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

Date of Hearing/Decision:26.04.2017

Service Tax Appeal No.527/2012 (DB)

[Arising out of Order-in-Original No.5-6/AKM/CST(Adj.)/2012 dated 25.01.2012 passed by the Commissioner of Customs & Central Excise, New Delhi].

CST, Delhi   Appellants

Vs.

M/s.Shilpkar Interiors Designers Consultants Pvt.Ltd.   Respondent

Appearance:
Rep. by Shri Sanjay Jain, DR for the appellant.
Rep. by Shri P.K. Sahu, Advocate for the respondent.

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

Final Order No.53142/2017

Per B. Ravichandran

The Revenue is in appeal against order dated 25.01.2012 of Commissioner (Adj.), Service Tax, New Delhi. The respondents were engaged in providing various taxable services in construction activities. Proceedings were initiated against them to demand and recover service tax, not paid for the period 10.09.2004 to 31.03.2008. The allegation is that they have not properly classified their taxable services, which should be properly categorized under completion and finishing service of commercial/residential building. By improper classification of taxable service generally as under construction services, the respondent were alleged to have availed ineligible abatement under notification no.15/04-STfollowed by notification no.1/2006-ST dated 1.3.2006. The abatement under these notifications were not available for completion and finishing services. Even otherwise, the respondents availed cenvat credit during the period, which barred them from availing the abatement under these notifications.

2. The Original Authority adjudicated the case and held that the services rendered by the respondents are correctly classifiable under the categories of "Commercial or Industrial Construction Service/Residential Complex Services" in terms of Section 65 (105) (zzq) and Section 65(105) (zzzh) of Finance Act, 1994. He did not accept the respondent's plea for classification of service under works contract service. However, he allowed the abatement in terms of notification nos.01/2006-ST dated 1.3.2006, 15/2004-ST dated 10.09.2004, 18/2005-ST dated 7.6.2005 holding that the respondent fulfilled the conditions for such abatement.

3. The Revenue is aggrieved by the above order on the ground that the Original Authority has wrongly classified the services under "Commercial or Industrial Construction/Residential Complex Services" and also wrongly allowed the abatements under the above mentioned notifications. It is submitted by the Revenue that the respondent did not fulfill the conditions for abatement and the Original Authority fell in error in allowing such concessions. In other words, the Revenue contested re-classificaion of service and consequent extension of provisions for abatement under the above notifications to the respondent.

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

5. Ld. AR submitted that the respondent did not file any appeal against the impugned order and as such, are barred from making a submission for re-classification of their service under works contract service.

6. We note that the respondent did make submissions for classification of service before the Original Authority, which was rejected. However, the

respondent did get relief on other grounds. As the Revenue is agitating against the basis of the relief granted to the respondent, we find that the respondent can revive their submissions made before the Original Authority . In this connection, we refer to the decision of the Hon'ble Supreme Court in the case of **J.K. Cotton Spg. & Weaving Mills – 1998 (99) ELT 8 (SC).** The Hon'ble Supreme Court held that the respondent cannot be precluded in the appeal from canvassing for reversal of a finding contained in the impugned judgement despite its end result being in their favour. Accordingly, we find no infirmity in considering the plea of the respondent regarding correct classification of the taxable service especially taking into account the law as laid down in respect of 'Works Contract Service' by the Hon'ble Supreme Court in **Larsen & Toubro Ltd.,** which came after the impugned order was issued.

7. Contesting the grounds of appeal by the Revenue, ld. Advocate for the Respondent submitted that all the contracts executed by the respondent are involving supply of materials and are rightly to be considered as work contract services. The show cause notice itself mentions that all their contracts are composite works contract. They did plead the said facts before the Original Authority. However, the Original Authority declined to accept the plea of the respondent holding that prior to 1.6.2007, the activities can be classified under construction of commercial or industrial construction/residential complex service". Ld. Advocate further submitted that in terms of law laid down by the Hon'ble Supreme Court in the case of **Larsen & Toubro Ltd. – 2015 (39) STR 913 (SC),** composite works contract cannot be subjected to service tax prior to 1.6.2007. For the period post 1.6.2007, they have discharged service tax under works contract

service. The valuation of works contract service is not a point under consideration in the present proceedings.

8. The contracts executed by the respondent were involving supply of materials subjected to sales tax liability. The Original Authority held, on perusal of the contract agreements, that all are contracts with materials. In such factual background we find that there can be no service tax liability on these contracts for the period prior to 1.6.2007. The legal position is clearly brought out by the Hon'ble Supreme Court in **Larsen & Toubro (supra).** As such, issue of classification of services rendered by the respondent under construction services or under finishing services is no more relevant. For the period post 1.6.2007, the respondent claimed that they have discharged service tax under works contract service. However, we note that in view of the classification as held above and examining the scope of the present proceedings, we are not recording any findings regarding the exact quantum of service tax liability of the respondent after 1.6.2007, as the same is not for resolution before us.

9. In view of the above discussions and analysis, we find that the appeal by Revenue is without merit and the same is dismissed.

[Order dictated & pronounced in open court]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.