

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD
REGIONAL BENCH - COURT NO. 3**

SERVICE TAX Appeal No. 10874 of 2016-DB

[Arising out of Order-in-Original/Appeal No SUR-EXCUS-001-COM-033-15-16 dated 25.01.2016 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

Tirupati Shyam Enterprise

Block No. 99, Canal Road, Bhimrad, Althan
Road, SURAT, GUJARAT -395003

.... Appellant

VERSUS

Commissioner of Central Excise & ST, Surat-i

New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat-395001

.... Respondent

APPEARANCE :

Shri Jimit Shah & Shri Kiran Parikh, Chartered Accountants for the Appellant
Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

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

DATE OF HEARING : 19.12.2023

DATE OF DECISION: 09.04.2024

FINAL ORDER NO. 10842/2024

RAMESH NAIR :

This appeal has been filed by M/s. Tirupati Shyam Enterprise against the Order-In-Original No. SUR-EXCUS-001-COM-033-15-16 dated 25.01.2016 passed by the Commissioner, Central Excise & Service Tax, Surat-I.

2. Briefly, the facts of the case are that during the course of the audit it was observed by the department that appellant were deemed service provider for construction of service brought under Service tax net with effect from 01.07.2010. The construction work had been outsourced by the appellant to sub-contractors who were registered under works contract service. The Appellant was also registered under works contract service category with an intention to evade service tax by wrong availment of Cenvat credit and short payment of Service tax at the concessional rate of 4.12%. As per revenue the correct classification of service provided by the Appellant falls under construction of Residential Complex. Since the Cenvat Credit of Service tax paid by the sub-contractor was not available under

category of Construction Service, the appellant had misclassified their service under 'Works Contract Service category with intention to avail Cenvat credit wrongly and evade service tax. Since the Appellant had paid service tax through inadmissible Cenvat Credit, they were liable to pay from the cash account. Further department observed that for the services provided by the appellant during the period of its commencement to 30.06.2012, abatement of 75% has been provided under Notification No. 01/2006-ST dated 01.03.2006 as amended vide Notification No. 29/2010-ST dated 22.06.2010 (Sr. No. 7a and 10a). The abatement of 75% is subject to the condition that value of land is not separately recovered from the buyer by the builder i.e value of land is included in the amount charged from the service receiver and that Cenvat credit of inputs, capital goods or input services not taken. For the service provided by the Appellant during the period 01.03.2013 to 31.03.2014, abatement of 75% has been provided under Notification No. 02/2013-ST dated 01.03.2013 (Sr. No. 12) as amended vide Notification No. 09/2013-ST dated 08.05.2013 (Sr. No. 12). It appears that the appellant is entitled for the abatement of 75% but not entitled for any Cenvat credit upto the period June 2012. During the scrutiny of the documents it is noticed that the appellant were required to pay total Service tax of Rs. 48,24,372/- during the period 2010-11 to 2013-14. Out of total service tax of Rs. 48,24,372/- the amount of Cenvat credit available for utilization was only Rs. 31,30,615/- considering the amount of Cenvat credit balance of Rs. Rs. 9,59,407/-as shown in their ST-3 return for the period October 2013 to March 2014. Since the Appellant has already paid the amount of Rs. 31,30,615/- from Cenvat account, they are required to pay Rs. 16,93,757/- from cash account by challan. Further the appellant has declared undisclosed income of Rs. 2,00,00,000/- before the Income Tax department, which appears to be received prior to the year 2012-13 and the said income was generated towards the construction and sale of flats. Therefore, appellant was required to pay service tax. Appellant paid the service tax of Rs. 6,18,000/- from the Cenvat account. Since the Cenvat credit during the period to which the said income belonged, were not available to the appellant, they were required to pay the amount of Rs. 6,18,000/- from the cash/current account by way of challan. Accordingly, show cause proceedings was initiated against the appellant, seeking for recovery of the service tax amount along with interest and for imposition of penalties and disallowance of wrongly availed Cenvat credit. The matter was

adjudicated vide impugned order against the appellant and demand proposed in the show cause notice were confirmed. Being aggrieved by the impugned order the Appellant has filed the present appeal.

