CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 447 of 2010

(Arising out of Order-in-Original No.42/2009/ST dt. 13/11/2009 passed by Commissioner of Central Excise and Customs, Cochin)

M/s. KVJ Builders & Developers P. Ltd.,
Priya Estate, NH Bye Pass,
Cochin. **................ Appellant(s)**

VERSUS

Commissioner of Central Excise and Customs,
Cochin Commissionerate,
CR Building, IS Press Road,
Cochin – 682 018. **................ Respondent(s)**

Appearance:

Mrs. Vani, Advocate for the Appellant
Mr. Neeraj Kumar, Superintendent (AR) for the Revenue.

Coram:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

<u>Final Order No. 20044 / 2024</u>

Date of Hearing: 13.09.2023

Date of Decision: 19.01.2024

Per: Dr. D. M. Misra

This is an appeal filed against the Order-in-Original No.42/2009/ST dated 13.11.2009 passed by the Commissioner of Central Excise and Customs, Cochin.

2. Briefly stated the facts of the case are that during the relevant period 16/06/2005 to 31/03/2008, the appellant had provided

construction services in respect of the project 'Skyline Kottayam' classifying under the category of 'Construction of Complex Service' or 'Commercial or Industrial Construction Service' defined under Section 65 (105) (zzzh) of the Finance Act, read with Section 65(30) of the Finance Act, 1994. The appellant accordingly discharged service tax after availing abatement of 67% of the gross amount charged from their clients as per Notification No.1/2006-ST dt. 01/03/2006. After introduction of service tax under Works Contract Service w.e.f. 01/06/2007, they started discharging service tax under composite scheme as 'Works Contract Service' w.e.f. January 2008. A show-cause notice was issued to the appellant proposing to deny the benefit of exemption notification and for recovery of the service tax short paid for the said period along with interest and penalty. On adjudication, the demand was confirmed with interest and penalty. Hence the present appeal.

3. The learned advocate for the appellant has submitted that during the period in dispute, the appellant had provided services which includes both labour as well as materials and correctly classifiable under 'Works Contract Service'. However, the service tax was paid by them under the taxable category of 'Construction of Residential Complex Services' during the said period after availing abatement of 67% on the gross amount charged. After introduction of Works Contract Service w.e.f. 01/06/2007, the appellant had discharged service tax under the composite scheme under Works Contract Service; however, the learned Commissioner rejected their contention for payment of service tax under Works Contract Service observing that the said Works Contract Service is not applicable to on-going contracts not completed on or before 01/06/2007. Also, he

has denied the benefit of Notification No.01/2006-ST dt. 01/03/2006 to the appellant. She submitted that the issue is squarely covered by the judgment of Hon'ble Supreme Court in the case of ***CCE & C, Kerala Vs. Larsen and Toubro Ltd***. [2016 1 SCC 170]. It is her contention that the said judgment has been followed by the Hon'ble Supreme Court in the case of ***Total Environment Building Systems (P) Ltd. Vs. Deputy Commissioner of Commercial Taxes*** [2022(63) GSTL 257 (SC)]. It is her contention that service rendered being in the nature of 'Works Contract Service', hence for the period prior to 01/06/2007, it cannot be chargeable to service tax levy, and for the period after 01/06/2007, since they had discharged service tax under 'Works Contract Service'; hence service tax for the period prior to 01/06/2007 not applicable and therefore the service tax paid under the composite scheme is in accordance with law.

