

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.126 of 2011

(Arising out of Order-in-Original No.ST/SHILLONG NO.02/2011 dated 31.01.2011
passed by Commissioner of Central Excise, Shillong.)

M/s. National Building Construction Corporation Limited

(1st BN Manipur Rifles Complex, Kaliomai Gate, Imphal-795001.)

...Appellant

VERSUS

Commissioner of Central Excise, Shillong

.....Respondent

(Morellow Compound, M.G. Road, Shillong-793001.)

WITH

Service Tax Appeal No.154 of 2011

(Arising out of Order-in-Original No.ST/SHILLONG NO.02/2011 dated 31.01.2011
passed by Commissioner of Central Excise, Shillong.)

M/s. Simplex Projects Limited

(12/1, Nellie Sengupta Sarani, Kolkata-700087.)

...Appellant

VERSUS

Commissioner of Central Excise, Shillong

.....Respondent

(Morellow Compound, M.G. Road, Shillong-793001.)

APPEARANCE

Shri Rajeev Agarwal, Advocate for the Appellant M/s. Simplex Projects Limited.

Shri K.Chowdhury & Shri S.Mukhopadhyay, both Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P. K.CHOUDHARY, MEMBER(JUDICIAL)

HON'BLE SHRI P.ANJANI KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 75445-75446/2022

DATE OF HEARING : 15 June 2022
DATE OF DECISION : 08 August 2022

P.K.CHOUDHARY :

Appeal No. ST-154/2011 has been filed by M/s. Simplex Projects Limited (SPL) against Order-in-Original No. ST/Shillong/02/2011 dated 31.01.2011 passed by the Ld. Commissioner of Central Excise, Shillong, whereby he has confirmed demand of service tax of Rs.84,43,911 along with interest and penalty for the periods 2005-06 and 2008-09. In the same adjudication order, demand of service tax of Rs.25,58,761/- along with interest and penalty have been confirmed against M/s. National Buildings Construction Co. Ltd (NBCC) being Appeal No. ST-126/2011. Since both the Appeals are arising out of the above adjudication order dated 31.01.2011, the same are taken up for disposal by this common order.

2. The facts of the case in brief are that SPL has undertaken construction of accommodation for urban employed youth & women vendors at New Market and Laxmi Market at Imphal, Manipur, in terms of the contracts awarded by NBCC on behalf of the Ministry of Urban Development & Poverty Alleviation, Govt. of India. The fund required for the said construction was released to NBCC by the Govt. out of non-lapsable central pool of resources for the development of North-Eastern States. The main contract was awarded to NBCC, which is the nodal implementing agency, which in turn has sub-contracted the entire work on back-to-back basis by retaining 10% of the total contract value.

Show Cause Notice dated 15.10.2009 (SCN) was issued which has been adjudicated by the Ld. Commissioner vide Order-in-Original dated 31.01.2011 confirming the demand of service tax under the category of 'Commercial or Industrial Construction Services'. The Ld. Commissioner has extended the benefit of abatement @ 67% to exclude the value of goods in order to arrive at the value of taxable services in terms of Notification No. 01/2006-ST dated 01.03.2006 by

considering the project to be inclusive of supply of goods for use in the construction project. The Ld. Commissioner also observed that the said market complexes are being constructed for the local government bodies for letting out, and hence, such activity would be considered for commercial purpose. The Ld. Commissioner rejected the submissions made by both the Appellants that subject services, if at all taxable, would be liable to be taxed under the category of 'Works Contract Service' which has not been proposed in the impugned SCN.

3. Shri Rajeev Kumar Agarwal, Ld. Advocate, appeared for SPL, whereas Shri K. Chowdhury and Shri S. Mukhopadhyay, Ld. A/Rs. both appeared for the Revenue. None appeared for NBCC.

4. The Ld. Advocate appearing for SPL submitted that since the contract has been undertaken for construction of accommodation for Urban employed Youth and Women Vendors on behalf of the Ministry of Urban Development & Poverty Alleviation, Govt. of India, the same cannot be said to be for commercial purpose and, therefore, the classification under the category of Commercial or Industrial Construction is not correct.

4.1 He also submitted that since the scope of contract included supply of goods, the same cannot be classified under the above service category of Commercial or Industrial Construction but under 'Works Contract service' which classification has not been invoked in the SCN proceedings. He also referred to clause 4.2 of the subject contract that the construction activities undertaken by them is inclusive of supply of goods on which applicable works contract tax have been paid under the State Sales Tax law. He relied on the judgement of the Hon'ble Supreme Court in the case of Commissioner of C. Ex. & Cus., Kerala vs. Larsen & Toubro Ltd. 2015 (39) S.T.R. 913 (S.C.) to submit that works contract services cannot be taxed under Commercial Construction Service.

4.2 He also relied on the Tribunal's decision in the case of URC Construction (P) Ltd. vs. CCE, Salem 2017 (50) S.T.R. 147 (Tri-

Chennai) wherein it has been held that when no proposal is made in the SCN to classify the service under the category of 'Works Contract Service', the demand of service tax cannot be sustained for the period subsequent to 01.06.2007.

4.3 He also referred to the letter dated 13.03.2008 issued by the Ld. Joint Secretary, MAHUD department, State Government of Manipur, addressed to NBCC wherein it has been stated that the market complexes constructed by the Government out of its budgetary resources and placed at the disposal of Municipal Bodies for utilization in the service of local people on recovery of user charges as licence fee cannot be described as 'Commercial Construction'. Copy of the said letter had also been sent to the Directorate General of Service Tax, Mumbai. On the basis of above, he also contested the demand on the ground of limitation in the absence of the willful suppression or fraud with intent to evade payment of service tax. On the same count, he contested the imposition of penalty.

