CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL No.768 OF 2012

(Arising out of Order-in-Original No. 08/COMMR/ST/IND/2012 dated 23.02.2012 passed by Commissioner, Central Excise, Customs & Service Tax, Indore)

Mega Power Transmission Ltd. …… **Appellant**
(10,SK-2 Compound, Lasudia Mori
Dewas Naka, Indore, MP)

VERSUS

Commissioner of Central Excise,
Customs and Service Tax, Indore …… **Respondent**
(P.B. No. 10, Manik Bagh Road,
Manik Bagh Palace, Indore, MP)

APPEARANCE:
Shri Krishnamohan K. Menon & Ms. Dania, Advocate for the Appellant
Shri Amresh Jain, Authorised Representative for the Respondent

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

DATE OF HEARING : 03 May, 2019

FINAL ORDER No. 50753/2019

JUSTICE DILIP GUPTA

1. This appeal seeks the quashing of the order dated 24 February, 2012 passed by the Commissioner, Customs, Central Excise and Service Tax, Indore by which demand of Rs. 2,52,82,721/- for Erection, Commissioning or Installation' Service as also demand of Rs. 1,14,221/- for 'Transport of Goods by Road' Service have been confirmed. However, an amount of Rs. 69,14,934/- has been appropriated against the first demand of the 2,52,82,721/-. The order

further directs for recovery of interest and also seeks to impose penalty.

2. The appellant is registered with the Service Tax Department under the category of "Erection, Commissioning or Installation Service", "Works Contract Services" and "Maintenance and Repair Services" since May, 2005. It is basically engaged in laying and setting up of Transmission Lines and allied works for the Wind Mill projects of **M/s Suzlon Infrastructure Services Ltd.** Information was gathered that the appellant had been collecting Service Tax from the clients for providing Erection, Commissioning or Installation Services (hereinafter referred to as ECIS) for the various Wind Mill projects carried out in Maharashtra, Gujarat, Madhya Pradesh and Rajasthan, but was not filing the ST-3 Returns since the inception of the unit and was also not discharging the Service Tax liability.

3. A show cause notice dated 21 October, 2010 was, accordingly, issued to the appellant mentioning therein that from the facts collected it was clear that the activities carried out by the appellant fell under the category of ECIS as defined under Section 65(39a) of the Finance Act, 1994 (hereinafter referred to Act) and was taxable under Section 65 (105) (zzd) that defines this service to mean any service provided or to be provided to a customer by a Commissioning and Installation Agency in relation to ECIS. The show cause notice also mentions that the appellant had paid freight amount to a Goods Transport Agency during 2005-06 to 2009-10 but had not paid Service Tax on the same under "Transport of Goods by Road

Services". The show cause notice, therefore, called upon the appellant to show cause as to why:

> " **(i)** The service tax amounting to Rs. 2,52,82,721/- [Rupees Two crores, Fifty Two Lakhs, Eighty Two Thousand, Seven Hundred Twenty One only [Service Tax: Rs. 2,46,16,901/-+ Education Cess: Rs. 4,92,338/- +Higher Education Cess: Rs. 1,73,481/-] during the period 2005-06 to 2009-10, should not be demanded and recovered from them towards the taxable service viz, erection, commissioning or installation services, under Section 73 of the Finance Act, 1994, by invoking extended period of limitation as per clause (a)/proviso, as the case may be, to sub-section (1) of said Section 73. The amount of Service Tax Rs. 69,14,934/- already paid by them should not be appropriated against the said demand.
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> **(ii)** The service tax amounting to Rs. 1,14,221/-[Rupees One Lakh, Fourteen Thousand Two Hundred and Twenty One Only] [Service Tax: Rs 1,11,268/-+ Education Cess: Rs. 2,225/- + Higher Education Cess: Rs. 728/-] during th period 2005-06 to 2009-10, should not be demanded and recovered from them towards the taxable service viz. Transport of Goods by Road Services, under Section 73 of the Finance Act, 1994, by invoking extended period of limitation as per clause (a)/proviso, as the case may be, to sub-section (1) of the said Section 73.
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> **(iii)** Interest at appropriate rate for delayed payment of Service Tax, should not be demanded and recovered from them under Section 75of the Finance Act, 1994 and amount of Rs. 5,69,509/- already paid by them on account of interest should not be appropriated against this demand.
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> **(iv)** Penalty should not be imposed upon them under Sections 76,77 & 78 of the Finance Act, 1994."

