CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70703 of 2021

(Arising out of Order-in-Original No.04-Commr/ST/GZB/20-21 dated 29/01/2021 passed by Commissioner of Central Goods & Services Tax, Ghaziabad)

M/s Ajay Kumar, **.....Appellant**
(KC-69, Kavi Nagar, Ghaziabad)

VERSUS

Commissioner of Central Goods &
Service Tax, Ghaziabad **....Respondent**
(CGO Complex-II, Kamla Nehru Nagar, Ghaziabad)

APPEARANCE:

Shri Sanjay Kumar, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70547/2024

DATE OF HEARING : 03 May, 2024
DATE OF PRONOUNCEMENT : 30 August, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.04/Comm /ST/GZB/20-21 dated2401.2021 of the Commissioner, Central Goods & Services Tax, Ghaziabad. By the impugned order following has been held:-

"ORDER

i) I confirm the demand of recovery of service tax, in total amounting to Rs.10,88,32,126/- [Rupees Ten crore Eighty Eight lakh Thirty Two thousand One hundred Twenty six only], under the provisions of Section 73 of the Finance Act, 1994, by invoking the extended period of time limitation

ii) *I confirm the demand of interest, at the appropriate rate, on the said confirmed amount of demand of recovery of service tax, under the provisions of Section 75 of the Finance Act, 1994.*

iii) *I impose penalty of Rs.10,88,32,126/- [Rupees Ten crore Eighty Eight lakh Thirty Two thousand One hundred Twenty six only]upon the said party under the provisions of Section 78 of the Finance Act, 1994;*

iv) *For the period w.e.f. 10.05.2008 onwards I refrain from imposing penalty under the provisions of Section 76 of the Finance Act, 1994 since I have already imposed penalty under the provisions of Section 78 of the Finance Act, 1994, supra; However for the period upto 09.05.2008, I impose a penalty on the party at the rate applicable under Section 76 ibid.*

v) *I also impose penalty of Rs.10,000/- [Rupees Ten thousand only] upon the said party under the provisions of Section 77 of the Finance Act, 1994 All the adjudged dues should be paid forthwith*."

2.1 Appellant having Service Tax Registration No. No.AAZPKO11 1HST001, is engaged in providing taxable services namely "Commercial or Industrial Construction Service and "Construction of Residential Complex Service"

2.2 During the Course of Audit, that appellant had constructed Kanshi Ram Multi Specialty Hospital Building at Greater Noida and received amounts of Rs.4,89,59,489.00 & Rs.49,77,49,882.00 respectively (totaling Rs. 54,67,09 ,371.00), but not paid service tax contending that construction of hospital is not for commercial purpose. The party failed to produce Certificate from the Competent Authority in support of their plea when asked for.

2.3 After further enquiries and investigations revenue was of the view that appellant has not paid Service Tax on the construction of said Hospital willfully suppressing the facts from the Department with the intent to evade the payment of Service Tax leviable thereon to the tune of Rs.10,88,32,126.00 as detailed here as under:

YEAR	Taxable Service	Rate of S.Tax	S. Tax	E.Cess	S.H.E.	Total S.Tax
2008-09	4,89,59,489	12%	58,75,139	1,17,503	58,751	60,51,393
2009-10	497749882	10%	4,97,74,988	9,95,500	4,97,750	5,12,68,238
2010-11	16,10,37,700	10%	1,61,03,770	3,22,075	1,61,038	1,65,86,883
2011-12	24,09,28,552	10%	2,40,92,855	4,81,857	2,40,929	2,48,15,641
2012-13	7,41,45,443	12%	88,97,453	1,77,949	88,975	91,64,377
2013-14 (up to 08/13)	76,50,455	12%	9,18,055	18,361	9,181	9,45,596
					TOTAL	10,88,32,126

2.4 Thus an amount of Rs.10,88,32,126.00 not paid by the party was liable to be demanded and recovered from the party by invoking the extended period as per proviso to Section 73(1) ibid along with interest under Section 75 ibid and they were also liable to penal action under Section 76, 77 and 78 ibid.

2.5 A Show Cause Notice dated 01.10.2013 was issued to the appellant them to Show Cause as to why :-

(i) the amount of Service Tax not paid/short paid by them to the tune of 10,88,32,126.00 (Rupees Ten Crore Eighty eight Lakh thirty two Thousand One Hundred Twenty six only) may not be demanded and recovered from them under proviso to Section 73(1) ibid, 1994 along with interest under Section 75 ibid.

