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. IV

DATE OF HEARING : 08/11/2017.
DATE OF DECISION : 08/11/2017.

Service Tax Appeal No. 34 of 2012

CCE, Jaipur – I Appellant

Versus

M/s Zuberi Engineering Company Respondent

Service Tax Appeal No. 129 of 2012

M/s Zuberi Engineering Company Appellant

Versus

CCE, Jaipur – I Respondent

[Arising out of the Order-in-Original No. 49/2011 (ST) - Commissioner dated 05/10/2011 passed by The Commissioner, Central Excise Commissionerate, Jaipur – I.]

Appearance

Shri Sanjay Jain, Authorized Representative (DR) – for the appellant/respondent.

Shri Jatin Mahajan, Advocate – for the respondent/appellant.

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

Final Order No. 57805-57806/2017 Dated : 08/11/2017

Per. B. Ravichandran :-

Both Revenue and assessee are in appeal against common impugned order dated 05/10/2011 of Commissioner of Central

Excise, Jaipur - I. The assessee/appellant are engaged in construction business. They were providing taxable service in pursuance of various contracts entered into with the client. After conducting certain verification of the records of the assessee/ appellant, the Revenue entertained a view that the assessee/ appellant did not discharge due service tax on various contracts executed by them. On completion of verification and enquiry, proceedings were initiated against the assessee/appellant by issuing show cause notice dated 13/04/2010. The notice proposed demand and recovery of service tax for the services rendered during the period 01/10/2004 to 30/09/2009. The notice listed various contracts alongwith tax liability in respect of each one of them. The case was adjudicated resulting in the impugned order. The Original Authority confirmed service tax liability of Rs. 3,47,30,682/- on the assessee/appellant. He also imposed penalty of equivalent amount under Section 78 and further penalty under Section 76 of the Finance Act, 1994.

2. The assessee/appellant is aggrieved by the order and filed this appeal. The learned Counsel elaborating the grounds of appeal submitted on the following lines :-

(a) the various contracts executed by the assessee/ appellant which are subject matter of this proceedings are essentially composite works contracts involving both supply of materials as well as provision of service. These contracts are not liable to service tax for the period prior to 01/06/2007 in terms of law laid down by the Hon'ble

Supreme Court in **CCE & CUS, Kerala vs. Larsen & Toubro Ltd. – 2015 (39) S.T.R. 913 (S.C.)** ;

(b) the Original Authority confirmed the tax liability on the same contracts under commercial or erection, commissioning or installation service for the period prior to 01/06/2007 and for the period after that date under works contract service. He allowed the abatement in the gross value under Notification 15/2004-ST and 01/2006-ST in respect of erection, commissioning or installation service and composition scheme in respect of works contract service w.e.f. 01/06/2007 ;

(c) wherever the contracts are not for commercial purpose or not of composite nature separate findings have been recorded ;

(d) the assessee/appellant is liable to pay service tax only w.e.f. 01/06/2007 availing composition scheme as they have fulfilled the conditions of composition scheme ;

(e) the demands issued invoking extended period are not sustainable. In fact some of the contracts were entered into even prior to the introduction of tax liability on erection, commissioning or installation service. The dispute regarding tax liability of composite works contract was resolved only by the decision of Hon'ble Supreme Court in **Larsen & Toubro Ltd.** (supra). Considering the interpretation issue and the dispute persisting during the relevant period there is no ground for invoking extended period of demand. On the same ground penalties also are not sustainable.

3. The learned AR opposed the appeal by the assessee/ appellant. He stated that the nature of contract has to be examined for a specific determination whether they are really

falling under composite works contract. The essential condition to decide the nature of contract is supply of materials which suffered sales tax. Further, the claim of the assessee/appellant for composition scheme in respect of works contract service is not tenable in as much as there is a clear condition of intimation of option in the scheme. The said intimation is necessary for the Revenue to verify the eligibility of the assessee/appellant for the said scheme. He relied on the decision of Hon'ble Supreme Court in **Nagarjuna Construction Co. Ltd. vs. Government of India – 2012 (28) S.T.R. 561 (S.C.)** to state that option to pay service tax has to be exercised specifically by the assessee/appellant.

