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**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

STA-23-2019 (O&M)

Date of Decision: 12.03.2020

THE PRINCIPAL COMMISSIONER

....APPELLANT

VERSUS

M/S RAJ KISHAN AND CO.

....RESPONDENT

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE AVNEESH JHINGAN**

Present: Mr. Sunish Bindlish, Senior Standing Counsel,
Indirect Taxation for the Appellant.

Mr. Amrinder Singh, Advocate
for the Caveator-Respondent.

DR. S. MURALIDHAR , J.

CM-20995-CII-2019

1. This is an application for condonation of delay of 5 days in re-filing the appeal.

2. For the reasons stated therein, the application is allowed. The delay of

5 days in re-filing the appeal is condoned.

CM-1343-CII-2020

3. This is an application for placing on record documents Annexures R-1 to R-5.

4. For the reasons stated therein, the application is allowed. The documents are taken on record.

STA-23-2019

5. This is an appeal preferred by the Principal Commissioner, Central Goods & Services Tax Commissioner of Goods and Service Tax, Chandigarh against the final order dated 24th October, 2018 passed by the Customs Excise and Service Tax Appellate Tribunal, Chandigarh ('CESTAT') in Appeal No. ST/53432/2014 under Section 35G of the Central Excise Act, 1944 read with Section 174 (2) of the Central Goods and Service Tax Act, 2017 ('CGST Act').

6. Among the questions sought to be raised as a substantial question of law in the present appeal is “whether the CESTAT is correct in holding that the subject case is covered by the decision of Hon'ble Supreme Court in the case of *Commissioner of C. Excise & Customs, Kerala v. Larsen & Toubro Ltd. 2015 (39) STR 913 (SC)?*”

7. This question arises against the following background facts. A show notice ('SCN') dated 22nd October, 2010 was issued to the Respondent, which is engaged in the business of construction, for recovery of service tax amounting to Rs. 2,64,19,926/- under Section 73 (1) of the Finance Act, 1994 by invoking the extended period of limitation for providing

the taxable services of 'Construction of Complex Services and Commercial or Industrial Construction Service' during the period from April, 2005 to March, 2010.

8. The said SCN came to be adjudicated by the Commissioner, Central Excise, Chandigarh-I, who passed an order dated 9th April, 2012 confirming the demand of Rs. 2,29,03,962/- in respect of services mentioned at Serial Nos. (i) & (ii) of category A of “Construction of Complex Services” and Serial Nos. (i), (ii), (iii), (iv) and (v) of category B which was “Commercial or Industrial Construction”. A penalty of a sum of Rs. 2,05,05,000/- was also imposed besides demanding interest. The demand for the remaining services mentioned in the SCN was held not to be sustainable and was accordingly dropped.

9. The Respondent then filed an appeal in the CESTAT against the aforesaid order of the Commissioner to the extent that it was prejudicial to its interest. The CESTAT by an order dated 24th September, 2012 ordered the pre-deposit of Rs. 30,00,000/- and remanded the matter to the Adjudicating Authority ('AA') for examining the evidence as well as the defence plea put forth by the Respondent, both on facts and law, and pass a reasoned order.

10. On remand, by an order dated 20th March, 2014, the AA confirmed the demand after allowing to the Respondent the benefit of Notification No. 1/2006 dated 1st March, 2006 and also ordered recovery of the interest amount and imposed applicable penalties.

11. For a second time, the Respondent filed an appeal before the CESTAT. By the order dated 24th October 2018, impugned in the present appeal, the CESTAT allowed the Respondent's appeal and set aside the order of AA. The CESTAT held that the service provided by the Respondent was classifiable under the category 'Works contract Service' in terms of the decision of the Supreme Court in ***Larsen & Toubro Ltd. (supra)***, whereas the demand has been created against it under the category of 'Construction of residential complexes and Commercial or Industrial Construction Service'.

12. At an earlier hearing of the present appeal, a preliminary objection was raised by the Respondent as to its maintainability essentially on the ground that a matter involving a dispute concerning classification would not be entertained by this Court in view of the Section 35L of the Central Excise Tax Act, 1944 read with Section 83 of the Finance Act, 1994.

13. The above submissions have been bolstered by the Respondent by their filing CM-1343-CII-2020, where apart from relying upon the decisions supporting its contention, it is pointed out that the Appellant itself has taken an inconsistent stand inasmuch as in matters involving similar issues of classification, it has chosen to file an appeal directly before the Supreme Court. One such instance pointed out is that of an appeal filed against the final order of CESTAT dated 24th September, 2018 in ***Vishranthi Homes Pvt. Ltd. v. Commissioner of Service Tax***, which was directly preferred to the Supreme Court. A copy of the

proceedings in the said appeal have been annexed as Annexures R-1 to R-5 collectively.

14. Learned counsel for the Appellant is not disputing the fact that in some other instances involving the neat question of classification, appeals have been directly preferred to Supreme Court. It is pointed out that the scope of the remand by CESTAT in the first round was limited and that at that stage, the Respondent had not been permitted to raise the issue that the services provided by it was 'Works Contract Services'.

15. Learned counsel for the Respondent points out that at the stage of remand the Respondent had the benefit of the decision of the Supreme Court in ***Larsen & Toubro Ltd.*** (*supra*) and that therefore, it was open to the Respondent, as a neat question of law, to raise such an issue, even if it was for the first time before the AA.

16. There appears to be merit in the contention raised by the Respondent. Indeed, whether the services provided by the Respondent were classifiable directly as 'Construction of residential Complexes and Commercial or Industrial Construction Service' or as 'Works Contract Service' was a neat question of law. The case involves the issue of classification and, therefore, in such instance an appeal against the order of the CESTAT would lie in the Supreme Court under Section 35L of the Central Excise Act, 1944, even if there are other questions involved.

17. This view finds support from the decision of this Court dated 14th March, 2017 in CEA-18 of 2016 (*Principal Commissioner of Customs, Central Excise and Service Tax v. Raja Dyeing*). As such, the present appeal before this Court is not maintainable. However, it is open to Appellant to avail appropriate remedies in accordance with law.

18. The appeal is accordingly dismissed.

[S. MURALIDHAR]

JUDGE

[AVNEESH JHINGAN]

JUDGE

12th March, 2020

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Whether speaking/ reasoned : Yes / No

Whether reportable : Yes / No