CUSTOMS, EXCISE & SERVICE TAX APPLELLATE TRIBUNAL, <u>NEW DELHI</u>

PRINCIPAL BENCH COURT NO. 1

Service Tax Appeal No. 1445 / 2011

(Arising out of Order-in-Appeal No. 151/ST/DHL/2011 dated 30.06.02011 passed by the Commissioner (Appeals), Central Excise & Service Tax, New Delhi).

M/s. YMC Buildmore Pvt. Ltd. **Appellant**
701 Mercantile House,
15-K G Marg, Connaught Place,
New Delhi.

VERSUS

Commissioner of Central Excise **Respondent**
Service Tax, New Delhi

APPEARNANCE:

Shri Jitin Singhal, Advocate for the Appellant
Shri R K Maji, Authorized Representative for the Respondent

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C L MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 53596 /2018

DATE OF HEARING/ DECISION: 16 /11/2018

<u>PER C L MAHAR :</u>

The brief facts of the matter are that the appellants are engaged in the business of construction activity and they have taken Service Tax registration under the category of "industrial and commercial construction service". The Registration taken for "industrial and construction service" was also endorsed for "works contract service" since

06.08.2007 as per the provisions of Section 65 of Finance Act, 1994. The Department, during the course of scrutiny of the appellants ST 3 returns for the period April, 2007 to Sept, 2007, noticed that the appellant short paid the Service Tax amounting to Rs.35,06.940/. The basic premise on which the short payment of Service Tax was demanded under section 73 of the Finance Act, 1994, was that it had wrongly availed the benefit of Notification No. 1/2006 dated 01.03.2006 under which abatement of 67% was availed from the amount charged by it on the services provided to their customers under the category of 'Commercial or Industrial Construction service' and / or 'Construction of Complex Service'. It was also the allegation of the Department that the appellant had wrongly switched over from the "commercial or industrial service'' and "construction of complex service" to "work contract service" on the on-going projects and it had wrongly taken the benefit of Composition Scheme under the "works contract service''. Thereby lesser Service Tax was paid.

2. A show cause notice dated 15.10.2008 came to be issued to the appellant demanding Service Tax as mentioned above. The penal provisions under section 76, 77 and 78, penalty under 76 were applied and interest under section 75 of the Finance Act was also demanded from the appellant. The show cause notice came to be adjudicated vide Order-in-Original dated 18.12.2009 issued from F. No.IV(16) HQRS/ Adj/ YMC Buildmore/379/ST/2008 dated 18.12.2008 wherein all the charges as mentioned in Show cause notice have been confirmed by the learned adjudicating authority. The appellants approached the Commissioner (Appeals) against the above mentioned order-in-original and the learned Commissioner (Appeals) vide his order dated 30.6.11 has rejected the appeal of the appellants thereby confirming the

amount of Service Tax and other provisions invoked in the show cause notice.

3. The learned Advocate appearing on behalf of the appellant submitted that all the activity undertaken by the appellant was a composite activity wherein the supply of goods along with the labour and service charges for construction services were involved and therefore, the activity was rightly classifiable under 'work contract service'. Learned Advocate submitted that since the 'works contract service' was introduced for levy of Service Tax for first time since 01.06.2007, every 'works contract service' which was in progress before the activity came under the Service Tax net, needed to be treated as a new contract and would be eligible for opting for the composite scheme under work contract service. The learned advocate has submitted that they have opted of availing the benefit of notification No. 32/2007 dated 22.05.2007 for work contract composition scheme by informing the Department by a letter dated 22.06.2007. The appellant agreed that though services under the category of 'work contract services' was introduced by the Finance Act of 2007 from 1.6.2007, but by mistake it paid Service Tax under 'work contract service' from 1.5.2007. It has also been contended by the learned advocate that Rule 3 of Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 contained in the Notification No. 32/2007-ST dated 22.5.2007 stipulates that notwithstanding anything contained in Section 67 of the Finance Act, 1994 and Rule 2 A of the Service Tax (Determination of Value) Rules 2006, the person liable to pay service tax in relation to work contract service shall have the option to discharge his Service Tax liability instead of paying the Service Tax at the rate specified under section 66 of the Finance Act, 1994 by paying an amount equivalent to 2% of the gross amount charged for 'works contract service'. It has been submitted that the

appellant has been carrying out the construction which involves labour and service as well as supply of the material and therefore the activity is rightly classifiable under the category of 'Works Contract Service'.

4. We have also heard learned Representative of the department who has supported the findings given in the Order in Original as well as the order of Commissioner (Appeals).

5. Both the sides have been heard. It is a matter of record that the appellant discharged its Service Tax liability under reduced Service Tax rate by availing the benefit of Composition Scheme under 'works contract service' for payment of Service Tax. It is also a matter of record that the appellant gave intimation for availing the benefit of the Notification No. 32/2007 to the Department on 22.6.2007, much before filing its ST 3 return for the services undertaken by it during the relevant period.

6. As per the Supreme Court judgment in the case of Commissioner of Central Excise & Cus, Kerala vs. Larsen and Toubro Ltd. Reported in 2015 (39) STR 913 (SC), the activity involving labour and service charges as well as supply of goods and material will rightly be classifiable under the 'Work Contract Service' as the work contract service was introduced for levy of Service Tax with effect from 01.06.2007. The demand of Service Tax prior to a period 1.6.2007 is not legally not sustainable. From 1.6.2007 onwards the appellant has paid Service tax by availing the composition scheme for payment of Service Tax as per Notification No. 32 of 2007 dated 22.05.2007. by rightly classifying its activity under the 'works contract service'. The Order in Appeal is, therefore, not sustainable and the appellant is not liable to pay any service tax beyond the Service Tax paid by it under the Composition Scheme.

7. In view of the above, we find that the impugned order passed by the Commissioner (Appeals) deserves to be set aside and, is set aside. The appeal is accordingly, allowed.

(Operative order of the order pronounced in the open Court)

(C L Mahar)
Member (Technical)

(Justice Dilip Gupta)
President

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