4. Learned AR for the Revenue reiterated the findings of the learned Commissioner.

5. Heard both sides and perused the records.

6. We find that the learned Commissioner has confirmed the demand under 'Construction of Complex Services' for the period 16/06/2005 to 31/03/2008 denying the benefit of Notification No.01/0206-ST dated 01/03/2006. It is not in dispute that for the period prior to 01/06/2007, the appellant has rendered construction of complex services, which included both material as well as service components; hence squarely fall under the category of 'Works Contract Service'. Also, during the course

of hearing, the appellant has submitted the VAT returns filed by the appellant during the relevant period under Works Contract Service. In these circumstances, denial of benefit of composite scheme under Works Contract Service w.e.f. 01/06/2007, is bad in law and levy of service tax prior to 01/06/2007. when the services are in the nature of 'Works Contract Service' also cannot be sustained in view of the judgment of the Hon'ble Supreme Court in the case of ***Total Environment Building Systems (P) Ltd. Vs. Deputy Commissioner of Commercial Taxes*** [2022(63) GSTL 257 (SC)]. Their lordships in the said case held as follows:-

> ***12.*** *What was said by the Constitution Bench in Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 and Keshav Mills Co. Ltd. v. Commissioner of Income Tax, Bombay North, Ahmedabad, AIR 1965 SC 1636, on the principle of stare decisis clearly bind us. The judgment of this Court in the case of Larsen and Toubro Limited (supra) has stood the test of time and has never been doubted earlier. As observed hereinabove, the said decision has been followed consistently by this Court as well as by various High Courts and the Tribunals. Therefore, if the prayer made on behalf of the Revenue to re-consider and/or review the judgment of this Court in the case of Larsen and Toubro Limited (supra) is accepted, in that case, it will affect so many other assessees in whose favour the decisions have already been taken relying upon and/or following the decision of this Court in the case of Larsen and Toubro Limited (supra) and It may unsettle the law, which has been consistently followed since 2015 onwards. There are all possibilities of contradictory orders. Therefore, on the principle of stare decisis, we*

are of the firm view that the judgment of this Court in the case of Larsen and Toubro Limited (supra), neither needs to be revisited, nor referred to a Larger Bench of this Court as prayed, i.e., after a period of almost seven years and as observed hereinabove when no efforts were made to file any review application requesting to review the judgment on the grounds, which are now canvassed before this Court.

13. *At this stage, it is required to be noted that one of the appeals being Civil Appeal No. 6523 of 2014 filed by M/s. G.D. Builders is against the decision of the Delhi High Court in the case of G.D. Builders v. Union of India reported P). It is to be noted that the said decision of the Delhi High Court in the case of G.D. Builders (supra) has been specifically overruled by this Court in the case of Larsen and Toubro Limited (supra). The decision of the Delhi High Court in the case of G.D. Builders (supra) has been considered by this Court in the case of Larsen and Toubro Limited (supra) in paragraphs 28, 29, 30, 32, 33, 38 and 39 and ultimately, this Court opined that the decision of the Delhi High Court in the case of G.D. Builders (supra) is in fact contrary to a long line of decisions. It is further specifically observed and held that the decision of the Delhi High Court in the case of G.D. Builders (supra) is wholly incorrect in its conclusion that the Finance Act, 1994 contains both the charge and machinery for levy and assessment of service tax on indivisible works contract. It is reported that while deciding the group of matters in the case of Larsen and Toubro Limited (supra), the papers of the appeal filed by M/s. G.D. Builders being Civil Appeal No. 6523 of 2014 were also called and the Learned Counsel* *appearing on behalf of the G.D. Builders was also heard. It appears that, however, the Civil Appeal No. 6523 of 2014 filed by M/s. G.D. Builders against the decision of the Delhi High Court has not been specifically disposed of. Therefore, once the decision of the Delhi High Court in the case of G.D. Builders (supra), which is the subject matter of Civil Appeal No. 6523 of 2014 has been held to be wholly incorrect, Civil Appeal No. 6523 of 2014 filed by M/s. G.D. Builders has to be allowed and the judgment and order passed by the Delhi High Court has to be quashed and set aside.*

7. Following the above said judgment, we set aside the impugned order and allow the appeal with consequential relief, if any.

(Pronounced in open court on 19.01.2024)

(D.M. Misra)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

Raja...