IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

COURT No. I

Appeal No. ST/36/09

(Arising out of Order-in-Appeal No. PIII/192/08 dated 23.10.2008 passed by Commissioner of Central Excise (Appeals), Pune I)

Commissioner of Central Excise, Pune III — **Appellant**

Vs.

Akruti Projects — **Respondent**

Appearance:

Shri M.P Damle, Asst. Commissioner (AR) — for appellant
Shri Bharat Raichandani, Advocate — for respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Date of Hearing & Decision:16.05.2018

FINAL ORDER NO. A/86921/2018

Per: S.K. Mohanty

This appeal is directed against the impugned order dated 23.10.2008 passed by Commissioner of Central Excise (Appeals), Pune-I.

2. Brief facts of the case are that the respondent herein, is a service provider and is duly registered with the Service Tax department for providing taxable service under the category of

"Commercial or Industrial Construction Service". During the period 2006-07, M/s Devi Construction Co. Pvt. Ltd, sub-contracted some of their civil work to the respondent. The respondent had discharged the service tax liability as per Notification No. 1/2006 dated 01.03.2006. In respect of the same activity, the main contractor M/s Devi Constructions also discharged the service tax liability. Since there was double payment of service tax, the respondent entertained the belief that it was not liable to pay tax under 'Commercial or Industrial Construction Service', and accordingly, filed refund application before the jurisdictional service tax authorities, claiming refund of service tax of Rs.20,34,317/- paid by it. The refund application was rejected by the original authority on the ground that the respondent did not produce any documentary evidence to show that they were in fact the sub-contractor of the work, ultimately executed by the main contractor, M/s Devi Constructions. On appeal against the adjudication order, learned Commissioner (Appeals) vide the impugned order has allowed the appeal filed by the respondent, holding that it should be entitled for the refund of service tax. Feeling aggrieved with the adjudication order, Revenue has filed this appeal before the Tribunal.

3. Revenue has assailed the impugned order mainly on the ground that the respondent being a service provider, was liable to pay service tax under the category of Commercial or

Industrial Construction Service and service tax paid by the main contractor cannot absolve the respondent from its statutory liability for payment of service tax on the taxable service provided by it. In support of such contentions, Revenue has relied upon the Circular No. 96/7/2008-ST dated 23.8.2007 issued by the Tax Research Unit (TRU) of CBEC.

4. Learned D.R. appearing for Revenue reiterates the submissions made in the grounds of appeal.

5. On the other hand, learned Advocate appearing for the respondent submits that since for providing the same taxable service, the tax liabilities have been discharged by both the main contractor as well as the sub-contractor, the benefit of refund of tax should be available either to the main contractor or the sub-contractor, the respondent herein. Thus, he submits that the refund claim lodged by the respondent should be available. He further submits that the activity undertaken by the respondent pursuant to the contract entered with the main contractor was a composite one, involving both supply of material as well as for execution of the assigned work and accordingly, the same should fall under the scope and purview of works contract service. Hence, he submits that since the period of dispute is 2006-07, as per the judgement of the Hon'ble Supreme Court, in the case of *Commissioner of Central Excise, Kerala vs. Larsen & Toubro* –

2015 (39) STR 913 (SC), liability to pay service tax under works contract service should commence only from 01.06.2007 and not prior to date. Thus, he pleaded that the service tax paid by the respondent should be eligible for refund on this ground also. In this context, he referred to the submission made by the respondent, which has been recorded in paragraph 3 in the impugned order.

6. Heard both sides and perused the case records.

7. It is an admitted fact on record that for providing Commercial and Industrial Construction Service to the client of the main contractor, both the main contractor as well as the respondent had discharged the service tax liability. The fact is also not disputed that the main contractor had not additionally provided any taxable service to its client, over and above the services provided by the respondent to it under the capacity of sub-contractor. Thus, for providing the same taxable service viz. Commercial and Industrial Construction Service, only one party was liable to pay service tax. Since both the parties had discharged the service tax liability for the some work, tax amount paid twice, cannot be retained by the Government, as the legitimate due; and on claim of one tax as refund by either of the person, the same should have been refunded. Revenue's contentions that the tax paid by the respondent should be eligible as CENVAT Credit to the main contractor, will not hold

any water inasmuch as the clarification of availment of CENVAT Credit by the main contractor was issued in 2007, subsequent to the period in dispute. Therefore, I am of the view that the service tax paid by the respondent should be eligible for the refund benefit. Further, I also find from the impugned order that the respondent had enclosed copy of invoices, showing payment of VAT/ Sales Tax on the material component, used for providing the works contract service. Since works contract service was specifically brought into tax net only with effect from 01.06.2007, the respondent should not be liable to pay service tax under the taxable category of Commercial or Industrial Construction Service prior to such date, as per the judgment of Hon'ble Supreme Court, in the case of Larsen & Toubro (supra). Thus, on this ground also, the respondent succeeds for entitlement of the refund benefit.

8. In view of the above discussions and analysis, I do not find any infirmity in the impugned order passed by the learned Commissioner (Appeals). Therefore, the appeal filed by Revenue is dismissed.

(Order dictated in Court)

(S.K. Mohanty)
Member (Judicial)

Nsk