

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench
Court - I

Appeal No. ST/399/2009

(Arising out of Order-in-Original No.13/2008-ST-ADJN-HYD-III-COMMR, dt.31.12.2008
passed by CCCE, Hyderabad - III)

Aster Teleservices Pvt Ltd

..... **Appellant(s)**

Vs.

CCCE, Hyderabad - III

..... **Respondent(s)**

Appearance

Shri G. Shivadas, Advocate for the Appellant.

Shri Dass Thavanam, Superintendent/AR for the Respondent.

Coram:

Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 30.07.2018

Date of Decision: 11.09.2018

FINAL ORDER No. A/31164/2018

[Order per: M.V. Ravindran]

1. This appeal is directed against Order-in-Original No. 13/2008-ST-ADJN-HYD-III-COMMR, dated 31.12.2008.

2. The relevant facts that arise for consideration after filtering out unnecessary details are, the appellant herein is engaged in manufacturing of tower parts, providing erection, installation and commissioning of said

telecom towers and equipments, consulting engineers, maintenance and repair services and construction services; are registered with the Service Tax authorities and discharging the appropriate Service Tax and filing returns with the authorities. During the course of an investigation by DGCEI, the authorities were of the view that the appellant had short paid the service tax liability for the period 01.07.2003 to 30.09.2007 on various services which they were providing. Show Cause Notices dated 06.12.2007, 14.03.2008 (invoking extended period of limitation) were issued to appellant directing to show cause as to why the demand of differential tax be not raised on them along with interest and also for imposition of penalty. The appellant herein gave a detailed reply contesting the issue on merits as well as on limitation. The adjudicating authority after considering the submissions made by the appellant and following due process of law by Order-in-Original dated 31.12.2008 confirmed the demands raised on the following grounds:

- (1) That the benefit of abatement under Notification no.19/2003 is available to only a contract for supplying plant, machinery or equipment and commissioning and installation of the said plant, machinery or equipment and not for supply on cement or steel.
- (2) No proof has been submitted that the main service provider has discharged the duty.
- (3) Railway Signalling System cannot be treated as construction services.
- (4) Classification of railway signalling system as structure is not acceptable.

3. Learned Counsel after giving the overall picture of the issue involved, submits that appellant undertakes design, erection and commissioning or installation of telecom towers to various telecom service providers which includes both supply of material and services and raises the invoices per tower basis, discharged sales tax/VAT in terms of composition scheme for tower implementation contracts and his claim has been that they have executed tower implementation work as a composite contract; the adjudicating authority has totally disregarded this fact as prior to 01.06.2007, all the works contract are not taxable and the same cannot be vivisected and charged to tax under various services is the law settled by the Apex Court in the case of CCE, Kerala Vs Larsen & Toubro Ltd [2015-39-STR-913-SC] which has been followed by this Bench in the case of Navayuga Engineering Ltd Vs CCE & ST, Visakhapatnam [2017-51-STR-285]. It is his submission that as regards the demands raised prior to 01.06.2007 on this point, it will not sustain the scrutiny of law as per the law settled by the Apex Court; as regards the service tax liability post 01.06.2007, he submits that the lower authorities need verification for demand on this point whether they would fall under works contract or any other services, hence, seeks remand on this point.

3.1. It is his further submission that for the period prior to 01.06.2007, other services on which service tax liability has been raised are erection and painting services which they undertake on the towers which are already erected by the telecom companies and they use paint procured by them and do the painting work; another issue of discharging of service tax liability on the erection of towers as a sub-contractor, it is his submission that prior to 01.06.2007, this also

would get covered under the category of works contract and hence, no tax liability would arise. It is his submission that for the demand post 01.06.2007, the matter may be remanded to the lower authorities in both these issues for considering the contentions made by the assessee which can be verified from the documents available with them.

3.2. It is his further submission that the service tax liability on erection of signalling system, which was undertaken by them for Railways, pre 01.06.2007 exempt as they undertake the erection, commissioning of the signalling system along with materials covered by judgment of the Apex Court in the case of Larsen & Toubro Ltd. Post 01.06.2007, the definition of the works contract squarely excludes the contracts executed to the railways as per Sec.65 (105) (zzzza) of the Finance Act, 1994; as regards another demand raised under the construction services, it is his submission that those would also need to be set aside for the period prior to 01.06.2007 as the entire execution of construction activity is under works contract for which they have discharged VAT/sales tax to the State Governments.

3.3. It is his further submission that question of interest and penalty would not arise and for the amounts for which they request remand, the question of penalty would not arise there also.