3. Shri Jimit Shah with Shri Kiran Parikh, Learned Chartered Accountant appearing on behalf of the appellant submits that appellant firm is engaged in real estate development activities. Appellant has carried out the project with name of Tirpuati Shyam Villa wherein Appellant has constructed 5 new towers having 198 flats and 23 shops. Appellant has utilized CENVAT credit facility on input services used in relation to execution of works contract. Appellant has not availed any CENVAT credit on Capital goods. Appellant is paying Service Tax on construction activities under the Works Contract Service and availing the CENVAT credit of Service tax paid on Input Services. Department's allegation is that appellant's activities are falling under the service of Commercial or Industrial Construction and partly under Construction of Complex Services and thus CENVAT credit of Service tax paid on Input Services shall not be available to the Appellant. The Appellant outsourced the construction work to the sub-contractor who were also registered under the works contract services. Appellant developed the land for developer as per the development agreement. The sub-contractor carried out the work of construction activity. The Appellant claimed the CENVAT credit of Service tax paid to sub-contractor as the appellant was falling under the category of works contract service. The Appellant was paying the Service tax on construction activities under the works contract services and were also availing the CENVAT Credit of service tax paid on the input services.

4. He further submits that Appellant were registered under composition scheme with Gujarat VAT Department and has paid VAT under composition scheme with Gujarat VAT department. Board circular bearing F.No. B1/16/2007-TRU states that contracts which are treated as works contract for purpose of the VAT /sales tax, shall also be treated as works contract for the purpose of levy of service tax. Thus considering the facts of the case and considering the activities performed by the appellant, it is clear that there transfer of property in goods is involved and in execution of such contract is leviable to tax as sale of goods. Further there is contract between developer and the customer wherein the developer is required to construct the

residential unit for the customers. Thus considering the same the activities of the appellant falls under the category of works contract services. Further the appellant pays the VAT to the Commercial Tax department. Thus the appellant's case clearly falls under the sub-clause (i) of Section 65(105)(zzzza) of the Finance Act 1994 and thus the said activity clearly falls under the activity of the works contract services.

5. He also submits that purchase of 'under-consideration for a composite price cannot be charged to service tax, in absence of any section/rule providing for agreement value of land/goods in computing value of services; segregation by way of abatement notification is insufficient for this purpose. The ultimate transaction between the parties may be sale of flat but it cannot be said that the characteristics of works contract are not involved in that transaction. Therefore, the activity carried out by the appellant shall be classified as works contract service. In such circumstance demand of service tax under construction of commercial or industrial service or under the construction of complex service. He placed reliance on the following judgments.

- (i) Larsen and Toubro Ltd. Vs. State of Karnataka (2013)65VST1/38 taxmann.com 453 (SC).
- (ii) Suresh Kumar Bansal Vs. Union of India (2016) 70 taxmann.com 55 (Delhi)
- (iii) Saumya Construction Pvt. Ltd. - 52 taxmann.com 510 (Ahmedabad -CESTAT)
- (iv) K Raheja vs. State of Karnataka -2006 STR 337 (SC)

6. He also submit that learned Commissioner has confirmed the demand of service tax of Rs. 3,18,000/- in relation to the undisclosed income declared during the course of survey under Section 133A of the Income Tax Act. After disclosure to the said income appellant paid the due service tax from Cenvat account, the department did not allow the appellant to make the payment of the same by way of CENVAT Credit and thus demanded the same in cash or current account. However only on the basis of income disclosure to the income tax department, no service tax can be demand. Further, department alleged that the appellant is providing the taxable service which are falling under the category of 'construction of commercial or

industrial construction' and partly under the 'Construction of Complex Service' thus the appellant is not entitled to the CENVAT credit on the input services and this the appellant is required to discharge the said liability of service tax by way of cash or current account. However, the activities performed by the appellant are clearly covered under the definition of works contract services. Thus considering the same the appellant is entitled to utilized the Cenvat Credit for making the payment of the service tax amounting to Rs. 6,18,000/- on account of undisclosed income.

