IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. ST/474/2012-CU[DB]

(Arising out of Order-in-Appeal No. 03-ST/GZB/2012 dated 18/01/2012 passed by Commissioner of Central Excise, Customs & Service Tax (Appeals), Ghaziabad)

M/s Sharma Construction Co. **Appellant**

Vs.

Commissioner of Central Excise & Service, Ghaziabad **Respondent**

Appearance:

Shri Rajesh Chhibber, Advocate, for Appellant
Shri Mohd. Altaf, Assistant Commissioner (AR), for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing & Date of Decision : 23/01/2018

FINAL ORDER NO-72748/2018

Per: Anil Choudhary

The appellant-assessee is in appeal against the impugned Order-in-Appeal, by which the Commissioner (Appeals) has upheld the demand of Service Tax with interest and penalty under Sections 76, 77 and 78 of the Act.

2. The brief facts of the case are that the appellant is engaged in construction of petrol pumps for Indian Oil Corporation Ltd. According to the Revenue, for the period June, 2005 to August, 2007, the said activity falls under the category of "Erection, Commissioning & Installation Service" under Section 65(39a) of the Finance Act, 1994. As it was

found that the appellants have not paid the Service Tax, therefore, the demand was proposed for the extended period vide SCN dated 22nd October, 2010, invoking the extended period of limitation.

3. Heard the parties.

4. It has been contended by the learned counsel for the appellant-assessee that it is admitted fact on record that M/s. IOCL were deducting work contract tax in respect of the above service and had been making payment to the appellants after deducting the amount of the work contract tax as paid by them (paid by M/s. IOCL) and in the fact of such payment of work contract tax, the instant services cannot be subjected to any service tax.

5. It is further urged by the learned counsel that in view of the ruling of Hon'ble Supreme Court in the case of *Commissioner of Central Excise* v. *Larsen & Toubro Ltd.* - 2015 (39) S.T.R. 913 (S.C.). Admittedly, the appellants have used materials for execution of the works contract and as such the work and/or service executed by them is squarely classifiable under the category of Works Contract Service under Section 65(105)(zzzza) and the Service Tax demanded under 'Erection, Commissioning & Installation Service' was not legal and proper.

6. Learned AR for Revenue have relied upon the Order-in-Original and the grounds of appeal in the appeal of Revenue.

7. Having considered the rival contentions, we find that the learned Commissioner have erred in holding that service tax is payable in spite of goods/material being used in execution of the contract for Indian Oil, supplied by the assessee-contractor and admittedly VAT-"works contract" tax have been paid. Accordingly, we find that the classification adopted in the impugned order-'Erection, Commissioning and Installation Service' is not tenable and palpably wrong. Accordingly, we hold that the service rendered by the appellant is classifiable under 'Works Contract Service' as defined under Section 65(105)(zzzza).

8. Accordingly, the impugned order is set aside and the appeal filed by appellant-assessee is allowed with consequential benefits to the appellant, in accordance with law. Since we allow appeal on merits itself we are not going into the issue of limitation.

(Dictated in Court)

(Anil G. Shakkarwar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

Ansari