

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

PRINCIPAL BENCH, COURT NO. 1

SERVICE TAX APPEAL NO. 52937 OF 2016

[Arising out of the Order-in-Appeal No. 120/ST/APPEAL-II/MK/GGN/2016 dated 17/08/2016 passed by Commissioner (Appeals - II), Service Tax, Gurgaon, Haryana - 122 001.]

M/s Shiv Naresh Sports Pvt. Ltd., **...Appellant**
E-23, Karampura,
New Delhi - 110 015.

Versus

Commissioner, Service Tax, **...Respondent**
Commissionerate : Service Tax Delhi - III,
4th Floor, Ambedkar Bhawan, (Opp. G-35, Cinema),
Sector - 16, Rohini,
New Delhi - 1110 085

WITH

SERVICE TAX APPEAL NO. 52938 OF 2016

[Arising out of the Order-in-Appeal No. 118/ST/APPEAL-II/MK/GGN/2016 dated 16/08/2016 passed by Commissioner (Appeals - II), Service Tax, Gurgaon, Haryana - 122 001.]

M/s Shiv Naresh Sports Pvt. Ltd., **...Appellant**
E-23, Karampura,
New Delhi - 110 015.

Versus

Commissioner, Service Tax, **...Respondent**
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4th Floor, Ambedkar Bhawan, (Opp. G-35, Cinema),
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AND

SERVICE TAX APPEAL NO. 52939 OF 2016

[Arising out of the Order-in-Appeal No. 119/ST/APPEAL-II/MK/GGN/2016 dated 17/08/2016 passed by Commissioner (Appeals - II), Service Tax, Gurgaon, Haryana - 122 001.]

M/s Shiv Naresh Sports Pvt. Ltd., **...Appellant**
E-23, Karampura,
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Versus

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Commissionerate : Service Tax Delhi - III,
4th Floor, Ambedkar Bhawan, (Opp. G-35, Cinema),
Sector - 16, Rohini,
New Delhi - 1110 085

APPEARANCE:

Shri R.K. Philips, Advocate for the appellant.
Dr. Radhe Tallo, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. 50525-50527/2022**DATE OF HEARING : 13.06.2022****RAJU**

These appeals have been filed by M/s Shiv Naresh Sports Pvt. Ltd.¹ against rejection of refund claims filed by the appellant.

2. The appellant had provided the following services to following recipient :-

Sl. No.	Nature of Contract	Service Recipient
1.	Development of sports facilities and associated infrastructure. <ul style="list-style-type: none"> • Providing and fixing of seating system. • Providing and laying of Synthetic Athletic Track Surface 	<ul style="list-style-type: none"> • Engineer India Limited (EIL) (Main Contractor) for CWG 2010
2.	Providing and laying of Synthetic Athletic Track Surface.	<ul style="list-style-type: none"> • CBI Academy
3.	Providing and laying of Synthetic Athletic Track Surface.	<ul style="list-style-type: none"> • SDPA, Kangra, Himachal Pradesh.

The appellant had paid service tax in the category of erection, commissioning and installation services.

3. The learned Counsel stated that they have filed refund claim on the ground that no service tax was payable by them. It

¹ appellant

was claimed that the service at Sl. No. 1 in table above would otherwise be covered by description given in commercial or industrial construction service (CCIS in short). It has also been argued by the appellant that since the nature of civil structure is not of commercial, the said services would not be taxable. Learned Counsel of the appellant argued that the service at Sl. No. 1 of table would fall under the description of commercial or industrial construction service except for the fact that the structures for which the services have been provided are not of commercial in nature. He relied on the decision of Tribunal in the case of **B.G. Shirke Construction Technology Pvt. Ltd. versus Commissioner of Central Excise, Pune – III²**.

4. The appellant also argued that the services at Sl. No. 2 & 3 provided by them were in the nature of works contract as the contracts were inclusive of all the material. It has been argued in the appeal that as per terms of the contract the services rendered by the appellant was construction of 400 mtrs. Synthetic athletic track for SPDA at Dharamshala in Distt. Kangra (HP) (SH – leveling of ground C/O Sub-grade, GSB/WBM, BM, SDBC on synthetic track, outer and inner drain and electric, telecommunication Pits etc.) vide Contract No. PWD/DD/CB/CF/R&B/2010/-2011 dated 18.04.2011. It was argued that the said work relates to installation, erection and commissioning service in relation to sports stadium which is a civil structure. It was argued that the commercial or industrial

² **2013 (31) S.T.R. 52 (Tri. – Mumbai)**

construction service as defined in Section 65 (25b)³ includes in its definition not only repair, alternation, renovation or restoration but also includes "similar services in relation to building or civil structure". It was argued that the service provided by the appellant falls under the description installation of track in respect of a civil structure (sports stadium). Since the civil structure for which the said service was provided does not fall in the commercial category, no service tax can be levied under the category of commercial or construction service. It was argued that the service provided to Himachal Pradesh Public Works Department and CBI Academy was in the nature of laying of Synthetic Athletic Track for S.P.D.A. at Dharamshala in HPPWD. The learned Counsel argued that it is also covered under the description of CCIS but civil structure is not of commercial nature. But for the fact that the structure for which the services was provided is not commercial in nature, the services would have been rightly classifiable as CCIS. It was argued that in the instant case since the stadium or the Synthetic athletic track is not used for commercial purpose, the same would not be fall under the category of CCIS.

