IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Sr. No.: 231

STA No.13 of 2017
Date of Decision: *December 03, 2019*

Commissioner of Central Excise and Service Tax, Panchkula
..... APPELLANT

VERSUS

M/s Kanhai
..... RESPONDENT

. . .

CORAM: **HON'BLE MR. JUSTICE JASWANT SINGH**
HON'BLE MR. JUSTICE SANT PARKASH

. . .

PRESENT: - Mr. Amit Goyal, Advocate, for the appellant.

Mr. Sandeep Goyal, Advocate, for the respondent.

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Sant Parkash, J

1. The instant appeal has been preferred under Section 35G of the Central Excise Act, 1944 (for short 'Act'), as made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994, for setting aside Final order No.A/61022/2016-CHD dated 10.08.2016 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chandigarh Bench (for short, 'Tribunal').

2. The following substantial questions of law arise for adjudication of this Court:-

i) Whether the Tribunal can allow the party to retreat from their earlier stand of paying Service tax under a certain category after claiming the benefit of abatement?

ii) Whether the party can be allowed to approbate and reprobate on the same issue?

3. Succinctly, an internal audit took place in the premises of the respondent. On the analysis of certain contracts, which were taken into custody, it was alleged that the respondent was engaged in the commercial and industrial construction services, during the period 10.09.2004 to 15.06.2005. In other words, respondent was providing the services in the nature of 'completion and finishing services' and was taxable in a general manner under the category of 'construction services', introduced from 10.09.2004 as defined in clause (25b) of Section 65 of the Act but had not been paying any service tax on the said services during the aforesaid period. Accordingly, a show cause notice dated 21.04.2010 (Annexure A-1) to the respondent was issued to demand ₹ 1,09,41,059/- for the period 10.09.2004 to 31.05.2007 after invoking extended period of limitation. Interest liability under Section 75 of the Act and penalty under Sections 76, 77 and 78 of the Act were also proposed. The Commissioner of Central Excise and Service Tax, Panchkula, vide order dated 28.01.2011 (Annexure A-2) confirmed the demand of service tax amounting to ₹ 1,09,41,059/- for the period 10.09.2004 to 31.05.2007 alongwith interest and penalty.

4. The respondent approached the Customs, Excise & Service Tax Appellate Tribunal, Chandigarh Bench (for short, 'Tribunal) wherein the appeal filed by the respondent against the aforesaid orders stands allowed vide impugned order dated 10.08.2016 (Annexure A-3) while

holding that the activities of the appellant (before the Tribunal) fall under the category of 'work contract service' which was made chargeable to service tax w.e.f. 01.06.2007.

5. Now, the aforesaid order dated 10.08.2016 (A-3) passed by the Tribunal has been assailed in the present appeal.

6. Learned counsel for the appellant has submitted that the Tribunal has erroneously set aside the service tax demand upto 31.05.2007 and the respondent was liable to pay the service tax demand of ₹ 1,09,41,059/- alongwith interest and penalty.

7. Per contra, learned counsel for the respondent submitted that the Tribunal has rightly relied upon the decision of Hon'ble Supreme Court in case 'Commissioner of Central Excise and Customs, Krala vs. Larsen & Tourbo Ltd., 2015 (39) STR 913 (SC), and held that activities of the respondent fall under the category of 'work contract service' which was made chargeable to service tax w.e.f. 01.06.2007.

8. We have heard the aforesaid submissions made by learned counsel for the parties.

9. The subject matter in this appeal as also the substantial questions of law, already stand adjudicated by this Court in Commissioner of Central Excise and Service Tax, Panchkula vs. M/s Satish Kumar Contractor Ltd., Panchkula, 2019-TIOL-2359-HC-P&H-ST, wherein this Court while relying on the decision of Hon'ble Supreme Court in Lassen & Tourbo Ltd.'s case (supra) set aside the service tax demand upto 30.05.2007 and confirmed the same only from 01.06.2007, while observing as under:-

> "5. The respondent was providing the services of construction with material and the amount and the material supplied cannot be vivisected. Therefore, the respondent was not liable to pay service tax prior to 1.6.2007 in view of the decision of the Apex

Court in **Larsen & Toubro Ltd's case (supra)**, wherein it was held as under:-

> "25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.
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> 26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second *Gannon Dunkerley* case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.
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> 27 to 32 XX XX XX

33. Section 13(3) of the Central Sales Tax Act says:-

> "The State Government may make rules, not inconsistent with the provisions of this Act and the rules made under sub-section (1), to carry out the purposes of this Act."

