

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI**

Appeal No.	Appellant	Respondent
ST/723/2010	Real Value Promoters Pvt. Ltd.	Commissioner of GST & Central Excise, Chennai
Arising out of Order-in-Original No.9/2010 dated 16.8.2010 passed by Commissioner of Central Excise, Chennai – IV		
ST/350/2010	Ceebros Property Development	Commissioner of GST & Central Excise, Chennai
Arising out of Order-in-Original No.1/2010 dated 6.1.2010 passed by Commissioner of GST & Central Excise, Chennai		
ST/528/2010	Prime Developers	Commissioner of GST & Central Excise, Coimbatore
Arising out of Order-in-Original No.4/2010 dated 10.5.2010 passed by Commissioner of Customs, Central Excise and Service Tax, Coimbatore – IV		

Appearance

Shri G. Natarajan, Advocate for Appellant at S. No.1
Shri Raghavan Ramabhadran for Appellant at S. No.2
Shri Ramachandra Rao, Consultant for Appellant at Sl. No.3

Shri A. Cletus, Addl. Commissioner (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing : **16.08.2018**
Date of Pronouncement: **18.09.2018**

Final Order Nos. **42436-42438 / 2018**

Per Bench

The issue involved in all these appeals being similar, they were heard together and are disposed by this common order.

2. The appellant M/s. Real Value Promoters (P) Ltd. are involved in activity of constructing commercial projects PRGT

and residential projects. The appellants were issued show cause notices alleging short-payment of service tax under Commercial or Industrial Construction Services. After 1.6.2007, though they discharged service tax under works contract services under the composition scheme, for three of their four projects namely Sananda Brindavan, Sujeet, Surya Skanda, the department was of the view that such payment is not proper for the reason that the services cannot be classified as Works Contract Service and also because appellants have not exercised their option for payment of service tax under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 by intimating the department as required. Accordingly Show Cause Notice No. 351/2008 dated 23.10.2008 was issued inter alia proposing to demand total service tax liability of Rs.2,06,20,252/- under the category of construction of commercial complexes and residential complex service for the period 1.4.2007 to 31.3.2008 along with interest thereon as under. The show cause notice also proposed penalties under sections 76 and 78 of the Finance Act, 1994.

Name of the Project	Allegation	Tax liability
Commercial PRGT	Non-payment of service tax on the services provided to buyers	Rs.34,38,337/-
Residential The Lords Sananda Brindavan Sujeet Surya Skanda	Non-payment of service tax on the services provided to buyers	Rs.1,07,33,392/-

Commercial PRGT Amarasri	Non-payment of service tax on the services provided to land owners	48,98,579/-
Residential Sai Brindavan	Non-payment of service tax on the services provided to land owners	Rs.15,49,944/-
	Total	Rs.2,06,20,252/-

2.1 Another Show Cause Notice No. 570/2009 dated 20.10.2009 was also issued in respect of amount received towards construction of residential apartments and commercial complexes for the period from 1.4.2008 to 31.3.2008. It appeared to department from the nature of the services provided, that appellants are liable to pay service tax under construction of complex services or under commercial construction service in terms of section 65(105)(zzzh) and section 65(105)(zzq) of the Finance Act, 1994. The show cause notice also proposed demand of Rs.1,05,99,978/- on the following projects:-

Name of the Project	Allegation	Tax liability
Commercial PRGT	Non-payment of service tax on the services provided to buyers	Rs.1,05,99,978/-

2.2 Both these show cause notices were adjudicated by common adjudication order dated 16.8.2010 wherein the adjudicating authority confirmed the demand proposed in the show cause notices along with interest thereon and imposed penalty of Rs.2,06,20,252/- under section 78 ibid and also imposed penalties under section 76 and 77 ibid. Aggrieved, the appellants are now before this Tribunal.

2.3 M/s. Prime Developers have filed Appeal No. ST/528/2010. They are engaged in construction of residential complexes by entering into Joint Development Agreement dated 17.1.2005 with Prime Textiles Ltd, who are the owners of the land for the development of residential complex comprising 432 apartments. The units in the complex are sold by appellant to ultimate buyers under separate agreements. Show cause notice dated 10.8.2009 was issued for the period January 2005 to August 2008 proposing to demand service tax under the category of Construction of Complex Service (CICS). After adjudication, the original authority confirmed an amount of Rs.1,16,42,448/- holding that for the period prior to 1.6.2007, the appellant has to pay service tax under CICS and not under Works Contract Service (WCS) as the project was launched prior to 1.6.2007 and consideration was also received prior to 1.6.2007. For the period after 1.6.2007, the adjudicating authority held that Commercial or Industrial Construction Services / Construction of Residential Complex Services (RCS) were taxable even after 1.6.2007 and that appellant would have to pay under either RCS or WCS.