4. Elaborating on the grounds of appeal by the Revenue, the learned AR submitted that apart from wrongly extending the composition benefit, the Original Authority failed to impose penalties under Section 70 and 77 of the Finance Act, 1994 for the violation of non-registration, non-filing of returns by the assessee/appellant.

5. We have heard both the sides and perused the appeal record. The dispute involves various types of contracts executed by the assessee/appellant. These are listed in the impugned order. Findings in respect of each contracts were also recorded by the Original Authority. The case of the appellant is that wherever there is a clear evidence to state that the contracts are all composite nature clearly falling under works contract service

there can be no tax liability on the assessee/appellant on these contracts for the period prior to 01/06/2007. We are in agreement with the said proposition. However, as contended by the learned AR the basic documents of each contracts, more specifically supporting evidence of supply of materials suffering sales tax is necessary for verification of the claim of the appellant. It is clear that in case of composite works contract, the appellant/assessee shall not be liable to service tax for the period prior to 01/06/2007. This has been clearly held by the Hon'ble Supreme Court in **Larsen & Toubro Ltd.** (supra).

6. For the tax liability post 01/06/2007 under works contract service, we note that the eligibility of the appellant/assessee to pay tax after availing the composition scheme is under dispute. The appellant/assessee supports the finding of the Original Authority. The Revenue is contesting the concession only on the ground that due option has not been exercised before the commencement of payment of tax on each of the contracts. The said condition being statutory requirement has to be followed strictly. In this connection, we note that the issue with reference to exercising option to pay concessional duty under composition scheme has been examined by this Tribunal in **ABL Infrastructure Pvt. Ltd. vs. CCE, Nashik – 2015 (38) S.T.R. 1185 (Tri. – Mumbai)**. The said decision examined various decided cases alongwith legal principles, including the ratio of the decision in **Nagarjuna Construction Co. Ltd.** (supra) and held that when the appellant/assessee did not pay any tax on such

works contract service and starts paying tax after availing concession, such payment of tax under the scheme should be construed as exercising the option. We note that the facts in respect of each one of the contracts now under contest requires verification with original documents. Accordingly, the matter has to go back to the Original Authority to apply the above ratio and to give a final finding regarding eligibility of the appellant/ assessee for such composition in respect of works contract service, post 01/06/2007.

7. The appellant/assessee also contested the demand on limitation. We note that essentially they have been executing contracts involving material as well as service. It is an admitted fact that there were persistent disputes regarding the tax liability and even quantification of such liability in respect of such contracts. The matter got resolved only by the decision of Hon'ble Supreme Court in **Larsen & Toubro Ltd.** (supra). Considering such issue of interpretation and disputes persistent during the time it is not sustainable for the Revenue to invoke extended period in respect of such services. Accordingly, the demand wherever liable to be paid shall be restricted to the normal period of limitation as per Section 73. In view of the above finding, the liability to penalties imposable also should be examined by the Original Authority.

8. In view of the above discussion and analysis, we note that impugned order as its stands is not sustainable. Considering the

grounds raised by both Revenue as well as appellant/assessee, we note that the matter has to go back to the Original Authority to decide the case afresh. The two main issues to be examined in such decision will be with reference to tax liability to be re-quantified for the period after 01/06/2007 on satisfactory verification of the documents regarding the claim of the appellant /assessee on classification of services under works contract service. The second issue is with reference to eligibility of the appellant/assessee to pay service tax after availing the concessional rate under composition scheme for works contract service. The other connected issues will also be looked into while deciding the case afresh. The appellant/assessee shall be given adequate opportunity to present their side of the case with supporting documents. The appeals are allowed by way of remand.

(Order dictated and pronounced in open court.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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