CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH, COURT NO. I

SERVICE TAX APPEAL NO. 254 OF 2009
WITH
SERVICE TAX CROSS APPLICATION NO. 124 OF 2009
(ON BEHALF OF THE RESPONDENT)

[Arising out of the Order-in-Appeal No. 12 (DK)/ST/JPR-II/2009 dated 25/02/2009 passed by The Commissioner (Appeals-II), Customs & Central Excise, Jaipur.]

Commissioner, Central Excise, **Appellant**
New Central Revenue Building, Statue Circle, C-Scheme,
Jaipur.

VERSUS

M/s J.K. White Cement Works, **Respondent**
Gotan, District – Nagpur,
(Rajasthan).

APPEARANCE
Shri Rajeev Kapoor, Authorized Representative (DR) – for the Department
Ms. Surabhi Sinha, Advocate – for the respondent.

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

FINAL ORDER NO. 51067/2022

DATE OF HEARING : 01.11.2022
DATE OF DECISION: 01.11.2022

P.V. SUBBA RAO

This appeal is filed by the Revenue assailing order-in-appeal dated 25.02.2009 passed by the Commissioner of Central Excise (Appeals), Jaipur – II, whereby he allowed the appeal of the respondent/assessee and set aside the order-in-original dated 31.03.2008 passed by the Assistant Commissioner of Central Excise, Ajmer.

2. None appeared on behalf of the respondent despite notice. We have heard learned Authorized Representative for the Revenue and perused the records.

3. The respondent is a manufacture of white Portland cement and has been paying central excise duty. It is also registered under the Service Tax Act. It appeared to the Revenue that it had evaded payment of service tax of Rs. 38,497/- by suppressing the taxable value of Rs. 4,81,215/- in respect of the Consulting Engineer service received by it from an overseas Consulting Engineer. Accordingly, a show cause notice dated 20.07.2006 was issued to the respondent proposing to recover the service tax of Rs. 38,497/- along with the interest and proposed penalties. The Assistant Commissioner confirmed the demand along with interest and imposed penalties under sections 78, 77 and 75A of the Finance Act upon the respondent. On appeal, the Commissioner (Appeals) passed the impugned order relying on the decision of the Larger Bench of this Tribunal in **Hindustan Zinc Ltd.** versus **Commissioner of Central Excise, Jaipur** rendered on 27.06.2008 in Service Tax Appeal No. 523 of 2006 in which it was held the taxable service provided by a non-recipient or from outside India, who does not have an office in India was not liable to service tax as it is covered under Notification No. 12/2004. Paragraph 6 of the impugned order is reproduced below:-

> "6. I have gone through the appeal memo, and records of personal hearing. The issue to be decided by me is as to whether

> the service tax Rs. 38,497.00 is chargeable from the appellant on the value of taxable service paid by them during the quarter Jan to March 2004 to a foreign firm on the basis of their invoice dated 03.01.2004, who were not having any office in India, <u>under the category of "consult engineer" as per clause (31) of Section 65 of the Finance Act, 1994</u> in terms of Rule 2 (1) (d) (iv) of the Service Tax Rules, 1994 read with Section 68 (2) of the Finance Act, 1994 (as emended).
>
> I find that identical issue came up before the Larger Bench of Hon'ble CESTAT in case of M/s Hindustan Zinc Ltd. vs. CCE, Jaipur in Service Tax Appeal No. 523 of 2006 when vide its Misc. Order No. ST/85/08 dated 276.06.2008 it held that taxable service provided by non-resident or from outside India, who does not have any office in India under Notification No. 36/2004, recipient of such service could not be held liable for paying service tax prior to 01.01.2005 notwithstanding the amendment in Rule 2 (1) (d) of Service Tax Rules in Notification No. 12/2004. Following the said Larger Bench order I hold that appellant as recipient of consulting engineer service from outside India, are not liable tp pay service tax for the period prior to 01.01.2005".

4. Accordingly, the Commissioner (Appeals) allowed the appeal and set aside the order of the lower authority.

5. Assailing this order, the present appeal is filed by the Revenue. In the grounds of appeal, Revenue does not dispute that the Larger Bench of this Tribunal has decided the matter in favour of the respondent/assessee. In fact, it further submits that the SLP filed before the Supreme Court by the Department against the decision of the Larger Bench was also dismissed on 23.01.2009. However, it asserts that a proposal for filing the review petition/application against dismissal of SLP is under consideration. The case of the Revenue is that although the Larger Bench of Tribunal has decided in favour of the assessee, which decision was also upheld by the Supreme Court by dismissing the SLP filed by the Revenue, the Commissioner (Appeals) has erred in passing the impugned order because the

Department is considering if a review petition/application should be filed against the dismissal of SLP by the Supreme Court.

6. In other words, Revenue’s case is that the Commissioner (Appeals) has greatly erred in following judicial discipline and should have disobeyed the order of Larger Bench of this Tribunal which was upheld by the Supreme Court. According to the Revenue, since department was considering whether a review petition should be filed against the dismissal of SLP by the Supreme Court, the Commissioner (Appeals) should not have followed the decision of this Tribunal and Supreme Court. Needless to say that such a ground cannot be the basis for allowing any appeal by the Revenue. The appeal filed by the Revenue accordingly deserves to be dismissed. The Cross Objection filed by the assessee prays for dismissal of the appeal filed by the Revenue with costs. We find from the records that none from the respondent has been appearing in the matter. Nobody appeared before us to press the demand for costs even today. In view of the above, the appeal filed by the Revenue is dismissed and the impugned order is upheld. The Cross Objection filed by the respondent is also disposed of.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

PK