IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. I

ST/Misc/50005/2017
Appeal No. ST/2178/2012-Cu [DB]

[Arising out of Order-in-Appeal No. 02/COMMR/CUST/IND/2012 dated23.02.2012, passed by the Commissioner of Central Excise, Indore]

CC- New Delhi **....Appellant**

Vs.

M/s Swadeshi Construction **....Respondent**

Appearance:
Ms. Neha Garg, DR for the Appellant
Sh. Atul Kumar Gupta, Sh. Varun Gaba, Advocate for the Respondent

CORAM:
Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 17.02.2017

Date of Pronouncement: 16.03.2017

FINAL ORDER NO. 52412 /2017-CU [DB]

Per V. Padmanabhan

The present appeal is filed by Revenue against the Order-in-Original no. 78/2012 dated 27.04.2012 passed by the Commissioner Service Tax, New Delhi, in which, he dropped the demand of Service Tax made against the respondent vide Show

Cause Notice dated 11.05.2011. The Show Cause Notice raised the demand for service tax for the period 2006-2007 to 2008-2009.The respondent is a proprietorship concerned and are registered with the Service Tax Department for providing taxable service in respect of "Commercial or Industrial Construction Services" (CIC) falling under Section 65(105)(zzq) and "Works Contract Services" (WCS) falling under Section 65(105)(zzzza). The respondent was awarded two contracts for Construction and Development of Dilli Haat, at Pitampura and INA through the tendering process initiated on 20.03.2006 by the "Delhi Tourism and Transportation Development Corporation" (DTTDC). During the course of the audit of the respondent in October, 2010 by the officers of Service Tax Commissionerate Delhi, it was noticed that the respondent did not pay service tax under the category of "Commercial or Industrial Construction Services" in respect of the construction work carried out in terms of the above contracts. They claimed that Dilli Haat was conceived as a project by DTTDC, Government of Delhi to promote Tourism and Cultural activities of various states not only for the tourist but also to attract international tourist. The project was assigned to the DTTDC by the Government of Delhi and the land was allotted by DDA and the fund for construction was contributed by various Government Departments and Agencies. Dilli Haat is also situated in the area of Delhi conceptualized as 'PS3', which as per the Master Plan Delhi 2021 for National Capital Territory of Delhi, is meant to house sports facilities, sports centre, stadium etc. The respondent also further claimed that Dilli Haat is not a commercial building. They also contended that the entry to Dilli Haat is by entry ticket but the rent charged for temporary occupation of various stalls is very nominal. For the above reasons, the respondent contended that the construction undertaken by the respondent for Dilli Haat cannot be considered as commercial construction. Consequently, no service tax will be leviable under CIC. The ld. Commissioner in the impugned order accepted the above contention of the respondent and dropped the entire service tax demand.

2. With the above background, we heard Ms. Neha Garg, ld. DR for the appellant as well as Sh. Atul Kr. Gupta and Sh. Varun Gaba, ld. Advocate for the respondent.

3. The ld. DR contended that the service tax demand was dropped erroneously and highlighted the following grounds of Revenue of the appeal. The respondent has undertaken the construction activity of Dilli Haat, which is evidentially used for commerce. Even though DTTDC proposed to construct a Dilli Haat for promotion of Tourism and Cultural activities of various states, the actual operation can be inferred from Dilli Haat Operation and Management Rule 2006, which prescribed the rates for renting of commercial space for brand promotion. From these, it can be seen that Dilli Haat is a commercial venture, which has been earning profits for DTTDC. Since, such constructions are for commercial purposes just like Government bodies getting stalls constructed for

letting them out such activity will be chargeable to service tax under Commercial or Industrial Construction service.

4. The ld. Counsel for the respondent of opposed the proposal for levy of service tax on the activity carried out by them. He reiterated the points that Dilli Haat has been constructed by DTTDC to promote Tourism and Cultural activities of various states. Even the letting of stalls were at a very nominal rate.

5. He argued that Hon'ble Supreme Court in the case of **Commissioner Central Excise Vs. M/s Larsen Toubro Ltd and Anr. (2015-TIOL-187-SC-ST)** has categorically held that no service tax can be charged on activities, which are in the nature of "Works Contract Services" for the period prior to 1.06.2007, when WCS was included in the service tax statue. He further submitted that the contracts executed by the respondent were composite contracts involving supply of goods and also undertaking construction service and hence cannot be charged to service tax for the period prior 1.06.2007. Even for the subsequent period, since the construction is not of commercial nature, no service tax should be charged.

6. Heard both sides and perused the records. The Show Cause Notice dated 11.05.2011 proposed levy of service tax on the activity carried out by the respondent for construction of Dilli Haat under Commercial or Industrial Construction. Service tax

amounting to Rs 93,01,154/- was also demanded along with interest and penalties. However, the ld. Commissioner, vide the impugned order dropped the proposal entirely by taking the view that the activity was not covered under CIC since the building constructed is not intended primarily for Commerce and Industry. Revenue on the other hand has pleaded that the building constructed is being let out in the form of various stalls for brand promotion and hence, the constructing activity is to be covered under CIC and liable to payment of Service Tax.

7. The Ld. Counsel for the respondent, at the time of arguments has also relied upon the decision of the Hon'ble Supreme Court in the case of Larson & Toubro Ltd. We have gone through the above decision of the Apex court in which it has been categorically laid down that composite contracts involving both supply of goods as well as performance of services, will be liable to service tax under the Works Contract Services only from the date of introduction of WCS; i.e. 01.06.2007. Further, Apex court has also held that such contracts shall not be liable to service tax under any other categories for the period upto 31.05.2007. The claim of the respondent is that the contracts executed by them for construction of Dilli Haat are composite contract and hence not liable for service tax upto 31.05.2007.

8. We find considerable force in the argument advanced on behalf of the respondent, in the light of categorical pronouncement

of law by the Apex Court. We are of the view, that there can be no levy of service tax for the period upto 31.05.2007 if the contracts executed are in the nature of composite works contract as claimed by the respondent. However, this fact will need verification by going through the Original contracts. For this purpose, we considered necessary to remand the matter to the Original adjudicating authority. The respondent is also directed to submit the relevant documents for verification. If it is so, there will be no demand for service tax upto 31.05.2007. For the period w.e.f. 01.06.2007 the activity will be liable to service tax under the category of WCS. The liability of service tax will need to be re-determined under WCS and afresh demand raised.

9. If the adjudicating authority were to find that the subject contracts are not in the nature of composite works contract, in which case service tax will be liable to be paid for the activity undertaken in the category of Commercial or Industrial Construction; since, the civil structure constructed is used for commercial activity. Even though the claim of the respondent is that Dilli Haat is meant for promotion of Tourism and Cultural activities, we are inclined to disregard the same since the various stalls are meant to be let out on a commercial basis even if at rates or rents which are comparatively less.

10. In view of the above discussions, the impugned order is set aside and the case remanded to the Original adjudicating authority

for a denovo decision in the light of the Apex Court decision (supra) but by providing reasonable opportunity of being heard. Additional evidence, if need be, may be admitted as per law.

[Pronounced in the open court on 16.03.2017]

(Justice (Dr.) Satish Chandra)
President

(V. Padmanabhan)
Member(Technical)

Ritu S.