(ii) Penalty under Section 76, 77 and 78 ibid may not be imposed upon them and provisions under proviso to Section 73 ibid may not be invoked

2.6 The show cause notice was adjudicated vide Order-in-Original No 04 /COMMR./ST/GZB/2014-15 dated 30.06.2014 whereby the said demand was ordered to be confirmed, along with accrued amount of interest, and equal penalty was imposed upon the said party under the provisions of Section 78 of the Finance Act and further, penalty was also imposed upon them under the provisions of Sections 77 (2) of the Act.

2.7 Being aggrieved, appellant preferred an appeal before the CESTAT which was disposed by the Final Order No 72664/2018 dated 19.11.2018 remanding the matter to the original adjudicating authority

2.8 Impugned order has been passed in the remand proceedings. Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Sanjay Kumar, Advocate for the appellant and Shri Manish Raj, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits:

CASE OF THE APPELLANT

- For the period 01.04.2008 to 30.06.2012 - Rs. 9,87,22,153/- the demand has been made under the category of Commercial Industrial and Construction services. The contracts executed by the appellant are composite in nature, involving transfer of material and provisioning of service. Thus as per decision of Hon'ble Apex Court in the case of L & T [2015 (39) STR 913 (S.C.)], the composite contract work is rightly classifiable under 'Works Contract Services. Since the demand was proposed under the wrong category, therefore the same is liable to be dropped on this ground. Reliance can be placed on the following decisions
    - National Building Construction Corporation Ltd. [2022 (66) GSTL 476 (Tri. - Kolkata)]
    - Rajendra Mittal Construction Company Private Limited [2022 (3) TMI 1259 - CESTAT New Delhi]
    - Manjeera Constructions Ltd. [2020 (6) TMI 260 - CESTAT Hyderabad]

  - Prime Developers [2018 (9) TMI 1149- CESTAT Chennai]
  - Shree Mohangarh Construction Co. [2018(4) TMI 619- CESTAT NEW DELHI]
  - Ashish Ramesh Dasarwar [2017 (9) TMI 1001- CESTAT MUMBAI]
  - Excel Enginnering [2017 (2) TMI 490- CESTAT ALLAHABAD] Department Appeal was dismissed by Hon'ble Apex Court, as reported at 2018 (12) G.S.T.L. J89 (S.C.)
  - URC Construction (P) Ltd. 2017 (50) S.T.R. 147 (Tri-Chennai)]

- The construction of hospital is not liable to be taxed being non-commercial in nature and falls outside the ambit of definition of WCS as defined u/s 65(105)(zzzza) of the Act. Reliance is placed on the following decisions:
  - Shapoorji Pallonji And Company Ltd.[2018 (5) TMI 487 - CESTAT MUMBAI]
  - N.S. Associates Pvt. Ltd. [2018 (2) TMI 1041- CESTAT NEW DELHI]
  - Kanwarji Construction Co. [2017 (12) TMI 1379 - CESTAT New Delhi]
  - Jyoti Sarup Mittal [2017 (3) G.S.T.L. 478 (Tri.- Del,)]
  - Harsh Construction Pvt.Ltd.[2014 (35) S.T.R. 617 (Tri.-Mumbai)]

- With effect from 01.07.2012, i.e. for the period 01.07.2012 to 31.08.2013 a demand of Rs 1,01,09,973/- has been made without invoking the provisions as effective during that period, i.e. Section 66B and Section 65B (44) of the Finance Act, 1994 (i.e.), thus the demand cannot be sustained. Reliance is placed on the the following decisions:
  - The Peoples Choice [2014 (36) STR 10 (Kar.)]

  - Super Spinning Mils Ltd [2015 (324) ELT 552 (Mad.)]

- That the activity carried out by the appellant has been exempted vide entry 12 of the Notification no. 25/2012-ST dated 20.06.2012, thus no service tax is payable in the present case

  12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of-

  (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

  Undisputedly GNIDA is a Governmental Authority, and it is clear beyond doubt that hospital buildings are predominantly meant for use as clinical establishment

- demand cannot be made on the value of material/ goods transferred during execution of contract.

  - Entry 92C of list I of Union list specifies 'Taxes on Services' i.e., Union can levy tax On services only and not on material/ goods.