4. Learned departmental representative submits that appellant had rendered taxable services of erection, commissioning and installation services for the period as indicated by the learned counsel, and discharged service tax by availing abatement under Notification Nos.12/2003 and

19/2003 on the gross amount received for the said services in certain cases did not discharge the service tax on the ground that main contractor has discharged the tax liability. He would draw our attention to the Order-in-Original that has confirmed the demands and submits that in respect of erection work of towers, abatement availed by the appellant treating the contract as composite contract of supply machinery is not acceptable in view of the fact that material in that case was supplied by the main contractor and appellant had undertaken services of erection only, whereas the notification prescribes for supply of plant, machinery and equipment for availment of exemption notification. It is his submission that learned counsel has placed reliance on judgment of Larsen & Toubro to argue that no tax is payable on these services is also incorrect as the work undertaken by the appellant will not fall under category of works contract since, there is no sale of the material and sales tax has been paid by the appellant in the course of rendering of their erection services and to be considered as works contract and there should be element of sale of material or transfer of property. As regards the work undertaken by the appellant on painting of erected towers, in this case also they discharged tax liability by claiming exemption under notification 19/2003-ST as amended and the said notification benefit is not available as there is no sale of material or transfer of property and appellant's view of treating the supply of paint as supply of material is incorrect as paint cannot be classified as a material. As regards the service tax liability on the services of erection as a sub-contractor, they have not discharged the same on the understanding that main contractor is responsible for the same and in the absence of any proof that main contractor has discharged the tax liability appellant, being sub-contractor, is

liable to discharge the service tax liability. It is his further submission that work undertaken by the appellant for erection and commissioning of railway signalling services, it would not fall under category of works contract since, there is no construction activity involved in the said works but only erection and commissioning of signalling systems. As regards the demand of tax in the construction of industrial or commercial building services, which include the construction of petrol pumps to IOCL, etc., it is his submission that for the period prior to 01.06.2007 also the tax liability arises on these services as has been held by the Tribunal in the case of Shapoorji Pallonji Infrastructure Capital Company Ltd [2017-5-GSTL-65] and Alstom Projects Indian Ltd [2011-23-STR-489]. It is his submission that the appeal be rejected.

5. We have considered the submissions made at length by both sides and perused the records.

6. The issue in short is whether the appellant herein is required to discharge the differential service tax liability on the services rendered of erection of telecom towers, construction of petrol pumps and industrial buildings, erection and painting of telecom towers, erection and installation of telecom equipments as a sub-contractor, erection of railway signalling system (railways) or otherwise. It is the case of the revenue that all these services are liable for service tax liability for the period pre and post 01.06.2007. Appellant has been arguing that for the demand raised prior to 01.06.2007 they are unsustainable for the reason that all these contracts have been executed as works contract and duty liability has been discharged availing the benefit of notification 12/2003-ST or 19/2003-ST.

7. On careful consideration of the submissions made by both sides and perusal of records, we find that the services rendered by the appellant as engaged herein above are indeed rendered by the appellant; that the billing is done on erection per tower basis rate; entered into agreements with various telecom service providers and considered the amounts as composite contracts involving supply of material and services and as per their understanding, paid tax after availing abatement of 67% as provided.

8. In respect of the telecom tower installation services, construction of petrol pumps and industrial buildings, erection and painting of telecom towers and erection of signalling system for railways, we find that these works have been awarded to the appellant on turnkey basis for laying the foundation as per the design, erect tower materials on the foundation, civil works for base station and consumption of materials like cement, steel for laying the foundation and construction of petrol pumps, industrial buildings are undisputedly composite contract for supply in materials and in the case of works contract in respect of railways, we notice that it is a works contract awarded to the appellant.

9. In our view, the demands raised on these services and also the painting activity undertaken by the appellant for the period prior to 01.06.2007 is squarely covered by the judgment of the Apex Court in the case of Larsen & Toubro Ltd (supra). As regards the work executed on sub-contract basis, it is the case of the appellant that for the period prior to 01.06.2007 also, the works were related to commissioning and installation of telecom equipments to various service providers on behalf of telecom service providers and it was also a works contract. On perusal of the

contracts and the findings of the adjudicating authority, it remains undisputed that appellant was executing all these work based upon the contracts awarded to them which are composite / works contract. In our view, the judgment of the Apex Court in the case of Larsen & Toubro Ltd (supra) (the ratio in Para 15) would squarely cover the issue in favour of the appellant in respect of the tax demand confirmed on tower implementation service, erection and painting services, erection services as sub-contractor and erection of signalling system for railways and construction services rendered to IOCL for the period prior to 01.06.2007 and the demands need to be set aside and we do so.

10. As regards to the demands raised on appellant post 01.06.2007 under the category of "tower implementation services" and "erection and installation services as a sub-contractor", we find that the demands raised under these two heads needs reconsideration by the adjudicating authority as the random perusal of the documents and impugned order indicate that the claim of the appellant has not been considered in proper perspective by the adjudicating authority. To the extent demands are raised on these two services post 01.06.2007, without expressing any opinion and leaving all the issues open, the matter is remitted back to the adjudicating authority to reconsider the issue afresh, after following principles of natural justice.

11. As regards the demand on signalling system erected for railways, post 01.06.2007, we find that the said work has been executed by the appellant under a contract awarded by the railways which has to be considered as works contract and the definition of works contract under Sec.65 (105) (zzzza), excludes from the tax liability, the work executed for railways.

Accordingly, the demand raised on the appellant on this issue is held as unsustainable and is set aside.

12. Since, the entire issue involved in this case is of interpretation and covered by the decision of the Apex Court for substantial period and set aside by us, interest and penalties are set aside. However, as regards the interest liability for the amounts which needs to be reconsidered by the adjudicating authority, we leave it to the adjudicating authority to come to an appropriate conclusion, as also in respect of the penalties on those amounts.

13. The appeal stands disposed of as indicated herein above.

(Pronounced in the Open Court on 11.09.2018)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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