5. Learned Authorized Representative pointed out that the appellant has classified the service as erection, commissioning, and installation service. He pointed out that there is no exemption to the services in relation to non-commercial structures in case of erection, commissioning and installation

³ **Finance Act, 1994**

services. He further pointed out that the refund claim of the appellant is hit by the clause of unjust enrichment as well as on account of limitation. Learned Counsel also raised the issue of self-assessment and failure to challenge the assessment order by the appellant. For this purpose, he relied on the decision of Apex Court in case of **ITC Ltd. versus Commissioner of Central Excise, Kolkata – IV⁴**.

6. We have gone through rival submissions. We find that the appellant is seeking to classify the services provided by the appellant in the service description of commercial and industrial construction. The CCIS has been defined in Section 65 (25b) as follows :-

- “(25b) [“commercial or industrial construction”] means —
- (a) construction of a new building or a civil structure or a part thereof; or
 - (b) construction of pipeline or conduit; or
 - (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or
 - (d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is —
 - (i) used, or to be used, primarily for; or
 - (ii) occupied, or to be occupied, primarily with; or
 - (iii) engaged, or to be engaged, primarily in,
- commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;]”

7. The nature of services provided by the appellant are :

⁴ **2019 (368) E.L.T. 216 (S.C.)**

- (i) providing and fixing of seating arrangement in a stadium ;
- (ii) providing and laying of Synthetic Athletic Track Surface in a sports facility.

The service of providing and laying of Synthetic Athletic Track has been provided in respect of sports organization of Government, Centre or State. It has been argued by the appellant that the service provided by them is squarely covered by the description of services given in a commercial and industrial construction service as defined in Section 65 (25b), however, since the said services are provided to Government facilities which are not of commercial nature, the same do not fall under the category of commercial or industrial construction services as defined in Section 65 (25b). On perusal of the definition of commercial or industrial construction service it is seen that it clearly includes the completion of finishing services, such as, glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure. It is seen that the installation of chairs in a stadium would clearly be an activity similar to the activity of acoustic application or fittings or of the nature of fencing and railing. In that sense the activity of fixing chairs in a commercial establishment would be covered the description of service in the commercial or industrial construction service as defined in Section 65 (25b).

8. The learned Counsel for the appellant has relied on the decision of the Tribunal in the case of **B.G. Shirke Construction Technology Pvt. Ltd.** In said decision it has been held that the services provided for the sports facilities owned by State would not be chargeable to tax under commercial or industrial construction service. The relevant paragraph is as under :-

"5.2 In the case of *B.B. Nirman Sahakari Samiti v. State of Rajasthan* - AIR 1979 Raj. 209, a question arose as to what is a Public Utility? The Hon'ble High Court held that 'public utility' means any work, project which is going to be useful to the members of the public at large. The public benefit aimed at or intended to be secured need not be to the whole community but to a considerable number of people. In American Law, the word 'Public facility' has been defined as under :-

'Public facility' means the following facilities owned by a State or local government, such as :-

- (a) Any flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility.
- (b) Any other Federal and street road or highway
- (c) *Any other public building, structure, or system, including those used for educational, recreational, or cultural purposes.*
- (d) Any park.

The Tribunal based on the above concluded that stadiums were deemed to be public utilities. The Tribunal further ruled as under:

5.3 The Sports Stadia is used for public purpose. Merely because some amount is charged for using the facility, it cannot become a commercial or industrial construction. Even in a Children Park, entry fee is levied for maintenance of the Park. Merely because some amount is charged for using the Park, it cannot be said that it is a commercial or industrial construction. Adopting the same logic, the Sports Stadia in the present case is also a non-commercial construction for use by the public. Therefore, we are *prima facie* of

the view that the Sports Stadium constructed for conducting Commonwealth Games, is a non-commercial construction.

The activity undertaken in a stadium, which belongs to Government and is used for non-commercial activities, would not be covered under definition of CCIS as held by Tribunal in the case of **B.G. Shirke Construction Technology Pvt. Ltd.** In view of above, it is apparent that the activity of affixing chairs in a stadium would be covered under the description of service covered under commercial or industrial construction service, but not chargeable to tax for the reason that the structure for which the said activity has been undertaken is not of commercial nature.

9. The activity of laying of Synthetic Athletic Track Surface is akin to the activity of floor and wall tiling, wall covering and wall papering. The activity is of civil nature and, therefore, would be covered by the activities described in the definition of commercial or industrial construction service, however, since the same have been provided in respect of sport facilities owned by Government, State or Centre, the same would not be chargeable to tax.

10. It is seen from the impugned order that since it was held that no refund is admissible, the ground of unjust enrichment as well as limitation were not examined. It is also noted that learned Authorized Representative has raised the issue regarding absence of challenge to self-assessment by appellant in the light of decision of Apex Court in **ITC Ltd.** This issue was not raised earlier, but being a legal issue, the same can be raised. It is seen

that impugned order does not contain any findings on the issue of limitation or unjust enrichment. Since the issue of unjust enrichment, limitation and the implication of the decision of Apex Court in the case of **ITC Ltd.** has not been examined by the lower authorities, its needs to be sent back to original Adjudicating Authority.

11. In view of above, the appeal is partly allowed. In so far as the taxability of service provided is concerned it is held that the services provided by the appellant are not taxable. For decision on the other issues listed in paragraph 10 above, the matter is remanded back to the original Adjudicating Authority.

12. The appeal is partly allowed, in above terms, by way of remand.

(Order dictated and pronounced in open court.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(RAJU)
MEMBER (TECHNICAL)