  - The benefit of Rule 2A or Composition Scheme should be given to the appellant Reliance is placed on the following decisions:

    - Nitson & Amitsu Pvt.Ltd.[2018 (4) TMI 1322- CESTAT KOLKATA]

    - Mehta Plast Corporation [2014 (5) TMI 1131- CESTAT NEW DELHI]

    - Pooja Marbles [2016 (10) TMI 620- CESTAT NEW DELHI]

- Extended period not invokable as the issue involved is Interpretational issue and appellant had no malafide intentions.
  - Jyoti Buildtech (P) Ltd [2017 (3) GSTL 116 (Tri. - All.)]
  - K.D. Builders [2018 (6) TMI 799- CESTAT NEW DELHI]
  - Shanti Builders, [2018 (4) TMI 965- CESTAT NEW DELHI]
- Cum tax benefit should have been extended
- Interest under section could not have been imposed
- Penalty under section 76, 77 & 78 cannot be sustained.

3.3 Learned authorized representative reiterated the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Matter was remanded by the CESTAT making observations as follows:

"3. The appellant's contention is that as the execution works for construction of hospital involves material components, hence, classification, if any, will be "works contract service" and not "Commercial or Industrial Service". He secondly urges that there is no basis for the Commissioner to conclude that the hospital is constructed for commercial purposes. He further points out that from the Order-inOriginal, wherein the Authoritiy have recorded that the Greater Noida Authority is a State Government Undertaking constituted under Industrial Area Development Authority Act. However, the hospital is a Government Hospital run by the Government of Uttar Pradesh and Greater Noida Industrial Development Authority, jointly. The staff for the hospital are partly provided by the Government and partly by the Greater Noida Authority. The Greater Noida Authority

is an instrumentality of the State Government and not solely for making profit.

4. After considering the above grounds we find that in terms of the Hon'ble Supreme Court's decision in the case of Commissioner of Central Excise & Customs v. Larsen & Toubro Ltd. & Others [2015 (39) STR 913 (SC)]. It has been held that no tax liability would arise in respect of "Works Contract Service" for the period prior to 1st July, 2006. As such we are of the view that entire issue needs to be examined in the light of the said decision of the Hon'ble Supreme Court, for which matter, the appeal is required to be remanded. We 3 ST/54208/2014-CU[DB] order accordingly. However, it is observed that all the other issues relatable to merits or limitation aspect are being kept open for the assessee to contest the same before the adjudicating authority, for which purpose he would be afforded a reasonable opportunity."

4.3 Impugned order records findings as follows on the issue of classification of services prior to introduction of neagtiove list regime with effect from 01.07.2012:

"4.6 Classification of taxable service

4.6.1 I find that one of the issues contested by the party in their defence is about classification of services rendered by the party. The party has argued that the civil construction of hospital is classifiable under "Work Contracts Service" and not under " Commercial or Industrial Construction Service"

- *Section 65(25b) of the Finance Act, 1994 defines "commercial or industrial construction" as:*

(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

Further, Section 65(105) (zzq) of the Act specifies service to any person, by any other person, in relation to commercial or industrial construction as a taxable service

- *Section 65(105)(zzzza) of the Finance Act, 1994 specifies service to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams, as a taxable service. For the purpose of this sub clause, the Explanation appended thereto defines "Works contract" as meaning to be a contract wherein,*

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out,

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or turnkey projects including engineering procurement and construction or commissioning (EPC) projects.

4.6.2 I notice that in the impugned show cause notice the department has classified the said construction under "Commercial or Industrial Construction Service" whereas the party has argued the same is classifiable under "Works Contract service". A plain reading of the statutory definitions of the said two services viz. "Commercial or Industrial Construction Service", and "Works Contract Service" reveal that the said two services are intertwined amongst themselves. Both the taxable services in its definition exclude services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams, and but does not exclude services provided for construction of new building or a civil structure or part thereof primarily for the purposes of commerce or industry. Thus, I find that the service provided by the party for construction of hospital can be classified in either of taxable services i.e "Commercial or Industrial Construction Service" defined under Section 65(105)(z2q) or 'Works Contract service" defined under Section 65(105)(zzzza) ibid, as both equally merit consideration to be classified in any of the said two taxable services

4.6.3 I find that prior to introduction negative list regime; classification of taxable service has to done in accordance to the procedure prescribed under Section 65A ibid The said section 65A ibid entails that:

