CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. 1

SERVICE TAX APPEAL NO. 50307 OF 2017

[Arising out of the Order-in-Original No. ALW-EXCUS-OIO-COM-29/16-17 dated 22/08/2016 passed by Commissioner of Central Excise & Service Tax, Alwar.]

M/s Incredible Unique Buildcon Pvt. Ltd., **...Appellant**
812/G1-15, Samtel Zone, Phase – III, Bhiwadi,
District Alwar.

Versus

Commissioner of Central Excise and Service Tax, **...Respondent**
A Block, Surya Nagar,
Alwar – 301 001.

APPEARANCE:

Shri G.G. Gupta, Advocate, Shri Utkarsh Gupta, Advocate for the appellant.
Dr. Radhe Tallo, Authorized Representative for the Department

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50651/2022

DATE OF HEARING : 20.05.2022
DATE OF DECISION: 26.07.2022

P.V. SUBBA RAO

This appeal has filed by M/s Incredible Unique Buildcon Pvt. Ltd.[1] assailing the order-in-original dated 22.08.2016[2] passed by the Commissioner of Central Excise & Service Tax, Alwar, the operative part of which is as follows :-

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[1] **appellant**
[2] **impugned order**

> "(i) I confirm the demand of Service Tax amounting to Rs. 2,54,64,515/- including Edu. Cess & SHE Cess (Rupees Two Crore Fifty Four Lakh Sixty Four Thousand Five Hundred Fifteen only) under the provisions of Section 73 (2) in respect of Works Contract Service" as defined under Section 65 (105) (zzzza) of the Finance Act, 1994 for the period from October 2010 to June 2012 against the assessee and order to recover the same under proviso to Section 73 (1) of the Finance Act, 1994.
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> (ii) I order to recover the interest on the confirm demand of Service Tax of Rs. 2,54,64,515/- (Rupees Two Crore Fifty Four Lakh Sixty Four Thousand Five Hundred Fifteen only) (as mentioned at (i) above) at applicable rate form the assessee under provisions of Section 75 of the Finance Act, 1994.
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> (iii) I impose a penalty of Rs. 10,000/- (Rupees Ten Thousand only) on the assessee for not filing the prescribed Service Tax Returns within the prescribed time limit, in a prescribed manner, under the provisions of Section 77 of the Finance Act, 1994 and
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> (iv) I impose a penalty of Rs. Rs. 2,54,64,515/- including Edu. Cess & SHE Cess (Rupees Two Crore Fifty Four Lakh Sixty Four Thousand Five Hundred Fifteen only) on the assessee under Section 78 of the Finance Act, 1994.
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> However, the assessee have an option to deposit the 25% amount of the said penalty, if the Service Tax and the interest payable alongwith penalty thereon are paid by them within 30 days from the communication of this order in terms of 1st proviso to Section 78 of the Finance Act, 1994".

2. The facts of the case, in brief are that the appellant is engaged in construction and is registered with the Department under the categories of Commercial or Industrial Construction Services[3] as defined under Section 65 (105) (zzq) and of Works Contract Services[4] as defined in Section 65 (105) (zzzza) of the Finance Act, 1994[5]. During audit of the appellant's records by the Department, it was found that the appellant had paid service tax on its activities under head CICS both before and after 01.06.2007. Audit found that after 01.06.2007 WCS was introduced as a separate service under which the appellant's

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[3] **CICS**
[4] **WCS**
[5] **Act**

services fell for the reason that it charges a composite amount for rendering its services as well as utilization of the material for providing the services. The appellant had not opted for Works Contract (Composite Scheme for Payment of Service Tax) Rules, 2007. It further found that the appellant was paying Value Added Tax[6] to the Rajasthan State Government as per the Rajasthan VAT Rules in respect of the same contracts. The audit team has found that the appellant has, thereby short paid an amount of Rs. 2,54,64,515/- including Edu. Cess & SHE Cess (Rupees Two Crore Fifty Four Lakh Sixty Four Thousand Five Hundred Fifteen only) being the service tax.

3. A show cause notice dated 30 September, 2015 was issued to the appellant proposing to classify its services under the category of WCS for the period October 2010 to June 2012 and recover the differential duty under the proviso to Section 73 (1) of the Act along with interest under Section 75 of the Act. Penalties were also proposed to be imposed under Section 77 and 78 of the Act.

