IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing/Decision:12.04.2017

Service Tax Appeals No.1227/2011 (DB)

[Arising out of common Order-in-Appeal No.150(DKV)ST/JPR-I/2011 dated 3.5.2011/4.5.2011 passed by the Commissioner (Appeals), Customs & Central Excise, Jaipur]

M/s.Apsara Construction — Appellant

Vs.

CCE,Jaipur-I — Respondent

Service Tax Appeal No.1188/2011 (DB)

CCE, Jaipur-I — Appellant

Vs.

M/s.Apsara Construction — Respondent

Appearance:

Rep. by Ms. Rinky Arora, Advocate for the party.
Rep. by Shri Sanjay Jain, AR for the Department.

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

Final order Nos.52942-52943/2017

Per B. Ravichandran:

Both the Revenue and the assessee are in appeal against the order dated 3.5.2011 of Commissioner (Appeals)-I, Jaipur. The assessee/appellants are engaged in providing various taxable services to oil companies in connection with setting up of petrol pumps. The dispute in the present case relates to service tax liability of the assessee/appellants for the period from October, 2003 to March, 2008. The Original Authority in his order dated 19.03.2010 concluded that the appellants are liable to service tax of Rs.26,50,902/- . He also imposed penalties under Section 76, 77 and 78 of the Finance Act, 1994. On appeal, the Commissioner (Appeals) upheld the original order except for waiving penalty imposed under Section 76 invoking provisions of Section 80 of the Act. He also set aside the penalty of Rs.1,000/- imposed under Section 77.

2. Ld. Counsel for the assessee/appellant submitted that they have executed various work orders for the oil companies in connection with setting up of petrol pumps. These contracts are basically composite work contracts and are liable to service tax only w.e.f. 1.6.2007 in view of the decision of the Hon'ble Supreme Court in **CCE Vs. Larsen & Toubro Ltd. – 2015 (39) STR 913 (SC).** It is submitted that w.e.f. 1.6.2007, they have been discharging service tax under works contract service after availing concession in terms of the composition scheme. As such, it is prayed that they have discharged their service tax liability for the period 1.6.2007 and there can be no penalty on them.

4. Ld. AR submitted that the Revenue is aggrieved by the decision of the Commissioner (Appeals) allowing abatement of 67% under notification no.15/2003-ST and notification no.1/2006-STafter classifying the services rendered by the assessee/ appellant under the category of "Commercial or Industrial Construction Service". The Revenue is also aggrieved by the decision of the Commissioner (Appeals) for waiving the penalty under

Section 76/77 of the Act. The classification adopted by the Commissioner (Appeals) under the category of "Commercial or Industrial Construction Service" is also contested. Ld. AR elaborating the grounds of appeal submitted that there is no evidence on record to indicate that the assessee/appellant has supplied any materials or equipments in the course of execution of work and as such, the abatement allowed is not justifiable. Regarding the claim of the assessee/appellant on their contracts being composite in nature, ld. AR submitted that the records available are not categorically establishing the fact that there was transfer of goods on which VAT has been paid by the assessee/appellant.

5. We have heard both the sides and perused the appeal records.

6. We note that the impugned order examined the nature of works executed by the assessee/appellant. It was observed that except for some work orders, which involved installation of pumps and tanks of clients or erection of steel canopy, other work orders are relating to "Commercial or Industrial Construction Services" only. However, the impugned order also recorded that "it would make no difference as to whether these services are classifiable under "Commercial Construction Service" or "Erection or Commissioning Services" or "Works Contract Service", hence, this issue of classification of services provided by the appellant reminds of academic only". After such observation, the Commissioner (Appeals) classified the service under "Erection or Installation Services" or under "Commercial Construction Services". We note that the classification of service is very much relevant to determine the tax liability of the assessee/appellant. As

held by the Hon'ble Supreme Court in case of **Larsen & Toubro Ltd. (supra),** there can be no levy of service tax on the indivisible composite works contract for the period prior to 1.6.2007. The appellant/assessee claimed that all their work orders are of composite nature and are correctly classifiable under Works Contract Service. Hence, it is necessary to examine each one of the contract, which were subject matter of adjudication by the lower authorities, in order to arrive at a correct factual position and thereafter, applying the said correct classification to determine the tax liability.

7. Accordingly, we find that the impugned order as it exists cannot be sustained. The same is set aside and the case is remanded back to the Original Authority for a fresh decision. The appeals are allowed by way of remand.

[Order dictated & pronounced in open court]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.