

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 48 of 2012

(Arising out of Order-in-Appeal No. 106/2011 dated 18.10.2011 passed by the Commissioner of Customs & Central Excise (Appeals), No. 1, Williams Road, Cantonment, Tiruchirappalli – 620 001)

M. Mani

Civil Contractor,
12, Sri Krishna Illam,
M-2, Police Colony,
Tiruchirappalli – 620 026

: Appellant

VERSUS

The Commissioner of Central Excise

No. 1, Williams Road, Cantonment,
Tiruchirappalli – 620 001

: Respondent

APPEARANCE:

Shri A.K. Jayaraj, Advocate for the Appellant

Shri R. Rajaraman, Assistant Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40328 / 2023

DATE OF HEARING: 05.04.2023

DATE OF DECISION: 03.05.2023

Order : [Per Hon'ble Mr. Vasa Seshagiri Rao]

Shri M. Mani, Civil Contractor, who is the appellant herein, has filed this appeal against the Order-in-Appeal No. 106/2011 dated 18.10.2011 passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappalli.

2. The allegation against the appellant is that he was engaged in the activity of construction of office buildings, erection of cell phone towers and other connected civil

structures in respect of M/s. BSNL, Tiruchirappalli, Airport Authority of India, M/s. Life Insurance Corporation of India (LIC) and also construction of school buildings for the State Public Works Department without payment of Service Tax, without filing ST-3 returns, during the period from 2004-05 (from October 2004) to 2008-09 (up to March 2009).

3. On the basis of intelligence collected by the Anti-evasion Unit of the Commissionerate and investigations conducted after obtaining various documents such as copies of work orders, financial statements, balance sheets and Form 16-A issued by M/s. BSNL, Airport Authority of India and also M/s. LIC, a Show Cause Notice vide C.No. V/ST/15/69/2009-Cx.Adj. dated 21.04.2010 came to be issued, proposing to demand Service Tax of Rs.12,98,611/- towards construction service / commercial or industrial construction service / works contract service for the period from 2004-05 (October 2004 onwards) to 2008-09 (up to March 2009) and an amount of Service Tax of Rs.14,531/- towards cleaning activity provided by the appellant during the period from 2005-06 to 2008-09, invoking the provisions of Section 73(1) of the Finance Act, 1994 and also proposing to impose penalties under Sections 76, 77 and 78 of the Act.

4. The Joint Commissioner of Central Excise and Service Tax, Tiruchirappalli held that the services rendered by the assessee would fall under the category of 'construction service' under Section 65(30a) of the Finance Act, 1994 with effect from 10.09.2004, under 'commercial or industrial construction service' under Section 65(25b) of the Finance Act with effect from 16.06.2005 and under 'works contract service' under Section 65(105)(zzzza) of the Finance Act with effect from 01.06.2007 and consequently, vide Order-in-Original No. 40/2010-ST dated 27.12.2010, has confirmed the above demands of Service tax and imposed a penalty of Rs. 5,000/- under Section 77 of the Act and also a penalty of Rs.13,13,142/- under Section 78 of the Act.

5. The lower appellate authority has upheld the Order-in-Original vide Order-in-Appeal No. 106/2011 dated 18.10.2011, which is impugned herein.

6. We have heard Shri A.K. Jayaraj, Learned Advocate representing the appellant and Shri R. Rajaraman, Learned Authorized Representative appearing for the Revenue.

7.1 The Learned Advocate appearing for the appellant has argued that the Joint Commissioner had erred in demanding Service Tax under construction service with effect from 10.09.2004 and under commercial or industrial construction service from 16.06.2005 to 31.05.2007 and under 'works contract service' with effect from 01.06.2007 as the service provided under a specific category could not be taken out and taxed under other category of service prior to 01.06.2007 as the nature of service of works contract is deliberately split into two categories of service. He would submit that while passing this order, the documentary evidence relating to deduction of Sales Tax by the service recipients was not considered.

7.2 He has put forth that the demand of Service Tax vide the Show Cause Notice dated 21.04.2010 is time-barred as none of the ingredients under Section 73(1) of the Finance Act have been met to invoke the extended period of limitation.

7.3 He has vehemently argued that the services rendered would not fall under construction service or commercial or industrial construction service as their services would be coming under works contract service with effect from 01.06.2007. He submitted that from the returns filed before the Sales Tax Department, it could be seen that the appellant had rendered activity in the nature of works contract and so, they are taxable only from 01.06.2007 since the activity falls under the definition of 'works contract service' as defined under Section 65(105)(zzzza) of the Finance Act, 1994.

