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

REGIONAL BENCH – COURT NO.2

**Service Tax Appeal No.140 of 2010**

(Arising out of Order-in-Original No.04/Comm/ST/SLG/09-10 dated 05.02.2010 passed by Commissioner of Central Excise, Customs & Service Tax, Siliguri)

**CCEx., Cus. & Service Tax, Siliguri**
C.R.Building, 4th Floor, Haren Mukherjee Road, Hakimpara, Siliguri-734001

**Applicant**

*VERSUS*

**M/s Varni Builders**

4/1, Akshaytara Apartment, 15/6 Don Bosco Road, Jyoti Nagar, Siliguri-734001

**Respondent**

**APPERANCE :**

Shri A. Roy, Authorized Representative for the Appellant

Shri S.Banerjee, Advocate for the Respondent

**WITH**

**Service Tax Appeal No.136 of 2010**

(Arising out of Order-in-Original No.04/Comm/ST/SLG/09-10 dated 05.02.2010 passed by Commissioner of Central Excise, Customs & Service Tax, Siliguri)

**M/s Varni Builders**

4/1, Akshaytara Apartment, 15/6 Don Bosco Road, Jyoti Nagar, Siliguri-734001

**Applicant**

*VERSUS*

**CCEx., Cus. & Service Tax, Siliguri**
C.R.Building, 4th Floor, Haren Mukherjee Road, Hakimpara, Siliguri-734001

**Respondent**

***Service Tax Appeal Nos.140 & 136/2010***

**APPERANCE :**

Shri S.Banerjee, Advocate for the Appellant

Shri A. Roy, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)**

**HON'BLE MR.P.VENKATA SUBBA RAO, MEMBER (TECHNICAL)**

**FINAL ORDER NO.76844-76845/2019**

DATE OF HEARING : 23.07.2019
DATE OF DECISION : 23.07.2019

**PER P.VENKATA SUBBA RAO :**

These two appeals have been filed challenging the same impugned order and hence are being disposed of together.

2. In the Revenue's Appeal (Service Tax Appeal No.140 of 2010), the Revenue challenged the non-imposition of penalty by the adjudicating authority in the impugned Order-in-Original No.04/Comm/ST/SLG/09-10 dated 05.02.2010. The Assessee's Appeal No.ST/136/2010 is against confirmation of demand, etc.

3. Heard both sides and perused the records.

4. The facts of the case in brief, are that the assessee, M/s Varni Builders, are engaged in construction business. A letter was issued by the Department on 20.09.2007 indicating that it had come to their notice that the assesse was providing service in relation to "Execution of Works Contract" services, which are liable to service tax and calling for details. After receiving the required information from the assessee, show cause notice dated 27.07.2009 was issued to the appellant demanding a service tax of Rs.72,96,127/- along with Education Cess and Higher Secondary Education Cess from the appellant under the

category of "Construction of Complex Service" in respect of their services rendered to M/s Laxmi Township Ltd. in their project, "Uttorayon", at Siliguri without obtaining the service tax registration and without paying the service tax. Interest was also demanded in the late payment of service tax. Show cause notice also proposed to impose penalty under Sections 76,77 & 78 of the Finance Act, 1994. The demand was made under proviso to Section 73 invoking extended period of limitation of five years. After following the due process, the adjudicating authority, by the impugned order, has confirmed the demand and interest as proposed in the show-cause notice and appropriated the amount of service tax already paid by the appellant towards this amount. He also imposed a penalty of equal amount under Section 78 of the Finance Act, 1994 and penalty of Rs.2,35,200/- under Section 77 of the Finance Act, 1994. He did not impose any penalty under Section 76 of the Act. Revenue is aggrieved by the fact that no penalty was imposed under Section 76 when the case was decided by the adjudicating authority against the assessee. The assessee is challenging the confirmation of demand itself as well as imposition of penalty under section 77 & 78. It is the case of the Revenue that the assessee has rendered the construction of complex service, which was chargeable to service tax during the relevant period. It is the case of the appellant that they are chargeable to service tax only under works contract service and this charge has been brought in only from 01.06.2007 with the introduction of Section 65(105)(zzzza) of the Finance Act, 1994. It is their contention that they are not liable to pay service tax under construction of complex services.

5. We have considered the arguments of both sides and perused the records.

6. We are unable to ascertain the nature of the contract in question – whether it was a contract which involved service simplicitor, in which case, the assessee is liable to pay service tax under construction of complex service or a contract which involved both rendition of service and transfer/deemed transfer of the materials used in the construction

which would render it chargeable to service tax under “works contract service”.

