CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. IV

E-HEARING

SERVICE TAX APPEAL NO. 53058 OF 2018

[Arising out of the Order-in-Appeal No. 306/AG/CE/JDR/2018 dated 19.06.2018 passed by The Commissioner (Appeals), CGST, Jodhpur (Raj.).]

M/s Chankya Enterprises, **Appellant**
Plot No. D-29, Shastri Nagar,
Dist. Jodhpur (Raj.).

VERSUS

Commissioner of CGST, **Respondent**
G-105, New Jodhpur Industrial Area,
Jodhpur (Raj.).

APPEARANCE

Shri O.P. Agarwal, Consultant – for the appellant.
Shri Manoj Kumar, Authorized Representative for the Department.

CORAM:
HON'BLE DR. MS. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50357/2025

DATE OF HEARING/DECISION : 13.02.2025.

RACHNA GUPTA

The present appeal is filed to assail the order-in-appeal (OIA) bearing No. 306/AG/CE/JDR/2018 dated 19.06.2018.

2. Facts, in brief, relevant for present adjudication are the appellant had been engaged in providing Erection,

Commissioning or Installation Service to M/s Jodhpur Development Authority and other authorities but never got themselves registered under service tax. They performed the work of fixing the poles, wiring the poles, fixing of street light; laying of cables, construction of Tennis court and Basket Ball court, fixing of swings and construction of rallying in the side and between the road. The department observed, during scrutiny, that the appellants failed to pay service tax amounting to Rs. 36,38,492/- (Rs. 35,36,163/- + E. Cess Rs. 70,723/- + S.H.E. Cess Rs. 13,606/-) during the period 2005-2006 to 2009-2010 under the category of Erection, Commissioning & installation service relating to the work undertaken for installation of electrical devices, laying of drain and similar services contravening the provision of section 68, 69 & 70 of the Finance Act, 1994 read with Rule 4,5,6 & 7 of the Service Tax Rules, 1994".

3. Accordingly vide show cause notice C. No. V(ST) Adj.-II/JPR-II/536/09/4801 dated 21.10.2010 service tax amounting to Rs. 36,38,492/- (as per Annexure A of the said show cause notice) was proposed to be recovered along with proportionate interest and appropriate penalties. The proposal was initially confirmed vide order-in-original (OIO) No. 40/ST/JP-II/ 2012 dated 19.03.2012. The said order has been modified by the impugned order-in-appeal vide which the appellant is granted the benefit of abatement admissible under Notification No. 01/2006-

ST dated 01.03.2006. Still being aggrieved appellant is before this Tribunal.

4. We have heard Shri O.P. Agarwal, learned consultant for the appellant and Shri Manoj Kumar, learned authorized representative appearing for the department.

5. Learned consultant for the appellant submitted that they have provided services under composite contracts involving both goods and services, which is clear from Para 14.12 and 14.13 of OIO and from Para 10 of impugned OIA vide which tax has been demanded on 33% of value (which is admissible only when materials has been sold on execution of contract), therefore, services provided by the appellant are taxable under 'Works Contract Services' (WCS) w.e.f. 01.06.2007. As per decision given by Hon'ble Supreme Court in the case of **Larsen & Toubro Ltd.** reported as **2015 (39) S.T.R. 913 (S.C.)** service tax under any other category simplicitor cannot be demanded for services which are in nature of WCS, therefore, notice dated 21.10.2010 vide which the demand was raised under the category of ECIS is legally not sustainable and resultantly, OIO and impugned OIA passed in pursuance to such notice are also legally not sustainable. This also stands clear from Final Order No. 50662/2019 dated 01.05.2019 (para 11 to 17) passed by the Tribunal in the case of **Gurjar Construction** versus **CCE, Jaipur – II** in Service Tax Appeal No. 57731 of 2013 decided on 01.05.2019. Reliance is also placed on **India Guniting**

Corporation versus **CCE, New Delhi – 2021 (52) GSTL 174 (Tri.)**. In view of this, confirmation of demand under the category of ECIS is liable to be set aside. Further, demand under the category of works contract services cannot be confirmed now for want of notice under that category which is clear from decision given in the case of Gurjar Construction cited supra.

6. Further, it is submitted that there was divergent views about taxability of works contract services and matters were referred to different Larger Bench of the Tribunal when the controversy and confusion got resolved. Ultimately, the issue was put at rest by Hon'ble Supreme Court in above case (**Larsen & Toubro Ltd.**). In such circumstances, allegation of suppression of facts with intent to evade tax is, therefore, not sustainable. Hence extended period is not available. Decision given on identical facts by the Tribunal in the case of **Anand Construction Work** versus **CCE – 2017 – TIOL – 642 – Trib. – Del.** is relied upon. Due to same reason, penalty imposed under section 78 is also liable to be set aside in view of provisions of section 80 of the Finance Act, 1994. With these submissions order under challenge is prayed to be set aside and appeal is prayed to be allowed.

