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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.164 OF 2015 WITH
CENTRAL EXCISE APPEAL NO.63 OF 2016 WITH
CENTRAL EXCISE APPEAL NO.64 OF 2016 WITH
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Commissioner of Central Excise, Nashik ... Appellant
Vs.
Maharashtra Industrial Development Corporation ... Respondent

Mr. Swapnil Bangur i/by Ms. Shalak0a Gujar for the Appellant.

Mr. Rafiq Dada, Senior Counsel a/w Mr. Vishal Agrawal, Mr. P.K. Shetty and Mr. Ashutosh Mishra and Mr. Girish Raman for the Respondent.

CORAM : A.S. OKA &
RIYAZ I. CHAGLA, JJ.

DATE : 23rd AUGUST, 2017

P.C.

1 These Appeals arise out of a demand of service tax made by the Appellant to the Respondent – the Maharashtra Industrial Development Corporation (for short “MIDC”) which is duly established by the State Government in exercise of powers under Sub-Section (1) of Section 3 of the Maharashtra Industrial Development Act, 1961 (for short “the MID Act”). As the facts of these Appeals are more or less identical, for the sake of convenience, we are making a reference to the facts of the case in Central Excise Appeal No.164 of 2015.

2 The demand subject matter of Appeal No.164 of 2015 was made by a notice dated 19th April, 2013 for the period from October, 2011 till September, 2012. The Respondent - MIDC is registered with Service Tax Department under the category of "renting of immovable property". The allegation under the show cause notice is that MIDC has not paid service tax on services charges collected from the holders of the plots situated at various Industrial areas/estates of the MIDC. Reliance is placed on clause 64 of Section 65 of the Finance Act, 1994 (for short "the said Act") which defines "management, maintenance and repairs". The contention raised in the show cause notice is that service charges are recovered by the MIDC from plot holders for providing various services to them and the activity of providing service attracts service tax liability under the aforesaid category defined under clause 64 of Section 65 of the said Act. It is alleged that on inquiry and verification it was found that though service charges were recovered by MIDC from the plot holders for relevant period, service tax was not paid. The specific case in the show cause notice is that service charges were collected from the plot owners in consideration of having provided them various facilities including the maintenance, management and repairs of the facilities in the MIDC Industrial area. By an Order-in-Original dated 30th August, 2013, the Additional Commissioner of Central Excise, Customs and Service Tax, Nashik held that the services

rendered by MIDC fall in the category of "management, maintenance and repairs" and therefore, the demand of service tax amounting to Rs.31,58,157/- was confirmed. This demand was confirmed in an Appeal preferred by the respondent before the Commissioner (Appeals). An appeal against the said judgments and orders was preferred by the Respondent before Customs, Excise and Service Tribunal, Western Zone, Mumbai (for short "the Appellate Tribunal"). The Appeal along with other connected five Appeals were allowed by the Appellate Tribunal by a judgment and order dated 4th September, 2014. These Appeals are preferred being aggrieved by the said common judgment and order.

3 The submission of the learned counsel appearing for the Appellant is that the service charges are collected by the MIDC from the allottees of the plots in its various industrial estates. He submitted that the services provided by the MIDC to the plot holders are covered by the category "maintenance, management and repairs" under clause 64 of Section 65 of the said Act. He submitted that management of immovable properties is covered by clause 64 of Section 65 and that is how liability is incurred to pay service tax. He invited our attention to contents of the circular dated 18th December, 2006 bearing No.89/7/2006 issued by the Central Board of Excise and Customs of the Government of India. He submitted that if the MIDC recovers service

charge for performing service which is not a part of its statutory activities, service tax would be leviable. He submitted that clause 2 of the said circular will apply only when fees are collected in the nature of compulsory levy for performing statutory obligations which are required to be performed in accordance with law. He submitted that the service subject matter of the demand rendered by MIDC to the allottees of the plots is not a statutory service and therefore, it will be squarely covered by clause 64 of Section 65. He also invited our attention to various findings recorded by the Additional Commissioner in the Order-in-Original and in particular paragraph 4.13. Inviting our attention to the findings recorded by the Appellate Tribunal, he urged that the findings of fact recorded by the Additional Commissioner in the Order-in-Original have not been disturbed and the Appellate Tribunal has proceeded on assumption that the service charges are levied and collected by the MIDC for performance of statutory obligations. He would, therefore, submit that substantial questions of law as set out in the Appeals will squarely arise.

