

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

Division Bench - Court No. – I

Service Tax Appeal No. 27159 of 2013

(Arising out of **Order-in-Original** No.14/2013-Adjn.(ST)Commr, dated 29.03.2013 passed by Commissioner of Central Excise, Customs & Service Tax, Hyderabad)

Manjeera Constructions Ltd.,

304, Aditya Trade Centre,
Ameerpet, Hyderabad,
Telangana – 500 038.

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APPELLANT

VERSUS

**Commissioner of Central Excise,
Customs & Service Tax
Hyderabad – II**

Kendriya Shulk Bhavan,
L.B. Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004.

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RESPONDENT

Appearance

Shri V.S. Sudhir, CA for the Appellant.

Shri A V L N Chary, Superintendent for the Respondent.

**Coram: Hon'ble Mr. ANIL CHOUDARY, MEMBER (JUDICIAL)
Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

FINAL ORDER No. A/30876/2020

Date of Hearing:02.03.2020

Date of Decision:10.06.2020

[ORDER PER: ANIL CHOUDARY]

1. Brief facts of the case are that the appellant is engaged in construction business and registered with the service tax department vide registration STC No. AABCM4763GST001. Appellant has developed and sold apartments to the prospective buyers. Appellant was paying service tax regularly on all the services and stopped making payment of tax from January, 2009 in view of Circular No. 108/02/2009 – ST dated 29.01.2009 and also intimated the same to department. For the composite contract (works contract) executed for M/s Manjeera Project, the service tax was paid adopting the valuation as per Rule 2A of 'Service Tax (Determination of value) Rules, 2006' i.e. deduction of materials value from the gross/invoice value, and paid service tax at full rate on the labour portion of the contract. The applicable service tax on rental incomes on property (rents), maintenance/repair, consultancy etc., was partly paid utilising the CENVAT credit and partly in cash. As it appeared to Revenue that there is some short payment of service tax, show

cause notice dated 22.10.2010 was issued relating to the period 2005-06 to 2009-10, proposing as follows:

(i) the services rendered by M/s Manjeera Constructions to various customers as detailed in Annexure-I to this notice should, not be classified under Commercial or Industrial Construction Services and an amount of Rs. 34,91,178/- for the period 2005-06 to 2007-08, should not be demanded from them on account of providing taxable services, under Section 73(1) of the Finance Act, 1994, read with the proviso thereto;

(ii) the services rendered by them to various customers as detailed in Annexure-II to this Show Cause Notice during the period from 2005-06 to 2009-10 should not be classified under "Construction of Complex Services" and short paid amount of Rs. 42,01,090/- for the period 2005-06 to 2009-10 should not be demanded from them on account of providing taxable services, under Section 73(1) of the Finance Act, 1994 read with the proviso thereto;

(iii) the services rendered by M/s Manjeera Constructions to various customers under "Works Contracts" as detailed in Annexure-III to this Notice, should not be classified under Works Contract Services and short paid amount of Rs. 1,32,29,790/- (as per composition scheme) for the period 2007-08 to 2009-10, should not be demanded from them on account of providing taxable services, under Section 73(1) of the Finance Act, 1994 read with the proviso thereto;

(iv) the services rendered by M/s Manjeera Constructions towards, Maintenance, Management and Repair works, as detailed in Annexure-IV to this notice, should not be classified under "Management, Maintenance & Repair Services" and an amount of Rs. 91,76,607/- for the period 2005-06 to 2009-10, should not be demanded from them on account of providing taxable services, under Section 73(1) of the Finance Act, 1994 read with the proviso thereto, and an amount of Rs. 90,42,207/- paid under "Business Support Services" should not be adjusted towards liability of these services;

(v) the services rendered by them towards Renting of Immovable properties, as detailed in Annexure-V to this notice, should not be classified under "Renting of Immovable Property Services" and an amount of Rs. 2,68,833/- for the period 2007-08 to 2009-10 should not be demanded from them on account of providing taxable services under Section 73(1) of the Finance Act, 1994 read with the proviso thereto;

(vi) the services rendered by them towards Consultancy services, as detailed in Annexure – VI to this Notice, should not be classified under “Engineering Consultancy Services” and an amount of Rs. 20,685/- for the period 2009-10 should not be demanded from them on account of providing taxable services, under Section 73(1) of the Finance Act, 1994 read with the proviso thereto;

Further, proposal to demand of interest and imposing penalty under Section 77 and 78 of the Finance Act. The show cause notice was adjudicated vide Order-in-Original No.14/2013-Adjn.(ST)Commr dated 29.03.2013, on contest, and the proposed demands were confirmed along with demand for interest and further penalty of Rs. 2,13,45,976/- was imposed under Section 78. Considering the amount of Rs. 90,42,270/- which were already paid during normal course under ‘business support service’. Further, penalty was imposed under Section 77.

2. Heard the parties.

3. The first issue is whether composite contracts are liable to service tax prior to 01.06.2007 when the classification of works contract service was introduced in the Finance Act, 1994 w.e.f. 01.06.2007.

4. Admittedly, the appellant have supplied both material and labour / service in the contracts executed by them. We find that the issue is no longer res-integra and it has been held by Hon’ble Supreme Court in the case of CCE Vs Larsen & Toubro [2015 (39) STR 913 (S.C.)] that prior to 01.06.2007 only service contracts simplisiter (not involving supply of material) are taxable under the existing classification of CICS, ICS, CCS, etc. Accordingly, we set aside the demand of Rs. 34,91,178/-. We also take notice that there is no proposal in show cause notice to alternatively classify and demand tax under the head works contract services, w.e.f. 01.06.2007.

5. The next issue is service tax liability on promoters / builder / developer prior to 01.06.2010 in respect of construction of residential complex.

6. We find that the CBEC by way of clarification vide Circular No. 108/02/2009-ST dated 29.01.2009 r/w Circular No. 151/2/2012-ST dated 10.02.2012, have clarified that for the period prior to 01.06.2010, construction(residential) provided by builder / developer will not be taxable. Admittedly, the tax under this category, of Rs. 42,01,090/- relates to the

period prior to 01.06.2010. Accordingly, this ground is allowed in favour of the appellant and the demand is set aside.

7. The appellant have constructed commercial building along with materials, thus it is composite contract. Admittedly, appellant have deposited service tax for the period 2007-08 to 2009-10 by calculating the taxable value under Rule 2A of 'Service Tax (determination of value) Rules, 2006'. The appellant as an assessee liable to pay tax under the head 'works contract service', is entitled to two options:

I) Either pay tax on the actual labour / service component by arriving at the taxable value under Rule 2A of the Valuation Rules, 2006 or

II) Alternatively can opt to pay service tax under "works contract (composition scheme for payment of service tax) Rules, 2007" and pay the service tax on the gross value at the prescribed rate (including the material component).

8. It appeared to Revenue that the appellant have paid service tax on the labour component only after availing the benefit of composition but have paid service tax on material component, as per 'composition scheme'. We find that the show cause notice on this issue is misconceived, as availment of 'composition scheme' is optional, and such option is at the volition of the assessee. The composition scheme cannot be imposed on the assessee, as have been clarified by the Ministry of Finance vide Circular No. B-1/16/2007-TRU dated 22.05.2007. Similar view has been taken by this Tribunal in *Interarch Building Products P. Ltd., Vs. CCE, Noida* [2018 (10) GSTL 330 (Tri-All)]. Accordingly, we allow this ground in favour of the appellant and set aside the demand of Rs. 1,32,29,790/-.

9. So far, the demand of Rs. 91,76,607 under the head 'maintenance and repair service' is concerned, Learned Counsel urges that the appellant does not dispute the tax liability, and they have already paid the amount of Rs. 90 lakhs (approximately) prior to the show cause notice, and shall pay the balance if any, upon reconciliation.

10. So far the demand of Rs. 2,68,883/- under the head renting of immovable properties for the period 2007-08 to 2009-10, is concerned, Learned Counsel states that they have already paid the tax prior to the issue of show cause notice, and within the window provided for payment of tax under this head, when this taxable head was re-introduced by Finance Act,

2010 after the same was quashed by Hon'ble Delhi High Court in 'Home Refail Solutions Pvt Ltd Vs Union of India'.

11. So far the service tax of Rs. 20,685/- under the head 'engineering consultancy services' is concerned for the period 2009-10, Learned Counsel states that they did not dispute this amount, thus same is confirmed.

12. Learned Counsel further states that admittedly appellant was registered with the department, they have filed regular ST-3 returns and deposited the admitted taxes. Further, whole issue is interpretational in nature and some issue like taxability of composite contracts (prior to 01.06.2007) was sub-judice and finally settled by Hon'ble Supreme Court in the case of Larsen & Toubro only in August, 2015. Further, service tax on renting of immovable properties was re-introduced vide Finance Act, 2010, and the appellant deposited the tax under this head within the window provided under the Finance Act, 2010. There can be no liability of interest and penalty. Reliance is placed on the ruling of Supreme Court of India in Star India Pvt Ltd., [2006 (1) STR 73 (S.C.)], D.S. Narayana & Company Pvt Ltd., Vs CCE, Visakhapatnam-II [2017 (4) GSTL 20 (Tri-Hyd)]. Further, service tax under 'management, maintenance and repair service' and 'engineering consultancy service' had been deposited prior to issue of show cause notice, along with applicable interest.

13. Learned AR for Revenue relies on the impugned order.

14. Having considered the rival contentions and the facts and circumstances, we hold that no penalty is imposable under Section 77 and 78 of the Finance Act, as the issues involved are interpretational in nature and the appellant have deposited the admitted taxes prior to issue of show cause notice, along with interest. The other grounds have already been discussed and decided individually, herein above.

15. To sum up, we have set aside the following demands:

Sl. No	Name of work	Period	Amount demanded (Rs.)
1.	Works Contract (construction of hotels)	2005-06 to 2007-08	34,91,178
2.	Construction of Residential Complex	2005-06 to 2009-10	42,01,090
3.	Works Contract short paid	2007-08 to 2009-10	1,32,29,790

16. We have confirmed the demand under

Sl. No	Name of work	Period	Amount demanded (Rs.)
1.	Maintenance and repair service	2005-06 to 2009-10	91,76,607
2.	Renting of immovable property service	2007-08 to 2009-10	2,68,833
3.	Engineering Consultancy Service	2009-10	20,685

17. We have set aside all the penalties.

18. The appellant is liable to deposit, if any tax is found short paid, on arithmetical verification. Appellant is also directed to file a calculation of their final tax liability, with the details of payment of such tax liability, before the adjudicating authority for his information and perusal.

19. Thus, the appeal have been allowed in the afore mentioned terms.

(order pronounced on 10.06.2020 in open court)

(ANIL CHOUDARY)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)