7. He also argued that the extended period not invocable in the present matter since appellant is under bonafide belief that the issue is purely interpretation in nature. Appellant have furnished all information required, as and when sought by the department. Further appellant were regularly filing their ST-3 returns wherein all the facts are disclosed by the appellant regarding availment of CENVAT credit, utilization towards service tax liability for providing works contract services. Hence the demand is hit by time bar.

8. On other hand Shri A.K. Samota, learned Superintendent (AR) supported the findings of impugned order.

9. On careful consideration of the submissions made by both sides and perusal of records, we find that from the facts itself, it is clear that the construction services rendered by the appellants are composite in nature involving materials as well as services. The documentary evidence produced by the appellant in form of VAT Audit Report, payment of VAT/Sale Tax, copy of agreements with developer and sub-contractors clearly prove the said fact. We find the Tribunal in the case of *Real Value Promoters* 2018-TIOL-2867-CESTAT-MAD (supra) had analysed the issue regarding demand of service tax under construction of residential complex services, commercial or industrial construction service and construction of complex service. The Tribunal has held that prior to 1-6-2007, levy of service tax can be under the above categories only for contracts which are purely for services. That after 1-6-2007, the above categories would be applicable only if the contracts are purely services and which are not composite contracts. Further, it was held that after 1-6-2007, demand in respect of composite contracts would fall

under works contract service only. The relevant portion of the said decision is reproduced as under :-

“3.5 The issue as to whether a composite contract involving provision of service as well as transfer of property in goods could be covered under CICS and CCS from the date of introduction of service tax levy on such services was, being litigated upon which was finally settled by the Hon’ble Supreme Court in the case of CCE v. Larsen & Toubro Ltd. - [2015 \(39\) S.T.R. 913](#) (S.C.) The Apex Court has observed that inasmuch as section 67 of the Act, dealing with valuation of taxable services, refers to the gross amount charged for service, the services of CICS and CCS would cover only pure service activities, as any contrary view would imply that the Union Government can levy service tax on the gross amount, including the value of transfer of property in goods also, which is constitutionally impermissible. The exemption notifications issued at the discretion of the executive are not sufficient to sustain the levy. The Hon’ble Apex Court has also observed that only with the introduction of WCS as a separate taxable service, statutory mechanism to exclude the value of transfer of property in goods has been prescribed.

3.6 The effect of the above decision is that CICS and CCS, as defined under clauses (zzq) and (zzzh), respectively, of sub-section (105) of the section 65 would cover only pure service contracts, without any transfer of property in goods.

3.7 In various decisions the importance of classification of services has been laid down and it has been held that once the show cause notice proposes demand of servicetax under a particular category of taxable service, the adjudicating/appellate authorities cannot travel beyond the scope of allegations in the show cause notice and confirm the demand under a different category of taxable service as the assessee was not at all put on notice on the new category of taxable service. These decisions were based on various decisions of higher appellate forums, where it has been held that the show cause notice is the foundation of allegations and the adjudication should be limited to the allegations. Further, as per Section 65A of the Act, classification of service shall be based on the specific entries and the more specific description has to be preferred. In this connection, he invited attention to C.B.E. & C.’s Circular No. 128/10/2010, dated 24-8-2010.