4. The impugned order dated 24 February, 2012 examines whether the appellant was required to deposit Service Tax on the activity of ECIS and 'Goods Transport Agency Services'. In regard to the first activity, the Adjudicating Authority found as a fact, after perusal of the works contract issued by M/s Suzlon Infrastructure Services Ltd, that the appellant was supplying partial material as per the scope of work under the contract but major portion of the material was provided by M/s Suzlon Infrastructure Services Ltd. It is for this reason that the Adjudicating Authority found that the essential character of the contract was service contract simplicitor. The Adjudicating Authority, therefore, concluded that there was a short payment of Service Tax to the extent of Rs. 2,52,82,721/-. The Adjudicating Authority also found as a fact that the appellant had paid

freight amount to a Goods Transport Agency during 2005-06 to 2004-10 but had not paid Service Tax on the same under the 'Transport of Goods by Road Services'.

5. It needs to be stated that the appellant, during the course of investigation, had deposited an amount of Rs. 69,14,934/- and that is why this amount has been appropriated in the impugned order. The operative part of the order dated 24 February, is reproduced below:-

> " i. I hereby confirm the demand of Rs. 2,52,82,721/- (Rs. Two Crore fifty two Lakhs Eighty two thousand seven hundred twenty one only) and order for recovery from the Noticee in terms of Section 73 of the Finance Act, 1994. I order for appropriation of Rs. 69,14,934/- against the demand.
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> ii. I hereby confirm the demand of Rs. 1,14,211/-(Rs. One Lakh Fourteen thousand two hundred twenty one only) and order for recovery from the Noticee in terms of Section 73 of the Finance Act, 1994.
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> iii. I order for recovery of interest on the amount confirmed for recovery, in terms of Section 75 of the Finance Act, 1994.
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> iv. I impose a penalty of Rs. 2,53,96.942/-(Rs. Two crores fifty three Lakhs ninety six Thousand nine Hundred forty two only) on the Noticee under Section 78 of the Finance Act, 1994.
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> v. I impose a penalty of Rs. 200/- for every day during the failure continues, starting with the first day after the due date to actual date of compliance in terms of Section 77 of the Finance Act, 1994. "

6. Shri Krishnamohan K. Menon, learned counsel for the appellant has submitted:

i. That the contracts with **M/s Suzlon Infrastructure Services Ltd.** were composite works contract and, therefore, the Adjudicating Authority could not have confirmed the demand under ECIS for the period prior to 01 June, 2007 in view of the decisions of the Supreme Court in **Commissioner of Central Excise, Kerala v/s Larsen & Toubro Ltd.** reported in **2015 (39) STR 913 (SC)** and even for the period post 1 July, 2007, the appellant cannot be asked to pay Service Tax under "Works Contract Service" (hereinafter referred to as WCS) because the show cause notice was issued for ECIS. It is, therefore, the contention that the entire demand under the impugned order deserves to be set aside;

ii. That though it is correct that the appellant had collected service tax but whatever Service Tax was collected, was deposited with the Government;

iii. That the Adjudicating Authority committed an error in only appropriating Rs. 69,14,934/- towards the first demand as this was the amount deposited by the appellant during the course of investigation but the amount that was subsequently deposited by the appellant by way of challans, of which details have been given at page 262 of the appeal memo, have not been considered and appropriated; and

iv. That the appellant was not required to pay Service Tax for the demand made under "Goods Transport Agency Service".

7. Shri Amresh Jain, learned Authorized Representative of the Department has, however, submitted:

i. That the Adjudicating Authority committed no error in confirming the demand under ECIS or "Goods Transport Agency Services" and, therefore, the appeal deserves to be dismissed; and

ii. That the contention of the appellant that he had deposited Service Tax which has not been appropriated, can best be examined by the Adjudicating Authority on production of documents.

8. We have considered the submissions advanced by learned counsel for the appellant and the learned Authorized Representative for the Department.

