CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Sl. No.	Appeal No.	Appellant	Respondent	Impugned Order
1.	ST/362/2009	S E W Infrastructure Ltd.,	CCE, C & ST, Hyderabad – II	OIA No. 1 to 3/2009 (H-II) S. Tax dated 20.01.2009
2.	ST/363/2009	-do-	-do-	-do-
3.	ST/364/2009	-do-	-do-	-do-
4.	ST/902/2009	CCE, C & ST, Hyderabad – II	S E W Infrastructure Ltd.,	OIA No. 46 to 49/2009 (H-II) S. Tax dated 30.07.2009
5.	ST/903/2009	-do-	-do-	-do-
6.	ST/904/2009	-do-	-do-	-do-
7.	ST/905/2009	-do-	-do-	-do-

Appearance
Shri Venkata Prasad, Chartered Accountant for the Appellant.
Shri Arun Kumar, Deputy Commissioner (AR) for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 03/05/2018
Date of Decision: 03/05/2018

FINAL ORDER No. A/30551-30557/2018

[Order per: Bench]

All these appeals are raising a common question of law, hence they are being disposed of by a common order.

2. Appeals No. ST/362, 363 & 364/2009 is filed by the assessee against Orders-in-Appeal No. 01 to 03/2009 (H-II) S. Tax

dated 20.01.2009, while appeals No. ST/902-905/2009 is filed by the Revenue against Orders-in-Appeal No. 46 to 49/2009 (H-II) S. Tax dated 30.07.2009.

3. The relevant facts that arise for consideration is during the period September, 2004 to July, 2006, the appellant assessee herein had discharged the service tax liability on the construction work under taken by them under the category of Commercial or Industrial Construction Services. Subsequently, noticing that these services would not get covered under the Commercial or Industrial Construction Services (CICS) they filed refund claims with the authorities. The said refund claims were of the amount which was discharged by them as service tax during the relevant period. The Adjudicating Authority after following due process of law, rejected the refund claims on the ground that said service tax was correctly discharged under CICS. Against such rejection of refund claims, appeals were preferred to the First Appellate Authority. The First Appellate Authority by Orders-in-Appeal No. 01 to 03/2009 dated 20.01.2009 remanded the matters back to the Adjudicating Authority to reconsider the issue as to whether appellant's case is covered under the category of works contract services or CICS. Appellant assessee is aggrieved by the said Order-in-Appeal dated 20.01.2009 on the findings that the activity under taken by the appellant would amount to an activity which is commercial in nature. The Adjudicating

Authority on remand proceedings, again rejected the refund claims on a finding the tax paid even if the execution of work is under work contract pre introducing the tax liability is correct, hence the refund claims were sought to be rejected. Aggrieved by the order of Adjudicating Authority, appeals were preferred to the First Appellate Authority. The First Appellate Authority by the impugned Orders-in - Appeal No. 46-49/2009 dated 30.07.2009 held that the activity under taken by the appellant for the period in question is nothing but works contract services and the said activity is not taxable. Accordingly, allowed the appeals by setting aside the Order-in-Original. Revenue is aggrieved this order and are before the Tribunal.

4. It is the submission of the Learned Departmental Representative that prior to 01.06.2007, the activity under taken by the appellant will amount to rendering of CICS and Board Circular No. 80/10/2004 will apply in its full force.

5. Learned Counsel submits that now the law is settled by the Apex Court in the case of *Larsen & Toubro Ltd.,* [2015 (39) STR 913] in as much any activity under the works contract under taken prior to 01.06.2007 cannot be taxed. It is his submission that in the case in hand assessee always pleaded that the activity under taken by them would fall under composite work contract. It is his further submission that in their appeals their arguments only against

reasoning of the First Appellate Authority that the activity under taken by them is of commercial in nature.

6. On careful consideration of submission made by both sides and perusal of records, we find that the issue to be decided in the Revenue appeals will take care of appeals filed assessee appellant. It is seen from the records, there is no dispute as to the fact that for the period September, 2004 to July, 2006, appellant had executed project of Madikheda Hydel project for the Government of Madhya Pradesh. It is also undisputed these projects were executed under composite contract, which has been always claimed by the appellant.

7. We find that the issue is no more res integra, the Apex Court in the case of *Larsen & Toubro Ltd.,* [2015 (39) STR 913] was considering a similar issue, as to whether Revenue Authorities can vivisect a composite contract and levy tax under other various services head prior to 01.06.2006 or otherwise. Their Lordships in their judgement at paragraph No. 15, laid down the ratio which covers the issue in favour of the appellant assessee in this case. We respectfully reproduce the same.

> ***"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."*

In view of the foregoing, we hold that the impugned order in the Revenue's appeals is correct and legal and does not require any interference.

8. As regards the appeals filed by the appellant/ assessee against Orders-in-Appeal dated 20.01.2009, since on remand proceedings, the entire issue has been disposed of in their favour by the First Appellate Authority, accordingly recording any findings on merits will be academic in nature. In view of this, the appeals filed by the assessee appellant are disposed of.

9. In view of the foregoing, Revenue's appeals are rejected and appellant's appeals are dismissed.

(Order dictated & pronounced in open court)

P. VENKATA SUBBA RAO	**M.V. RAVINDRAN**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

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