

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

Appeal No.ST/284/2012

[Arising out of Order-in-Original No.79 & 80/2011 dt. 30.12.2011 passed by
Commissioner of Service Tax, Chennai]

Ceebros Property Development

Appellant

Versus

Commissioner of Service Tax, Chennai

Respondent

Appearance :

Ms. S. Vishnupriya, Advocate
For the Appellant

Shri A. Cletus, ADC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 15.10.2018

FINAL ORDER No. 42613 / 2018

Per Shri Madhu Mohan Damodhar

M/s.Ceebros Property Development, the appellant herein is engaged in providing Construction Service. During the course of audit, it was noticed that appellants have rendered into an agreement with M/s.Shyamala Pictures and Hotel (P) Ltd. (land owner) for construction of a residential complex and commercial complex. As per the agreement, the land owner handed over the

land to the appellants for the purpose of construction of 7,25,305 sq. ft of commercial and residential complex. As per the agreement, the appellants were parted with 1,24,812/- sq.ft of undivided share of land in their favour and in consideration, they had agreed to construct a commercial complex of 2,61,385 sq.ft and 1,01,120 sq. ft of residential area and handed over the same to land owner in the following manner :

Land Owner	2,61,385 Sq. ft	Commercial Area
	1,01,120 sq. ft	75 apartments in all 4 blocks of residential units
Assessee	3,62,800 sq. ft	269 apartments in all 4 blocks of residential units
Total	7,25,305 sq.ft	

It appeared to the department that said activities undertaken by the assessee are taxable under the category of “Commercial or Industrial Construction Service” (CICS) and construction of “Residential Complex Service” (RCS). However, the appellants did not pay service tax on the 2,61,385 sq.ft of commercial area and 1,01,120 sq.ft of residential area built and handed over to the land owners though the assessee had already received 1,24,812/- sq.ft of undivided share of land being the equivalent money value of consideration received from the land owner towards the cost of construction done to latter. It was noticed that appellant did not pay service tax on their share of construction of residential complex service for the period from January 2009 to June 2009. It was also noticed that appellants were not paying service tax on the amount collected as Corpus Fund @ Rs.20 per sq.ft. to be remitted to the prospective flat owners’ association. Therefore, a show cause notice dt. 08.06.2010 was issued inter alia, proposing demand of service tax of Rs.6,16,83,281/- with interest, proposing appropriation

of amounts already paid by the appellants and also imposition of penalties under various provisions of law. In adjudication, the original authority confirmed the proposals made in the SCN and imposed equal penalty under Section 78 of the Finance Act, however reduced it to 25% of the demand, if demand of service tax and interest is paid within a period of one month. He also imposed penalty of Rs.5000/- under Section 77 (2) of the Act. Aggrieved, the appellants are before this forum.

2. Today when the matter came up for hearing, on behalf of the appellant, Ld. Counsel Ms. S. Vishnupriya, Advocate submits that issue as to whether a composite contract involving provision of service as well as transfer of property in goods could be covered under CICS and RCS from the date of introduction of service tax levy on such services stands finally settled by the Hon'ble Supreme Court in the case of *CCE & Cus., Kerala Vs L&T Ltd.* [2015 (39) STR 913 (SC)]. Ld. Advocate submits that the very same issue is also squarely covered by the recent decision of this Bench in the appellant's own case vide Final Order No.42436-42438/2018 dt. 18.09.2018. She also placed reliance on the decision of this Tribunal in the case of *Vishranthi Homes Pvt. Ltd. Vs CGST* Final Order No.42468 dt.24.09.2018.

3. Heard Ld. A.R Shri A. Cletus who supports the impugned order.

4. After hearing both sides, and on perusal of records, we find merit in the Ld. Advocate's assertion that the issue stands squarely covered by the decision of this Bench in appellant's own case vide Final Order No.42436-42438/2018 dt. 18.09.2018. The relevant portions of the order are reproduced as under :

"7.5 There was considerable litigation on the issue whether service tax can be levied on indivisible works contract prior to

its introduction from 1.6.2007 which was finally settled by the Hon'ble Apex Court in the case of Commissioner of Central Excise Vs. Larsen & Toubro Ltd. reported in 2015 (39) STR 390 (SC). The Hon'ble Apex Court held that the taxable services of 'consulting engineer' under section 65(105)(g) of the Finance Act; erection, 'commission and installation services' under section 65(105)(zzd) of the said Act; 'technical testing and analysis' under section 65(105)(zzh) *ibid*; 'construction services' under section 65(105)(zzq); construction of complex services under section 65(105)(zzzh) would refer only to service contracts *simpliciter* and not to composite works contracts; that these five taxable services only would qualify without any other element. The Hon'ble Supreme Court also observed that with introduction of works contract service as a separate taxable service, statutory mechanism to exclude the value of transfer of property of goods has been prescribed. The Apex Court held that since the Finance Act had not laid down any charge or machinery to levy and assess service tax on indivisible works contract prior to 1.6.2007, the levy on such composite works contract prior to that date has no constitutional validity.

7.6 The Larsen & Toubro (*supra*) judgment has been followed by this Tribunal in many numbers of cases to set aside the demand of service tax on services like commercial or industrial construction service, construction of complex service etc. involving composite contract of both material supply as well as service element prior to 1.6.2007.