5. The Ld. Authorized Representative appearing for the Revenue reiterated the findings made by the Ld. Commissioner in the impugned order and prayed that the appeals be rejected being devoid of any merit.

6. Heard both sides and perused the appeal records.

7. We find that the issue can be decided on the point of classification alone. It is noted that the contract is inclusive of supply of goods. The Ld. Commissioner while taking note of the fact that the construction service is inclusive of supply of goods has extended the benefits of abatement to exclude the value of goods so as to arrive at the assessable value for raising demand of service tax. We find that the issue has already been examined in detail by the Tribunal in the case of URC Construction (P) Ltd. (Supra)has observed as below:-

"4. The primary contention of learned Counsel for the appellant is that the decision of the Hon'ble Supreme Court in Commissioner of Central Excise and Customs, Kerala v. Larsen & Toubro Ltd. [[2015](#)

[\(39\) S.T.R. 913](#) (S.C.)] has settled the law to the effect that composite contracts involving services and goods covered under four categories, i.e., 'erection, commissioning and installation', 'construction of building for commerce and industry', 'construction of residential complex' and 'turnkey projects', under Section 65(105)(zzzza) are liable to tax only with effect from 1st June, 2007. It is also contended that, at the adjudication stage, they had taken the plea that they being providers of 'works contract service' were not liable to tax as providers of 'commercial or industrial construction service'. This plea was not accepted by the adjudicating authority who proceeded to confirm the demand. Their further contention is that even though they are liable to tax with effect from 1st June, 2007 the show cause notice had not invoked the taxable entry rendering the determination of tax liability to be contrary to the provisions of Section 73 of the Finance Act, 1994. It was submitted by the learned Counsel that further arguments should be contingent upon a decision on these two issues.

5. Learned Authorised Representative was of the opinion that the facts of the appellant are distinguishable from the facts relating the judgment delivered by the Hon'ble Supreme Court in re M/s. Larsen & Toubro Ltd. According to him, the non-taxability of works contract service prior to 1st June, 2007 was not contended before the adjudicating authority, who, therefore, had been denied the opportunity of ascertaining the nature of contract entered into by the appellant and the supply of goods as a component of the contract. He, therefore, submitted that the contracts require re-examination for which matter would have to be remanded back to the original authority for scrutiny.

6. On the claim of the appellant before the original authority that they were providers of 'works contract service', which is taxable only from 1st June, 2007, the finding in the impugned order that - 'having failed to establish with documentary evidence that there is a transfer of property of goods involved in the execution of the contract which was charged to tax on sale of goods. On this basic criterion, having not been fulfilled, applicability to tax of Works Contract Service involves a remote question. Their contention is, therefore, superfluous being devoid of any substance of law and, therefore, fails before the altar of law'. was relied upon by the learned Authorised Representative to reiterate that the adjudicating authority had no means of ascertaining that these were composite contracts.

7. Having heard both sides on this limited issue, we are of the opinion that the resolution of this dispute lies within the narrow compass of taxability as 'works contract service'. **We note the contention of learned Counsel that the adjudicating authority had perused the contracts on which the demand was raised in the show cause notice and rendered a clear finding, including on the allegation of abatement availed in Notification No. 15/2004-S.T., dated 10th September, 2004 and Notification No. 01/2006, dated 1st March, 2006; the allowance of abatement is a clear demonstration of ascertainment that supply of goods did form a part of the contract. Therefore, we have no**

hesitation in accepting the said contracts in dispute to be composite contracts for supply of both goods and services.

8. We note that the findings of the adjudicating authority do accept that supply of goods were involved in the contracts and that he was merely sceptical that VAT liability had been discharged on the goods supplied in the contract; whether VAT liability was discharged on the goods or not is irrelevant in the light of the decision of the Hon'ble Supreme Court in *re Larsen & Toubro and Ors.* We, therefore, have to merely determine the scope of taxability of 'works contract service' rendered before and after 1st June, 2007 under the Finance Act, 1994.

9. The Hon'ble Supreme Court in *re Larsen & Toubro & Ors.* has decided thus

'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.'

10. In view of this specific decision and the admitted claim of the appellant that they are not providers of 'commercial or industrial construction service' but of 'works contract service', no tax is liable on construction contracts executed prior to 1st June, 2007.

11. Insofar as demand for subsequent period till 30th September, 2008 is concerned, it is seen that neither of the two show cause notices adduce to leviability of tax for rendering 'works contract service'. On the contrary, the submission of the appellant that they had been providing 'works contract service' had been rejected by the adjudicating authority. Therefore, even as the services rendered by them are taxable for the period from 1st June, 2007 to 30th September, 2008 the narrow confines of the show cause notices do not permit confirmation of demand of tax on any service other than 'commercial or industrial construction service'. It is already established in the aforesaid judgment of the Hon'ble Supreme

Court that the entry under Section 65(105)(zzd) is liable to be invoked only for construction simpliciter. Therefore, there is no scope for vivisection to isolate the service component of the contract.

The above views have also been taken by the Tribunal in the following cases:-

- **Ajit India Pvt Ltd vs. CST, Mumbai 2018 (19) GSTL 659 (Tri-Mum)**
- **India Guniting Corporation vs. CCT, New Delhi 2021 (52) GSTL 174 (Tri-Del)**
- **OTIS Elevator Co. (India) Ltd vs. CST, Mumbai 2021 (51) GSTL 386 (Tri-Mum)**

8. Since the issue is no longer res-integra, the instant demand of service tax under the category of Commercial or Industrial Construction cannot be sustained and hence, set aside. Since the appeal is being decided on merits for the reasons stated above, we refrain from making any observation on the issue of limitation.

Both the appeals are thus allowed with consequential relief as per law.

(Order pronounced in the open court on 08 August 2022.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)