CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. 1

SERVICE TAX APPEAL NO. 52734 OF 2015

[Arising out of Order-in-Original No. JOD-EXCUS-000-COM-0013-14-15 dated 27.03. 2015 passed by the Commissioner of Central Excise Jodhpur]

M/S. Ram Pratap Richpal Construction Co, Bikaner **Appellant**
RD-860, Bangadsar, VPO-
Bajju, The. Kolayat,
Bikaner (Rajasthan)

Versus

Commissioner of Central Excise, Jodhpur **Respondent**
Commissioner of Central Excise-Jodhpur (Hq at jaipur),
NCR Building Statue Circle, Jaipur (Rajasthan)

Appearance

Shri O P Agarwal, Chartered Accountant for the Appellant

Shri Harsh Vardhan, Authorized Representative for the Respondent

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 08.02.2022
Date of Decision: 23.02.2022

Final Order No. 50154/2022

P.V. Subba Rao:

1. This appeal is filed by M/s Ram Pratap Richpal Construction Co.[1] assailing Order-in-Original[2] dated 27.03.2015 passed by the Commissioner of Central Excise, Jodhpur whereby he confirmed a demand of service tax of Rs. 2,06,74,901/- on the appellant. He also appropriated an amount of Rs. 2,83,870/- already deposited by the appellant.

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1 the appellant
[2] Impugned order

He further imposed penalties under section 77 and 78. The operative part of this order is as follows:

(i) I confirm the demand of service tax Rs. 2,06,74,901/- and order recovery of the same under Section 73 (2) of the Finance Act, 1994. Since an amount of Rs. 2,83,870/- has already been deposited, I order the same to be appropriated to Government Account.

(ii) I drop the demand of service tax amounting to Rs. 1,36,895/- under Section 73 (2) of the Finance Act, 1994.

(iii) I order recovery of interest on the amount of service tax confirmed at (i) above under Section 75 of the Finance Act, 1994.

(iv) I impose penalty of Rs. 10,000/- or two hundred rupees for every day during which failure to furnish information continued, under Section 77(1) (c) of the Finance Act, 1994.

(v) I impose penalty of Rs. 10,000/- under Sections 77(2) of the Finance Act, 1994 for contravention of the provisions of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994.

(vi) I impose penalty equal to the amount of service tax which pertain to the period from 01.04.2008 to 07.04.2011 and confirmed at (i) above, under section 78 of the Finance Act, 1994. However, if such service tax and the interest payable thereon determined above is paid within thirty days from the date of communication of this order, the amount of penalty liable to the paid by the assessee shall be twenty-five per cent of such service tax in terms of proviso to Section 78 of the Finance Act, 1994; however, the benefit of reduced penalty shall be available only if the amount of penalties have also been paid with other dues within the period of said thirty days with other dues;

(vii) I impose penalty of 50% of amount of service tax which pertain to the period from 08.04.2011 to 31.03.2013 and confirmed at (i) above, under proviso to Section 78 of the Finance Act, 1994. However, if such service tax and the interest payable thereon determined above is paid within thirty days from the date of communication of this order, the amount of penalty liable to be paid by the assessee shall be twenty five per cent of amount of service tax which pertain to the period from 08.04.2011 onwards and confirmed at (i) above, in terms of third proviso to Section 78 of the Finance Act, 1994; however, the benefit of reduced penalty shall be available only if reduced penalty with amounts due has also been paid within the period of said thirty days with other dues.

2. The facts of the case, in brief, are that the appellant is engaged in providing 'construction services other than residential complex, including commercial/industrial building or civil structure' and "works contract services". It has been paying service tax and filing ST-3 Returns. During the course of audit of some of the service recipients of the appellant, it was noticed that the appellant had rendered them service and had received consideration for such services but did not reflect the same in its ST-3 returns and also did not pay service tax on such services. On receipt of a letter dated 14.05.2013 from the Additional Commissioner (Audit) Jaipur-1, the jurisdictional range officer summoned the appellant and obtained copies of balance sheets for the financial year 2008-09 to 2012-13 and compared them with the ST-3 returns filed by the appellant and the amount of service tax paid. It was felt that service tax of Rs. 2,08,11,794/- was short paid as follows:

S. No	Period	Taxable value as per balance sheet	Rate of Service Tax	Service Tax Payable	Service Tax Paid	Service Tax Short Paid
1	2008-09	51779317	12.36	6399923	0	6399923
2	2009-10	46938430	10.30	4834659	217863	4616796
3	2010-11	62754945	10.30	6463760	0	6463760
4	2011-12	9073464	10.30	934567	148570	785997
5	2012-13	20593187	12.36	2545318	0	2545318
Total		**191139343**		**21178227**	**366433**	**20811794**

3. It appeared that the services provided by the appellant were covered under the category of "construction other than residential complex, including commercial/ industrial building or civil structure" and "works contract services" up to 30.06.2012. From 01.07.2012 the services rendered by the appellant appeared to not fall under the negative list. Services specified under section 65(105) were taxable prior to 01.07.2012, i.e., only such services as were specifically covered under any of the clauses of section 65 (105) were exigible to service tax. With effect from 01.07.2012, new provisions were introduced and service tax became leviable on all services except those specified in the negative list. The new charging section, Section 66B of the Act provided that "there shall be a levied tax, hereinafter referred to as service tax, at the rate of 12 per cent of value of all services other than those services specified in the negative list, provided or

agreed to be provided in the taxable territory by a person to another and collected in such a manner as may be prescribed". The Explanation to this Section states "for removal of doubts, it is hereby clarified that reference to the provisions of Section 66 in Chapter V of the Finance Act, 1994 or any other Act, for the purpose of levy of collection of service tax, shall be construed as references to the provisions of Section 66B". In other words prior to 1.07.2012, service tax could be levied only if the particular service was covered as a taxable service while after 1.7.2012, every service other than what is listed in the negative list became taxable. As can be seen from the table above, the impugned order covered the period 2008-09 to 2012-13 in respect of the services which were said to have been rendered by the appellant to nine service recipients. Of these nine, services to only four viz., M/s Harsha Abakus Solar Pvt Ltd., M/s Indus Project Ltd., Refex Energy Ltd. and M/s Zuberi Engineering Co. were rendered partly after 1.7.2012. Services to the rest were provided prior to 1.7.2012. Further, in respect of one service rendered to M/s Pratibha Industries Ltd. during 2010-11, it has been indicated in the table that the contract was merely a labour contract. In all the remaining cases it is undisputed that the service rendered by the appellant involved both supply of materials and rendition of services.

4. Leaned counsel for the appellant submits that no demand under the head of 'works contract service' was made

in the show cause notice nor was it confirmed in the impugned order. The entire demand has been confirmed under the category of 'Commercial or Industrial Construction Service' which cannot be sustained because 'Works Contract Service' is a separate head of service and there is no demand under this head. He further submits that although for the period post 2012 'Works Contract Service' was exigible to service tax since it was not in the negative list, they were entitled to the benefit of abatement in terms of Rule 2A (ii)(A) of the Service Tax (Determination of Value) Rules, 2006. Learned Commissioner has wrongly denied the benefit of this abatement holding that the appellant had not demonstrated that it had not availed any CENVAT credit of the duties or cess paid on any input in or in relation to the 'Works Contract' under CENVAT Credit Rules, 2004. He asserts that it is incorrect to say that the appellant had availed CENVAT credit and no evidence was produced by the Revenue to show that it had availed CENVAT credit. Therefore, the demand on 'Works Contract' for this period also needs to be set aside. Consequently, the demand for interest also needs to be set aside and the penalties under Section 77 and 78 cannot be imposed upon the appellant.

5. Learned Departmental representative reiterated the findings of the impugned order and submitted that the impugned order calls for no interference.

6. We have considered the submissions on both sides and perused the records.

7. It is undisputed that except one labour contract during 2010-11 valued at Rs. 3,80,544/- which is said to have been rendered by the appellant to M/s Pratibha Industries Limited, all contracts entered into by the appellant and in dispute before us were for 'Works Contract' . The demand has been confirmed under the head of 'Commercial or Industrial Construction Service' under Section 65 (25d) for the period up to 2012 thereafter on the ground that the service was not covered under the negative list.

