FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 07/09/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/70854/2017-CU[DB] dated 12/04/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	ST/51663/2014	**Shiva Engineering Works** Village Parichha,kanpur Road JHANSI U.P
		Name and Address of Respondent
2		C.C.E. & S.T.-Kanpur 117/7...SARVODYA NAGAR, KANPUR, UTTAR PRADESH-208005

Copy To

3Advocate(s) / Consultant(s):

B. K.Singh, (Advocate)
D-40, 1st floor, South
Extenstion Part-I,New Delhi-
110049

4 Bar Association, CESTAT, Allahabad

5 Director Publications. Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH: ALLAHABAD

DIVISION BENCH

ST/51663/2014-CU(DB)

Date of Hearing/Decision: 12/4/2017

[Arising out of Order-in-Appeal No. KNP-EXCUS-000-COM-016-13-14 dated 01.12.2013 passed by Commissioner, Central Excise and Service Tax, Kanpur]

Shiva Engineering Works — Appellant

Vs.

C.C.E. & S.T.- Kanpur — Respondent

Appearance:

Present for the Appellant: Shri B.K. Singh (Advocate)
Present for the Respondent: Shri Rajeev Ranjan (Joint Commissioner) A.R.

Coram: Hon'ble Shri Anil Choudhary, Judicial Member
Hon'ble Shri Anil G. Shakkarwar, Member (Technical)

Final Order No. 70854\2017

Per: Anil Choudhary

The Appellant are a partnership firm registered with the department bearing PAN based registration No.AAXFS7656PST001 with effect from 20/4/2005 for the taxable service falling under the category of "Construction of Industrial & Commercial Building and Civil Structures". During the course of audit of accounts of the Appellant for the period July 2007 to Marc h 2012 by the officers of Central Excise and Service Tax, Commissionerate Kanpur, it was observed by the officers that the Appellant were providing taxable services to various clients viz M/S BHEL Jhansi, M/s Utility Energy Tech, &

Engineers Pvt. Ltd, M/s Tata Projects Ltd, Kota Rajasthan; M/s Areva T & D" India Ltd., Noida Reliance etc. under works contract given by these firms, without issuing invoice or any other document in lieu of services provided to its clients as laid down under Rule 4A of Service Tax Rules, 1994.

2. On enquiry, the Appellant vide letter received on 03/02/2012, informed the department that measurement of work was done by their site supervisors/engineers as well as engineers of the service recipient jointly and after measurement of work invoices/measurement sheets/pay sheets were finalized and payment was released accordingly. Scrutiny of Annual Accounts & Ledgers, service tax details and payment sheets of the appellant for the period from 2007-08 to 2011-12 reflecting the amounts received during a particular financial year from different service recipients, revealed that the payment sheets, signed by the representative of the Appellant, contained amounts of two types, i.e. the amounts on which service tax was paid by the appellant and the amounts on which service tax was not paid. On being asked as to why service tax was not paid on some amounts received from their clients, it was informed by the appellant that they were also providing non-taxable service i.e. supply of materials etc., hence service tax was not paid on such amount. The department was of the view that the Appellant had neither disclosed these amounts in their ST-3 returns submitted to the department nor paid Service Tax on value of such materials claimed to have been supplied to their clients (i.e. service receivers).

3. The Appellant had got them registered as service tax assessee on 20/4/2005 but started paying service tax from July'07 onwards. Further, while they failed to produce acknowledgement of having filed returns to the jurisdictional Superintendent of Central Excise & Service tax, they produced postal/courier receipts dated 23.4.2010, 25.4.2011 and 25.10.2011 in support of their having filed/sent the returns for the period ending Mar'10-Mar'11 and Sep' 11 respectively. From the perusal of year wise payment sheets produced by the Appellant, it was confirmed that they had paid Service Tax on payments received from their service recipients @ 4.08% 4.12%, 12.24%, 12.36% (during financial, year 2007-08); 2.12%, 4.12%, 4.08%, 12,36%, 10-30% (during the financial year 2008-09), 4.08%, 4.12%, 10 30% (during the financial year 2009-10), 4.12%, 10.30% (during the financial year 2010-11 and 10.30% (during the financial year 2011-12). As observed by the officers, service Tax at the aforesaid rated was paid by the Appellant only on a part of payment received for providing the services, and not on the gross amount received for providing above services.

