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

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.35 of 2011
(On behalf of Appellant)

(Arising out of Order-in-Original No.18/Commr./ST/Kol/2010-11 dated 10.11.2010 passed by Commissioner of Service Tax, Kolkata)

M/s Mas Construction Private Limited
7B, K.S.Roy Road, 5th Floor, Kolkata-700001

Appellant

VERSUS

Commissioner of Service Tax, Kolkata
180,Shantipally,Rajdanga Main Road, Kolkata-700107

Respondent

APPERANCE :

Shri Arun Agarwal, Chartered Accountant for the Appellant
Shri S.S.Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO...77188/2023

DATE OF HEARING : 19.09.2023

DATE OF PRONOUNCEMENT : **04.10.2023**

Per Ashok Jindal :

The appellant is in appeal against the impugned order wherein the demand of service tax has been confirmed under the category of commercial or industrial construction services and construction of residential complex services during the period 10.09.2004 to 31.03.2008.

2. The facts of the case are that the appellant was engaged in construction of commercial and civil structures.

2.1 A show-cause notice dated 17.04.2009 was issued to the appellant alleging contravention of the provisions of Section 67,68, 69 & 70 of the Finance Act, 1994 read with Rules 4 (1), 6(1) & 7 of the

Service Tax Rules, 1994 on the part of the appellant in as much as they did not pay the service tax in respect of construction services and construction of residential complex services provided during the period 10.09.2004 to 31.03.2008 without obtaining service tax registration.

2.2 The appellant contested the show-cause notice stating that in some of the cases, they are getting free supply materials, namely, steel and cement. The same are not to be included in the assessable value of services and are entitled for abatement under Notification No.15/2004-ST dated 10.09.2004 and also they are entitled for the benefit of Notification No.12/2003-ST dated 20.06.2003, but the matter was adjudicated and the demand of service tax was confirmed to the extent of Rs.1,63,44,556/- along with interest and equivalent amount of penalty.

2.3 Against the said order, the appellant is before us.

3. Today, when the matte was called, the ld.Consultant appearing on behalf of the appellant, submits that the appellant was engaged in the activity of construction services and the services rendered by them wherein free supply of materials was given by the service recipient. The said free supply materials are not to be included in the assessable value as held by the Larger Bench of this Tribunal in the case of Bhayana Builders Private Limited and Others Vs. Commissioner of Service Tax, Delhi, reported in 2013-TIOL-1331-CESTAT-DEL-LB, which has been affirmed by the Hon’ble Delhi High Court. He further submits that the appellant was providing the services along with materials. Therefore, the merit classification of service rendered is not construction of industrial and commercial services or construction of

residential complex services, but "works contract service", which was come into service tax net w.e.f. 01.06.2007. Therefore, they are not liable to pay any service tax as no demand has been raised against the appellant under the "works contract service".

4. On the other hand, the ld.A.R. for the Revenue, reiterated the findings of the impugned order.

5. Heard both the parties and considered the submissions.

6. We find that the appellant has provided the above services along with materials and on material part, they have paid the VAT to the State Government. The said fact is not in dispute at all. Therefore, the merit classification of the service rendered by the appellant is "works contract service" which came into service tax net w.e.f. 01.06.2007 as held by the Hon'ble Apex Court in the case of Larsen & Tourbro Limited reported in 2015 (39) STR 913 (S.C.), wherein the Hon'ble Apex Court has observed as under :

> "***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.

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41. *We are afraid that there are several errors in this paragraph. The High Court first correctly holds that in the case of composite works contracts, the service elements should be bifurcated, ascertained and then taxed. The finding that this has, in fact, been done by the Finance Act, 1994 Act is wholly incorrect as it ignores the second Gannon Dunkerley decision of this Court. Further, the finding that Section 67 of the Finance Act, which speaks of "gross amount charged", only speaks of the "gross amount charged" for service provided and not the gross amount of the works contract as a whole from which various deductions have to be made to arrive at the service element in the said contract. We find therefore that this judgment is wholly incorrect in its conclusion that the Finance Act, 1994 contains both the charge and machinery for levy and assessment of service tax on indivisible works contracts."*

7. We further take note of the fact that w.e.f. 01.06.2007 onwards also, no demand has been raised against the appellant under "works contract service". In that circumstances, for the period post 01.06.2007 also, the appellant is not liable to pay service tax under the category of construction of commercial and residential services or construction of residential complex services.

8. In view of this, we do not find any merit in the impugned order and the same is set aside and the appeal is allowed with consequential relief, if any.

(Pronounced in the open court on **04.10.2023**)

Sd/

(Ashok Jindal)
Member (Judicial)

Sd/

(K.Anpazhakan)
Member (Technical)

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