8. Works contracts are those contracts where goods are supplied and services were also rendered in the same contract. It was held by the Supreme Court in **State of Madras vs. Gannon Dunkerley Company (Madras) Ltd.**[3]**.** that works contracts are neither contracts for supply of goods nor contracts for supply of services but are a separate species of contract known to commerce. The State Government of Madras had in **Gannon Dunkerley,** taxed the material used by builders in the course of construction deeming the materials used in construction to have been sold. This taxing provision was assailed by Gannon Dunkerley and the Supreme Court held that 'Composite Works Contract' are a special species of contracts known to commerce and the State of Madras had no power to levy sales tax on the materials used

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3. 1959 SCR 379

in executing works contracts. Thereafter, Constitution of India was amended (46th Amendment) by the Parliament in 1983 and clause 29A was inserted in Article 366 enabling the states to tax such transfer of goods deeming them to be a sale or purchase of goods.

9. After the 46th Amendment States were empowered to tax the transfer of goods used in 'Composite Works Contract' deeming them to be sales. The power of Parliament to levy service tax on the service component of the 'Works Contract' was never in doubt as the Parliament has residual powers of legislation under S.No. 97 of List 1(Union First) of the Seventh Schedule to the Constitution of India.

10. The service tax itself was levied under the Finance Act, 1994 exercising the powers under S. No. 97 of List 1 of the Seventh Schedule of Constitution of India. Initially, it was levied on a few services. From time to time, various services were added to the charging section. Wherever the services were rendered along with supply of goods under composite contracts, exemption Notifications were issued to deduct the value of goods from 'Composite Works Contract' while charging service tax. Thereafter, 'Works Contract Service' was introduced as a separate category by itself, under Section 65 (105) (zzzza). The question which arose was whether service tax on 'Composite Works Contract' could have been levied under various other heads prior to the introduction of section 65(105)(zzzza). This issue was decided by the

Supreme Court in case of **Commissioner of Customs, Excise, Kerala vs. Larsen & Toubro Ltd.**[4] Paragraphs 17, 24 to 29 and 43 to 45 of this judgement are reproduced below:

> "**17.** We find that the assessees are correct in their submission that a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In Gannon Dunkerley, 1959 SCR 379, this Court recognized works contracts as a separate species of contract as follows:–
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> > "To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."
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> **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

4. 2015 (39)STR 913 (SC)

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 property in goods transferred in the execution of a works contract.

25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.

26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.

27. In fact, the speech made by the Hon'ble Finance Minister in moving the Bill to tax Composite Indivisible Works Contracts specifically stated:-

> "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 levy service tax on services involved in the execution of a works contract. However, I also propose an optional composition scheme under which service tax will be levied at only 2 per cent of the total value of the works contract."

28. Pursuant to the aforesaid speech, not only was the statute amended and rules framed, but a Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was also notified in which service providers could opt to pay service tax at percentages ranging from 2 to 4 of the gross value of the works contract.

29. It is interesting to note that while introducing the concept of service tax on indivisible works contracts various exclusions are also made such as works contracts in respect of roads, airports, airways transport, bridges, tunnels, and dams. These infrastructure projects have been excluded and continue to be excluded presumably because they are conceived in the national interest. If learned counsel for the revenue were right, each of these excluded works contracts could be taxed under the five sub-heads of Section 65(105) contained in the Finance Act, 1994. For example, a works contract involving the construction of a bridge or dam or tunnel would presumably fall within Section 65(105)(zzd) as a contract which relates to erection, commissioning or installation. It is clear that such contracts were never intended to be the subject matter of service tax. Yet, if learned counsel for the revenue is right, such contracts, not being exempt under the Finance Act, 1994, would fall within its tentacles, which was never the intention of Parliament.

43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into

> composite works contracts containing elements both of transfer of property in goods as well as labour and services.
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> **44.** We have been informed by counsel for the revenue that several exemption notifications have been granted qua service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of.
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> **45.** We, therefore, allow all the appeals of the assessees before us and dismiss all the appeals of the revenue."

