CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Application(s) Involved:

ST/Additional Evidence/21236/2018 in ST/459/2008-DB

Appeal(s) Involved:

ST/459/2008-DB

[Arising out of Order-in-Original No. 6/2008-ST dated 18/06/2008 passed by the Commissioner of Central Excise & Customs, Cochin]

SK Boilers Pvt. Ltd. East Fort Gate, Manjali Centre, PB No.53, Thripunithura	**Appellant(s)**

Versus

C.C., C.E.& S.T-Cochin C.R Building, I.S Press Road, Ernakulam, Cochin – 682 018, Kerala	**Respondent(s)**

Appearance:

Shri. Cherian Punnoose, Advocate A.K.B. Associates #311-312,'Commerce House' '9/1, Cunningham Road, Bangalore – 560 052 Karnataka	For the Appellant
Shri. Madhup Sharan, Asst. Commissioner (AR)	For the Respondent

Date of Hearing: 24/06/2019

Date of Decision: 18/07/2019

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20555 / 2019

Per : S.S GARG

The present appeal is directed against the impugned order dated 18.06.2008 passed by the Commissioner whereby the Commissioner (Appeals) has confirmed the demand of Rs. 56,45,623/- (Rupees Fifty Six Lakhs Forty Five Thousand Six Hundred and Twenty Three only) under Section 73(2) of the Finance Act 1994 for the period from 01.07.2003 to 31.03.2006 and also confirmed the demand of interest under Section 75 and imposed penalties under Section 76, 77 and 78. Briefly the facts of the present case are that the appellants are registered under Section 69 of the Finance Act under the classification of services "Maintenance or Repair Services" which was brought under Service Tax net by the Finance Act, 2003 w.e.f. 01.07.2003 vide Notification No. 7/2003 dated 20.06.2003. The appellant has paid the service tax and filed half-yearly return in Form ST-3 in terms of Section 70 of the Finance Act. On the basis of an investigation/enquiry by invoking the provisions of Section 14 of the Central Excise Act, 1944 and on the basis of a contract produced, a show-cause notice dated 09.05.2007 was issued to the appellant on the following grounds:

(a) On scrutiny of the Contracts entered by the appellant with different clients it was seen that the nature of the contracts involved such services as re-tubing of Air pre heater, replacement of conveyor structural, re-tubing of evaporated tubes, fabrication, erecting, testing and commissioning of fire water system, commissioning services, installation service etc.

(b) The contracts contain only consolidated amounts giving no separate account for distinct work.

(c) The appellant was not only providing the services of erection but also the services of commissioning and installation. Therefore, the services provided by the assessee during the period from 01.07.2003 to 31.03.2004 was taxable under the category of Commissioning or Installation Services.

(d) The appellant had received Rs. 1,14,62,765/- (Rupees One Crore Fourteen Lakhs Sixty Two Thousand Seven Hundred and Sixty Five only) for the period from 01.07.2003 to 31.03.2004 from the clients towards Installation charges and the appellant was liable to pay service tax at the rate of 8% on Rs. 1,14,62,765/- (Rupees One Crore Fourteen Lakhs Sixty Two Thousand Seven Hundred and Sixty Five only) which worked out to Rs. 9,17,021/- (Rupees Nine Lakhs Seventeen Thousand and Twenty one only).

(e) On scrutiny of the records it was noticed that the assessee was not paying service tax on the gross amount charged claiming abatement on the gross value under Notification 19/2003 ST dated 21.08.2003 and 1/2006 ST dated 01.03.2006 and availing cenvat credit for payment of service tax and it appeared that the appellant was not eligible to claim abatement from value as well as cenvat credit facility. As such it appeared that there was a short payment of Rs. 46,57,842/- (Rupees Forty Six Lakhs Fifty Seven Thousand Eight Hundred and Forty Two only) towards service tax + Rs. 76,768/- (Rupees Seventy Six Thousand Seven Hundred and Sixty Eight only) towards education cess totally amounting to Rs. 47,28,602/- (Rupees Forty Seven Lakhs Twenty Eight Thousand Six Hundred and Two only) during the period 01.04.2004 to 31.03.2006.

Appellant filed reply to the show-cause notice and after following the due process, Commissioner passed the impugned order dated 18.06.2008 and confirmed the demand along with interest and penalties.

2. Heard the rival contentions of both the parties and perused the documents and also gone through the decisions referred during the course of arguments.

3. Learned counsel for the appellant submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the activity carried out by the appellant falls under the taxable category of 'works contract service' and hence not liable to service tax during the period in dispute. He further submits that for any activity to come under the taxable service of 'works contract service' which was introduced w.e.f. 01.06.2007 there should be a transfer of property in goods and the contract should be for the purpose of carrying out any of the identified services. Once these conditions are satisfied then the activity would fall under the category of 'Works Contract Service' and not under any other category. He also submits that in the present case there is no dispute that the work undertaken by the appellant was for fabrication, supply of materials, installation and commissioning of various items like Air pre Heater, replacement of conveyor or structural, retubing, Fire water system. The Commissioner in the Order-in-Original had in fact given a finding that there was supply of

