

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI
COURT HALL No.III**

SERVICE TAX APPEAL No.40497 OF 2014

(Arising out of Order-in-Original No.19/2013-Commr. dated 23.12.2013 passed by Commissioner of Central Excise, Customs & Service Tax, No.6/7, A.T.D. Street, Race Course, Coimbatore 641 018)

M/s.Visanthi & Co.

No.16/116-1, Capetown Colony,
Appanaickenpalayam Road,
Thudiyalur,
Coimbatore – 641 034.

.... Appellant

Versus

The Commissioner of GST & Central Excise,

Coimbatore Commissionerate
No.6/7, A.T.D. Street, Race Course,
Coimbatore 641 018.

...Respondent

APPEARANCE :

Mr. G. Natarajan, Advocate
For the Appellant

Ms. Anandalakshmi Ganeshram, Assistant Commissioner (A.R)
For the Respondent

CORAM :

**HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**

Date of Hearing : 12.10.2023

Date of Decision : 12.10.2023

FINAL ORDER No.40937/2023**ORDER : Per Ms. SULEKHA BEEVI C.S.**

Brief facts are that the appellant is engaged in providing construction services and hold Central Excise registration for providing Commercial or Industrial Construction Service (CICS). On scrutiny of records, it was noted that the appellant while providing construction services had obtained free supplies from the customer and had not discharged service tax liability according to the provisions of law. Show cause notice dt. 19.10.2012 was issued to the appellant proposing to demand the service tax under 'Commercial or Industrial Construction Services' for the period 2007-08 to 2011-12 along with interest and for imposing penalties. After due process of law, the original authority confirmed the demand interest and imposed penalties. Hence this appeal.

2. On behalf of the appellant, learned counsel Sri G. Natarajan appeared and argued for the appellant. It is submitted by the learned counsel that during the disputed period, the appellant had undertaken construction activities mainly for educational institutions. Major part of the materials required for construction like cement and steel were supplied by the customer. All other materials required for construction was procured by the appellant. The nature of the works executed by the appellant is not service simplicitor and is composite in nature involving both supply of materials and rendering of services. Therefore the demand of service tax under CICS cannot sustain as decided by the Tribunal in the case of

M/s.Real Value Promoters Pvt. Ltd. Vs CGST & Central Excise, Chennai - 2018-TIOL-2867-CESTAT-MAD.

3. Without prejudice to the above submission, it is submitted by the counsel that the demand of service tax under CICS has been raised on the gross amount without extending the benefit of 67% abatement under Notification No.1/2006-ST dt. 1.3.2006 alleging that the value of all materials involved in the contract are not included in the contract value in as much as part of the materials were supplied free of cost by the customer. The Ld. Counsel relied upon the decision of Hon'ble Supreme Court in the case of *CST Vs Bhayana Builders Pvt. Ltd.*- 2018 (10) GSTL 118 (SC) to argue that even if part of the materials have been supplied free of cost by the customer, the abatement under Notification No.1/2006 has to be extended for the purpose of calculating the taxable value. There was much confusion and various litigations as to the levy of service tax on Works Contract Services. Being interpretational issue, the invocation of extended period cannot sustain. Ld. Counsel prayed that the appeal may be allowed.

4. Ld. A.R Ms. Anandalakshmi Ganeshram supported the findings in the impugned order. It is argued by Ld. A.R that even if the construction is provided for educational institutions, these are taxable as clarified by the Board in its circular dt. 17.09.2004 and 1.11.2006. Further, some customers have not paid sales tax / VAT on the materials used in providing construction as they have not filed any VAT returns. The appellant falls under clause (i) of Section 65 (105) (zzza) and hence the Commissioner has correctly upheld the classification under 'Commercial or Industrial Construction Services'. The adjudicating authority has rightly not extended the benefit of Notification No.1/2006-ST since some materials were obtained free of cost. Ld. A.R submitted that the demand has been correctly confirmed and prayed that the appeal may be dismissed.

5. The main issue that arises for consideration is whether the demand of service tax raised under 'Commercial or Industrial Construction Services' is sustainable or not. The definition of the said service under Section 65 (105) (zzza) reads as under :

"(a) construction of a new building or a civil structure or a part thereof; or

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or Civil structure; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit,

which is -

(i) used, or to be used, primarily for; or

(ii) occupied, or to be occupied, primarily with; or

(iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams."