(1) The classification of taxable services shall be determined according to the terms of the sub-clauses (105) of section 65;

(2) When for any reason , a taxable service is prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-

(a) the sub-clause which provides the most specific description shall be preferred to subclauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service. which gives them their essential character, in so far as this criterion is applicable,

(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub- clauses which equally merits consideration

4.6.4 Further, as regard to classification of services, reference may here be made of M.F.(D.R.) letter bearing D.O.F. No. 334/1/2008-TRU, dated 29-2-2008 which interalia, specified the following

> *"3. Classification of taxable services*
>
> *3.1 Taxable services are defined separately under clause (105) of Section 65 of the Finance Act, 1994. Services are supplied as a single composite service by bundling number of different services or disaggregating a single supply into different components. Tax liability may vary depending upon the treatment of the transaction either as a single composite service or multiple supply of service. For the purpose of levy of service tax, a single composite service is to be classified under any one of the specified taxable services*
>
> *3.2 For the purpose of classification of a service covering number of separate services, a view has to be taken as to*

whether an individual service is merely a component of the overall supply or is itself a distinct and independent supply i.e., whether the component is merely ancillary to the principal supply or the component can be considered as separate taxable service in its own right. A service, which does not constitute for a customer an aim in itself but a means of better enjoying the principal supply, is considered as a supply ancillary to the principal supply

3.3 Section 65A states the principles for classification of taxable services Classification of a composite service is based on that component of the service which gives the essential character. There is a need to determine whether a given transaction is the one containing major and ancillary elements or the one containing multiple and separate major elements. In the case of a transaction containing major and ancillary elements, classification is to be determined based on the essential features or the dominant element of the transaction. A supply which comprises a single supply from an economic point of view should not be artificially split. The method of charging or invoicing does not in itself determine whether the service provided is a single service or multiple services. Single price normally suggests a single supply though not decisive. The real nature and substance of the transaction and not merely the form of the transaction should be the guiding factor for deciding the classification

3.4 .... .Specifying a service separately as a taxable service does not necessarily mean or suggest that services falling within the scope of newly specified service were not earlier classifiable under any one of the existing taxable services. Grouping of services under a specific taxable service may change. The scope and coverage of a taxable service are to be determined strictly in accordance with the language of the relevant statutory provision existing during the material period.

4.6.5 From the aforesaid provision of Section 65 A ibid and Board's circular the following facts become apparent that when taxable services cannot be specifically classified the provisions of Section 65A are to be applied for classifying a service.

4.6.6 Also, I found the same has been pronounced in the case of Ace Construction Mines & Mineral Coop. Society Vs CCE, Jaipur-II [2018 (9) G.S.T.L. 107 (Tri. - Del.)] :Held :Classification of services - Composite Services - Board circular clarifying application of Section 65A of Finance Act, 1994 while classifying composite service - Such services ought to be classified based on service having essential character to activity - Whether given transaction to be one containing main and ancillary element or one containing multiple and separate measurable elements, to be determined;

4.6.7 Thus, in the instant case provisions of Section 65A(2)(c) ibid shall be applicable as construction of hospital equally merit for consideration in either "Commercial or Industrial Construction Service" or "Works Contract service", and as sub-clause (zzq) of Section 65(105) ibid defining "Commercial or Industrial Construction Service" comes before sub-clause (zzz2a) of Section 65(105) ibid defining "Works Contract service", the construction of hospital merit classification under Commercial or Industrial Construction Service"

4.6.8 I have gone through cases relied upon by the party i.e. Manjeera Construction Ltd.Vs. Commissioner of Central Excise, Customs & Service Tax Hyderabad-II and URC Construction (P) Ltd.vs.Commr. of Central Excise, Salem dated 14.07.2016. The ratio of these judgments relied upon by the party is not applicable in the instant case as issue involved is related to period prior to 01.07.2006 whereas the period of the impugned case is of period 2008-09 onwards. Also, the decision of Apex court in the case of M/s Excel Engineering Vs. Commr of Central Excise & S.T., Meerut-Il, cannot be relied upon in the instant case as the dispute in it was *regarding classification between "Works contract service" and "Erection, Commissioning and Installation service", which is not the subject matter of discussion in the instant case.*

4.6.9 Further, Hon'ble CESTAT, Allahabad in its Final Order ST/A/72664/2018- CU[DB) dated 19.11.2018, has held that "After considering the above grounds we find that in terms of the Hon'ble Supreme Court's decision in the case of Commissioner of Central Excise & Customs v. Larsen &Toubro Ltd. & Others [2015 (39) STR 913 (SC)|. It has been held that no tax liability would arise in respect of Works Contract Service' for the period prior to 1st July, 2006. As such we are of the view that entire issue needs to be examined in the light / of the said decision of the Hon'ble Supreme Court, for which matter the appeal is required to be remanded".

