IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

Appeal No.: ST/00242/2012

(Arising out of Order-in-Original No. 02/2012 dated 30.01.2012 passed by the Commissioner of Central Excise & Service Tax, Chennai)

M/s. Raga Foundation, : Appellant
No. 30/31 Chockalingam Nagar,
Teynampet,
Chennai – 600 018

Versus

The Commissioner of G.S.T. & Central Excise, : Respondent
Chennai South Commissionerate

Appearance:-
Shri. M. Karthikeyan, Advocate
for the Appellant
Ms. T. Usha Devi, DC (AR)
for the Respondent

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

Date of Hearing/Decision: **16.10.2018**

Final Order No. 42683 / 2018

Per P. Dinesha :

The appellant is engaged in providing Construction of Residential Complex Service. It is the case of the Revenue that on verification of records, it was noticed that the assessee engaged in construction of independent houses and residential flats, had undertaken construction of a residential complex consisting of 56 apartments at Medavakkam during the year 2007-08 in terms of joint development agreement entered with the land owner, however without obtaining service tax registration from the Department nor had it paid service tax for undertaking such construction activity. On being pointed out about the same, the assessee undertook to obtain service tax registration and pay the dues with interest; the assessee having failed to discharge the entire service tax liability for the above project, a Show Cause Notice dated 04.08.2010 was issued proposing to demand service tax of Rs. 68,68,678/- under proviso to Section 73(1) of the Finance Act, 1994 for the period April, 2007 to September, 2009, interest under Section 75 of the Act ibid. and also penalty under Sections 76, 77 and 78 of the said Act. After due process of law, the Commissioner of Service Tax, Chennai, vide the impugned Order dated 30.01.2012 confirmed the demand of service tax to the tune of Rs. 68,68,678/-, imposed equal penalty under Section 78 of the Act, penalty of Rs. 31,000/- under Section 77 of the Act; and appropriated the amount of Rs. 24,22,421/- and interest of Rs. 1,57,081/- already paid by the appellant. Aggrieved by the same, the appellant is in appeal before this forum.

2. Today when the matter came up for hearing, Ld. Advocate Shri. M. Karthikeyan appeared on behalf of the appellant and Ld. DC (AR) Ms. T. Usha Devi appeared on behalf of the Revenue.

3. During the course of hearing Ld. Advocate submitted that the issue involved in this case is no more *res integra* as the same has already been decided by this very Bench of the CESTAT in the case of ***M/s. Aswini Apartments Vs. Commissioner of G.S.T. & Central Excise, Chennai South in Appeal No. ST/42463/2015,*** wherein this Bench vide its ***Final Order No. 42515/2018 dated 26.09.2018*** has ruled in favour of the appellants therein.

4. *Per contra,* Ld. AR supported the findings of the lower authorities.

5. We have heard the rival contentions, perused the materials placed on record and have also gone through the decisions referred to during the course of arguments.

6. On a careful consideration of the Order of this Bench in the case of *M/s. Aswini Apartments (supra)* we find that this Bench after considering the rival contentions, has ruled as under :

> *"4. After hearing both sides, it is brought to light that the period involved in the present case is from October 2004 to March 2009. The demand has been raised in the show cause notice under construction of residential complex*

services. The contracts entered between the appellant and the service recipient is a composite contract which involves both supply of materials as well as rendering of service. The Tribunal in the case of Real Value Promoters Ltd. (supra) had occasion to analyse the issue regarding demand of service tax under construction of residential complex services, commercial or industrial construction service and construction of complex service. The Tribunal has held that prior to 1.6.2007, levy of service tax can be under the above categories only for contracts which are purely for services. That after 1.6.2007, the above categories would be applicable only if the contracts are purely services and which are not composite contracts. Further, it was held that after 1.6.2007, demand in respect of composite contracts would fall under works contract service only. The relevant portion of the said decision is reproduced as under:-

> *' 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.*
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> *7.9 At this juncture, it is worthwhile to reproduce excerpts from the Union Finance Minister's budget speech in 2007:-*
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> *'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'.*
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> *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 ld. 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.*
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> *7.11 The ld. 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.

7.13 We find sustenance in arriving at this conclusion by a number of decisions of the Tribunal in which it has held as under:-

a. In the case of Commissioner, Service Tax, New Delhi Vs. Swadeshi Construction Company - 2018-TIOL-1096-CESTAT-DEL, the Tribunal in para 7 has held as under:-

' 7. We note that in the present case, the SCN was issued on 27.05.2011. On that date, both the tax entries, namely, Commercial or Industrial Construction Service and Works Contract Service, were available in the Finance Act, 1994. The SCN did mention this in the first para itself. However, the proposal for tax demand was specifically made under Commercial or Industrial Construction Service under Section 65 (105) (zzq) of the Finance Act, 1994. In such situation, we note that it cannot be a case of simple mentioning of wrong provisions of law as submitted by the Revenue. Apparently, the tax liability of composite works contract is to be considered under works contract services only as per legal position settled by the Hon'ble Apex Court in M/s L&T Limited. Even in the appeal, the Revenue submitted that the respondent were engaged in construction services liable to tax under tax entry Section 65(105) (xxq). The grievance of the Revenue is with reference to commercial nature of the construction undertaken by the respondent and not on the correct classification of taxable activity.'

