IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 05/04/2017.
DATE OF DECISION : 05/04/2017.

Service Tax Appeal No. 996 of 2011

CCE, Jaipur – I   Appellant

Versus

M/s Yadav Fabricator and Contractor   Respondent

Service Tax Appeal No. 1031 of 2011

M/s Yadav Fabricator and Contractor   Appellant

Versus

CCE, Jaipur – I   Respondent

[Arising out of the Order-in-Original No. 19/2011-(Service Tax) Commissioner dated 24/03/2011 passed by The Commissioner, Central Excise, Jaipur.]

Appearance

Shri Amresh Jain, Authorized Representative (DR) – for the appellant/Respondent.

Ms. Rinki Arora, Advocate – for the Respondent/Appellant.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 52738-52739/2017 Dated : 05/04/2017

Per. B. Ravichandran :-

These are two appeals against a common impugned order dated 24/03/2011 of Commissioner of Central Excise, Jaipur. Both the assessee as well as Revenue is in appeal against part of the findings in the impugned order. The assessee/appellant is engaged in construction and commissioning of petrol pumps for oil companies like IOCL, BPCL, IBP etc. Proceedings were initiated against the appellant/assessee for non-payment/short payment of service tax under the category of "commercial or industrial construction service" and "erection, commissioning or installation service" during the period 01/03/2003 to 31/03/2008. Upon adjudication of the demand notice, the Commissioner held that the appellant/assessee is liable to service tax of Rs. 8,41,857/-. He also imposed equal amount of penalty under Section 78 and further penalties under Section 76 and 77 of the Finance Act, 1994.

2. The appellant/assessee is contesting the findings of the Original Authority to the effect that they are not eligible for abatement of 67% in the taxable value for services rendered under "commercial or industrial construction service". The reason for denial of abatement is that the appellant/assessee did not include the value of pumps and equipments, given free of cost by the oil companies, for execution of the work. In the appeal they have submitted that such free supply items cannot form part of the gross value in terms of Section 67 as held by the Tribunal in

Bhayana Builders Pvt. Ltd. vs. CST, Delhi reported in **2013 (32) S.T.R. 49 (Tri. – LB)** and followed by the Tribunal in various other decisions later including **CCE, Bhopal vs. Sonali India** reported in **2014 (34) S.T.R. 47 (Tri. – Del.)**.

3. The learned Counsel appearing for the appellant/assessee, apart from elaborating grounds of appeal, as above, also contested the appeal filed by the Revenue against the same impugned order. It is submitted that all the contracts executed by the appellant/assessee are involving supply of goods subjected to VAT and such indivisible contracts are liable to service tax only w.e.f. 01/06/2007 after the introduction of new tax entry for "works contract service". Reliance was placed on the law laid down by Hon'ble Supreme Court in **CCE & CUS, Kerala vs. Larsen & Toubro Ltd.** reported in **2015 (39) S.T.R. 913 (S.C.)** on the above subject.

4. The learned AR submitted that the Revenue is in appeal against the findings of the Commissioner, regarding classification of the services, rendered by the appellant/assessee. However, it is submitted that the law laid down by the Hon'ble Supreme Court in **Larsen & Toubro Ltd.** (supra) as well as the decision of the Tribunal Larger Bench in **Bhayana Builders Pvt. Ltd.** (supra) are applicable to the facts of the case as on date.

5. We have heard both the sides and perused the appeal records. On the appeal filed by the appellant/assessee we note that the denial of abatement by the learned Commissioner only on the ground of non-inclusion of the value of free supply items, is not tenable. The Tribunal in the case of **Bhayana Builders Pvt. Ltd.** (supra) and on same issue in **Sonali India** (supra), held that free supply items from the recipient of service to the provider of service is not to be considered while deciding the abatement under Notification 1/2006-ST. Without going into the correctness of the classification, we hold that the appellant/assessee entitlement for such abatement cannot be denied. We rely on the decision of the Tribunal in **Bhayana Builders Pvt. Ltd.** (supra) and **Sonali India** (supra), cited above.

6. On the appeal filed by the Revenue we note that the issue is no more in dispute. Admittedly, all the contracts executed by the appellant/assessee are in the nature of indivisible works contract. They were registered with the State VAT Authorities under the said category. The Hon'ble Supreme Court in **Larsen & Toubro Ltd.** (supra) held that such works contracts are liable to service tax only w.e.f. 01/06/2007. Accordingly, following the ratio of the Hon'ble Supreme Court in **Larsen & Toubro Ltd.** (supra), we find that there is no merit in the appeal filed by the Revenue regarding re-classification of the service or for denial of abatement to the appellant/assessee.

7. In view of the above discussion and analysis, we find the appeal filed by the Revenue is to be dismissed and the appeal by appellant/ assessee is to be allowed. Order accordingly.

(Order dictated and pronounced in open court.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

PK