7.4 In support of his arguments, the Learned Advocate for the appellant has relied on the following decisions: -

- (i) *Commissioner of C.Ex. & Cus., Kerala v. M/s. Larsen & Toubro Ltd. [2015 (39) S.T.R. 913 (S.C.)];*
- (ii) *M/s. Real Value Promoters Pvt. Ltd. v. Commissioner of G.S.T. and Central Excise, Chennai & ors. [Final Order Nos. 42436-42438/2018 dated 18.09.2018 – CESTAT Chennai];*
- (iii) *M/s. Jain Housing & Construction Ltd. v. The Commissioner of Service Tax, Chennai [Final Order Nos. 40077-40079/2023 dated 24.02.2023 – CESTAT, Chennai];*
- (iv) *M/s. South India Shelters Pvt. Ltd. v. The Commissioner of Central Excise, Chennai [Final Order Nos. 40123-40124/2023 dated 07.03.2023].*

8.1 The Learned Authorized Representative appearing for the Revenue has reiterated the findings of the lower authorities. He submitted that the appellant, though had taken registration in 2004, had neither paid any Service Tax nor filed their Service Tax returns till the time investigation was taken up by the Department and that the services rendered by the appellant would be taxable under 'construction service' under Section 65(30a) of the Finance Act, 1994 with effect from 10.09.2004, under 'commercial or industrial construction service' under Section 65(25b) with effect from 16.06.2005 and under 'works contract service' under Section 65(105)(zzzza) with effect from 01.06.2007.

8.2 He has also contended that the levy of Service Tax on construction service was introduced with effect from 10.09.2004 and the appellant have been providing taxable services, had received payments during the period from October 2004 to 2008-09 for such taxable services provided, but had not paid the Service Tax, did not follow

the procedures laid down for payment of Service Tax nor filed their turns, with an intention to evade payment of Service Tax. So, he has argued that the demands raised and penalties imposed are justified.

9. We have considered the submissions made by both sides and perused the records, as available.

10. The issues that arise for decision in this appeal are:-

- 1) Whether the services rendered by the appellant to M/s. BSNL, Tiruchirappalli, Airport Authority of India and M/s. Life Insurance Corporation of India, in construction of buildings and civil structures and erection of cell phone towers, are taxable under construction service / commercial or industrial construction service, where the contract was a composite works contract, for the period up to 31.05.2007 and whether are classifiable under works contract after 01.06.2007?
- 2) Whether the appellant is liable to pay Service Tax towards the cleaning activity provided by them during the period from 2005-06 to 2008-09?
- 3) Whether invocation of extended period of limitation for demand of service tax and imposition of penalty are justified in the facts and circumstances of this case?

11. "Construction service", as defined under Section 65(30a) of the Finance Act, 1994, introduced with effect from 10.09.2004, reads as under: -

"(30a) 'construction service' means, -

- a) construction of new building or civil structure or a part thereof; or*
- b) repair, alteration or restoration of, or similar services in relation to, building or civil structure,*

which is –

- (i) used, or to be used, primarily for; or*
- (ii) occupied, or to be occupied, primarily with; or*
- (iii) engaged, or to be engaged, primarily in,*

commerce or industry, or work intended for commerce or industry, but does not include road, airport, railway, transport terminal, bridge, tunnel, long distance pipeline and dam”

12. With effect from 16.06.2005, the scope of construction service was expanded as “commercial or industrial construction service” under Section 65(25b) of the Finance Act, 1994, as under: -

“(25b) “commercial or industrial construction” means —

- (a) construction of a new building or a civil structure or a part thereof; or*
- (b) construction of pipeline or conduit; or*
- (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or*
- (d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit,*

which is —

- (i) used, or to be used, primarily for; or*
- (ii) occupied, or to be occupied, primarily with; or*
- (iii) engaged, or to be engaged, primarily in,*

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;”

13. The definition of "works contract" as contained in Section 65(105)(zzzza) of the Finance Act, 1994 with effect from 01.06.2007 reads as under: -

"(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation. — For the purposes of this sub-clause, "works contract" means a contract wherein, —

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out,—

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;"

14.1 The issue of taxability of composite contracts before 01.06.2007 has been considered by the Hon'ble Apex Court in the case of *M/s. Larsen & Toubro Ltd. (supra)*, which ratio has been followed by the Chennai Bench of the CESTAT in the case of *M/s. Real Value Promoters Pvt. Ltd. (supra)*. In the case of *M/s. Real Value Promoters Pvt. Ltd. (supra)*, it has been held that demand of Service Tax under 'construction service' and 'commercial or industrial construction service' in respect of composite contracts up to 01.06.2007 is not sustainable. The relevant portion of the order is extracted below: -

"3.3 When CICS and CCS were introduced on 1.7.2003 and 16.6.2005 respectively, it was the assumption of many that such construction activities which are undertaken as a composite contract, involving transfer of property in goods {which falls under the taxation domain of the State Governments, being a deemed sale as per Article 366 (29A)}, can be taxed under these service categories, in so far as the service portion is concerned. Hence, in order to exclude the value of goods involved in such contracts, exemption notifications under section 93 have been issued to exclude a portion of value towards the value of transfer of property in goods, which is known as abatement.

3.4 Subsequently, the service portion in the composite works contracts, was specifically made as a taxable service under WCS with effect from 01.06.2007 and the manner of determination of the value of such service portion has been prescribed vide Rule 2A of the Service Tax (Determination of Value) Rules, 2006, framed under Section 94 (2) of the Act. An alternative in the form of Works Contract (Composition scheme for payment of Service Tax) Rules, 2007 has also been introduced to pay service tax at a lesser rate on the gross amount (including the value of transfer of property in goods).