On going through the impugned show cause notice, I notice that the demand period involved in the impugned show cause notice is post 01.07.2006 i.e. period involved is 01.07.2008 to 31.08.2013. As such, I find that the cited decision of Larsen & Turbo vis-a-vis taxability of "Works Contract Service" prior to 1slJuly, 2006 not applicable in the instant subject matter, as the period involved is way beyond 1st July 2006, even if said construction service is classifiable under "Works Contract Service" or otherwise."

4.4 From the order of the CESTAT remanding the matter back to the original authority it is evident that the matter was remanded to examine the matter with regards to classification of service in light of the decision of Hon'ble Apex Court in case of Larsen and Tubro, supra. Instead of examining the matter in manner as directed by CESTAT, commissioner has recorded the finding as above.

4.5 In case of National Building Construction Corporation Ltd. [2022 (66) GSTL 476 9T-Kol)] relying on the decision in case of Larsen & Toubro, following has been held:

> *7. We find that the issue can be decided on the point of classification alone. It is noted that the contract is inclusive*

of supply of goods. The Ld. Commissioner while taking note of the fact that the construction service is inclusive of supply of goods has extended the benefits of abatement to exclude the value of goods so as to arrive at the assessable value for raising demand of service tax. We find that the issue has already been examined in detail by the Tribunal in the case of URC Construction (P) Ltd. (Supra) has observed as below :-

"4. The primary contention of Learned Counsel for the appellant is that the decision of the Hon'ble Supreme Court in Commissioner of Central Excise and Customs, Kerala v. Larsen & Toubro Ltd. [2015 (39) S.T.R. 913 (S.C.)] has settled the law to the effect that composite contracts involving services and goods covered under four categories, i.e., 'erection, commissioning and installation', 'construction of building for commerce and industry', 'construction of residential complex' and 'turnkey projects', under Section 65(105)(zzzza) are liable to tax only with effect from 1st June, 2007. It is also contended that, at the adjudication stage, they had taken the plea that they being providers of 'works contract service' were not liable to tax as providers of 'commercial or industrial construction service'. This plea was not accepted by the adjudicating authority who proceeded to confirm the demand. Their further contention is that even though they are liable to tax with effect from 1st June, 2007 the show cause notice had not invoked the taxable entry rendering the determination of tax liability to be contrary to the provisions of Section 73 of the Finance Act, 1994. It was submitted by the learned Counsel that further arguments should be contingent upon a decision on these two issues.

5. Learned Authorised Representative was of the opinion that the facts of the appellant are distinguishable from the facts relating the judgment delivered by the Hon'ble Supreme Court in re M/s. Larsen & Toubro Ltd. According to him, the non-taxability of works contract service prior to 1st

June, 2007 was not contended before the adjudicating authority, who, therefore, had been denied the opportunity of ascertaining the nature of contract entered into by the appellant and the supply of goods as a component of the contract. He, therefore, submitted that the contracts require re-examination for which matter would have to be remanded back to the original authority for scrutiny.

6. On the claim of the appellant before the original authority that they were providers of 'works contract service', which is taxable only from 1st June, 2007, the finding in the impugned order that - 'having failed to establish with documentary evidence that there is a transfer of property of goods involved in the execution of the contract which was charged to tax on sale of goods. On this basic criterion, having not been fulfilled, applicability to tax of Works Contract Service involves a remote question. Their contention is, therefore, superfluous being devoid of any substance of law and, therefore, fails before the altar of law' was relied upon by the Learned Authorised Representative to reiterate that the adjudicating authority had no means of ascertaining that these were composite contracts.

