wrongly titled as 'Debit' note instead of 'Credit' Note; actual transaction which was effected was of refunding the claimed amount to said service recipient.

> 12. I, therefore, set aside the impugned order and allow the subject appeal with all its consequential relief, if any, as per law to the appellant."

We find that ld. Commissioner (Appeals) by proper application of mind set aside rejection of refund claim and allowed appeal of the respondent. The impugned order therefore does not require any interference. We, therefore, uphold the impugned order and dismiss the appeal of the Revenue."

14. In view of the above Board's Circular and the judgments we are of the clear view that construction of a building for use as hospital by a charitable organization does not fall under the category of 'commercial or industrial construction'. Therefore, demand confirmed in this respect is set aside.

15. As regard the issue of GTA service provided for construction of building of Tata Consultancy Service in the SEZ, we refer to Section 26 of the SEZ Act, 2005 which reads as under:

> "26. Exemptions, drawbacks and concessions to every Developer and entrepreneur
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> 1. Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely:-
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> a. exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods imported

into, or services provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur;

b. exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods exported from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India;

c. exemption from any duty of excise, under the Central Excise Act, 1944 (1 of 1944) or the Central Excise Tariff Act, 1985 (5 of 1986) or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the Developer or entrepreneur;

d. drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special Economic Zone or Unit or services provided in a Special Economic Zone or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur;

e. exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1944) on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special

Economic Zone;

f. exemption from the securities transaction tax leviable under Section 98 of the Finance (No. 2) Act, 2004 (23 of 2004) in case the taxable securities transactions are entered into by a non-resident through the International Financial Services Centre;

g. exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 (74 of 1956) if such goods are meant to carry on the authorised operations by the Developer or entrepreneur.

2. The Central Government may prescribe, the manner in which, and, the terms and conditions subject to which, the exemptions, concessions, draw back or other benefits shall be granted to the Developer or entrepreneur under sub-section (1)."

16. In the above section in clause € it can be seen that the taxable service provided to the developer or unit to carry on the authorised operation under the SEZ is exempted. In the present case the service of GTA is admittedly provided for construction of building in the SEZ. Therefore, the said service is exempted. Moreover, with regard to the submission of the Learned Counsel that if at all the service tax is payable, the same is available as CENVAT credit to the appellant for the reason appellant is a service provider to SEZ and even though such service is not taxable the appellant is entitled to retain this input credit on the input service in terms of Rule 6A of the CENVAT Credit

Rules, 2004. Therefore, it is a revenue neutral exercise. Hence, service tax is not chargeable on the GTA service used for construction of building in SEZ. Accordingly, the demand in this respect is set aside.

17. As regard the demand in respect of GTA service availed by the appellant in connection with the construction of the Lata Mangeshkar Hospital and Research Centre, we find that the construction service provided for construction of hospital is exempted. However, the appellant as a service provider is not exempted on any service provided by them. In the present case, the GTA service is used by the appellant and the appellant is the deemed service provider. Hence the GTA service is integral to construction of hospital building. Therefore, the GTA service relating to construction of hospital is taxable in the hands of the appellant. However, as regard the time-bar issue, we find that the appellant have not disclosed the transaction of GTA to the department as no ST-3 returns were filed declaring the value of GTA service to the department. Therefore, extended period in respect of show cause notice dated 31/12/2012 is rightly invoked. As regard the show cause notice dated 14/10/2013 we agree with the submissions of Learned Counsel that once the department came to know about the activity of the appellant and a show cause notice was issued then in the subsequent show cause notice invocation of extended period is not available to the department as held by the

Supreme Court in the case of *Nizam Sugar Factory (supra).* Therefore, demand relating to show cause notice dated 14/10/2013 for the extended period i.e. for April 2011 to September 2011 is time-barred. Remaining demand is sustainable.

18. The penalty commensurate to the demand of GTA relating to the hospital is maintained along with interest. The impugned order is modified to the above extent.

19. The appeals are partly allowed as detailed above.

(Pronounced in Court on 13/04/2018))

(C J Mathew)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

**/as260206030504*