CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

SERVICE TAX Appeal No.55676 of 2013
(on behalf of the Appellant)

(Arising out of Order–in-Original No. OIA-30/2012-13 (ST) dated 27 / 31.08.2012 passed by COMMISSIONER OF CENTRAL EXCISE-JAIPUR - 1)

M/s. Khandal Construction **...Appellant**
'Matrachaya' Shyam Path, Arya Nagar
Near SBI, Alwar, Rajasthan

Versus

Commissioner ofCustoms,
Central Excise, Jaipur-1 **....Respondent**
Office of The Commissioner,
CENTRAL EXCISE, Jaipur-1
New Central Revenue Building,
Statue Circle, C-Scheme, Jaipur-303005

APPEARANCE:
Shri Krishna Mohan Menon & Ms Parul Sachdeva, Advocate for the Appellant
Mr.R.K. Manjhi, Authorised Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR.BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/ Decision: **08.04.2019**

FINAL ORDER NO. 50604/2019

JUSTICE DILIP GUPTA

1. This appeal is directed against the order dated 31 August, 2018 passed by the Commissioner, Central Excise Jaipur confirming the demand of Service Tax and imposition of penalty. The period

involved in the present appeal is from 24 March, 2006 upto 20 March 2007 during which period the appellant was a proprietorship firm.

2. The appellant at the relevant time was engaged in providing supply of materials and services for installation of telecommunication towers. During the relevant period from 24 March, 2006 upto 20 March 2007, the appellant was awarded two contracts for establishment of GSM Network. A perusal of the agreements entered into between the appellant and M/s. Nokia India Pvt. Ltd. and M/s. Ericsson India Pvt. Ltd. reveal that the scope of work included survey, design, planning, engineering, supply, installation, integration, testing and commissioning of GSM equipments in India.

3. A show cause notice dated 17 June 2010 was issued to the appellant on the basis of intelligence gathered by the officers of the Anti Evasion Department of Central Excise Commissionerate, Jaipur-I. It was revealed that the appellant was doing Erection of Foundation of Tower and Commissioning and Installation of BTS of Mobile Towers for M/s. Nokia India Pvt. Ltd. and M/s. Ericsson India Pvt. Ltd. and for this purpose had entered into contracts with the aforesaid two parties and was receiving payment including Service Tax but was not depositing the Service Tax with the Department. The show cause notice further mentioned that from the nature of the services provided by the appellant, it appeared that it was engaged in Erection, Commissioning or Installation Services for which the Service Tax liability (inclusive of cess) for the period

from 24 March 2006 upto 12 March 2008 would come to Rs. 1,58,74,210/-. The appellant was, therefore, called upon to show cause within 30 days of the receipt of the notice as to why:

i. Service Tax amounting to Rs. 1,58,74,210/- (including Ed. Cess and HSE Cess) should not be recovered from them under proviso to Section 73 (1) of the Finance Act, 1994.

ii. Interest on the above Service Tax amount should not be recovered from them in terms of the provisions of Section 75 of the Finance Act, 1994; and

iii. Penalty should not be imposed upon them under Section 76, 77 and 78 of the Finance Act, 1994 for contravention of provisions of Section 66, 68, 69 and 70 of the Finance Act, 1994 read with Rule 4, 5, 6 and 7 of the Service Tax Rules, 1994.

4. The appellant submitted a reply stating therein that the firm existed as a proprietorship firm from June 2005 upto June 2006 (should be March 2007), whereafter it was converted into a partnership firm. It was therefore, stated that all three partners had the liability to pay service tax and the same should not be limited to Shri Sandeep Sharma, proprietor of the firm. The adjudicating authority held that as per the contracts all the works mentioned in purchase order were integral part of Erection, Commissioning and Installation or incidental thereto for the supply of GSM Cellular Network. The Adjudicating authority also found that the approximate value of these services comes to Rs. 13 crores.

The adjudicating authority also found that the appellant had not paid Service Tax amounting to Rs. 1,58,74,210/- on the taxable value of Rs. 12,96,49,997/- received on the account of "Erection, Commissioning and Installation services" classifiable under section 65 (105)(zzd) of the Finance Act 1994 read with Section 65 (39a) of the Finance Act during the period from 24 March 2006 to 12 March 2008, even though it had collected Rs.60,44,659/- towards service tax from their service recipient. Accordingly the Commissioner confirmed the demand on Service Tax and also imposed penalty. The order is reproduced below:

> i) I confirm, under proviso to section 73(1) of the Finance Act, 1994, demand of service tax amounting to Rs.1,29,41,548/- (Rs. One Crore Twenty Nine Lacs Forty One Thousand Five Hundred Forty Eight only) including Education and S&H Education Cess and order it to be recovered from M/s. Shri Khandal Construction (proprietorship firm upto 20.03.2007) or its proprietor Shri Sandeep Sharma along with interest in terms of Section 75 of the said Act.
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> ii) I confirm, under proviso to section 73(1) of the Finance Act, 1994 =, demand of service tax amountin to Rs.29,99,662/- (Rs. Twenty Eight Lacs Ninety Nine Thousand Six Hundred Sixty Two only) including Education and S&H Education Cess and order it to be recovered from M/s. Shri Khandal Construction working (partnership firm from 21.03.2007 to 12.03.2008) or its partners Shri Sandeep Sharma, Kapil Taneja and Sher Singh Sunda jointly or severally along with interest in terms of Section 75 of the said Act.
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> iii) I also impose a penalty of Rs. 1,29,41,548/- (Rs. One Crore Twenty Nine Lacs Forty One Thousand Five Hundred Forty Eight only) on M/s Shri Khandal Construction (proprietorship firm upto 20.03.2007) under section 78 of the Finance Act, 1994 which is liable to be recovered from the firm or its proprietor Shri Sandeep Sharma. However, benefit of reduced penalty of 25% as per proviso to Section 78 ibid, is available to them subject to the conditions that service tax demand of Rs.1,29,41,548/- and the interest payable thereon under Section 75, is paid within thirty days from the date of communication of this order and further subject to the condition that the benefit of reduced penalty shall be available if the amount of penalty so determined has also been paid within the period of thirty days from the date of communication of this order.
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> iv) I also impose a penalty of Rs.28,99,662/- (Rs.Twenty Eight Lacs Ninety Nine Thousand Six Hundred Sixty Two only) on M/s. Shri Khandal Construction (partnership firm from 21.03.2007) under Section 78 of the Finance Act, 1994, which is liable to be recovered from the firm or its partners Shri Sandeep Sharma, Kapil Taneja and Sher Singh Sunda jointly or severally. However benefit of reduced penalty of 25% as per proviso to Section 78 ibid, is available to them subject to the conditions

that service tax demand of Rs.28,99,662/- and the interest payable thereon under Section 75, is paid within thirty days from the date of communication of this order and further subject to the condition that the benefit of reduced penalty shall be available if the amount of penalty so determined has also been paid within the period of thirty days from the date of communication of this order.

v) I impose a penalty of Rs.200/- per day for the period during which such failure continued or at the rate of 2% of the amount of Service Tax due per month on M/s. Shree Khandal Corporation working as proprietorship firm and partnership firm, whichever is higher, till the date of actual payment of outstanding service tax, subject to maximum of service tax amount outstanding under section 76 of the Finance Act, 1194. This is also liable to be recovered from the firm or its proprietor or partners jointly or severally.

vi) I also impose a penalty of Rs. 1,20,400/- (Rs. One Lac Twenty Thousand Four Hundred only) on Shri Sandeep Sharma Proprietor / Partner of M/s. Shri Khandal construction under Section 77(1)(c) of the Finance Act 1994.

5. Shri Krishna Mohan Menon, leared counsel for the appellant has submitted that since the two contracts entered by the appellant with M/s. Nokia India Pvt. Ltd. and M/s. Ericsson India Pvt. Ltd. were composite work contracts, the appellant could not have been subjected to any service tax liability till the introduction of a specific legislation for the same w.e.f. 01 June 2007, in view of the decision of the Supreme Court in **Commissioner of CE Kerala Vs. Larsen & Toubro Ltd.** reported in **2015 (39) STR 913 (SC).** Learned Counsel also submitted that when the firm existed as a proprietorship firm till March 2007, Shri Sandeep Sharma had not filed the service tax return for the period from June 2005 to March 2007 and that it was only w.e.f. 01 June 2007, after introduction of work contract service, that tax was required to be paid under this category of service but the entity of the appellant ceased to exist since the firm was converted into a partnership firm.

6. Shri R.K. Manjhi, learned Authorised Representative of the Department, has however submitted that the appellant did not state in reply to the show cause notice that the work performed under agreement was in the nature of works contract and in fact the appellant itself had collected service tax under Erection, Commissioning or Installation Services. It has, therefore, been submitted that the appellant cannot now turn around and contend in this appeal that the actual service rendered by the appellant was Works Contract Service and not Erection, Commissioning or installation Service. In support of his submission learned Authorised Representative has placed reliance on the decision of this Tribunal in the case of **Kamakhaya Steels Pvt. Ltd. Vs. CCE Meerut 2015 (317) ELT 67 (Tri-Del).**

7. We have considered the submissions advanced by the parties.

8. It is not in dispute that the appellant had collected service tax from the service recipients, namely M/s. Nokia India Pvt. Ltd. and M/s. Ericsson India Pvt. Ltd. by treating the service as Erection, Commissioning or Installation Service and the Department had also issued the show cause notice to the appellant treating the service to be Erection, Commissioning or Installation service and it was only the service tax short paid by the appellant that was sought to be recovered. Learned Counsel for the appellant also does not dispute that some service tax had been collected by the appellant from the service recipient, but what he contends is that the appellant had not been issued a show cause notice for depositing this amount under section 73A of the Finance Act.

