CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench - Court No. – I

Service Tax Appeal No 277 of 2011

(Arising out of **Order-in-Original** No.37/2010, dated 26.11.2010 passed by Commissioner Visakhapatnam)

V.R.K. & Comapny .. **APPELLANT**
9-28-5, Balajinagar,
Visakhapatnam – 530 003.

VERSUS

Commissioner of CentralExcise, .. **RESPONDENT**
Customs & Service Tax
Visakhapatnam– I
Central Excise Building,
Port Area, Visakhapatnam,
Andhra Pradesh – 530 035.

Appearance
Ms. A S K Swetha, Advocate for the Appellant.
Shri L.V.Rao, Additional Commissioner for the Respondent.

Coram: HON'BLE Ms. SULEKHA BEEVI, C.S. MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No. A/30681/2019

Date of Hearing:22.10.2019
Date of Decision:22.10.2019

[Order per: SULEKHA BEEVI, C.S.]

1. Brief facts are that the appellants were issued show cause notice proposing to demand service tax under Commercial or Industrial Construction services for the period 10.09.2004 to 30.01.2008. After due process of law the original authority confirmed the demand, interest and imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

2. On behalf of the appellant, Learned Counsel Ms. A S K Swetha appeared and argued the matter. The demand is confirmed under Commercial or Industrial Construction Services. She furnished the samples of the work orders, and submitted that the appellant had carried out the works as sub-contractor to various other main contractors. The work executed was mainly piling works. Such works are in the nature of composite contracts and therefore the decision of the Hon'ble Apex Court in

the case of Larsen & Toubro Ltd., would apply for the period prior to 01.06.2007. Though the customers had provided cement and steel as free supplies the appellant had used sand, wood and other consumables in large quantities for the construction activities. She relied upon the certificate issued by the Chartered Accountant to establish that goods other than cement and steel have been used for the piling works. The entire work order is evidently in the nature of composite contract.

3. The demand confirmed under Commercial or Industrial Construction Services cannot sustain for the period after 01.06.2007 also as per the decision of the Tribunal in the case of Real Value Promoters vide Final Order Nos. 42436-42438/2018 dated 18.09.2018. The decision in the case of Sree Krishna Builders reported in [2019 (6) EMI 69-CESTAT-Chennai] was relied to argue that the demand confirmed under Commercial or Industrial Construction Services for the period prior to 01.06.2007 was set aside by the Tribunal following the decision in the case of Larsen & Toubro Ltd., reported in [2015 (8) TMI 749 (SC)]. The decision in the case of P. Balakrishnan Vs CCE, Tirunelveli reported in [2019 (3) TMI 955-CESTAT-Chennai] was relied by Learned Counsel to argue that even in the case where certain materials were supplied free of cost by the customer, since other goods were also used for execution of work of the contract would be composite one and therefore the demand confirmed under CICS cannot sustain.

4. Out of the total demand of Rs. 81,57,855/- the main contractor had discharged the service tax in respect of Rs. 58,66,086/-. The demand has been raised against the appellant on such amount also as a sub-contractor. She conceded that the Larger Bench of the Tribunal in the case of M/s Melange Developers Pvt Ltd., [2019 (6) TMI 518] has held that the sub-contractor is also liable to pay service tax. However the entire demand has been raised invoking extended period as there is no evidence to establish suppression of facts with intend to evade payment of tax. She submitted that the issue is entirely interpretational and there is no positive act of suppression on the part of the appellant. The demand raised invoking the extended period cannot sustain. She prayed that the appeal may be allowed.

5. Learned AR Shri L.V. Rao appeared on behalf of the department. He supported the findings in the impugned order. He argued that the appellant

being a sub-contractor is liable to pay the service tax as per the decision of the Larger Bench in the case of M/s Melange Developers Pvt Ltd., (supra). He relied on M/s Sew Construction Ltd., [2011-TIO-61-CESTAT-Delhi] to argue that the Tribunal in the said case had considered the issue whether the sub-contractor is liable to pay service tax. The issue was settled and therefore the contention of the assessee that they were not aware of the law or that the issue is interpretational cannot sustain. This is a clear case of suppression of facts and therefore the extended period has been rightly invoked.

6. Heard both sides.

7. The period involved as per operative part of the order is from 10.09.2004 to 31.03.2008. On perusal of records it is seen that the period involved as per the transactions in SCN is from 10.09.2004 to November, 2007.

8. The first issue that arises for consideration is whether the confirmation of demand under CICS can sustain for the period prior to 01.06.2007. Undisputedly, the contracts are composite in nature which has been brought out from the evidences placed before us. Though cement and steel was supplied free, other goods viz-wood, sand, consumables were used for execution of the piling works. The appellant has paid VAT and filed VAT returns for the very same work orders for which certificate is issued by the Commercial Tax Officer. Further, a certificate issued by Chartered Accountant is also produced to show that apart from steel and cement other materials have also been used. On perusal of this certificate, we find that the appellant has used consumables to the amount of Rs. 38,01,188/- in financial year 2004-05 and Rs. 26,62,871/- in 2005-06. There is also purchases of brick, wood and other items which have been used for executing the work orders. Thus, it is established that the contracts are composite in nature. There upon the decision in the case of Larsen & Toubro (supra) would apply to the period prior to 01.06.2007 and therefore the demand cannot sustain. For the period after 01.06.2007 the decision of the Tribunal in the case of Real Value Promoters (supra) as followed in P. Balakrishnan Vs Thirunalveli [2019 (3) TMI 955 CESTAT-Chennai] would assist the appellant. Applying these decisions we are of the view that the entire demand cannot sustain.

9. Even though the decisions of the Larger Bench in M/s Melange Developers Pvt Ltd., has held that the sub-contractor is liable to pay service tax since the services itself are not taxable as discussed above, the said Larger Bench decision is of no help to the Revenue.

10. From the foregoing, after appreciation the evidence and submissions, we are of the considered opinion that the demand cannot sustain. The impugned order is set aside. The appeal is allowed with consequential relief.

(Order dictated & pronounced in open court)

(SULEKHA BEEVI, C.S.)
MEMBER(JUDICIAL)

(P. ANJANI KUMAR)
MEMBER(TECHNICAL)

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