7. While rebutting these submissions learned departmental representative fairly conceded about the decision of Hon'ble apex court in **Larsen & Toubro** (supra), however, has reiterated the findings of the impugned order.

8. Having heard both the parties and perusing the appeal record, we observe it to be an admitted fact that appellants were awarded work orders by Jodhpur Development Authority during the impugned period for undertaking activities like :

"a. Fixing the poles,

b. Wiring the poles,

c. Fixing of street light (road light),

d. Laying of cables.

e. Construction of tennis court and basket ball court,

f. Fixing of swings, and

g. Construction of railing (iron railing) in the centre and sides of the public roads along with the material."

The department has alleged the activity to be classifiable under 'Erection, Commissioning and Installation Service' and the appellant has claimed it to be called as 'Works Contract Service'. The controversy has been put on rest by Hon'ble apex court in **Larsen & Toubro** (supra) case. While following this decision in the case of M/s Gurjar Construction (supra), the Tribunal observed as follows :-

> "10. The Supreme Court in Larsen & Toubro examined as to whether Works Contract Service can be classified under Section 65(105)(zzzh) and held that the scope of Section 65(105) (zzzh) is limited to cover contract of service simplicitor only and not a composite works contract. The Supreme Court noticed that it is only w.e.f 01 June, 2007 that Section 65(105)(zzzza) was introduced to cover composite works contract and so works contract cannot be

covered under any other category of services prior to 01 June, 2007. The relevant portion of the judgment is reproduced below :

> "15. A reading of this judgment, on which counsel for the assessees heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting therefrom charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub-paras (f), (g) and (h). Under each of these paras, a bifurcation has to be made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor"s accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost, expenses and profit as would be attributable in the works contract to the transfer of property in goods in such contract. This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of

property in goods transferred in the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts.

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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 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.

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14. The position that comes out very clearly, therefore, is that even prior to 01 June, 2007 and post 01 June, 2007, the nature of service rendered by the Appellant was WCS and not CCS. The show cause notice alleged that the Appellant was providing CCS service and the demand has also been confirmed under this category by the adjudicating authority. The impugned order, therefore, deserves to be set aside for this reason alone since the demand made under a particular category of service found to be incorrect in a subsequent proceeding, cannot be sustained. This is what was observed by the

Supreme Court in Hindustan Polymers Company and the relevant portion is reproduced below :

> "6. While we appreciate the Tribunal's desire to do complete justice and mould the relief in that direction, we think that, in the circumstances, the Tribunal should not, in this case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the appellants. That is not "moulding" relief. The demand that was made upon the appellants was under Tariff Item 68 and it proceeded upon the basis that there was a process of manufacture of coloured polystyrene from uncoloured polystyrene. Having come to a conclusion against the Revenue on these counts, the appropriate order for the Tribunal to have passed was to have set aside the demand and left it open to the Revenue to proceed against the appellants, as permissible under the law. The appellants would then have had the opportunity of meeting the precise case made out by the Revenue."

9. This Tribunal has been following the said decision. The decision of Supreme Court is law of land and the Tribunal is bound by the same. The adjudicating authorities are held to have violated the judicial protocol.

10. We also find that there has been a substantial litigation on the applicability of the various tax entries and in case of composite works contract the position got clarified only after the decision of the Supreme Court in **Larsen & Toubro** case supra. Hence the non-payment/partial payment was due to prevalent confession about nature of such services where the transfer of goods is agreed for rendering service i.e. in case of Composite Contracts. In such cases the non-payment of tax cannot be called

as intentional evasion nor suppression of facts. In view of this, demand of the period up to 31.03.2009 is hit by limitation. We draw our support of the decision in the case of **Uniworth Textiles Ltd.** versus **Commissioner of Central Excise, Raipur**[1]. It has been held as follows :

> "Burden to prove malafide of noticee is on department who makes the allegation. Onus to prove bonafide conduct is not on noticee even in term of Section 28 of the Customs Act.
> Mere non-payment of duties is not equivalent to collusion or wilfull mis-statement or suppression of facts. Otherwise there would be no situation for which ordinary limitation of six months would apply. Inadvertent of six months, whereas deliberate default faces limitation of five years. Some positive act has to be there on part of appellant".

11. Resultantly the show cause notice dated 21.10.2010 proposing the demand for the period 2005-2006 to 2009-2010 is held barred by time. No demand arising out of such show cause notice can be confirmed.

12. Resultantly, the impugned order confirming demand even for the abated amount is not sustainable also for the reason that demand is confirmed under ECIS whereas the service rendered was WCS. Therefore the OIA under challenge is set aside. The appeal is allowed.

(Order dictated and pronounced in open court.)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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

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1. 2013 (288) E.L.T. 161 (S.C.)