9. To examine the first contention of learned counsel for the appellant that the taxable service that the appellant was actually providing was WCS and not ECIS, it is necessary to examine the contract that was entered into between the appellant with M/s Suzlon Infrastructure Services Ltd. A perusal of one such contract dated 5 January, 2004 clearly demonstrates that it is a composite works contract for supply of material and packing and erection, assembly testing and commissioning of entire work covered under the invitation to bid. The Adjudicating Authority also found as a fact that the appellant was required to make a minor supply of the material but major portion of the material was supplied by M/s Suzlon Infrastructure Services Ltd**.** and that invoices had been issued both for supply of goods and labour charge for erection, commissioning and installation of the goods.

10. It would be appropriate to refer to the various provisions of the Act. Section 65(39a) of the Finance Act defines Erection, Commissioning or Installation" to mean:

"**65(39a)** - "erection, commissioning or installation" means any service provided by a commissioning and installation agency, in relation to,-

(i) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise]; or

(ii) installation of-

(a) electrical and electronic devices, including wirings or fittings therefore; or

(b) Plumbing, drain laying or other installations for transport of fluids; or

(c) Heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or
(d) thermal insulation, sound insulation, fire proofing or water proofing; or
(e) lift and escalator, fire escape staircases or travelators; or
(f) Such other similar services"

11. Section 65(105) deals with "Taxable Service" and in relation to ECIS, Section 65(105)(zzd) is reproduced below :

> **"65(105)(zzd)** - to any person, by a commissioning and installation agency in relation to erection, commissioning or installation"

12. It is w.e.f. 01 June, 2007 that (zzzza) was inserted in Section 65(105) of the Act in relation to execution of 'Works Contract'. Taxable Service under Section 65(105)(zzzza) is defined as :

> **"65(105)(zzzza) -** to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.
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> *Explanation* —For the purposes of this sub-clause, "works contract" means a contract wherein,—
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> (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
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> (ii) such contract is for the purposes of carrying out,—
>
> (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
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> (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
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> (c) construction of a new residential complex or a part thereof; or
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> (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
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> (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;"

13. The Supreme Court in **Larsen & Toubro** examined as to whether Works Contract Service can be classified under Section

65(105)(zzzh) and held that the scope of Section 65(105) (zzzh) is limited to cover contract of service simplicitor only and not a composite works contract. The Supreme Court noticed that it is only w.e.f 01 June, 2007 that Section 65(105)(zzzza) was introduced to cover composite works contract and so works contract cannot be covered under any other category of services prior to 01 June, 2007. The relevant portion of the judgment is reproduced below :

> "**15**. A reading of this judgment, on which counsel for the assessees heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting therefrom charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub-paras (f), (g) and (h). Under each of these paras, a bifurcation has to be made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor's accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost, expenses and profit as would be attributable in the works contract to the transfer of property in goods in such contract. This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts.
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> xxxxxxx xxxxxxx xxxxxxx
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> **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."

14. It is, therefore, clear from the aforesaid judgment of the Supreme Court in **Larsen & Toubro** that a Composite Works Contract cannot be taxed under CCS under Section 65(105) (zzzh) as the scope is limited to cover contract of service simplicitor only. This would also apply to ECIS.

15. What is also important to note is that the definition of ECIS in Section 65(105) (zzg) remained the same even after 01 June, 2007 when WCS was introduced. In the absence of any change in the definition of ECIS, the judgment of the Supreme Court in **Larsen & Toubro** will apply to a period after 01 June, 2007 also.

16. The Appellant had undertaken the activity under a composite and indivisible works contract and by no means can it be said that it was a contract for 'Service' simplicitor. In our opinion partial supply of material will not change the nature of the service provided by the appellant and it would still fall under the definition of "Works Contract Service". The show cause notice was, however, issued to the Appellant alleging that the Appellant is providing ECIS.