4 The learned counsel appearing for the Respondent supported the impugned judgment and order of the Appellate Tribunal. He relied upon the decisions of the Apex Court in the case of Ramtanu Co-operative Housing Society and Anr. Vs. State of Maharashtra and

Ors.[1] as well as the Managing Director, Haryana State Industrial Development Corporation and Ors. Vs. Hari Om Enterprises and Anr.[2]. He submitted that MIDC is a wing of the State Government which performs sovereign functions and hence, no interference is called for.

5 We have given careful consideration to the submissions. Firstly, it will be necessary to note what is set out in the circular dated 18th December, 2006 bearing No.89/7/2006. Clauses 2 and 3 of the said circular read thus :-

> "2. The issue has been examined. The Board is of the view that the activities performed by the sovereign/ public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute, and it is deposited into the Government Treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/ public authority under the provisions of law does not constitute provision of taxable service to a person and, therefore, no service tax is leviable on such activities.

1 AIR 1970 SC 1771

2 AIR 2009 SC 218

3. However, if such authority performs a service, which is not in the nature of statutory activity and the same is undertaken for a consideration not in the nature of statutory fee/levy, then in such cases, service tax would be leviable, if the activity undertaken falls within the ambit of a taxable service."

(underlines supplied)

6 Thus, the activities performed by sovereign or public authorities under the provisions of law which are in the nature of statutory obligations are covered by clause 2 which provides that the fee collected by such sovereign or public authorities for performing such activities is in the nature of compulsory levy. Only if such authority performs service which is not in the nature of statutory activity and the same is undertaken for a consideration which is not in the nature of statutory fee, service tax would be leviable if the activity undertaken otherwise falls within the ambit of taxable service.

7 Going by the show cause notice, the allegation is that the Respondent – MIDC has collected service charges from the plot owners/ plot allottees in consideration of having provided them various facilities including maintenance, management and repairs of the facilities in the MIDC area. As stated earlier, reliance is placed on clause 64 of Section 65 of the said Act. As pointed out earlier, MIDC is already registered

under the category of “renting of immovable property” and for services covered by such category, MIDC is admittedly paying service tax.

8 At this stage, a reference will have to be made to certain provisions of the MID Act. The preamble of the Act shows that for securing orderly establishment of Industrial Areas and Industrial Establishments of Industries in the State of Maharashtra and for assisting generally in the organization thereof, MID Act has been enacted for the establishment of a Corporation (MIDC). As stated earlier, MIDC is set up under Sub-Section (1) of Section 3 of the MID Act. The functions of MID have been enlisted in Section 14 which reads thus :-

> “14. The functions of the Corporation shall be -
>
> (i) generally to promote and assist in the rapid and orderly establishment, growth and development of industries in the State of Maharashtra, and
>
> (ii) in particular, and without prejudice to the generality of clause (i), **to -**
>
> **(a) establish and manage industrial estates at places selected by the State Government;**
>
> (b) develop industrial areas selected by the State Government for the purpose and make them available for undertakings to establish themselves;
>
> (d) undertake schemes or works, either jointly with other corporate bodies or institutions, or with

Government or local authorities, or on an agency basis, in furtherance of the purposes for which the Corporation is established and all matters connected therewith."

(emphasis added)

9 Hence, one of the statutory functions of MIDC is to establish and manage the industrial estates at places selected by the State Government. Clause (a) of Section 2 of MID Act defines amenity which reads thus :-

"2(a) "amenity" includes road, supply of water or electricity, street lighting, drainage, sewerage, conservancy and such other convenience as the State Government may, by notification in the Official Gazette specify to be an amenity for the purpose of this Act."

10 In the case of Ramtanu Co-operative Housing Limited and another, the Apex Court was dealing with the issue of constitutional validity of MID Act. In paragraphs 15 and 16, the Apex Court held thus :-

"15. The pith and substance of the Act is establishment, growth and organisation of industries, acquisition of land in that behalf and carrying out the purposes of the Act by setting up the Corporation as one of the limbs or agencies of the Government. The powers and functions of the Corporation show in no uncertain terms that these are all in aid of the principal and predominant purpose of establishment, growth and establishment of industries. The Corporation is established for that purpose. When the Government is satisfied that the Corporation has substantially achieved the purpose for which the Corporation is established, the Corporation will be dissolved because the raison d'etre is gone. We, therefore, hold that the Act is a valid piece of legislation.

