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

Appeal No. ST/452/2009

(Arising out of Order-in-Original No. 08/2008 dated 26.12.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad - IV)

M/s Indu Projects Limited **…..Appellant(s)**

Vs.

Commissioner of Customs & Central Excise, Hyderabad - IV **…..Respondent(s)**

Appeal No. ST/402/2009

(Arising out of Order-in-Original No. 08/2008 dated 26.12.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad - IV)

Commissioner of Customs & Central Excise, Hyderabad - IV **…..Appellant(s)**

Vs.

M/s Indu Projects Limited **…..Respondent(s)**

Appearance
Shri Anand & Shri Ch. Sumanth, Advocates for the Assessee.
Shri Bhanu Kiran, Assistant Commissioner (AR) for the Revenue.

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

Date of Hearing: 08/08/2018
Date of Decision: 08/08/2018

FINAL ORDER No. A/30934-30935/2018

[Order per: M.V. Ravindran]

These two appeals are filed against the same Order-in-Original No. 08/2008 dated 26.12.2008, hence they are disposed of by a common order.

2. Appeal No. ST/452/2009 is filed by the assessee against Order-in-Original on merits, while the Revenue's appeal No. ST/402/2009 is for non-imposition of penalties on the assessee/appellant.

3. Heard both sides and perused the records.

4. On perusal of records, it transpires that the Revenue Authorities issued a show cause notice to appellant for demand of differential service tax for the period September, 2004 to March, 2007, on the ground that the contracts which were executed by the appellant customers for Construction of Commercial or Residential Construction business would fall under the category of Commercial or Industrial Construction services or Construction of Residential services. Appellant contested the show cause notice on merits as well as on limitation. On merits, it was a contention of the appellant construction contract supply and services would fall under works

contract services that they have paid VAT on the works contract services. The Adjudicating Authority after following due process of law, rejected the contentions and confirmed the demands raised.

5. Learned Counsel for the appellant draws our attention to the findings of the Adjudicating Authority and submits that the Adjudicating Authority has recorded that the contracts are in the nature of construction contracts involving civil, structural and finishing works in relation to the residential or commercial or industrial buildings or civil structures. He submits that this issue is now squarely settled by the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise & Customs, Keral Vs. Larsen and Toubro Ltd.,* [2015 (39) STR 913 (S.C.)]. He draws our attention to paragraph No. 15.

6. Learned Departmental Representative submits that during the relevant period in question the appellants were discharging the service tax liability under various categories and now they cannot say that they are not liable to pay service tax under works contract service. It is his submission would mean that tax liability arises and they have to discharge the same.

7. On careful consideration of submissions made by both sides and on perusal of records, we find that the period involved in this case is post 01.06.2007. We find that the adjudication order that

there is no dispute as to the facts that the contracts which were executed by the appellant/assessee during the period in question were works contract. Since the issue involved is regarding the works contract prevailing the same in the various services. The issue is no more res integra as per the judgment of the Apex Court in the case of Larsen & Tourbo Ltd., (supra). We reproduce paragraph 15 from the judgement.

> *"**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."*

8. Identical issue came up before this Bench after the Apex Court in the case of *Sew Infrastructure Limited* and following the judgment of the Apex Court, the Bench has set aside the Order-in-Original. In view of the foregoing, we find the impugned order is unsustainable as indicated herein above and is liable to be set aside and we do so.

9. As regards the Revenue's appeal, since we have already allowed the assessee's appeal on merits, we find no merits in the appeal filed by the Revenue the same stands rejected.

(Order pronounced and dictated in open court)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….