17. The position that comes out very clearly, therefore, is that even prior to 01 June, 2007 and post 01 June, 2007, the nature of service rendered by the Appellant was WCS and not ECIS. The show cause notice alleged that the Appellant was providing ECIS and the demand has also been confirmed under this category by the adjudicating authority. The impugned order, therefore, deserves to be set aside for this reason alone since the demand made under a particular category of service found to be incorrect in a subsequent proceeding, cannot be sustained. This is what was observed by the Supreme Court in **Hindustan Polymers Company** and the relevant portion is reproduced below:

> "**6**. While we appreciate the Tribunal's desire to do complete justice and mould the relief in that direction, we think that, in the circumstances, the Tribunal should not, in this case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the appellants. That is not "moulding" relief. The demand that was made upon the appellants was under Tariff Item 68 and it proceeded upon the basis that there was a process of manufacture of coloured polystyrene from uncoloured polystyrene. Having come to a conclusion against the Revenue on these counts, the appropriate order for the Tribunal to have passed was to have set aside the demand and left it open to the Revenue to proceed against the appellants, as permissible under the law. The appellants would then have had the opportunity of meeting the precise case made out by the Revenue."

18. This is what was also observed by the Supreme Court in **Reckitt & Colman of India** in paragraph 3 of the judgment which is reproduced below :

> "**3.** It will be remembered that the case of the Revenue, which the appellant had been required to meet at every stage from the show cause notice onwards, was that the said product was a preparation based on starch. Having come to the conclusion that the said product was not a preparation based on starch, the Tribunal should have allowed the appeal. It was beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet. It is upon this ground alone that the appeal must succeed."

19. The decision of the Mumbai Tribunal in **Ashish Ramesh Dasarwar vs Commissioner of Central Excise & Service Tax, Nagpur,** reported in **2017-TIOL-3230-CESTAT-MUM**, also needs to be referred. The Division Bench of the Tribunal held as follows :

> **"6.** As regards the period after 1.6.2007, since the demand was raised under 'commercial or industrial construction service, whereas admittedly the service is correctly classifiable under works contract service, the demand raised under wrong head of service cannot sustain.
>
> **7.** As per above discussion, the demand raised under 'commercial or industrial construction service' shall not sustain. Hence, the same is set aside."

20. The submission advanced by learned counsel for the appellant that the Adjudicating Authority committed an error in confirming the demand under "Transport of Goods by Road Services" cannot also be accepted. The appellant had admitted that the appellant had paid freight to "Goods Transport Agency" during the relevant period. It was, therefore, required to pay Service Tax on the amount received under 'Transport of Goods by Road Service by Reverse Charge Mechanism.

21. The issue that needs to be examined now is that though the Adjudicating Authority was not justified in confirming the demand under ECIS, but the appellant had admittedly collected Service Tax. The appellant is also not contesting that it is not required to deposit the Service Tax collected with the Department but what is sought to be contented is that the appellant had in addition to the amount that has been appropriated in the impugned order, deposited an amount of Rs. 16,614,934/- with the Department, (details of which have been

mentioned at page 262 of the appeal memo.), which amount has not been considered by the Adjudicating Authority and, therefore, not appropriated.

22. As contended by the learned Authorized Representative of the Department, this is a factual aspect which can be examined by the Adjudicating Authority. The appellant may produce the relevant documents before the Adjudicating Authority so that it can determine whether this amount has been deposited by the appellant or not. Learned counsel for the appellant has submitted that what has been deposited by the appellant is much more than the tax the appellant had collected and, therefore, the balance amount should be refunded. Learned Authorized Representative of the Department has, however, submitted that the appellant has also to pay interest for the delayed deposit of the Service Tax amount. This again is an issue that needs to be examined by the Adjudicating Authority. For these two issues, the matter needs to be remanded to the Adjudicating Authority for passing an appropriate order. This exercise should be completed by the Adjudicating Authority expeditiously and preferably within three months from the date the appellant produces the documents with a certified copy of the order passed today, which exercise the appellant shall complete in three weeks from today.

23. Thus, for all the reasons stated above, the confirmation of demand under heading ECIS with interest and penalty is set aside. The demand made under "Goods and Transport Agency Service" is maintained. So far as the appropriation of the amount is concerned, the matter is remanded to the Adjudicating Authority for passing a

afresh order in accordance with the observations made above. The appeal is, accordingly, allowed to the extent indicated above.

(Order dictated and pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

Rekha