IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Appeal No.ST/75709/2017

(Arising out of Order-in-Original No. 114/Commr/ST-II/KOL/2016-2017 dated 23.01.2017 passed by the Commissioner of Service Tax-II, Kolkata)

M/s S.K.Samanta & Company Limited …APPELLANT(S)

VERSUS

Commissioner of Service Tax, Kolkata-II

…RESPONDENT (S)

APPEARANCE

Dr. Samir Chakraborty, Sr. Advocate and Shri Abhijit Biswas, Advocate for the Appellant
Shri D.Haldar, AC (AR) for the Revenue

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI BIJAY KUMAR, TECHNICAL MEMBER

Date of Hearing/Decision : 19.09.2018

ORDER NO.FO/76820/2018

Per Shri Bijay Kumar :

The instant appeal has been filed against the Order-in-Original No. 114/Commr/ST-II/KOL/2016-2017 dated 23.01.2017, wherein a portion of demand has been dropped and the remaining portion has been confirmed against the appellant. The appellant is in appeal against the portion of demand that has been confirmed against him under the various provisions of Finance Act, 1944 alongwith interest and penalty in pursuance of show cause notice dated 11.04.2016.

2. The brief fact of the case is that the appellant is engaged in providing taxable services which has been classifiable under "Commercial and

Industrial Construction Services" as defined under Section 65(105)(zzq), "Erection, Commissioning or Installation Services" defined under Section 65(105)(zzd), "Transportation of Goods by Road Service" as defined under Section 65(105)(zzp), "Works Contract Service" as defined under Section 65(105) (zzzza) and "Design Service" as defined under Section 65(105)(zzzzd). As per the contention of the Department that however the appellant had paid Service Tax (including cess)@4.12% in respect of services provided, for construction of Ore Handling Plant (OHP) and Coal Handing Plant (CHP) at Bhilai Steel Plant as sub-contractor of M/s. Heavy Engineering Corporation (HEC), Ranchi under Composition Scheme treating them as Works Contracts Services. As per the Revenue, on scrutiny by the Department, it was found that they had not supplied any materials in those projects. Accordingly, they were not entitled to get the benefit of composition scheme as value of goods would not been included in the taxable value as required to be done under the provisions of Rule 3(1) of the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007. It was also alleged that the appellant has misclassified their service to avail the benefit in respect of concessional rate of service tax as there was no supply of goods to the clients while providing the services, the appellant was allegedly providing Erection, Commissioning or Installation Service and therefore they have short paid the service tax to the extent of Rs.3,80,75,749/-. After the due process, the case was adjudicated upon and the demand was confirmed and the appellant is in appeal against the order confirming demand. The period involved in the said demand and adjudication order is from October , 2010 to March, 2013.

3. Ld. Senior Counsel on behalf of the appellant submits that the contracts involved in the instant case are two EPC contracts dated 19.06.2008 and 16.02.2009 with Heavy Engineering Corporation Ltd. (HECL) as a sub-contractor in relation to construction of Ore Handling Plant and Coal Handling Plant, including supply related contracts to be carried out at Bhilai Steel Plant, on turnkey basis. The contract dated 19.06.2008 and services thereunder is also subject matter of Appeal No.ST/75453/2014. It was further contended by the Ld. Senior Advocate that under both the said contracts, the Adjudicating Authority has held that the same to be classifiable under "Erection, Commissioning or Installation Service" under Section 65(105)(zzd) of the Finance Act, 1944 and taxable as such without the benefit of exemption as per Notification No.1/2006-ST dated 01.03.2006 on the ground that the contract did not involve supply of "major items" and supply of the component in the two contracts was restricted merely to the materials required for civil and structural job and not the vital plant and machinery. The entire differential duty demand has been confirmed on this basis. It was further submitted by the Ld. Senior Advocate that the issue is concluded in favour of the appellant by this Tribunal Order No.FO/76440-76441/2018 dated 17.07.2018 in their own case pertaining to earlier period wherein the Hon'ble Tribunal has been pleased to hold that the services rendered under the similar contracts are classifiable as "works contract" service under the Act. The fact in the said decision and the contracts is almost identical and therefore decision of this Hon'ble Tribunal is fully applicable.

