

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

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No. 736 of 2011

(Arising out of OIO-06/STC/BRC-I/MP/COMMR-I/2011 dated 30/08/2011 passed by
Commissioner of Central Excise, CUSTOMS (Adjudication)-VADODARA-I)

Western Corrosion Controller

.....Appellant

G-12, Krishna Complex,
Opp. Alembic Nagar, Gorwa,
Vadodara, Gujarat

VERSUS

C.C.E. & S.T.-Vadodara-I

.....Respondent

1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat -390007

APPEARANCE:

Shri Dhaval Shah, Advocate for the Appellant
Shri Vinod Lukose, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. ASHOK JINDAL
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/ 10027 /2022

DATE OF HEARING: 09.11.2021
DATE OF DECISION: 11.01.2022

RAJU

This appeal has been filed by M/s Western Corrosion Controller against denial of Cenvat Credit, demand of interest and imposition of penalty.

1.1 During 16.06.2005 to 31.03.2010 the appellant's were engaged in providing various services to their clients and were discharging service tax under the head of Commercial and Industrial Construction Services availing benefit of Notification No. 01/2006 dated 01.03.2006. Notification No. 01/2006 provided abatement of 33% on the gross amount charged for the purpose of discharge the service tax. However, the said exemption was not available to the activity which qualified as finishing and completion work. The Show Cause Notice sought to deny the benefit of service tax exemption Notification No 01/2006 on the ground that the services provided by the appellant qualified as finishing and completion work.

2. Learned counsel for the appellant pointed out that the activities undertaken by them were inclusive of supply of material and therefore qualified as Works Contract. He pointed out that for the period prior to 01.06.2007 no service tax was leviable on works contract in terms of decision of the Hon'ble Apex Court in case of Larsen & Toubro Ltd- 2015 (39) STR 913 (SC). He pointed out that their service was covered under the category of Works Contract Service and they have been discharging the tax under VAT/ Sales Tax under the category of Works Contract. In support of the said argument the appellant produced the registration certificate which shows that the appellant was registered under the category of Works Contract with Sales Tax Authorities in Gujarat. The appellant produced various challans of payment of VAT/ Sales tax however, from the said challans it was not cleared if the tax has been paid under the category of works contract or otherwise. Learned Counsel pointed out that the CBEC Circular No 334/1/2008-TRU has clarified that the fact that the VAT has been paid under the category of the works Contract is evidence in support of activity being works contract.

3. Learned AR relies on the impugned order.

4. We have considered rival submissions. We find that the demand has been raised under the category of the Commercial or Industrial Construction Services. The claim of the appellant is that period prior to 01.06.2007 the works contract services was not chargeable to service tax. Moreover, for the period after 01.06.2007 their service would qualify as Works Contact Service and not Commercial or Industrial Construction service and therefore, the demand cannot be sustained under Commercial & Industrial Construction Service. We have taken up a few contracts which show that they were engaged in the activity of painting/ coating of various structures to prevent corrosion. They have also engaged themselves in Concrete Work. They have claimed that these service falls under the category of Works contract

service. There are few contracts which involved construction of concrete work as well. The appellant have submitted a long list of contracts.

4.1 We find that CBEC in letter DOF No. 334/1/2008- TRU dated 29.02.2008 has clarified as follows: -

"4.4 Supply of tangible goods for use :

4.4.1 Transfer of the right to use any goods is leviable to sales tax / VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.

4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT/sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid."

From the above it is apparent that the CBEC is of the view that if VAT is paid under the category of Works Contract then the service should be classified as works contract services.

4.2 In the instant case while the appellant has submitted the challans under which VAT has been paid but it cannot be ascertained from the said challans if the VAT has been paid under category of "Works Contract". While the registration document shows the appellant was registered under works

contract with Sale tax authorities. The learned counsel could not establish from the said records that the sales tax or VAT was paid under the head of works contract service though prima facie is claim appears to be correct.

5. In view of the above the impugned order is set aside and the matter is remanded to the Original Adjudicating Authority to ascertain if the VAT/Sales tax has been paid for all the contracts under the category of works contract. If the appellant has paid VAT/Sales Tax under the head of Works contract then the service would fall under the category of Works Contract Service. No demand under the category of Commercial & Industrial Construction Service can be confirmed. Moreover, in that case the demand of duty for period prior to 01.06.2007 too cannot be confirmed as at material time the works contract service was not taxable. In view of the decision of the Hon'ble Apex Court in the case of Larsen and Toubro Ltd (Supra).

6. The appeal is allowed by way of remand in above terms.

(Pronounced in the open court 11.01.2022)

(Ashok Jindal)
Member(Judicial)

(Raju)
Member(Technical)