4. The Commissioner passed the impugned order. Aggrieved, the appellant filed this appeal.

5. Learned Counsel for the appellant has submitted as follows:-

(a) The appellant has rightly classified its services under CICS only since it charges from its clients a consolidated

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[6] **VAT**

amount which is inclusive of value of material used by it in the construction. The appellant has not paid VAT under the Rajasthan Value Added Tax but has opted for exemption under the Rajasthan VAT Act by paying an exemption fee @ 1.5% of the entire contract value without availing the input credit of the VAT paid on the raw materials/goods purchased by it.

(b) The service rendered by the appellant is not WCS because there is no transfer of property in goods in the execution of the contract.

(c) The option to pay service tax either under the CICS or under WCS is with the appellant and it can choose whatever is beneficial to it.

(d) The demand of service tax has been wrongly computed by not considering clause (ii) of Rule 2A of Service Tax Valuation rules by the Commissioner.

(e) The demand is time barred as it has been filing the returns periodically before the Revenue. The penalties under Section 77 and 78 are not imposable.

6. Learned Counsel prayed that the appeal may be allowed and the impugned order may be set aside with consequential relief.

7. Learned Authorized Representative of the Revenue supports the impugned order and submits that it calls for no interference.

8. We have considered the submissions on both sides and perused the records.

9. The undisputed facts of the case are that the appellant had rendered services which involved utilization of materials and had charged a gross amount from its clients without vivisecting the cost of goods used and the charges for its services. Contracts which involve both rendering of services and supply or deemed supply of goods are known as "works contracts". It has been held by Supreme Court in the case of **Commissioner of Central Excise & Customs, Kerala versus Larsen & Toubro Ltd.[7],** that the indivisible works contracts are a separate species of contracts known to the commerce distinct from contracts for services simpliciter or contracts for supply of goods. Such contracts are leviable to VAT by the State Governments and service tax by the Centre. In this case, the appellant has indeed subjected itself to the provisions of Rajasthan VAT on these contracts. However, instead of paying VAT on the value of the goods used, it opted for a scheme under the Rajasthan VAT Act whereby it paid an exemption fee @ 1.5% of the total value of the contracts without availing the benefit of input credit under the VAT Rules. The relevant portion of the judgment of the Supreme Court in the case of **Larsen & Toubro** is as follows :-

> **"17. We find that the assessees are correct in their submission that a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as**

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[7] 2015 (39) S.T.R. 913 (S.C.)

such. In *Gannon Dunkerley*, 1959 SCR 379, this Court recognized works contracts as a separate species of contract as follows :-

> "To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment." (at page 427)

18. Similarly, in *Kone Elevator India (P) Ltd.* v. *State of T.N.* - (2014) 7 SCC 1 = 2014 (34) S.T.R. 641 (S.C.) = 2014 (304) E.L.T. 3 (S.C.), this Court held :-

> "Coming to the stand and stance of the State of Haryana, as put forth by Mr. Mishra, the same suffers from two basic fallacies, first, the supply and installation of lift treating it as a contract for sale on the basis of the overwhelming component test, because there is a stipulation in the contract that the customer is obliged to undertake the work of civil construction and the bulk of the material used in construction belongs to the manufacturer, is not correct, as the subsequent discussion would show; and second, the Notification dated 17-5-2010 issued by the Government of Haryana, Excise and Taxation Department, whereby certain rules of the Haryana Value Added Tax Rules, 2003 have been amended and a table has been annexed providing for "Percentages for Works Contract and Job Works" under the heading "Labour, service and other like charges as percentage of total value of the contract" specifying 15% for fabrication and installation of elevators (lifts) and escalators, is self-contradictory, for once it is treated as a composite contract invoking labour and service, as a natural corollary, it would be works contract and not a contract for sale. To elaborate, the submission that the element of labour and service can be deducted from the total contract value without treating the composite contract as a works contract is absolutely fallacious. In fact, it is an innovative subterfuge. We are inclined to think so as it would be frustrating the constitutional provision and, accordingly, we unhesitatingly repel the same." (at para 60)