Ld. Senior Advocate argued that the benefit under the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 is available to the appellant, as it has complied with the requirements thereof. The appellant therefore correctly paid the service tax payable under the said contracts during the relevant period including the value of connected supply of contracts so as to arrive at the gross amount. There is no dispute on account of this.

The allegation that the appellant has artificially bifurcated the two contracts i.e. the supply contract and the works and services contract to reduce tax liability is based on no material evidence and is misconceived and devoid of any substance. The terms and conditions of the contract including providing for two separate contracts, one for the supply of plant and machinery and the other for the works and services wherein also related materials will to be supplied, has been acknowledged in the Order itself and also contained in the tender notice. The terms and conditions of the tender laid down therein are in the sole domain of the contractees and tenderers like the appellant have no part in framing such conditions. The said terms and conditions have to be accepted by the tenderers without any deviation. In this regard reliance placed on the decision of this Hon'ble Tribunal in the case of **Essar Projects (India) Ltd. vs. Commissioner of C.Ex.& S.T. [2014(33)STR 696 (T)].**

Further, the manner in which the Commissioner proceeded in this regard is also contrary to the decision of the Apex Court in the case of Union of India vs. Mahindra & Mahindra Ltd.[1995(76) ELT 481(SC)]. In addition to the above it is the contention of the ld. Senior Advocate that the demand is also barred by limitation as the show cause notice having been issued on 11.04.2016 beyond the prescribed time limit of 18 months contained in Section 73(1) of the Act during the relevant period when the show cause notice was issued on the ground that the relevant information was available with the department and the factum of payment of service tax discharged was within the knowledge of the department. In addition to above in view of the prevailing confusion regarding work contract service the interpretation of statute regarding classification of service under the works contract service was an issue which was finally settled after the Hon'ble Apex Court decision in the case of **Commr. Of Central Excise & Customs, Kerala vs. Larsen & Toubro Ltd. [2015(39)STR 913 (S.C.)].**

In this regard the ld. Senior Advocate referred and relied upon the following case laws:

(i) Uniworth Textiles Ltd. vs. Commissioner of Central Excise [2013(288) ELT 161 (SC)]

(ii) Ramdev Blocks vs. Commissioner of Central Excise [2017(357) ELT 356(T)]

(iii) Sundram Finance Ltd. vs. Commissioner of C.Ex. & S.T., LTU [2018(11) GSTL 305 (T)]

4. Ld.DR supports the impugned order and reiterates the grounds contained in the adjudication order in support of confirmation of demand.

5. We have considered the rival submissions and perused the appeal records. The issue regarding classification of service is settled in favour of the appellant vide this Tribunal order in case of appellant themselves pertaining to earlier period wherein it has been held that the activities undertaken by the appellant falls within the works contract service and liable to the benefit of Works Contract Act subsequent to 01.06.2007 in view of the decision of the Hon'ble Supreme Court in case of Commr. Of Central Excise & Customs, Kerala vs. Larsen & Toubro Ltd. (supra).

6. We also find that the demand has been raised invoking the extended period. It is on record that for the previous period department had been issuing the show cause notice which was subject matter of appeal before this Tribunal. Under the circumstances considering the decision of Uniworth Textiles Ltd., Ramdev Blocks and Sundaram Finance Ltd. (Supra) the department is precluded from invoking the extended period for raising of the demand. Therefore, we are satisfied that the appeal is rightly covered under the Works Contract Service as they have provided services alongwith supply of materials, even though in a small proportion. In addition to above the entire demand is time barred also.

7. We accordingly set aside the impugned order on both counts and allow the appeal with consequential benefit.

(Operative portion of the order have already been pronounced in the open court.)

S/d. S/d.

(P. K. CHOWDHARY)
MEMBER (JUDICIAL)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

ss