7. Having heard both sides on this limited issue, we are of the opinion that the resolution of this dispute lies within the narrow compass of taxability as 'works contract service'. We note the contention of Learned Counsel that the adjudicating authority had perused the contracts on which the demand was raised in the show cause notice and rendered a clear finding, including on the allegation of abatement availed in Notification No. 15/2004-S.T., dated 10th September, 2004 and Notification No. 1/2006, dated 1st March, 2006; the allowance of abatement is a clear demonstration of ascertainment that supply of goods did form a part of the contract. Therefore, we have no hesitation in accepting the said contracts in dispute to be composite contracts for supply of both goods and services.

8. We note that the findings of the adjudicating authority do accept that supply of goods were involved in the contracts and that he was merely sceptical that VAT liability had been discharged on the goods supplied in the contract; whether VAT liability was discharged on the goods or not is irrelevant in the light of the decision of the Hon'ble Supreme Court in re Larsen & Toubro and Ors. We, therefore, have to merely determine the scope of taxability of 'works contract service' rendered before and after 1st June, 2007 under the Finance Act, 1994.

9. The Hon'ble Supreme Court in re Larsen & Toubro & Ors. has decided thus

'24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.'

10. In view of this specific decision and the admitted claim of the appellant that they are not providers of 'commercial *or industrial construction service' but of 'works contract service', no tax is liable on construction contracts executed prior to 1st June, 2007.*

11. Insofar as demand for subsequent period till 30th September, 2008 is concerned, it is seen that neither of the two show cause notices adduce to leviability of tax for rendering 'works contract service'. On the contrary, the submission of the appellant that they had been providing 'works contract service' had been rejected by the adjudicating authority. Therefore, even as the services rendered by them are taxable for the period from 1st June, 2007 to 30th September, 2008 the narrow confines of the show cause notices do not permit confirmation of demand of tax on any service other than 'commercial or industrial construction service'. It is already established in the aforesaid judgment of the Hon'ble Supreme Court that the entry under Section 65(105)(zzd) is liable to be invoked only for construction simpliciter. Therefore, there is no scope for vivisection to isolate the service component of the contract.

The above views have also been taken by the Tribunal in the following cases :-

- *Ajit India Pvt. Ltd. v. CST, Mumbai - 2018 (19) G.S.T.L. 659 (Tri. - Mum.)*
- *India Guniting Corporation v. CCT, New Delhi - 2021 (52) G.S.T.L. 174 (Tri. - Del.)*
- *OTIS Elevator Co. (India) Ltd. v. CST, Mumbai - 2021 (51) G.S.T.L. 386 (Tri. - Mum.).*

8. Since the issue is no longer res integra, the instant demand of service tax under the category of Commercial or Industrial Construction cannot be sustained and hence, set aside. Since the appeal is being decided on merits for the reasons stated above, we refrain from making any observation on the issue of limitation.

4.6 From the above decision of the Hon'ble Apex Court and tribunal it is quite evident that the services which are not service simpliciter but also involve the transfer in property of goods associated with those services are "Work Contract Services" and liable to be taxed under that category. Impugned order has completely misdirected itself as it ignores the above decision of Hon'ble Apex Court in arriving at the contrary finding even when directed by CESTAT. We are in agreement with the submission made by the appellant that the services provided by them are work contract services and should be subject to service tax under that category only.

4.7 This tribunal has in catena of decisions referred to by the Appellant has held that the show cause notice lays down the foundation of the proceedings initiated, hence demand could have been made within the parameters specified in the show cause notice. As no demand has been made by the revenue by classifying the services provided by the appellant under the category of work contract services, then the same could not have been determined under the said category.

4.8 In case of 3I Infotech Ltd. [**2018-TIOL-3559-CESTAT-MUM**] Mumbai bench has observed as follows:

"10.13 In respect of Commissioner confirming the demand under the category of Intellectual Property Services for period prior to 16.05.2008 and under the category Information Technology Services from 16.05.2008 in respect of 1st show-cause notice party has relied upon the decisions in the following cases to argue that such confirmation of demand is not tenable:-

(i) Mahakoshal Beverages Pvt. Ltd. v. CCE, (2006) 6 STR 148 (Tri. – Bang.) affirmed by Karnataka High Court in CCE vs. Mahakoshal Beverages Pvt. Ltd(2014) 33 STR 616 (Kar)

(ii) Balaji Contractor v. CCE (2017) 52 STR 259 (Tri-Del.))].