19. In *Larsen & Toubro Ltd.* v. *State of Karnataka*, (2014) 1 SCC 708 = 2014 (34) S.T.R. 481 (S.C.) = 2014 (303) E.L.T. 3 (S.C.), this Court stated :-

> "In our opinion, the term "works contract" in Article 366(29-A)(b) is amply wide and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of contract. Parliament had such wide meaning of "works contract" in its view at the time of the Forty-sixth Amendment. The object of insertion of clause (29-A) in Article 366 was to enlarge the scope of the expression "tax on sale or purchase of goods" and

> overcome Gannon Dunkerley (1) [*State of Madras* v. *Gannon Dunkerley and Co. (Madras) Ltd.*, AIR 1958 SC 560 : 1959 SCR 379]. Seen thus, even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract. The additional obligations in the contract would not alter the nature of contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of works contract are satisfied in a contract then irrespective of additional obligations, such contract would be covered by the term "works contract". Nothing in Article 366(29-A)(b) limits the term "works contract" to contract for labour and service only. The learned Advocate General for Maharashtra was right in his submission that the term "works contract" cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into existence some "works". We are also in agreement with the submission of Mr. K.N. Bhat that the term "works contract" in Article 366(29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Parliament had all genre of works contract in view when clause (29-A) was inserted in Article 366." (at para 72)
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> **42.** It remains to consider the argument of Shri Radhakrishnan that post 1994 all indivisible works contracts would be contrary to public policy, being hit by Section 23 of the Indian Contract Act, and hit by *Mcdowell's* case.
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> **43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.**
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> **44. We have been informed by counsel for the revenue that several exemption notifications have been granted *qua* service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of.**
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> **45.** We, therefore, allow all the appeals of the assessees before us and dismiss all the appeals of the revenue.
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> **(emphasis supplied)"**

10. Considering that the appellant in this case has used material for rendering service and has paid an exemption fee under the Rajasthan VAT Act in order to exemption from payment of the Act there cannot be any doubt that the contracts involved

deemed sale of materials. We, therefore, find no basis for the appellant's contention that its contracts were for services simpliciter classifiable under CICS. Clearly, the contracts of the appellant were not services simpliciter but involved supply/use of materials in the course of rendering such services as well. They clearly fall under the category of WCS. Therefore, the appellant's contention that they were not rendering WCS, has no legs to stand on.

11. Another interesting proposition by the learned Counsel for the appellant is that the service provider has an option to pay service tax either under CICS or under WCS. This submission is completely misplaced and is contrary to any canons of taxation. When any tax is levied, the taxable event is defined in the Act. In case of Customs, the taxable event is the import or export, in case of excise, it is the manufacture, in case of VAT, it is the sale or deemed sale of goods and in case of income tax, it is the earning of income. If no taxable event takes place, no tax can be levied. The taxable event under Finance Act, 1994 in case of services simpliciter is rendering of a taxable service and in the case of works contract it is rendering of a service along with supply or deemed supply of goods. To determine tax liability, it must first be established as to whether the service rendered falls in one of the taxable services. This classification is not a matter of choice or discretion either of the officers or of the assessee. A service cannot, at the same time be classified under more than one head. Similarly, when central excise duty is levied, it is based

on the nature of the goods manufactured and where they fall within the Central Excise Tariff. The goods which are manufactured cannot simultaneously fall under two or three headings which are chargeable to various rates of duty. Similarly, in income tax the income which is earned is classified under one of the heads such as "income from salary", "income from business or profession", "income from house property", etc. It is not open for any assessee to classify income earned under one head as an income under another head. For instance a salary can only be classified as an income from salary and not as income from profession or business to claim deductions. Therefore, the submission of the learned Counsel for the appellant that it is open for the appellant to classify its services under any head it pleases is not correct. We have already held above that given the factual matrix, the services rendered by the appellant were correctly classifiable under WCS.

12. Learned Counsel for the appellant has also submitted that even if the demand is made classifying its services under WCS, the calculation by the learned Commissioner is not correct. Further, he submitted that the Works Contract (Composition Scheme for the payment of Service Tax) /Rules, 2007 is also available to it. As has been observed in the audit report and in the impugned order, the Service Tax Composition Scheme, requires the assessee to make an option which it had not done.