7.7 In the present appeal also, there is no dispute that the construction activities are in the nature of composite works contract. The appellants being involved in the construction of the same projects prior to and after 1.6.2007, for example, even in the show cause notice dated 20.10.2009 (relating to Appeal No. ST/723/2010), taxable value has been calculated at 33% of gross amount received which is an implicit admission that that activity involved both material supply as well as value services. Another ground for demand is that the appellants have not exercised their option for payment of service tax under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. In any case, the show cause notices implicitly agree that the work performed by the appellant is in the nature of composite works contract only. Based on the Hon'ble Apex Court judgment in Larsen & Toubro, such composite works contract then will not be liable to service tax levy prior to 1.6.2007. On the same ratio, such composite contracts even for the period after 1.6.2007 disputed in these appeals will still have to be held as composite works contract only and not pure service *simpliciter* contracts that could be

classified under commercial or industrial construction service, or construction of complex service. To put in another way, to merit being classified as CICS or CCS, the service provider concerned will be rendering only service simpliciter without any other element in them namely without any material or goods supply involved. That is definitely not the case in the facts of these appeals. The activities of the appellants will therefore continue to be in the nature of composite works contract services and hence even after 1.6.2007 for the periods disputed in these appeals they cannot be brought within the fold of commercial or industrial construction service or construction of complex service as proposed in the show cause notices and confirmed in the impugned orders.

7.8 On the contrary, being composite works contracts, they will necessarily fall within the ambit of works contract service as defined under section 65(105)(zzzza) *ibid*. It is possibly with this intent in mind that the lawmakers have included in the definition of works contract, erection and commissioning service, commercial or industrial construction service, construction of complex service and in addition turnkey projects including EPC projects within the definition of Works Contract Service.

7.9 At this juncture, it is worthwhile to reproduce excerpts from the Union Finance Minister's budget speech in 2007:-

"State Governments levy a tax on the transfer of property in goods involved in the execution of a works contract. The value of services in a works contract should attract service tax. Hence, I propose to an optional composition scheme under which service tax will be levied at only 2 per cent of the total value of the words contract".

7.10 The issue was analyzed by the Hon'ble Apex Court in *Larsen & Toubro case* (*supra*) and held that there can be no levy of service tax on composite contracts (involving both service and supply of goods) prior to 1.6.2007. This read together with the budget speech as above would lead to the strong conclusion that composite contracts were brought within the ambit of levy of service tax only with effect from 1.6.2007 by introduction of Section 65(105)(zzzza) i.e. Works Contract Services. As pointed out by the *Id.* counsels for appellants, there is no change in the definition of CICS/CCS/RCS after 1.6.2007. Therefore only those contracts which were service simpliciter (not involving supply of goods) would be subject to levy of service tax under CICS / CCS / RCS prior to 1.6.2007 and after. Our view is supported by the fact that the method /

scheme for discharging service tax on the service portion of composite contract was introduced only in 2007.

7.11 The Id. AR Shri A. Cletus has tried to counter this contention by stating that works contract service is service / activity which would be of a general nature whereas the construction activities defined in Commercial or Industrial Construction Services, Construction of Complex Service and Construction of Residential Complex etc. are of special nature. He took support of the maxim '*generalia specialibus non derogant*' – 'general things do not derogate special things'. The counsel for appellants have submitted that as per Section 65A of the Act *ibid*, classification of service shall be based on the specific entries and the more specific description of service has to be preferred. He invited our attention to CBEC's Circular 128/10/2010 dated 24.8.2010 which is reproduced as under:-

"The matter has been examined. As regards the classification, with effect from 1-6-2007 when the new service 'Works Contract service' was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service prior to 1-6-2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of Section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date."

7.12 Thus, for example, while construction of a new residential complex as a service simpliciter would find a place under section 65(105)(30b) of the Act, the same activity as a composite works contract will require to be brought under section 65(105)(zzzza) Explanation (c). For both these categories for the definition of residential complex, the definition given in section 65(105)(91a) will have to be adopted as discussed above will have to be taken into account.

... ..

8. In the light of the discussions, findings and conclusions above and in particular, relying on the ratios of the case laws cited *supra*, we hold as under:-

a. The services provided by the appellant in respect of the projects executed by them for the period prior to 1.6.2007 being in the nature of composite works contract cannot be brought within the fold of commercial or industrial construction service or construction of complex service in

the light of the Hon'ble Supreme Court judgment in Larsen & Toubro (supra) upto 1.6.2007

b. For the period after 1.6.2007, service tax liability under category of 'commercial or industrial construction service' under Section 65(105)(zzzh) *ibid*, 'Construction of Complex Service' under Section 65(105)(zzzq) will continue to be attracted only if the activities are in the nature of services' simpliciter.

c. For activities of construction of new building or civil structure or new residential complex etc. involving indivisible composite contract, such services will require to be exigible to service tax liabilities under 'Works Contract Service' as defined under section 65(105)(zzzza) *ibid*.

d. The show cause notices in all these cases prior to 1.6.2007 and subsequent to that date for the periods in dispute, proposing service tax liability on the impugned services involving composite works contract, under 'Commercial or Industrial Construction Service' or 'Construction of Complex' Service, cannot therefore sustain. In respect of any contract which is a composite contract, service tax cannot be demanded under CICS / CCS for the periods also after 1.6.2007 for the periods in dispute in these appeals. For this very reason, the proceedings in all these appeals cannot sustain."

Following the ratio already laid down in the decisions cited *supra*, we are of the view that the impugned order cannot then sustain and requires to be set aside, which we hereby do. Appeal is allowed with consequential benefits, if any, as per law.

(operative part of the order pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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