

In the Customs, Excise & Service Tax Appellate Tribunal
West Block No.2, R.K. Puram, New Delhi-110066

Appeal No.ST/2178/2012

(Arising out of Order-in-Original No.78/GB/2012 dated 27.04.2012 passed by Commissioner (Adj) ST, New Delhi))

Commissioner, ST, New Delhi

...Appellant

Vs

M/s Swadeshi Construction Co.

...Respondent

Appearance:

Present for the Appellant : Shri P.Juneja, AR

Present for the Respondent : Shri Rajveer Singh, Advocate

Coram:

HON'BLE MR ASHOK JINDAL MEMBER (JUDICIAL)

HON'BLE MR B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of hearing: 27.12.2017

Date of decision: 16.01.2018

Final Order No.50158/2018

Per B. Ravichandran,

The appeal by the Revenue is against order dated 27.04.2012 of Commissioner of Service Tax, New Delhi. By the said order, the original authority dropped the entire demand of Service Tax of Rs.93,01,154/- covering the period 2006-07 to 2008-09 with reference to construction project of Delhi Haat in INA and Pitampura. The demand was raised by SCN dated 27.05.2011 under the category of "Commercial or Industrial Construction Service" in terms of Section 65 (25b) read with Section 65(105) (zzq) of the Finance Act, 1994. The original authority held that the

construction undertaken by the respondent cannot be classified as “Commercial or Industrial Construction” and dropping the demand.

2. In the appeal, the Revenue contended that the construction is covered by tax entry “Commercial or Industrial Construction Service”, as admittedly, shops, stalls, spaces so constructed were let-out on rent and whole premises is used for trading and commercial activity. The Revenue further contended that the civil construction in Delhi Haats is one of the profitable commercial ventures by the DTTDC and the tax liability should have been confirmed on such construction activity.

3. The appeal of the Revenue was decided by the Tribunal vide Final Order No. 51412/2017 dated 16.03.2017. The Tribunal observed that in view of the decision of Hon’ble Supreme Court in M/s Larsen & Toubro Limited-2015 TIOL (187) SC ST, the claim of the respondent, that these composite contracts cannot be subjected to service tax for the period prior to 01.06.2007, requires consideration. For the period post 01.06.2007, the activity will be liable to service tax under a category of “Works Contract Service”. The Tribunal accordingly held that liability of service tax will need to be re-determined under “Works Contract Service” and afresh demand raised. It was also observed that in case the contracts were found to be not of composite nature, the respondent shall be liable to service tax as this construction is for commercial purpose. With these observations, the Tribunal directed the original authority for a *de nova* decision after

considering the decision of the Apex Court in M/s L&T Limited (supra). Additional evidence, if need be, may be admitted as per law. The respondent challenged the said order of the Tribunal before the Hon'ble Delhi High Court by filing SERTA 6/2017. The High Court, vide their order dated 22.09.2017, set-aside the order of the Tribunal and directed the CESTAT to examine the nature of contracts executed by the respondent to find the applicability of the decision of the Supreme Court in M/s L&T Limited (supra).

4. With the above background, we have heard the Id AR for the Revenue and the Id Counsel for the respondent-assessee. Both filed written submissions also. We note that though the High Court directed either of the parties to place complete copies of relevant contracts before the Tribunal, copy of one contract with reference to construction of Delhi Haat, Pitampura was placed by the respondent. When the case was heard on 21.11.2017, it was recorded by the Tribunal that the second contract is said to be not readily available. The Id Counsel sought time to place the same. The matter was adjourned to 27.12.2017 and on that day also, no further documents were placed before the Bench. However, we heard both the sides and perused appeal records. The Id Counsel for the respondent submitted that the very fact that the SCN itself demanded service tax under "Commercial or Industrial Construction Service" after allowing the appellant of 67% of value in terms of Notification 1/2006 ST dated 01.03.2006 making it clear that the contracts are composite in

nature. We also perused the contract with reference to construction of Delhi Haat at Pitampura which is placed before us. The said contract involves supply of materials as well as provision of service. It is a composite contract which is rightly to be considered for taxation only after the introduction of new tax entry for works contract service w.e.f. 01.06.2007. It would appear that the Revenue proceeded to demand service tax with abatement which leads to the inference that the contracts now under consideration were involving supply of materials. In the face of such facts, it is clear that the services rendered by the appellant cannot be taxed under the category of Commercial or Industrial Construction Service for the period prior to 01.06.2007. As observed by the Hon'ble Delhi High Court, in their remand order, the tax liability on composite works contracts arise under the tax entry of works contract service w.e.f. 01.06.2007. We note that the commercial nature of the construction has already been held by the Tribunal in its finding dated 16-03.2017. We note that the civil construction for Delhi Haats is rightly to be considered as commercial in nature. On this account, we are not in agreement with the original authority.

5. The LD AR submitted that the respondent shall be held to be liable to service tax under "Works Contract Service" though the demand proceedings were with reference to tax entry "Industrial or Commercial Construction Service". He submitted that the Hon'ble Supreme Court in M/s Pradyumana Steel Ltd-1996 (82) ELT 441 (SC) held that mentioning of

wrong provision of law, when the power to exercise is available even though in different provision, is by itself not sufficient to invalidate the exercise of that power. It is his submission that the Works Contract Service introduced w.e.f. 01.06.2007 covered the taxable activities of Commercial or Industrial Construction Service also and, as such, the tax liability has to be confirmed w.e.f. 01.06.2007 on such services.

6. The Id Counsel for the respondent contested the above submission on the ground that the whole proceeding against the respondent is for demand of service tax under Section 65 (256) as Commercial or Industrial Construction Service. Service tax liability cannot be affirmed under “Works Contract Service”. Such action will be beyond the scope of the SCN and the same is not permissible. Reliance was placed on various decided cases by the Apex Court.

7. We note that in the present case, the SCN was issued on 27.05.2011. On that date, both the tax entries, namely, Commercial or Industrial Construction Service and Works Contract Service, were available in the Finance Act, 1994. The SCN did mention this in the first para itself. However, the proposal for tax demand was specifically made under Commercial or Industrial Construction Service under Section 65 (105) (zzq) of the Finance Act, 1994. In such situation, we note that it cannot be a case of simple mentioning of wrong provisions of law as submitted by the Revenue. Apparently, the tax liability of composite works contract is to be

considered under works contract services only as per legal position settled by the Hon'ble Apex Court in M/s L&T Limited. Even in the appeal, the Revenue submitted that the respondent were engaged in construction services liable to tax under tax entry Section 65(105) (xxq). The grievance of the Revenue is with reference to commercial nature of the construction undertaken by the respondent and not on the correct classification of taxable activity.

8. In view of the above discussion and analysis, we hold that the constructions undertaken by the appellant are in pursuance of composite works contracts and were not liable to be taxed prior to 01.06.2007 in view of the decision of Apex Court in M/s L&T Limited (supra). The constructions are of commercial nature and the original authority is not correct in his finding to the contrary. Since the impugned order dealt with the tax liability for the whole period only under the Commercial or Commercial or Industrial Construction Service, the same is not sustainable in view of the legal position held by Apex Court in M/s L&T Limited. In view of this legal position, we dismiss the appeal by the Revenue.

(Pronounced in Court on 16.01.2018)

(Ashok Jindal)
Member (Judicial)

(B. Ravichandran)
Member(Technical)

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