34. In the aforesaid judgment it was found that Section 9(2) of the Central Sales Tax Act conferred powers on officers of the various States to utilize the machinery provisions of the States' sales tax statutes for purposes of levy and assessment of central sales tax under the Central Act. It was also noticed that the State Government itself had been given power to make rules to carry out the purposes of the Central Act so long as the said rules were not inconsistent with the provisions of the Central Act. It was found that, in fact, the State of Uttar Pradesh had framed such rules in exercise of powers under Section 13 (3) of the Central Act as a result of which the necessary machinery for the assessment of central sales tax was found to be there. The Delhi

High Court judgment unfortunately misread the aforesaid judgment of this Court to arrive at the conclusion that it was an authority for the proposition that a tax is leviable even if no rules are framed for assessment of such tax, which is wholly incorrect. The extracted passage from Mahim Patram's case only referred to rules not being framed under the Central Act and not to rules not being framed at all. The conclusion therefore in paragraph 36(2) of the Delhi High Court judgment is wholly incorrect. Para 36(2) reads as follows:-

> "(2) Service tax can be levied on the service component of any contract involving service withsale of goods etc. Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for computation, it
> does not follow that no tax is leviable." [at para 36]

35. XX XX XX

36. In a recent judgment by one of us, namely, Shabina Abraham & Ors. v. Collector of Central Excise & Customs, judgment dated 29th July, 2015, in Civil Appeal No.5802 of 2005, this Court held:-

> "It is clear on a reading of the aforesaid paragraph that hat revenue is asking us to do is to stretch the achinery provisions of the Central Excises and Salt Act, 1944 on the basis of surmises and conjectures. This we are afraid is not possible. Before leaving the judgment in Murarilal's case (supra), we wish to add that so far as partnership firms are concerned, the Income Tax Act contains a specific provision in Section 189(1) which introduces a fiction qua dissolved firms. It states that where a firm is dissolved, the Assessing Officer shall make an assessment of the total income of the firm as if no such dissolution had taken place and all the provisions of the Income Tax Act would apply to assessment of such dissolved firm. Interestingly enough, this provision is referred to only in the minority judgment in M/s. Murarilal's case (supra).
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> The impugned judgment in the present case has referred to Ellis C. Reid's case but has not extracted the real ratio contained therein. It then goes on to say that this is a case of short levy which has been noticed during the lifetime of the deceased and then goes on to state that equally therefore legal representatives of a manufacturer who had paid excess duty would not by the selfsame reasoning be able to claim such excess amount paid by the deceased. Neither of these reasons are reasons which refer to any provision of law. Apart from this, the High Court went into morality and said that the moral principle of unlawful enrichment would also apply and since the law will not permit this, the Act needs to be interpreted accordingly. We wholly disapprove of the approach of the High Court. It flies in the face of first principle when it comes to taxing statutes. It is therefore

> necessary to reiterate the law as it stands. In Partington v. A.G., (1869) LR 4 HL 100 at 122, Lord Cairns stated: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute". (at paras 26 and 31)."
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> 6. The Tribunal had rightly set aside the service tax demand upto 30.5.2017 and confirmed the same from 1.6.2007 onwards. No illegality or perversity could be pointed out in the order passed by the Tribunal which may warrant interference by this Court."

10. Thus, the subject matter of this appeal is squarely covered by the ratio of judgment reproduced above and therefore, no illegality or perversity could be pointed out in the order passed by the Tribunal which may warrant interference by this Court.

11. Dismissed.

(Jaswant Singh)
Judge

(Sant Parkash)
Judge

December 03, 2019
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Whether Speaking/ Reasoned: Yes/ No
Whether Reportable: Yes/ No

AVIN KUMAR
2019.12.09 11:28
I attest to the accuracy and integrity of this document