materials and provision of labour. Further the Commissioner in paragraph 25 and 26 of the Order-in-Original had also accepted the fact that the appellants have availed the credit of duty paid on inputs used for providing services. Further the purchase order clearly states that the order is for fabrication, supply of materials and erection, installation and commissioning. The Commissioner in the impugned order denied the benefit of Notification No. 1/2006 ST and 12/2003 ST on the ground that the appellants have availed the credit of duty paid on inputs used for providing the output services and hence the condition of Notification has been violated. He further submitted that the appellants were registered contractors of the Kerala State authorities and also had paid sales tax/VAT under Kerala Sales Tax Act/Kerala VAT Act on the activities in dispute. The first condition of the definition of 'Works Contract Service' is therefore satisfied. It is his further submission that the second condition stipulates that the contract should be for one of the services indicated in the list. The explanation *inter alia* contains analysis which states that if the contract is for erection, commissioning, installation of plant and machinery or a part thereof, primarily for the purpose of commercial or industry then the same would be liable to works contract tax whereas in the present case it is not in dispute that the various works undertaken by the appellant were for fabrication and erection which is intended for commercial or industry and therefore the second condition is also satisfied in the present case. Once the two conditions are satisfied, the activity would fall under the taxable category of 'Works Contract Service'. Learned counsel further submitted that now it is settled law that no service tax is leviable on 'Works Contract Service' for the period prior to 01.06.2007. For this he placed reliance on the decision of the Hon'ble Apex Court in the case of ***CCE & Cus., Kerala Vs. Larsen & Toubro Ltd.*** as reported in ***2015 (39) S.T.R. 913 (SC).*** He also submitted that the stand of the Department is that since the appellants have collected/remitted service tax during the period it will make them liable to discharge service tax on the activity carried out during the period 01.07.2003 to 31.03.2007, though the activity qualifies as 'Works Contract Service'. To counter this argument, the learned counsel submitted that merely because the appellant during the period from 01.04.2004 to 31.03.2006 remitted service tax on 33% of the amount received under Erection, Commissioning or Installation Service would not make the appellant liable to pay service tax on the balance 67%, once the activity is held to be 'Works Contract Service'. For this submission, he relied upon the following decisions:

a. *Poorva Bhattacharjee Vs. CCE, Visakhapatnam – 2019 (3) TMI 711 – CESTAT – Hyderabad*
b. *Marine Corporation of India Vs. CCE, Visakhapatnam – 2019 (2) TMI 771 – CESTAT Hyderabad*
c. *G.N. Buildev Pvt. Ltd. Vs. CCE, Jaipur – 2019 (2) TMI 1176 – CESTAT New Delhi*
d. *Deva Interiors Pvt. Ltd. Vs. CGST, Chennai – 2019 (1) TMI 1432 – CESTAT Chennai*

3.1. Another argument of the appellant is that the activity of erection of plants, structures, machinery cannot be taxed prior to its insertion in the definition of 'taxable service'. He further submitted that 'Commissioning and installation' was brought under service tax net w.e.f. 01.07.2003. The activity of erection was included in the definition only w.e.f. 10.09.2004. The Commissioner in the impugned order has confirmed the demand on the activity of erection before the same was taxable which is not permitted under law. For this submission, he relied upon the decision in the case of ***Aakrti Construction (P) Ltd. Vs. CCE, Jaipur as reported in 2017 (7) GSTL 478 (Tri.-Del.)*** wherein it has been held that erection service was brought in the statute book w.e.f. 10.09.2004 vide Section 90 of the Finance Act, 2004 and therefore no service tax could be levied on the activity of 'Erection and Commissioning' prior to that date. Learned counsel further submitted that the appellants have availed only the credit on input service and therefore entitled for the abatement under Notification No. 19/2003 ST dated 21.08.2003. The Commissioner in the impugned order denied the benefit of 67% abatement under Notification No. 19/2003-ST on the ground that appellants have availed the credit on inputs whereas as per the learned counsel, the appellants have availed only the credit on input service and not the inputs which fact is evident from the Cenvat Register maintained by the appellant and also the amount of credit mentioned in the ST-3 return. The next submission of the learned counsel for the appellant that the activity of fabrication carried out by the appellant amounts to manufacture and therefore no service tax is liable to be paid in view of the decision of the Tribunal in the case of ***Neo Structo Construction Ltd. Vs. CCE & Cus. as reported in 2010 (19) S.T.R. 361 (Tri.-Ahmd.).*** Learned counsel also submitted that substantial demand is barred by limitation because the period for which the demand has been confirmed is 01.07.2003 to 31.03.2006 by invoking the extended period of limitation and the show-cause notice was issued on 09.05.2007. Hence, the entire period except October 2005 to March 2006 is beyond the normal period.

4. On the other hand the learned AR defended the impugned order..

5. After considering the submissions of both the parties and perusal of the material on record, we find that in the present case there is no dispute that the works undertaken by the appellant was for fabrication, supply of material, installation and commissioning of various items as per the contract entered between the parties. Further we find that in

the impugned order Commissioner has given a finding that there was a supply of material and provision of labour and therefore there is no dispute that the works contract involving transfer of goods as well as rendering of service. Further we find that the appellants are also paying sales tax/VAT under the Kerala Sales Tax/Kerala VAT on the activities in dispute. We also find that the works undertaken by the appellant fulfill the requirement of 'Works Contract Service'. Once the appellant is rendering the Works Contract Service, then in view of the settled law in the case of **CCE Vs. Larsen & Toubro** cited supra, no service tax is leviable on Works Contract Service for the period prior to 01.06.2007 and in the present case the entire period is prior to 01.06.2007 and therefore by following the ratio of the decision of the Apex Court in the case of **Larsen & Toubro** cited supra, appellant is not liable to pay any service tax. Since the appellants are not liable to pay the service tax under Works Contract Service, we do not think it appropriate to give findings on any other issue. Since the appellant's case is squarely covered by the decision of the Apex Court in the case of **Larsen & Toubro** and by following the ratio of the said decision, we set aside the impugned order by allowing the appeal of the appellant.

(Order was pronounced in Open Court on **18/07/2019**)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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