

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

STA-7-2017 (O&M)

Date of Decision: 15.1.2019

Commissioner of Central Excise and Service Tax, Panchkula

...Appellant

Versus

M/s Satish Kumar Contractor Ltd., Panchkula

...Respondent

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL.**

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

Mr. Jagmohan Bansal, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. This appeal has been preferred by the revenue under Section 35G of the Central Excise Act, 1944 (in short “the Act”) against the order dated 11.8.2016 (Annexure A-3) passed by the Customs, Excise and Service Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (hereinafter referred to as “the Tribunal”), claiming the following substantial questions of law:-

- i) Whether the Hon'ble 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?

2. The facts, in brief, necessary for adjudication of the present appeal as narrated therein are that the assessee is engaged in commercial or

contract services. As per ST-3 returns filed by the respondent, during the financial years 2004-05 to 2007-08, they had received ₹ 19,79,78,934/- for providing taxable services and had paid ₹ 63,54,701/- as service tax. On scrutiny of documents, it was found that the party had actually received a sum of ₹ 32,25,07,034/- for providing taxable services to various clients upon which service tax of ₹ 1,47,92,693/- was payable by the respondent. According to the revenue, the assessee appeared to have suppressed the value of taxable services and was also erroneously availing the benefit of abatement and had short paid service tax of ₹ 84,37,992/-. A show cause notice dated 21.4.2009 (Annexure A-1) was issued to the respondent raising service tax demand of ₹ 84,37,992/- along with interest and penalty. Accordingly, the adjudicating authority vide order dated 16.9.2009 (Annexure A-2) confirmed the demand of service tax of ₹ 84,37,992/- along with interest and also imposed a penalty of equal amount of ₹ 84,37,992/- against the assessee. Feeling aggrieved, the respondent filed an appeal before the Tribunal. The Tribunal vide order dated 11.8.2016 (Annexure A-3) set aside the demand of service tax upto 30.5.2007 and confirmed the same from 1.6.2007 onwards by relying upon the judgment of the Apex Court in **Commissioner of Central Excise and Customs, Kerala v. Larsen & Toubro Ltd. 2015 (39) STR 913 (SC)**. Further, the Tribunal held that the penalty was also not imposable upon the respondent. Hence, the present appeal by the revenue.

3. Learned counsel for the appellant submitted that the Tribunal has wrongly set aside the service tax demand upto 30.5.2007 and the respondent was liable to pay the service tax demand of ₹ 84,37,992/- along

3. On the other hand, learned counsel for the respondent submitted that the respondent was never claiming refund in respect of the service tax already paid in view of the amendment made by the Finance Act, 2007 effective from 1.6.2007. Relying upon the judgment of the Supreme Court in **Larsen & Toubro Ltd's case (supra)**, it was contended that no service tax was payable in respect of composite contract value prior to that date.

4. After hearing learned counsel for the parties, we do not find any merit in the appeal.

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.

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.

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 with sale 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 what revenue is asking us to do is to stretch the machinery 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).

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 self-same 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).”

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.

7. In view of the above, no substantial question of law arises in this appeal. Accordingly, finding no merit in the instant appeal, the same is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

January 15, 2019
gbs

(MANJARI NEHRU KAUL)
JUDGE

Whether Speaking/Reasoned

Yes

Whether Reportable

Yes