9. The Supreme Court in **Larsen & Toubro Ltd.** examined whether service tax can be levied on indivisible works contract prior to the introduction of work contract service on 1 June 2007 by the Finance Act 2007 that expressly makes such contracts liable to service tax. In paragraph 17 of the judgment, the Supreme Court observed that the "assessees were correct in their submission that the works contract is a separate species of contract distinct from contracts for services simpliciter recognised by the world of commerce and law as such, and has to be taxed separately as such". The Supreme Court ultimately held that prior to 01 June 2007 there was no charging section specifically levying the service tax only on works contract and prior to this date, service tax could be levied only on contracts simpliciter and not composite indivisible works contract.

10. Paragraphs 24 to 29 of the judgement which are relevant to the controversy involved in the appeal are reproduced below:

> **"24.** A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "*any service provided*". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.
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> **25.** In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is

not ascertainable, to be the amount as may be determined in the prescribed manner.

26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second *Gannon Dunkerley* case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second *Gannon Dunkerley* case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.

27. In fact, the speech made by the Hon'ble Finance Minister in moving the Bill to tax Composite Indivisible Works Contracts specifically stated :-

"State Governments levy a tax on the transfer of property in goods involved in the execution of a works contract. The value of services in a works contract should attract service tax. Hence, I propose to levy service tax on services involved in the execution of a works contract. However, I also propose an optional composition scheme under which service tax will be levied at only 2 per cent of the total value of the works contract."

28. Pursuant to the aforesaid speech, not only was the statute amended and rules framed, but a Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was also notified in which service providers could opt to pay service tax at percentages ranging from 2 to 4 of the gross value of the works contract.

29. It is interesting to note that while introducing the concept of service tax on indivisible works contracts various exclusions are also made such as works contracts in respect of roads, airports, airways transport, bridges, tunnels, and dams. These infrastructure projects have been excluded and continue to be excluded presumably because they are conceived in the national interest. If learned counsel for the revenue were right, each of these excluded works contracts could be taxed under the five sub-heads of Section 65(105) contained in the Finance Act, 1994. For example, a works contract involving the construction of a bridge or dam or tunnel would presumably fall within Section 65(105)(zzd) as a contract which relates to erection, commissioning or installation. It is clear that such contracts were never intended to be the subject matter of service tax. Yet, if learned counsel for the revenue is right, such contracts, not being exempt under the Finance Act, 1994, would fall within its tentacles, which was never the intention of Parliament."

11. It is clear from the agreements entered into between the appellant and M/s. Nokia India Pvt. Ltd. and M/s. Ericson India Pvt. Ltd. that the contracts were indivisible works contract. In view of the aforesaid decision of the Supreme Court in Larsen and Toubro Ltd., no levy of service tax could, therefore, be imposed prior to 1 June 2007.

12. Learned Authorised representative of the Department has, however, submitted that since this was not a defence taken by the appellant in reply to the show cause notice, the appellant cannot be permitted to contend that the nature of service provided by the appellant was Works Contract Service and not Erection, Commissioning or Installation Service and in support of this contention he has placed reliance on the decision of the Tribunal in **Kamakhya Steels.**

13. The agreements entered into between the appellant and M/s. Nokia India Pvt. Ltd. and M/s. Ericson India Pvt. Ltd. as also the show cause notice dated 17 January 2010 issued to the appellant were examined by the Adjudicating Authority and it was found as a fact that all the works mentioned were integral part of Erection, Commissioning or Installation Services but the service was treated to be under the taxable category of Erection, Commissioning or Installation services. The Adjudicating Authority has also found that the services provided by the appellant were in the nature of Erection, Commissioning or Installation service even though the contracts were composite in nature. It is true that the appellant did not take a defence before the Adjudicating Authority that the

nature of the service was in fact Works Contract Service and not Erection, Commissioning or Installation Service and that no service tax could be levied on it, but it is a fact that the Supreme Court in **Larsen and Toubro Ltd.** examined the very nature of service provided by the appellant and held that it would be Works Contract Service for which no service tax could be levied prior to 1 June 2007. This is a purely legal issue and a ground has also been taken by the appellant in the memo of appeal as ground B. It cannot also be urged that the decision of the Supreme Court in **Larsen and Toubro Ltd.** is prospective in nature.