b. In the case of Skyway Infra Projects Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai - 2018-TIOL-360-CESTAT-MUM, in respect of identical issue for the period from 2005 to 2012, the Tribunal in para 7 has held as under:-

" 7. On careful consideration of the submissions made by both the sides, we find that the issue falls for consideration is whether the services rendered by the appellant in respect of 52 contracts entered with various Govt. authorities need to be taxed under MMRC/CICS/ECIS or otherwise. It is on record and undisputed that the adjudicating authority has specifically held that all the 52 contracts which has been executed by the appellants are with material. Learned Counsel was correct in bringing to our notice that the said findings of the adjudicating authority that the appellant is eligible for abatement of 67% of the value of the goods is in itself the acceptance of the fact that the contracts were executed with material. It is also on record that the Revenue has not contested these findings of the adjudicating authority before the Tribunal. If that be so, even when the Revenue authorities are accepting the facts that the contracts executed by the appellant are nothing but works contracts, for the period in question, entire case of the Revenue in the show-cause notice stands demolished by the Apex Court in the case of Larsen & Toubro Ltd. (supra). In the said judgment, their Lordships have very categorically laid down the law that the works contract cannot be vivisected for the confirmation of demand under various other services. On this ground itself, the entire demand confirmed by the adjudicating authority is liable to be set aside and we do so."

c. In the case of URC Construction (P) Ltd. Vs. Commissioner of Central Excise, Salem - 2017 (50) STR 147, the Tribunal in paragraphs 9, 10 and 11 has held as under:-

" 9. The Hon'ble Supreme Court in re Larsen & Toubro & Ors. has decided thus

' 24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by

any of the aforesaid Sections by deducting from the gross value of the works contract the value of properly in goods transferred in the execution of a works contract."

10. In view of this specific decision and the admitted claim of the appellant that they are not providers of "commercial or industrial construction service" but of "works contract service", no tax is liable on construction contracts executed prior to 1st June, 2007.

11.?Insofar as demand for subsequent period till 30th September, 2008 is concerned, it is seen that neither of the two show cause notices adduce to leviability of tax for rendering " works contract service" . On the contrary, the submission of the appellant that they had been providing "works contract service" had been rejected by the adjudicating authority. Therefore, even as the services rendered by them are taxable for the period from 1st June, 2007 to 30th September, 2008 the narrow confines of the show cause notices do not permit confirmation of demand of tax on any service other than "commercial or industrial construction service". It is already established in the aforesaid judgment of the Hon'ble Supreme Court that the entry under Section 65(105)(zzd) is liable to be invoked only for construction simpliciter. Therefore, there is no scope for vivisection to isolate the service component of the contract."

d. In the case of Logos Construction Pvt. Ltd. Vs. Commissioner of Central Excise as reported in 2018 (6) TMI 1361, the Tribunal has held as under:-

' 5.1 The payment upto 01.06.2007 will get extinguished on account of the law that has been laid down by the Apex Court in the case of Larsen & Toubro Ltd., (supra), relied upon by the Ld. Counsel. So ordered.

5.2 The Ld. Counsel has been at pains to point out that on-going projects which were only in the nature of works contract prior to 01.04.2007 cannot be brought under different category of Construction Services and CICS subsequently. We find merit in his arguments. The SCN has proposed demand of service tax liability only under these two categories and not under Works Contract service. The demand confirmed in the impugned order under these categories namely under construction service for the period 10.09.2004 to 16.06.2005 under CICS for the period 16.06.2005 to 30.09.2008 cannot also sustain and are therefore set aside. So ordered

5.3 For the period 01.04.2008 to 30.09.2008, the demand confirmed is Rs. 26,88,611/-. We note that the appellant has not contested the liability under works contract for this period. The only argument brought forth by the Ld. Counsel is that they have discharged an amount of around Rs. 82 lakhs under this category after the visit of the departmental officers and therefore an amount of Rs. 36,88,611/- demanded in the impugned order should be considered as having been discharged. We find merit in his argument and hence the demand of Rs. 26,88,611/- under works contract service for the period 01.04.2008 to

30.09.2008 is required to be considered as having been paid, albeit subsequent to the visit of the officers. However, the interest liability if any that arise on this amount if not paid already will have to be discharged by the appellants. So ordered.'

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."

5. Following the above decision, we are of the considered opinion that the demand of service tax under commercial or industrial construction service (residential complex) cannot sustain after the period 1.6.2007. The levy of service tax prior to 1.6.2007 cannot also sustain by application of the decision of the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. - 2015 (39) STR 913 (SC).

6. From the discussions made above, we hold that the impugned order cannot sustain and is set aside. The appeal is allowed with consequential relief, if any."

7. We find that the above ruling squarely applies to this case. On the contrary, Revenue was unable to produce any contrary

decisions/orders to persuade us from distinguishing the above ruling.

8. Going therefore by the ratio laid down in the above case, we are of the view that the impugned Order is unsustainable for which reason we set aside the same.

9. The appeal is allowed with consequential benefits, if any.

(Operative part of the order was pronounced in open Court)

(P Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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