7. Before proceeding to decide this case, it would be profitable to discuss the nature of the charge of service tax on works contract service. This issue has been a subject of dispute for a long time. In the case of State of Madras Vs. Gannon Dunkerley & Co. (Madras) Ltd. : 1959 SCR 379, the Hon’ble Supreme Court examined the power of State/ Provincial Government to levy of service tax on such contracts. The Provincial Legislature of Madras had imposed sales tax on deemed sale of goods used in works contract service. During the relevant period, the powers of the Provincial Legislature were covered by the Entry No.48 of List II to the seventh Schedule to the Government of India Act, 1935, which is *pari-materia* with Entry No.54 of List II to the seventh Schedule of the Constitution of India. Both these Entries empower the Provincial/State Legislature to levy of tax on sales or purchase of goods. The Hon’ble Apex Court examined whether this power to levy sales tax also extends to by such tax in case of deemed sale of goods used in execution of works contract and held in the negative. Therefore, the State Government had no power to levy of sales tax on deemed sale of goods used in works contract service. In other words, the power to levy sales tax on Works Contract Service is not covered in List-II (State List) and therefore it fell within the residuary power (Entry 97 of List-I of the Seventh Schedule of the Constitution) of the centre. The matter was then examined by the Law Commission in its 61st Report. As per its recommendations, Parliament made the Forty Sixth Amendment to the Constitution and Article 366 (Definitions Article) was amended and Sub-Clause 29A has been inserted therein creating a deeming fiction to enable the States to tax the goods which are used in execution of works contract. This amendment thus enlarged the powers of State and to that extent truncated the residuary power of Parliament.

8. The power of Central Government to levy service tax on works contract, has never been in dispute. Entry 97 of List I of 7th Schedule of the Constitution of India, gives the residuary power to the Union. In

fact, the service tax itself was initially introduced in exercise of this power. Therefore, the Centre has also levied service tax on the service component of the works contract services. Section 66 of the Finance Act, 1994, is the charging Section for levy of service tax. The taxable services for the purposes of levy, are defined under Section 65(105) of this Act. Various clauses under this Section 65 (105) created various taxable services. Wherever the services were rendered along with transfer of some goods or deemed transfer of goods, abatements were provided towards value of such goods used in rendering the services under various entries by notifications. Thereafter, a specific entry called as "works contract service" was introduced for the first time in the Finance Act, 2007, by inserting Section 65 (105) (zzzza) as follows :

> *"(zzzza) 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;"*

9. The question, which was before the Hon'ble Apex Court, in the case of Commissioner of Central Excise & Customs, Kerala Vs. Larsen & Toubro Ltd. reported in 2015 (39) STR 913 (SC), was whether service tax could have been levied on composite works contracts prior to insertion of Section 65 (105) (zzzza) under other Heads under which such service would fall, if there was no transfer /deemed transfer of the goods.

10. After examining the issue at length, the Hon'ble Apex Court held that "works contract" is a separate specie of contract known in the commercial parlance and it cannot be equated with sales of goods or with the services. Therefore, it can be charged to service tax only when the charge has been created on "works contract services" and not before. Accordingly, no service tax can be levied on works contract service prior to 01.06.2007 on any service rendered along with transfer/deemed transfer of goods.

11. To sum up, the legal position, which is now well settled is that if the services are rendered along with transfer/deemed transfer of goods, such contract can only be charged as "works contract service" under Section 65 (105) (zzzza) with effect from 01.06.2007 if such contract falls within this clause. They cannot be charged the service tax under any other Head either prior to 01.06.2007 or thereafter.

12. We are unable to make out in this case from the records whether in the contract in question, there was deemed/transferred of materials also along with rendition of services. If so, the contract squarely falls under works contract services and can be charged under this Head only. If it does not fall under "Works Contract Service", then no tax can be levied under this or any other head. On the other hand, if the contract pertains to service simplicitor and involves no transfer/deemed transfer of materials, then it can be charged to service tax under construction of complex services. Consequently, the demand needs to be re-worked along with interest and penalty also needs to be re-calculated.

13. With these observations, we remand the matter back to the original authority to decide the issue afresh after examining the nature of contract in the case and following the ratio laid down by the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. (supra).

14. Both the appeals are allowed by way of remand to the original authority.

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

Sd/

**(P. K. CHOUDHARY)**
**Member (Judicial)**

**Sd/**
**(P.V.SUBBA RAO)**
**Member (Technical)**

Mm/vrg