6. Section 65 (105) (zzq) speak about the taxable services as under :

"Taxable service means any service provided or to be provided to any person by any person in relation to Commercial or Industrial Construction service".

7. From the definition of "Commercial or Industrial Construction Service" it can be seen that the said definition speaks only about contract simplicitor which does not involve supply of goods / materials. After the introduction of 'Works Contracts Service' (WCS) w.e.f. 1.6.2007, the definition takes into account, the element of including the value of goods that have gone into the composite contract.

8. The Hon'ble Supreme Court in the case of *CCE & Customs, Kerala Vs Larsen and Toubro Ltd.* – 2015 (39) STR 913 (SC) had analyzed the very same issue and held that the demand under WCS in the nature of composite contract (construction of residential complex service, commercial or industrial construction service, erection, commissioning and installation service) cannot sustain when it involves composite contracts which includes both supply of goods / materials as well as rendering of services.

9. The Tribunal in the case of *Real Value Promoters Pvt. Ltd.* (supra) had considered the issue as to whether even after 1.6.2007, the levy under CICS or CRC etc. is sustainable when the works executed are composite in nature. The relevant part of the order reads as under :

“7.10 The issue was analyzed by the Hon'ble Apex Court in Larsen & Toubro case (supra) and held that there can be no levy of service tax on composite contracts (involving both service and supply of goods) prior to 1.6.2007. This read together with the budget speech as above would lead to the strong conclusion that composite contracts were brought within the ambit of levy of service tax only with effect from 1.6.2007 by introduction of Section 65(105)(zzzza) i.e. Works Contract Services. As pointed out by the Id. counsels for appellants, there is no change in the definition of CICS/CCS/RCS after 1.6.2007. Therefore only those contracts which were service simpliciter (not involving supply of goods) would be subject to levy of service tax under CICS / CCS / RCS prior to 1.6.2007 and after. Our view is supported by the fact that the method / scheme for discharging service tax on the service portion of composite contract was introduced only in 2007.

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8. In the light of the discussions, findings and conclusions above and in particular, relying on the ratios of the case laws cited supra, we hold as under:-

a. The services provided by the appellant in respect of the projects executed by them for the period prior to 1.6.2007 being in the nature of composite works contract cannot be brought within the fold of commercial or industrial construction service or construction of complex service in the light of the Hon'ble Supreme Court judgment in Larsen & Toubro (supra) upto 1.6.2007

b. For the period after 1.6.2007, service tax liability under category of „commercial or industrial construction service“ under Section 65(105)(zzzh) ibid, „Construction of Complex Service“ under Section 65(105)(zzzq) will continue to be attracted only if the activities are in the nature of services“ simpliciter.

c. For activities of construction of new building or civil structure or new residential complex etc. involving indivisible composite contract, such services will require to be exigible to service tax liabilities under „Works Contract Service“ as defined under section 65(105)(zzzza) ibid.

d. The show cause notices in all these cases prior to 1.6.2007 and subsequent to that date for the periods in dispute, proposing service tax liability on the impugned services involving composite works contract, under „Commercial or Industrial Construction Service“ or „ Construction of Complex“ Service, cannot therefore sustain. In respect of any contract which is a composite contract, service tax cannot be demanded under CICS / CCS for the periods also after 1.6.2007 for the periods in dispute in these appeals. For this very reason, the proceedings in all these appeals cannot sustain.”

10. The said decision in *Real Value Promoters Pvt. Ltd.* was applied by the Tribunal in *Jain Housing and Construction Ltd. Vs CST - (2023) 10 Centax 170 (Tri-Mad) [24.02.2023]* and the demand was set aside. The department filed appeal before the Hon'ble Supreme Court against the order passed by the Tribunal. The Supreme Court dismissed the appeal filed by the department as reported in (2023) 10 Centax 171 (SC) [05.09.2023].

11. From the discussions made above, we hold that the demand under 'Commercial or Industrial Construction Services' (CICS) cannot sustain and requires to be set aside which we hereby do. The appeal is allowed with consequential relief, if any, as per law.

(dictated and pronounced in court)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI C.S.)
Member (Judicial)

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