3.8 If show cause notices are issued demanding service tax under CICS/CCS, on composite contracts, involving transfer of property in goods, for the period post 1-6-2007, the said demands of service tax cannot be sustained, as these services would cover only pure service activities, as held by the Hon’ble Supreme Court in Larsen & Toubro (supra). At the stage of adjudication or appeal proceedings, the demand cannot be confirmed under WCS, when the show cause notice raises demand on CICS/CCS. Such an attempt would amount to travelling beyond the scope of the show cause notice, which is not permissible.

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(a) *The services provided by the appellant in respect of the projects executed by them for the period prior to 1-6-2007 being in the nature of composite works contract cannot be brought within the fold of commercial or industrial construction service or construction of complex service in the light of the Hon'ble Supreme Court judgment in Larsen & Toubro (supra) upto 1-6-2007*

(c) For activities of construction of new building or civil structure or new residential complex etc. involving indivisible composite contract, such services will require to be eligible to service tax liabilities under 'Works Contract Service' as defined under section 65(105)(zzzzq) *ibid.*

(d) *The show cause notices in all these cases prior to 1-6-2007 and subsequent to that date for the periods in dispute, proposing service tax liability on the impugned services involving composite works contract, under 'Commercial or Industrial Construction Service' or 'Construction of Complex' Service, cannot therefore sustain. In respect of any contract which is a composite contract, service tax cannot be demanded under CICS/CCS for the periods also after 1-6-2007 for the periods in dispute in these appeals. For this very reason, the proceedings in all these appeals cannot sustain."*

10. We find that the decision in *Real Value Promoters* (supra) is squarely applicable to the facts of the case in present appeals. The demand made under construction of residential complex service/construction of Commercial or Industrial Construction cannot therefore sustain.

11. We also find that service tax can be demanded only under 'Works Contract Service' from 1-6-2007 as held in the *Commissioner of Central Excise Kerala v. Larsen and Toubro* - [2015 \(39\) S.T.R. 913](#) (S.C.). The current demand is under Construction of Complex Services giving abatement on the gross amounts charged. It has been held by Supreme Court in para 17 of this judgment that "*a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In Gannon Dunkerley, 1959 SCR 379 = 2015 (330) E.L.T. 11* (S.C.), this Court recognized works contracts as a separate species of contract". For all these above reasons also the impugned order confirming a demand of service tax under construction of complex services is not sustainable.

12. The position that comes out very clearly, therefore, even prior to 1 June, 2007 and post 1 June, 2007, the nature of service rendered by the appellant was Works Contract Service and not Construction of Commercial or Industrial Construction or Construction of Complex Service. The show cause notice alleged that the appellant was providing Construction of Commercial or Industrial Construction /Construction of Complex Service and demand has also been confirmed under this category by the adjudicating authority. The impugned order, therefore, deserves to be set aside for this reason also since the demand made under a particular category of service found to be incorrect in a subsequent proceeding, cannot be sustained.

13. We also find that the extended period of limitation cannot be invoked in the present matter. We have carefully considered the facts on this point and we find that firstly the issue involved is of pure interpretation of legal provisions of Works Contract Service (Composition Scheme for Payment of Service Tax) Rules, 2007 particularly read with amended provision became effective from 7-7-2009. On the same issue there are number of litigation as can be seen in the above judgments and the tribunal has decided in favour

of the assessee therefore, it cannot be said that the Appellant had any *mala fide* intentions and have suppressed any fact with intention to evade payment of service tax. Further Appellant has filed periodical ST-3 return regularly and disclosed all the necessary details as may be required. The payment of tax under works contract service also disclosed by the appellant along with ST-3 return filed before the Jurisdictional Authority. In this circumstances charge of suppression or willful misstatement do not survive against the Appellant. On the basis of the above fact, we are of the clear view that extended period of limitation is also not invocable in the present matter. Therefore the demand in the impugned order is not sustainable not only on merit but also on limitation.

14. As per our above discussion and findings the impugned order is set aside. The appeal is allowed with consequential reliefs, if any, in accordance with law.

(Pronounced in the open court on 09.04.4024_)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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