16. The petitioners contended that the Corporation was a trading one. The reasons given were that the Corporation could sell property, namely, transfer land; that the Corporation had borrowing powers; and that the Corporation was entitled to moneys by way of rents and profits. **Reliance was placed on the report of the Corporation and in particular on the income and expenditure of the Corporation to show that it was making profits. These features of transfer of land, or borrowing of moneys or receipt of rents and profits will by themselves neither be the indicia nor the decisive attributes of the trading character of the Corporation.** Ordinarily, a Corporation is established by shareholders with their capital. The shareholders have their Directors for the regulation and management of the Corporation. Such a Corporation set up by the shareholders carries on business and is intended for making profits. When profits are earned by such a Corporation they are distributed to shareholders by way of dividends or kept in reserve funds. In the present case, these attributes of a trading Corporation are

> absent. **The Corporation is established by the Act for carrying out the purposes of the Act. The purposes of the Act are development of industries in the State. The Corporation consists of nominees of the State Government, State Electricity Board and the Housing Board. The functions and powers of the Corporation indicate that the Corporation is acting as a wing of the State Government in establishing industrial estates and developing industrial areas, acquiring property for those purposes, constructing buildings, allotting buildings, factory sheds to industrialists or industrial undertakings.** It is obvious that the Corporation will receive moneys for disposal of land, buildings and other properties and also that the Corporation would receive rents and profits in appropriate cases. Receipts of these moneys arise not out of any business or trade but out of sole purpose of establishment, growth and development of industries."
>
> (emphasis added)

11 The Apex Court categorically held that functions and powers of MIDC indicate that the said Corporation is acting as a wing of the Government. In the case of Managing Director, Haryana State Industrial Development Corporation, the Apex Court was considering the role played by Haryana State Industrial Development Corporation. The Apex Court held that the said Corporation discharges sovereign

functions. The Apex Court also held that considering the objects and purport for which the said Corporation of Haryana has been constituted, the function discharged by the Corporation must be held as Governmental function.

12 We have already referred to Section 14 of the MID Act which provides that the function of the MIDC is not only to develop industrial areas but to establish and manage industrial estates. The role of MIDC is not limited only to establishing industrial estates and allotting the plots or buildings or factory sheds to industrial undertakings. The function and obligation of the MIDC is also to manage and maintain the said industrial estates as provided in Section 14. Therefore, it is the statutory obligation of the MIDC to provide amenities as defined in clause (a) of Section 2 of the MID Act to the industrial estates established by it. Thus, it is the statutory obligation of MIDC to provide and maintain amenities in its Industrial estates such as roads, water supply, street lighting, drainage, etc. Thus, we find that the activities for which the demand was made are part of the statutory functions of the MIDC under MID Act. As stated earlier, the demand is in respect of service charges collected from plot holders for providing them various facilities including maintenance, management and repairs. As provided in the circular dated 18th December, 2006, for providing

amenities to the plot holders, the service fees or service charges collected by MIDC are obviously in the nature of compulsory levy which is used by MIDC in discharging statutory obligations under Section 14. We find that even in the Order-in-Original, there is no finding of fact recorded that the service rendered for which service tax was sought to be levied was not in the nature of statutory obligation.

13 Therefore, we find no error in the view taken by the Appellate Tribunal. No substantial question of law arises.

14 MIDC is a statutory Corporation which is virtually a wing of the State Government. It discharges several sovereign functions. In our view, the Revenue ought not to have compelled MIDC to prefer Appeals before Appellate Tribunal. Not only that MIDC was driven to prefer Appeals before the Appellate Tribunal, this group of Appeals were preferred by the Revenue. Needless to add that MIDC was required to incur huge expenditure on litigation. All this could have been avoided by the Appellant.

15 Therefore, we propose to saddle the Appellant with costs of Rs.10,000/- in each Appeal. We dismiss the Appeals. We direct the Appellant to pay costs quantified at Rs.10,000/- in each Appeal to the

Respondent – MIDC within a period of one month from the date on which this judgment and order is uploaded. Place the Appeals for reporting compliance regarding payment of costs on 12th October, 2017 under the caption of “Directions”.

(RIYAZ I. CHAGLA, J) **(A.S. OKA, J)**