

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
New Delhi**

PRINCIPAL BENCH
COURT NO. I

Service Tax Appeal No. 52082 of 2015

[Arising out of the Order-in-Original No. 34/AKM/CST/ADJ/2014 dated 28/02/2014 passed by The Commissioner of Service Tax, New Delhi.]

M/s D.S. Gupta Contracts Ltd.

Appellant

D-7, Sector – 49,
Noida (U.P.).

VERSUS

The Commissioner of Service Tax

Respondent

17-B, IAEA House, I.P. Estate,
NEW DELHI – 110 002.

Appearance

Shri Gaurav Gupta, C.A. – for the appellant.

Shri Sanjay Jain, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice Dilip Gupta, President**
Hon'ble Shri C.L. Mahar, Member (Technical)

Final Order No. 53592/2018 Dated : 30/11/2018

DATE OF HEARING/DECISION : 30/11/2018.

C.L. MAHAR :-

The brief facts of the matter are that the appellant is engaged in providing industrial or commercial construction service as well as construction of complex service. The appellant have taken the required registration from the Service Tax Department for payment of the service tax under the category of commercial or industrial construction service as well as construction of complex service. Investigations were started by the Department against the appellant wherein it was found that the appellant have changed the classification from commercial or

industrial construction service to work contract service since 1 June 2007. The basic allegation on the basis of which the demand of service tax has been raised in the show cause notice dated 19 May 2009 is that the appellant have wrongly paid service tax at the composition scheme under the work contract service for the work orders which were under progress before 1 June 2007. It has been the contention of the department that firstly the appellant should have paid service tax under commercial or industrial construction service for the projects which were under progress before 1 June 2007 and secondly that reduced rate of service tax under the composition scheme was not available to them because necessary declaration has not been made by the appellant before the proper authority for availing the facility of the composition scheme of work contract service as announced vide Notification No. 32/2007-ST dated 22 May 2007. The show cause notice has been adjudicated by the learned Commissioner vide his order-in-original No. 34/AKM/CST/ADJ/2014 dated 28 February 2014. Under the impugned order-in-original, the learned Commissioner has confirmed the demand of the service tax. The learned Adjudicating Authority has held that even though there might have been a transfer of the property in execution of the contracts executed by the appellant before 1 June 2007 even in that case the appellant should have discharged their service tax liability under the respective services namely commercial or industrial construction service, construction of complex service or erection, commissioning or installation service. The Adjudicating Authority has also held that whereas the service tax has been paid under any other service prior to 1 June 2007 an assessee cannot switch over to composite work contract scheme for remaining contract and pay service tax under the work contract composition scheme. Holding such views, the service tax demand has been confirmed under Section 73 (1) of Finance Act, 1994, penalties under Section 76, 77 and 78 of the Finance Act, has also been imposed on the appellant.

2. It has been contended by the learned Advocate appearing on behalf of the appellant that since all the contracts executed by the appellant were composite contracts where the service component as well as the transfer of the property of the goods was involved in execution of the projects at hand and since the work contract service has been enacted for the levy of the service tax only since 1 June 2007 and, therefore, the comprehensive contract involving supply of material and service component will be classifiable as work contract service. It has further been contended by learned Advocate that since the service provided by them was a composite service involving transfer of property and service in the contracts and therefore same cannot be classified under service simplicitor under the category of commercial or industrial construction service or under construction of complex service. The learned Advocate supported his arguments with the Hon'ble Supreme Court judgment in the case of **Commissioner of Central Excise & Customs, Kerala versus Larsen & Toubro** reported in **2015 (39) S.T.R. 913 (S.C.)**, wherein it has been held that there was no charge or machinery to levy service tax on indivisible composite work contracts containing elements both of transfer of property in goods as well as labour and services before 1 June 2007 and the service tax cannot be demanded under service simplicitor. The learned Advocate has also pointed out that they have classified their services after 1 June 2007 as work contract service and they have paid the service tax liability availing the benefit of Work Contract (Composition Scheme for demand of Service Tax) Rules, 2007. It is wrong on the part of the department to deny them the benefit of the composition scheme for payment of service tax for the projects which were already in progress before the work contract service came into being from 1 June 2007.

3. We have also heard the learned Departmental Representative who has supported the findings as given in the order-in-original.

4. Having heard both the sides, we notice that the contracts on which the service tax has been demanded by the impugned order-in-original, are contracts of composite nature where the transfer of property as well as service components are involved. It has already been held by Hon'ble Apex Court in the case of **Commissioner of Central Excise & Customs, Kerala versus Larsen & Toubro** reported in **2015 (39) S.T.R. 913 (S.C.)** that any contract which involves transfer of the property as well as service component same has to be classified as the work contract service and same will not be entitled for the classification as the service simplicitor. Considering the views of the Apex Court and of the fact that a new service under the category of work contract service was got enacted by the Finance Act since 1 June 2007, we hold that where both transfer of the property as well as the service component were involved in the respective contracts of the appellant, same are not taxable under the service tax simplicitor category and need to be classified under the work contract service and service tax need to be demanded accordingly. The contention of the appellant is that they have already discharged their service tax liability availing the benefit of work contract (Composition Scheme for payment of Service Tax) Rules, 2007 which provides a reduced rate of service tax for the work contracts. We feel that the composition scheme was applicable to all the contracts which were under progress on the day when the work contract service came to be enacted and service tax became leviable under the category of the work contract service. We hold that on the purchases which involved both transfer of the property in contract as well as the service component, the appellant was entitled to avail the composition scheme for payment of the work contract. We hold that the learned Adjudicating Authority has erred in holding that the appellant was not entitled to switch over to work contract service from the respective services in respect of the ongoing contract/purchase after 1 June 2007 to pay service tax under

work contract composition scheme. As explained by us in the preceding paras, considering the Hon'ble Apex Court's decision in the case of **Commissioner of Central Excise & Customs, Kerala versus Larsen & Toubro** reported in **2015 (39) S.T.R. 913 (S.C.)**, we hold that the composite contracts involving transfer of the property and service component are not taxable before 1 June 2007 under the simplicitor service namely commercial or industrial construction service or construction of complex service. We also hold that after 1 June 2007, the appellants are entitled to classify the service under the work contract service and are entitled to avail the composition scheme under work contract service for payment of service tax at the reduced rates.

5. In view of the above, we remand back the matter to the Adjudicating Authority to re-adjudicate the matter on following lines ;

- (i) the Adjudicating Authority should examine every contract which are subject matter of the present service tax demand to ascertain whether a contract is a composite indivisible work contract or not ;
- (ii) The indivisible composite work contracts where transfer of property in goods and supply of labour and service are involved such contracts are classifiable under work contract service and since the work contract service was brought under service tax net since 1 June 2007 the same cannot be subject to service tax under the respective service simplicitor;
- (iii) After 1 June 2007 the composite work contracts be classifiable under work contract service and charged to service tax accordingly ; and
- (iv) If on examination of contracts it is found that certain contracts are only for providing service simplicitor and there is no transfer of property is involved in the contract, same need to be taxed and assessed on the merits.

6. We also make it clear that the appellants will extend full cooperation in getting the matter re-adjudicated at earliest. The matter be adjudicated denovo within 3 months from date of receipt of this order.

7. The appeal is allowed by way of remand with the above directions.

(Operative part of the order pronounced in open court.)

(Justice Dilip Gupta)
President

(C.L. Mahar)
Member (Technical)

PK