4. On being asked by the department vide letter dated 18/6/2012 about above variation in the rates of Service Tax payments, the Appellant informed that service tax was paid as received by them from their service recipients. The applicable rate of service tax for the service 'Construction of industrial and Commercial Buildings and Civil Structures' for which the Appellant had obtained registration under service tax law, was 12.24% 12.36% and 10 30% during the relevant

period, after availing an abatement of 67% on the gross amount received.

5. Considering the definition of the terms 'Commercial & Industrial Construction Services' and 'Work Contract', the department was of the view that the Appellant had provided services to their clients/customers in respect of execution of a particular work under 'work contract'. After referring to the Terms of contract and also considering the Rule 3(1) of the Works Contract (composition scheme for payment of service tax) rules 2007, the department was of the view that whosoever is liable to pay service tax in relation to work contract service, shall have the option to discharge service tax liability on the work contract services provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act by paying an amount equivalent to four percent of the gross amount charged for the works contract.

6. The department alleged that the Appellant, instead of following a uniform structure, sometimes paid service tax @ 4.12% under composite scheme and sometimes paid service tax at full rate. It was further alleged that the Appellant had neither opted for composite scheme as required under para 3 of the said notification 32/2007-ST dated 22/05/2007 nor remained under this scheme for entire contract as evident from the ST-3 returns. Even in the cases where service tax was paid under composite scheme, it was not paid on the gross amount received by them as provided under Para 4 of the above

Notification. According to the department, the Appellant were not entitled for benefit under composite scheme, in terms of Notification No. 32/2007-ST dated 22.5.2007.

7. Considering the Act and the clauses in the agreements entered into between the appellant and other parties and in particular the agreement with M/s Tata Project Ltd., the department came to the conclusion that nature of services provided by the Appellant were covered under the 'Work Contract Service' under section 65(105) (zzzza) of the Finance Act, 1994 and not under "construction services in respect of commercial or industrial building and Civil structures." Accordingly to the department, the appellant was not allowed to keep on changing the option of paying duty under composition scheme or otherwise which was reflected in their return. It was clear that the Appellant had at times paid service tax @ 2.08% and 4.12%, which was applicable to works contract and *under Composition Scheme for payment of Service Tax Rules, 2007*, but several occasions, service tax was paid @ 10.30% and 12.36% of the calculated value. It was further alleged that the Appellant had not produced any records to show that they had exercised any option as required under Notification No. 32/2007-ST dated 22/5/2007 and therefore, they were not entitled for any relaxation in service tax rates and were required to pay service tax on gross amount received by them at full rate of service tax. As per service tax law, service tax was required to be paid on the gross amount irrespective of the fact whether the material was supplied by the service recipient or the service provider. The department negated

the contention of the appellant that in cases where the material was supplied by the recipient of the service, the said value was not to be included for assessing the tax liability. The reasoning advanced by the department was that the Appellant failed to produce any evidence in support of their claim and even if it was presumed that the material was supplied, the exemption for this value from gross value was not available as per Service Tax (Determination of Value) Rules, 2006.

8. Heard the parties. As the impugned order is ex-parte, and appellant had sought time by filling representation and no opportunity was allowed to file written submission and evidence. We find there is Violation of Principle of Natural Justice. Also law on works contract stands clarified subsequently by this Tribunal Larger Bench in Lanco & by Apex Court in *Larson & Toubro Ltd.*

9. Accordingly we allow this appeal by way of remand with direction to the Adjudicating authority to pass a reasoned order, after hearing the Appellant. Appellant is also directed to appear before the Adjudication Authority, with reply to show cause notice, within the period of 60 (Sixty) days from receipt of this order and seek opportunity of hearing. Appeal allowed by way of remand.

(Dictated and Pronounced in the open Court)

-Sd/-
(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

(K. Gupta)

प्रमाणित प्रति/Certified True Copy
14/09/17
सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण(C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38 M. G. MARG, ALLAHABAD-211001