11. Therefore, as per the judgment of the Supreme Court in **Larsen & Toubro Ltd.,** service tax on 'Works Contract' can be levied only under the head of 'Works Contract' under section 65 (105) (zzzza) and not under any other service. Therefore, for the period up to 2012, the demand of service tax under the head of 'Commercial or Industrial Construction service' in the impugned order cannot be sustained, as undisputedly, the services rendered (except one service for 'Labour Contract' to M/s Pratibha Industries Limited for 2010-11) were 'Works Contract Services'. There is no demand under the head of 'Works Contract Service'. Therefore the demands up to 2012 cannot be sustained and needs to be set aside and we do so.

12. As far as the period post 2012 is concerned, the appellant's contention is that although they are liable to pay service tax on the 'Works Contract', but they were entitled to abatement in terms of Rule 2A(ii)(A) of service Tax (Determination of Value) Rules, 2006.

13. In the impugned order, the Commissioner has discussed the demand service recipient- wise. As we have recorded above, services after 2012 were rendered to M/s Harsha Abacus Pvt Ltd., M/s Indu Projects Ltd., M/s Refex Energy Ltd. and M/s Zuberi Engineering Co. The Commissioner has discussed the services provided to M/s Harsha in paragraph 19 and those provided to M/s Refex in paragraph 23 of the impugned order. He has not given any findings in respect of the services rendered to the other two service recipients (M/s Indu and M/s Zuberi). In both paragraphs (19 and 23), the observations made by the Commissioner are as follows:

> "I observe that the assessee has failed to substantiate that they were eligible for such valuation since they have not shown that they had not availed CENVAT credit of duties or CESS paid on any inputs, used in or in relation to the said 'Works Contract', under the provisions of CENVAT Credit Rules, 2004. Further the assessee has also not shown that they were even eligible for abatement for 'Commercial or Industrial Construction'. They also failed in showing even by the taxation correctly determined their service tax liability. In other words Commissioner findings is that he was not specified with the evidence produced by the appellant that they had not availed CENVAT credit for the inputs used. And there is

> no positive finding that they had availed the CENVAT credit. This is something which can be easily verified from the ST-3 Returns and other records. The Commissioner has also examined the legal provision to see if the abatement was permissible for 'Commerce of Industrial Construction Services' when rendered under the 'Composite Works Contract'. He also admits that he was not able to determined correctly their service tax liability from the data provided by the appellant."

14. In view of the above, we find that major portion of the demand which pertains to period prior to 2012 cannot be sustained in view of the judgment of the Supreme Court in the case of **Larsen & Toubro Ltd.** and it needs to be set aside and is set aside.

15. In respect of the period post 2012 the impugned order is not clear as to how the Commissioner has concluded that the appellant had availed CENVAT credit on the inputs. For this period, the Commissioner's findings in the impugned order are sketchy in respect of two service recipients and there are no findings in the remaining two service recipients. Further, in respect of the labour contract, which is said to have been rendered during 2010-11 by the appellant to M/s Pratibha Industries Ltd., an amount of Rs. 39,196/- has been confirmed in the impugned order. It needs to be seen whether this amount is already covered by the service tax already paid by the appellant.

16. The matter is, therefore, remanded to the Adjudicating Authority for determination of the liability post 2012 and in

respect of the sole Labour Contract entered into by the M/s Pratibha Industries. The appellant may produce all the evidence and documents which they have to the Commissioner whereafter the Commissioner shall pass a reasoned order.

17. The appeal is partly allowed and partly remanded and the impugned order is modified as follows:

a. The demand in respect of 'Works Contract' prior to 01.07.2012 is set aside as they cannot be sustained under the head of 'Commerce or Industrial Construction Service'.

b. The demand for the period post 2012 and the demand on the sole 'Labour Contract' for the period prior 2012 are remanded to the Commissioner.

c. All penalties are set aside under section 80 of the Chapter V of the Finance Act, 1994 as the bulk of the demand has been set aside.

(Order pronounced on 23.02.2022)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER(TECHNICAL)

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