IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No.08 of 2009

(Arising out of Order-in-Original No.23/Commr./ST/Kol/2008-09 dated 21.10.2008 passed by Commr. of Service Tax, Kolkata)

M/s Blue Star Ltd.
7, Hare Street, Kolkata 700001

Applicant

VERSUS

CST, Kolkata
180, Shantipally, Rajdanga Main Road, Kolkata 700107

Respondent

APPERANCE :

Dr.Samir Chakraborty, Sr.Advocate & Shri Amit Kr.Jain, C.A. for the Appellant
Shri A. K. Das, Spl.Counsel for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.C. J. MATHEWS, MEMBER (TECHNICAL)

FINAL ORDER NO.76806/2019

DATE OF HEARING : 26.09.2019
DATE OF DECISION : 26.09.2019

PER P.K.CHOUDHARY

1. The instant appeal is against the adjudication order dated October 21, 2008 passed by the Commissioner of Service Tax, Kolkata confirming a service tax demand of Rs.17,09,17,754/- along with interest under Sections 73(2) and 75 of the Finance Act, 1994 against the appellant and imposing penalty of an equivalent amount upon the appellant under Section 78 of the said Act. The Commissioner held that the services rendered by the appellant during the period 01.07.2003 to 31.03.2007 of providing Central Air Conditioning System to their client was not "works contract" but came under "Erection, Commissioning and Installation" under Section 65(39a) of the Finance Act, 1994 and that the appellant was liable to pay service tax on 33% of total charges as

per Notification No.19/2003-ST dated 21.08.2003 which it did not, resulting in short payment of service tax as above. According to the Commissioner, the appellant was not eligible to benefit under Notification No.12/2003 dated 20.06.2003 having not satisfied the conditions laid down therein.

2. The appellant during the material period undertook the work of turnkey contracts on lump sum basis of design, engineering, fabrication, supply and erection, installation, commissioning of Central Air Conditioning plants at the customer's premises. According to the appellant the said indivisible contracts which were "works contract" under Section 65(105)(zzzza) of the Finance Act, 1994, was outside the purview of service tax for the period prior thereto involved herein.

3. However on the basis that the said services rendered by the appellant during the period 01.07.2003 to 31.03.2007 was classifiable as providing of "erection, commissioning and installation services" under Section 65(39a) read with Section 65(105)(zzd) of the Finance Act, 1994 and, in the absence of segregation of material sold and the service charges in the composite bill, the appellant is to pay service tax on 33% of the gross amount charges for the supply of machinery, installation and commissioning of the same in terms of Notification No. 19/2003 dated 21.08.2003 which was not paid, a show cause notice was issued, which resulted in the impugned order.

4. It has been contended on behalf of the appellant by Dr. Samir Chakraborty, Senior Advocate that, inter alia, the requisites to qualify as a works contract under Section 65(105)(zzzza) of the Finance Act, 1994 (in short, "the Act") are:

(a) There should be a transfer of property in goods leviable to tax as sale of goods and

(b) It should be for the purpose of carrying out erection, commissioning or installation of plant, machinery, equipment or structures, turnkey projects including engineering, procurement and construction or commissioning (EPC) projects.

Both the conditions are satisfied in the case of the subject contracts. The contracts are for supply of goods and also involve erection, commissioning or installation. Further, they are turnkey projects. There is no dispute with regard to these aspects in either the show cause notice or the impugned order. Therefore the activity carried on by the appellant is a “works contract” under Section 65(105)(zzzza) of the finance Act, 1994. Hence the activity is exigible to service tax only with effect from June 1, 2007 and therefore no service tax is payable on such services prior thereto. In support of this the appellant has relied upon the decisions of the Hon’ble Supreme Court in Commissioner of C.Ex. & Cus. Vs. Larsen & Toubro Ltd., 2015 (39) STR 913 (SC) and the Hon’ble Delhi High Court in Delhi Jal Board Contractors Welfare Association Vs. Union of India, 2019 (26) GSTL 180 (Del). Reliance has also been placed upon he decision of the Tribunal’s South Zonal Bench in the appellant’s own case reported in 2008 (10) STR 188 (T) [Blue Star Ltd. Vs. Commissioner of Central Excise]. Hence, according to the appellant, the impugned order, the demands of tax and interest confirmed and the penalty imposed thereby are contrary to law and unsustainable.

5. On behalf of the Department Learned Special Counsel, Mr. A.K. Das has submitted a “Synopsis of Departmental Submissions” wherein it has been contended as under:

(a) During the material period, erection/commissioning was a defined service under Section 65(39a) and Board Circular No. 59/8/2003-ST dated 20.06.2003 clarified that in case the service provider shows consolidated charges, service tax would be leviable on such consolidated amount.

(b) The demand has been confirmed on that basis. Now, if the subsequent development, as stated above, on the point is followed, the appeal will have to succeed. However, any amount collected as service tax during the period would continue to be payable under Section 73A of the Act.

(c) On the other hand, if the then existing section, CBEC circular and the practice are followed, the appellant has to pay service tax on the value of the service rendered less the value of the goods/materials in terms of Notification No.12/2003-CE. The CA certificate regarding the value of the goods/materials may be ordered to be taken as sufficient documentary proof.

6. We have heard both the parties and perused the appeal records.

7. We find that in the instant case there is no dispute on facts. The issue to be decided is that whether the services rendered under the subject contracts by the appellant is to be classified as "works contract" under Section 65(105)(zzzza) and hence liable to service tax on and from 01.06.2007 or as "erection, commissioning and installation" service under Section 65(39a) and taxable under Section 65(105)(zzd) of the Act for the period prior thereto.

8. This issue is no more res integra in view of the decision of the Hon'ble Supreme Court in Commissioner of C.Ex. & Cus. Vs. Larsen & Toubro Ltd. (supra). While holding that indivisible works contracts were liable to service tax only on and from 1st June, 2007, whereafter Finance Act 2007 expressly made such contracts liable to service tax, it was, inter alia, observed by the Hon'ble court as follows:

> "*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."

9. In the case of Delhi Jal Board Contractors Welfare Association Vs. Union of India (supra) the Hon'ble Delhi High Court, dealing with exactly the same issue involved herein, held, following the decision of the Hon'ble Supreme Court in Larsen & Toubro Ltd.'s case (supra), that indivisible works contracts are not liable to service tax prior to 1st June 2007 under "Erection, Commissioning and Installation Service" and circulars to the contrary of CBEC are to be disregarded in this regard.

10. Respectfully following the above decisions of the Hon'ble Supreme Court and the Hon'ble Delhi High Court, which are fully applicable to the instant case, we are of the view that the services rendered by the appellant under the subject contracts are classifiable as works contract and are not liable to service tax under the Act during the period involved. This legal position is also agreed to by the Learned Special Counsel on behalf of the Department.

11. In the premises, the demand of tax and interest confirmed by the impugned order and the penalty imposed are unsustainable.

12. We therefore set aside the impugned order and allow the appeal, with consequential relief to the appellant.

(Operative part of the order was pronounced in open Court)

Sd/
(P. K. Choudhary)
Member (Judicial)

Sd/
(C.J.Mathews)
Member (Technical)

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