*3.5 The 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 CCS from the date of introduction of service tax levy on such services was, being litigated upon which was finally settled by the Hon'ble Supreme Court in the case of *CCE Vs. Larsen & Toubro Ltd. 2015 (39) STR 913 SC*. The Apex Court has observed that in as much as section 67 of the Act, dealing with valuation of taxable services, refers to the gross amount charged for service, the services of CICS and CCS would cover only pure service activities, as any contrary view would imply that the Union*

Government can levy service tax on the gross amount, including the value of transfer of property in goods also, which is constitutionally impermissible. The exemption notifications issued at the discretion of the executive are not sufficient to sustain the levy. The Hon'ble Apex Court has also observed that only with the introduction of WCS as a separate taxable service, statutory mechanism to exclude the value of transfer of property in goods has been prescribed.

3.6 The effect of the above decision is that CICS and CCS, as defined under clauses (zzq) and (zzzh), respectively, of sub section (105) of the section 65 would cover only pure service contracts, without any transfer of property in goods.

3.7 In various decisions the importance of classification of services has been laid down and it has been held that once the show cause notice proposes demand of service tax under a particular category of taxable service, the adjudicating / appellate authorities cannot travel beyond the scope of allegations in the show cause notice and confirm the demand under a different category of taxable service as the assessee was not at all put on notice on the new category of taxable service. These decisions were based on various decisions of higher appellate forums, where it has been held that the show cause notice is the foundation of allegations and the adjudication should be limited to the allegations. Further, as per Section 65 A of the Act, classification of service shall be based on the specific entries and the more specific description has to be preferred. In this connection, he invited attention to CBEC's Circular 128/10/2010 Dt. 24.08.2010.

3.8 If show cause notices are issued demanding service tax under CICS / CCS, on composite contracts, involving transfer of property in goods, for the period post 01.06.2007, the said demands of service tax cannot be sustained, as these services would cover only pure service activities, as held by the Hon'ble Supreme Court in Larsen & Toubro (supra). At the stage of adjudication or appeal proceedings, the demand cannot be confirmed under WCS, when the show cause notice raises demand on CICS/CCS. Such an attempt would amount to travelling beyond the scope of the show cause notice, which is not permissible.

3.9 Though the definition of WCS incorporates the definitions of CICS / CCS into it, the scope of coverage of these services are distinct. While the definition of CICS / CCS would cover such construction activities without involving any transfer of property in goods (Example:- Where all materials required for the construction are supplied by the service recipient and the service provider is engaged only for provision of construction service), a

composite construction activity would fall only under WCS.

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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."

14.2 The Tribunal, Chennai in the case of *M/s. URC Construction (P) Ltd. v. Commissioner of Central Excise, Salem* [2017 (50) S.T.R. 147 (Tri. – Chennai)] 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 levability 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."

15. The appellant has admitted that the services rendered by them are taxable under 'works contract service' with effect from 01.06.2007 in the grounds-of-appeal and also before the lower authority. As the activities undertaken by the appellant were in the nature of works contract, the demands raised under construction service and commercial or industrial construction service till 31.05.2007 are not sustainable. Hence, we are of the view that the appellant is required to pay Service Tax of Rs.1,82,467/- towards works contract service during the period from June 2007 to March 2008 (as detailed in Annexure-IV-A to the Show Cause Notice) and Rs.8,50,546/- towards works contract service during the period from April 2008 to March 2009 (as detailed in Annexure-V to the Show Cause Notice).

16. We also hold that the appellant is liable to pay Service tax of Rs.14,531/- towards cleaning activity provided by them during the period from 2005-06 to 2008-09, which is not disputed.

17. On the issue of invoking the extended period of limitation, we find that though the appellant has taken registration in 2004, they have not paid Service Tax on the considerations received for the services rendered to M/s. BSNL, Airport Authority of India and M/s. LIC. The non-payment of Service Tax by the appellant has been detected and investigated by the Anti-evasion Unit of the Commissionerate and as such, we hold that the extended period has been rightly invoked in this case.

18. In view of our above discussions, we hold that the demand of Service Tax from October 2004 up to 31.05.2007 under 'construction service' and 'commercial or industrial construction service' are required to be set aside. However, the demand of Service Tax under works contract service with effect from 01.06.2007 is held to be payable under the provisions of Section 73(1) of the Finance Act, 1994, along with applicable interest under Section 75 of the Finance Act, 1994. We also hold that the appellant is liable to pay penalty of Rs.5,000/-, as imposed under Section 77 of the Finance Act, 1994 and penalty equivalent to the amount of Service Tax payable towards works contract service and cleaning activity, under Section 78 of the Act. The impugned order is modified to the above extent.

19. The appeal is partly allowed, as indicated above.

(Order pronounced in the open court on **03.05.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd