CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH

SERVICE TAX APPEAL NO. 1745 of 2010

(Arising out of the Order-in-Original No. 18/2010-ST dated 30.03.2010 passed by the Commissioner of Customs and Central Excise, Hyderabad)

Ambience Constructions India Ltd. **...Appellant**
Girisikhara Residency,
Flat No. 101, 6-3-600/2/B,
Padmavathi Nagar, Khairtabad,
Hyderabad

Versus

The Commissioner of Customs, **...Respondent**
Central Excise & Service Tax,
Hyderabad-II Commissionerate,
Hyderabad

APPEARANCE:

Shri C.Sumanth, Advocate for the Appellant
Shri C.Mallikarjun Reddy, Authorized Representative of the Department

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/ Decision: 05.01.2022

FINAL ORDER NO. A/30025/2022

JUSTICE DILIP GUPTA:

This appeal seeks the quashing of the order dated 30.03.2010, by which the Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II, Commissionerate[1], has confirmed the amount of service tax demanded on the value of commercial service rendered by the appellant for construction of Paryatak Bhavan of the Andhra Pradesh Tourism Development Corporation Ltd.[2]

---

1. **the Commissioner**
2. **the Tourism Development Corporation**

2. The appellant is engaged in the construction activity and was awarded the contract of construction the Paryatak Bhavan (multi-storeyed building with parking for tourism development) as a sub-contractor for M/s. Ramky Infrastructure Limited[3] on back to back basis.

3. RIL had entered into an Agreement dated 29.11.2003 with the Tourism Development Corporation which, in turn, sub-contracted the construction work to the appellant by contract dated 15.12.2003. The consideration received by the appellant towards this turnkey contract was a lumpsum amount after deducting 2% of the gross amount.

4. The present demand was raised by the Department on the ground that Paryatak Bhavan, which was constructed for the Tourism Development Corporation was primarily a commercial building as the same was constructed as a part of the infrastructure to promote tourism in the State by the Tourism Development Corporation and hence, comes within the scope of taxable services under the category of 'construction service' w.e.f. 10.09.2004 as defined under section 65(30a) of the Finance Act, 1994[4] or 'commercial or industrial construction service' as defined under section 65(25b) of the Finance Act. The Department also alleged that the appellant suppressed the fact of construction services that were rendered and thus, was liable to penalty under section 78 of the Finance Act. The impugned order has confirmed the demand and the appellant has filed the present appeal to assail the order.

---

3. RIL
4. the Finance Act

5. Shri C. Sumanth, learned counsel for the appellant made the following submissions:

(i) The services rendered by the appellant were 'works contract' service and leviable to tax after 01.06.2007 under section 65(105)(zzzza) of the Finance Act. Thus, they could not be subjected to levy of service tax prior to 01.06.2007. In support of the contention, learned counsel placed reliance upon the judgment of the Supreme Court in **Commissioner of Central Excise & Customs, Kerala** vs. **Larsen & Toubro Ltd.[5];**

(ii) Service tax is not leviable even for the period post 01.06.2007 and so the same is also liable to be set aside. The contention is that once it is held to be a 'works contract' prior to 01.06.2007, the demand under the category of 'construction service' or 'commercial or industrial construction service' would not survive for the reason that the demand was not made under the category of 'works contract'; and

(iii) The extended period of limitation could not have been invoked and interest and penalty could not be imposed.

6. Shri C. Mallikarjun Reddy, learned authorized representative appearing for the Department has, however, supported the impugned order and contended that it does not call for any interference in this appeal.

---

5. 2015 (39) STR 913 (SC)

7. The submission advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

8. The first issue that arises for consideration is as to whether service tax could be levied for the period prior to 01.06.2007. In this connection it needs to be noticed that the services rendered by the appellant falls under the ambit of 'works contract' since composite services for construction of Paryatak Bhavan was provided for a lumpsum consideration known as the 'contract price'.

9. It is w.e.f. 01.06.2007 that clause (zzzza) was inserted in section 65(105) of the Finance Act in relation to execution of "works contract". Taxable Service under Section 65(105)(zzzza) is defined as:

> "65(105)(zzzza) 'taxable service' means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.
>
> Explanation — For the purposes of this sub-clause, "works contract" means a contract wherein,-
>
> (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
>
> (ii) such contract is for the purposes of carrying out, —
>
> (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
>
> (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
>
> (c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;"

10. Thus, service tax could only have been demanded on 'works contract' services after introduction of a charge on a 'works contract' service and not under any other head. This is what was observed by the Supreme Court in **Larsen & Toubro.** The Supreme Court examined as to whether 'works contract' service can be classified under section 65(105)(zzzh) as 'construction of complex' service and held that the scope of section 65(105) (zzzh) is limited to cover contract of service simplicitor only and not a composite 'works contract'. The Supreme Court noticed that a "works contract" is different from a contract for service simpliciter and that it is only w.e.f 01.06.2007 that section 65(105)(zzzza) was introduced to cover composite 'works contract' and so works contract cannot be covered under any other category of services prior to 01.06.2007. The relevant portion of the judgment is reproduced below :

> "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.

17. **We find that the assessees are correct in their submission that a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such.**

****

24. **A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is**

> **clear from the very language of Section 65(105)** which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. **This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases.** It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract."
>
> **(emphasis supplied)**

11. It is, therefore, clear from the aforesaid judgment of the Supreme Court in **Larsen & Toubro** that a composite works contract cannot be taxed under 'construction services' under section 65(30a) or under 'commercial or industrial construction service' under section 65(25b) of the Finance Act, prior to 01.06.2007 as the scope is limited to cover contract of service simplicitor only.

12. Even post 01.06.2007 service tax could not have been confirmed under 'works contract' service. The show cause notice alleged that the appellant was providing 'construction services' or 'commerical or industrial construction service' and the demand has also been confirmed under this category by the adjudicating authority. The impugned order, therefore, deserves to be set aside for post 01.06.2007 period also since the demand made under a particular

category of service found to be incorrect in a subsequent proceeding, cannot be sustained.

13. This is what was observed by the Supreme Court in **Hindustan Polymers Company Limited** vs. **Collector of Central Excise, Guntur**[6] and the relevant portion is reproduced below :

> "6. While we appreciate the Tribunal's desire to do complete justice and mould the relief in that direction, we think that, in the circumstances, the Tribunal should not, in this case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the appellants. That is not "moulding" relief. The demand that was made upon the appellants was under Tariff Item 68 and it proceeded upon the basis that there was a process of manufacture of coloured polystyrene from uncoloured polystyrene. Having come to a conclusion against the Revenue on these counts, the appropriate order for the Tribunal to have passed was to have set aside the demand and left it open to the Revenue to proceed against the appellants, as permissible under the law. The appellants would then have had the opportunity of meeting the precise case made out by the Revenue."

14. This is what was also observed by the Supreme Court in **Reckitt & Colman of India Limited** vs. **Collector of Central Excise**[7] of India in paragraph 3 of the judgment which is reproduced below :

> "3. It will be remembered that the case of the Revenue, which the appellant had been required to meet at every stage from the show cause notice onwards, was that the said product was a preparation based on starch. Having come to the conclusion that the said product was not a preparation based on starch, the Tribunal should have allowed the appeal. It was beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet. It is upon this ground alone that the appeal must succeed."

---

6. **1999 (106) ELT 12 (SC)**
7. **1996 (88) ELT 641 (SC)**

15. Thus, for all the reasons stated above, the order dated 30.03.2010 passed by the Commissioner, cannot be sustained.

16. In view of the aforesaid, it is not necessary to examine the contention raised by learned counsel for the appellant relating to the demand being barred by limitation.

17. The order dated 30.03.2010 passed by the Commissioner is, accordingly, set aside and the appeal is allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

Shreya