13. It has been submitted by the learned Counsel for the appellant that three methods for calculation of service tax are :-

(a) Under commercial or industrial construction service claiming the benefit of Notification No. 1/2006-ST dated 01.03.2006 on 33% of the gross amount charged ;

(b) Under Rule 2A of Service Tax (Determination of Value) Rules, on an amount equal to 40% of the total value of the contract ;

(c) As per Works Contract (Composition Scheme for the payment of Service Tax) Rules, 2007 @ 4% of the gross amount charged by the service provider.

14. The appellant also submitted that the demand is time barred as it has been issued beyond the normal period of limitation and it had been filing its returns periodically. There was no suppression of facts on its part. For the same reasons, no penalties may be imposed under Section 77 and 78.

15. It is undisputed that the appellant had been rendering the services and has been paying service tax under the head CICS although its service involved for provision of service and use of goods. Revenue does not dispute its classification under the head CICS under Section 65 (105) (zzq) for the period prior to 01.06.2007. After 01.06.2007, WCS was introduced by virtue of Section 65 (105) (zzzza) of the Act. The appellant continued to classify its services under CICS, which according to the Revenue was not correct. We find that as per the ratio of **Larsen &**

Toubro Composite Work Contracts involving supply of goods or deemed supply of goods along with rendering of services are only chargeable to service tax under the head of WCS from 01.06.2007. They were not exigible to service tax prior to this date. Therefore, on merits we find in favour of the Revenue that for the period October 2010 to June 2012 the appellant's services were chargeable to service tax under WCS.

16. If a tax is chargeable, in order to recover the service tax not paid or short paid a notice has to be issued under Section 73 of the Act. This is the only remedy available to the Revenue. The notice can be issued within the normal period of limitation only unless the elements of fraud or collusion or wilful statement or suppression of facts or contravention of any provisions of the Act or Rules with an intent to evade payment of service tax is established. If any of these elements are established in any case, the demand can be raised within an extended period of limitation of 5 years. The observation in the show cause notice justifying invocation of the extended period of limitation is as follows :-

> "In the instant case, the assessee failed to discharge their service tax liability as required by them under the said provisions in as much as, the assessee had not disclosed the material facts to the department to the extent of providing the taxable service under the category of "works Contract service" as defined under Section 65 (105) (zzzza) of the Finance Act, 1994 during the period from October, 2010 to June, 2012 thus they have willfully not deposited the applicable service tax and deliberately & knowingly suppressed the facts by not filing the prescribed Service Tax Returns within the prescribed time limit, in a prescribed manner. Thus, it appears that they did so with intent to evade payment of Service Tax. Therefore, extended period of limitation appears to be invokable in this case under the proviso to Sub-section (1) of Section 73 of the Finance Act, 1994, as amended. The assessee also appears liable to pay interest at applicable rates under Section 75 of the Act ibid".

17. We are unable to find any proof of intent to evade either from the show cause notice or from the impugned order. Mere omission or merely classifying its services under an incorrect head does not amount to fraud or collusion or willful misstatement or suppression of facts. The intention has to be proved to invoke extended period of limitation. Supreme Court has delivered the judgment in the case of **Larsen & Toubro** dated 20 August 2015, prior to which there was no clear ruling that services which involved supply or deemed supply of goods could only be classified under WCS. The appellant had been classifying its services (which also involved supply/use of goods) under the CICS and Revenue never objected to it and, therefore, the appellant could have reasonably believed it to be the correct head and continued to file returns accordingly and paying duty. Once the returns are filed, if Revenue was of the opinion that the self-assessment of service tax and the classification was not correct, it could have scrutinized the returns and issued notices within time. The show cause notice was issued on 30 September 2015 for the period covered October 2010 to June 2012, which is clearly beyond the normal period of limitation. Therefore, although Revenue is correct on merits, the demand is time barred and, therefore, cannot sustain. For the same reason, the penalties imposed upon the appellant under Sections 77 and 78 also cannot be upheld.

18. In view of the above, we find that the impugned order cannot be sustained.

19. The appeal is allowed and the impugned order is set aside with consequential relief, if any, to the appellant.

(Order pronounced in open court on 26/07/2022.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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