(iii) Enpee Earthmovers vs. C.C.E., Goa(2012) 27 S.T.R. 48 (Tri. – Mumbai)

(iv) DHL Logistics Pvt. Ltd. vs. CST, Mumbai – I (2014) 36 S.T.R. 874 (Tri. – Mumbai)

(v) Marubeni India Pvt. Ltd v/s CST (2016) 45 STR 549 (Tri Del)

(vi) Warner Hindustan Ltd v/s CCE (1999) 113 ELT 24 (S.C.)

10.14 Relying on the above cases, the party had submitted that the demand cannot be made ahead which is not proposed in the show-cause notice. There is no dispute in that reference to the proposition made. It is settled principle in law to proceed against any person, the basic requirement is that he should be put to sufficient notice about his contravention and allowed to make proper defense. Since the first show cause notice dated 19.10.2009 has been issued demanding service tax under the category of "Management, Maintenance & Repair Service", the confirmation of demand under any other category, namely "Intellectual Property Right Services" for the period prior to 16.05.2008 cannot be justified and the order to that extent is definitely not maintainable."

Upholding the said Hon'ble Supreme Court has vide order dated 14.08.2023 in Civil Appeal No 4007 of 2019 [2023-TIOL-125-SC-ST] filed by revenue has held as follows:

"APPEAL OF REVENUE

9. We have given careful consideration to the submissions. Firstly, we deal with the appeal preferred by the Revenue. The appeal is confined to the first show cause notice. The first show cause notice covers the period from 1st April 2004 to 31st March 2009. The demand under the said show cause notice dated 19th October 2009 was for taxable service of "Management, Maintenance and Repair". The CESTAT found that the service of transfer of intellectual property rights was classifiable under the *category of "Intellectual Property Service" till 16th May 2008 and was taxable in terms of Section 65(105)(zzr) of the Finance Act. In the Union Budget of 2008¬09, a new service under the head "Information Technology Software" was defined separately under Section 65(53a) of the Finance Act. The said service was made taxable in terms of Section 65(105) (zzzze). Thus, the transfer of the right to use the software was covered by the service classifiable as "Information Technology Software" with effect from 16th May 2008. In fact, the CESTAT relied upon the clarification given by CBEC by Circular dated 29th February 2008 which clarifies the position, as stated above.*

10. It is pertinent to note here that the first show cause notice dated 19th October 2009 contained a demand for service tax under the taxable service of "Management, Maintenance and Repair" and the rest of the three notices contain a demand under classifiable service "Information Technology Software". In the facts of the case, the demand was made on account of services provided by the assessee in respect of the supply of third¬party software, software developed in-house or customised software. The assessee had temporarily transferred the right to use the said software to their clients. Thus, prior to 16th May 2008, such service was classifiable under the category of "Intellectual Property Service" and with effect from 16th May 2008, it was classifiable under the category of 'Information Technology Software". In fact, the management, maintenance and repair services of computer hardware as well as software under the annual maintenance contract was covered by the category of "Management, Maintenance or Repair" services which was defined under Section 65(64) of the Finance Act. Thus, the classification mentioned in the first show cause notice was completely erroneous. Therefore, CESTAT was right in holding that the first show cause was illegal.

Elementary principles of natural justice required that the adjudication on the basis of show cause notice should be made only on the basis of classification stated in the show cause notice. Assessee cannot be subjected to a penalty on the basis of a show cause notice containing a completely erroneous category of service. Therefore, the demand made on the basis of the first show cause notice was illegal. Therefore, we find that there is no merit in the appeal preferred by Revenue."

4.9 By Order dated 31.01.2024 the review petition filed against this order have been dismissed by Hon'ble Apex Court observing as follows:-

> *"Delay condoned. Application for listing the review petions in Open Court are rejected. We have perused the Judgment dated 14th August, 2023 which has been sought to be reviewed. There is no error apparent on the record. Even Otherwise, there is no ground for review.*
>
> *Review Petitions are dismissed."*

4.10 As we find that the entire demand has been made by classifying the said service for the entire period of dispute under the category of **"Commercial Industrial and Construction Service",** without reference to any other provision of Finance Act, 1994, both for the period prior to 01.07.2012 or thereafter, in view of the above decision of the Hon'ble Apex Court we do not find any merits in the impugned order.

4.11 As we have decided the issue on the classification of services and the maintainability of show cause notice under the category of **"Commercial Industrial and Construction Service",** we are not taking up the other issues decided by the impugned order or raised in the appeal and during the course of arguments.

5.1 Appeal is allowed.

(Pronounced in open court on- 30 August, 2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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