IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.551 of 2011

(Arising out of Order-in-Original No.18/Commr/ST/Kol/2011-12 dated 29 August 2011 passed by Commissioner of Service Tax, Kolkata.)

M/s. Mackintosh Burn Limited
(D-1/1, Gillander House,
8, N.S. Road, B.B.D. Bagh,
Kolkata-700001.) **...Appellant**

VERSUS

Commissioner of Service Tax, Kolkata
.....Respondent
(Kendriya Utpad Shulk Bhawan (3rd Floor),
180, Santipally, Rajdanga Main Road, 6th Floor,
Kolkata-700107.)

APPEARANCE

Shri Kartik Kurmy (Advocate) for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P. VENKATA SUBBA RAO, MEMBER(TECHNICAL)

FINAL ORDER NO. 76386/2019

DATE OF HEARING : 24 July 2019
DATE OF DECISION : 22 October 2019

P.K.CHOUDHARY :

The present Appeal arises out of the Order-in-Original No. 18/Commr/ST/Kol/2011-12 dated 29 August 2011 read with Corrigendum No. V(15) 135/ S.T.-Adjn/Commr/10/23020 dated 01 November 2011 passed by Ld. Commissioner, Kolkata.

2. The facts of the case in brief are that the Appellant is a state owned PSU engaged in execution of works contract for construction/repair, etc. of roads, distress bridges, non-commercial infrastructure, civil structures, government buildings, civic amenities of public interest by way of provision of labour/services and supply of goods in the execution of such

contracts. The Service Tax of Rs.6,04,13,997/- is demanded on various assorted services provided by the Appellant during 2005-06 to 2008-09 for contravention of Sec. 68 of the Finance Act, 1994. Further CENVAT Credit of Rs.9,78,838/- is demanded for the year 2008-09 for contravention of Rule (2)(1) of the CENVAT Credit Rules, 2004.

3. The Learned Advocate appearing on behalf of the Appellant submits that the Work Contracts executed by them cannot be taxed under any service contract simplicitor in view of the judgment of the Hon'ble Supreme Court in the case of CCE vs. Larsen & Toubro Ltd. reported in 2015 (390) S.T.R. 913 (SC). The Learned Advocate also relied upon the decision of the Tribunal in Hindustan Engineering Vs. CCE reported in 2017-TIOL-2166-CESTAT-DEL and judgment of the Supreme Court in the case of State of Gujarat Vs. Bharat Pest Control reported in 2018 (13) G.S.T.L. 401 (SC). The Ld.Advocate further submits that repairs of roads is retrospectively exempted by Sec. 97 of the Finance Act, 1994 inserted by Finance Act, 2012. He further submits that the management, etc. of government buildings are also retrospectively exempted u/s. 98 of the Finance Act, 1994 inserted by Finance Act, 2012. The Learned Advocate made the Bench go through the work orders awarded by Burdwan Zilla Parishad for repairing of Kusum Gram – Samaspur Road and the works contract dated 05-02-2005 for repairing of distress bridge structure over Gouria Khalat 2nd km of Gopiballavpur – Nayagram Road under Midnapore Highway division no. 2 awarded by Govt. of West Bengal which involves provision of labour/services and also supply of goods involving transfer of property of in such goods. The Ld. Counsel further drew our attention to the Work Order dated 11-04-2007 for repair and renovation of Computer Laboratory Building, Bidyasagar Bhawan, West Bengal Council of Higher Secondary Education which is a government building and is exempted U/s 98 with retrospective effect. The Work Order dated 21-07-2005 awarded by All Bengal Primary Teachers' Association recognized by the Govt. of West Bengal for construction of Association Building which is non-commercial in nature has also been perused. It is also contended that construction of boundary wall of school and construction of roads thereof

at Singur for ICICI –Winfra is non-commercial construction and also involves construction of roads which are not taxable under the Act. Our attention is further drawn to Work Order No. 530 dated 06-03-2008/17-03-2008 awarded by Executive Engineer, North – 24 Pargana, Zilla Parishad, Barasat for execution of Works Contract for repair of Jatragachi – Sulongony via Ghuni Road and similar work Orders by the said authority i.e. Job No. 08/21 and 08/22 for improvement of road in North -24 Pargana from Langolpata Station to 211 Bus Route Road and 91 Bus Route Road to 211 Bus Route Road and also Work Order No. 704 dated 05-04-2005 awarded by Government of West Bengal for strengthening of Bagnan Amta Road from 0 km to 13.40 km.

4. The Learned Advocate fairly submits that the subsequent retrospective amendment brought in by Sec. 97 and Sec. 98 in Finance Act, 1994 by Finance Act, 2012 were not before the Ld. Commissioner while passing the adjudication order. Further, he submits that the Ld. Commissioner did not have the benefit of judgment of the Supreme Court in Larsen & Toubro Ltd. and others *cited supra* which were pronounced subsequently. It is submitted on behalf of the Appellant that their case is directly covered by Sec. 97 and Sec. 98 and judgment of the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. and judgment of the Tribunal in Hindustan Engineers cited *supra* etc. It is his submission that no penalty has been imposed on the Appellant being a state owned PSU and also that the facts were disclosed at the time of EA-2000 Audit, hence there was no suppression of facts.

5. The Learned Representative for the Respondent Department justified the impugned Order.

6. Heard both the sides and perused the appeal records.

7. We find that the repair and maintenance, etc. of roads, Government buildings, etc. are retrospectively exempted by Finance Act, 2012 and

therefore question of demanding tax thereon does not arise. Further, the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. has held that a Works Contract cannot be taxed under any other category of service like Erection, Commissioning or Installation Services.

8. We agree with the Learned Advocate for the appellant that on the day of passing of the impugned Order the provision of Sec. 97 and sec. 98 were not in the statute book and the judgment of the Supreme Court in Larsen & Toubro Ltd. was passed subsequently, hence, the Learned Commissioner did not have the benefit of examining the aforesaid contracts in the light of Sec. 97 and Sec. 98 and judgment of the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd.. Considering the facts and circumstances of the case, we consider it appropriate to remand the matter back to the adjudicating authority for passing orders afresh in the light of Sec. 97 and Sec. 98 and the judgment of the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd.and Bharat Pest Control and the judgment of the Tribunal in the case of Hindustan Engineering relied upon by the Appellant.

9. Needless to say that the Appellant shall be granted a reasonable opportunity of being heard before passing the adjudication order.

(Order pronounced in the open court on 22 October 2019.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)
SD/

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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