14. Reliance placed by the Revenue on **Kamakhya Steels** is misconceived. The Tribunal was examining the matter on a remand by the Allahabad High Court in the appeal filed by the **Kamakhya Steels** and the operative part of the order passed by the Allahabad High Court is reproduced below:

> "10. We find that the Tribunal has not considered the plea of the appellant that for the financial year 1999-2000 under Rule 96ZO(3) the option has (sic) required under sub-rule (3) of 96ZO has not been given by the appellant.
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> 11. The Tribunal has not adjudicated that if the option has not been given for the 1999-2000 whether the appellant is liable for the payment of duty under Rule 96ZO.
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> 12. On the aforesaid facts and circumstances we are of the opinion that this aspect of the matter requires consideration by the Tribunal afresh.
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> 13. It is made clear that the matter is relegated only for the determination of the liability for the financial year 1999-2000 and not for any other year."

15. Though it is correct that the appellant at the stage of hearing before the Tribunal, after remand by the Allahabad High Court, raised an issue regarding maintainability of the proceedings as Rule 96(Z)(O) of Central Excise Rules as well as Section 3A of

the Central Excise Act 1944 had been abolished, but the Tribunal refrained itself from examining the issue as the adjudication before the Tribunal was within the narrow campus in terms of the directions issued by the Allahabad High Court. The decision, in **Kamakhya Steels**, therefore, cannot come to the aid of the Revenue to contend that if a certain legal plea is not taken by the appellant in response to the show cause notice, it cannot be taken up in appeal before the Tribunal.

16. Such being the position, the appellant could not have been asked to discharge the service tax liability as no service tax could be levied on Works Contract Service prior to 1 June 2007.

17. However, it is not in dispute that the appellant had collected service tax from the service recipients and this service tax was not deposited by the appellant with the Government. It has, therefore, to be examined as to what should be done in such a case, as the appellant cannot be permitted to retain any service tax which it had collected.

18. We find that section 73 A of the Finance Act which came into effect from 18 April 2006, provides a complete answer to this issue. Section 73 A deals with service tax collected from any person to be deposited with Central Government. While sub section (1) deals with service tax collected in excess of the service tax assessed or determined, sub section (2) deals with any person who has collected any amount which is not required to be collected from any other person, in any manner as representing service tax. Sub section (2) in such a situation would be applicable. Such a

person is required to forthwith pay the amount so collected to the credit of the Central Government. Sub section (1),(2),(3) and (4) of section 73 A are reproduced below:

> (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.
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> (2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.
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> (3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.
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> (4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.

19. Section 73 B deals with interest on amount collected in excess.

20. Before the Adjudicating Authority, both the appellant and the Revenue contended that the nature of the service rendered by the appellant was Erection, Commissioning or Installation Service and it is by this order, in view of the decision of the Supreme Court in **Larsen and Toubro,** that the Tribunal is holding that the nature of service provided by the appellant is infact Works Contract Services, for which no tax could be levied. In such circumstances, the case of the appellant would fall under sub section (2) of section 73A in as much as appellant had collected an amount which it was not

required to collect from any other person as representing service tax.

21. The present is, therefore, clearly a case where the appellant had collected service tax which it was not required to collect in law because of the decision of the Supreme Court in **Larsen and Toubro.** The appellant, therefore has to forthwith pay the amount so collected to the credit of the Central Government.

22. It is however the contention of the learned counsel of the appellant that notice was not issued to the appellant under sub section (3) of section 73A of the Act and, therefore, this amount cannot be recovered from the appellant. It is, however, the contention of the learned authorised representative of the department that it is by this order that the Tribunal is holding that the nature of service provided by the appellant was Works Contract Services and, therefore, the Department can now invoke the provisions of sub section (2) of section 73 A of the Act in recovering the amount with interest under sub-section (3) of the Section 73A.

23. The department could not have issued a notice under section 73 A of the Act as it is by this order that the Tribunal is holding that the appellant was not required to collect any service tax in law during the relevant period. We, therefore, leave it open to the Revenue to now proceed, if it so decides in accordance with the provisions of 73A and B of the Finance Act by issuing a notice under sub section (2) of 73 A of the Act.

24. The impugned order dated 31 August 2012, is accordingly, set aside with liberty to the Revenue, if it so decides, to proceed in accordance with law. The appeal is allowed to the extent indicated above.

(Dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

Bhanu