2.4 M/s. Ceebros Property Development is the appellant in ST/350/2010. The demand is for the period from 1.7.2007 to 28.2.2008. It was put forward by the Id. consultant that the appellant Ceebros Property Development has been discharging service tax under WCS post 1.6.2007 @ 2.06% under the

composition scheme. The demand has been raised alleging that since the appellant was discharging service tax under construction of complex service prior to 1.6.2007, they have to continue with the same classification post 1.6.2007 and cannot change the classification to works contract service and pay service tax under composition scheme. Further, that since appellant had not intimated the department about exercising the option to pay service tax under the compositions scheme, they cannot do so. He relied upon the decision in the case of Vasihno Associated vide Final Order No. 50871/2018 dated 6.3.2018 to argue that the non-intimation to the department is only a procedural lapse and that the same may be condoned.

3. Today, when the matter came up for hearing, Id. counsel Shri G. Natarajan, appeared for Real Value Promoters Pvt. Ltd. and took us to the history of introduction of service tax on various construction services and also made various contentions, submissions in respect of the matter under appeal. The submissions and contentions of the Id. counsel can be broadly summarized as under:-

3.1 Service Tax was introduced on the following taxable services from the dates mentioned against each:

S.No	Name of the service	Section of the Finance Act, 1994	Introduced with effect from
1	Commercial or industrial construction service (CICS)	65 (105) (zzq)	01.07.2003
2	Construction of Complex Service (CCS)	65 (105) (zzzh)	16.06.2005

3	Works Contract Service (WCS)	65 (105) (zzzza)	01.06.2007
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3.2 Section 65A of the Act deals with the principles of classification of services. As each of the taxable services are made taxable from different dates and the scope of abatement from value, exemption entitlements, valuation, rate of tax are based on appropriate classification of service, correct classification of service is very important.

3.3 When CICS and CCS were introduced on 1.7.2003 and 16.6.2005 respectively, it was the assumption of many that such construction activities which are undertaken as a composite contract, involving transfer of property in goods {which falls under the taxation domain of the State Governments, being a deemed sale as per Article 366 (29A)}, can be taxed under these service categories, in so far as the service portion is concerned. Hence, in order to exclude the value of goods involved in such contracts, exemption notifications under section 93 have been issued to exclude a portion of value towards the value of transfer of property in goods, which is known as abatement.

3.4 Subsequently, the service portion in the composite works contracts, was specifically made as a taxable service under WCS with effect from 01.06.2007 and the manner of determination of the value of such service portion has been prescribed vide Rule 2A of the Service Tax (Determination of Value) Rules, 2006,

framed under Section 94 (2) of the Act. An alternative in the form of Works Contract (Composition scheme for payment of Service Tax) Rules, 2007 has also been introduced to pay service tax at a lesser rate on the gross amount (including the value of transfer of property in goods).

3.5 The issue as to whether a composite contract involving provision of service as well as transfer of property in goods could be covered under CICS and CCS from the date of introduction of service tax levy on such services was, being litigated upon which was finally settled by the Hon'ble Supreme Court in the case of CCE Vs. Larsen & Toubro Ltd. 2015 (39) STR 913 SC. The Apex Court has observed that in as much as section 67 of the Act, dealing with valuation of taxable services, refers to the gross amount charged for service, the services of CICS and CCS would cover only pure service activities, as any contrary view would imply that the Union Government can levy service tax on the gross amount, including the value of transfer of property in goods also, which is constitutionally impermissible. The exemption notifications issued at the discretion of the executive are not sufficient to sustain the levy. The Hon'ble Apex Court has also observed that only with the introduction of WCS as a separate taxable service, statutory mechanism to exclude the value of transfer of property in goods has been prescribed.

3.6 The effect of the above decision is that CICS and CCS, as defined under clauses (zzq) and (zzzh), respectively, of sub section (105) of the section 65 would cover only pure service contracts, without any transfer of property in goods.

3.7 In various decisions the importance of classification of services has been laid down and it has been held that once the show cause notice proposes demand of service tax under a particular category of taxable service, the adjudicating / appellate authorities cannot travel beyond the scope of allegations in the show cause notice and confirm the demand under a different category of taxable service as the assessee was not at all put on notice on the new category of taxable service. These decisions were based on various decisions of higher appellate forums, where it has been held that the show cause notice is the foundation of allegations and the adjudication should be limited to the allegations. Further, as per Section 65 A of the Act, classification of service shall be based on the specific entries and the more specific description has to be preferred. In this connection, he invited attention to CBEC's Circular 128/10/2010 Dt. 24.08.2010.

3.8 If show cause notices are issued demanding service tax under CICS / CCS, on composite contracts, involving transfer of property in goods, for the period post 01.06.2007, the said demands of service tax cannot be sustained, as these services would cover only pure service activities, as held by the Hon'ble

Supreme Court in Larsen & Toubro (supra). At the stage of adjudication or appeal proceedings, the demand cannot be confirmed under WCS, when the show cause notice raises demand on CICS/CCS. Such an attempt would amount to travelling beyond the scope of the show cause notice, which is not permissible.

3.9 Though the definition of WCS incorporates the definitions of CICS / CCS into it, the scope of coverage of these services are distinct. While the definition of CICS / CCS would cover such construction activities without involving any transfer of property in goods (Example:- Where all materials required for the construction are supplied by the service recipient and the service provider is engaged only for provision of construction service), a composite construction activity would fall only under WCS.

3.10 The Id. counsel argued that the demands of service tax under CICS / CCS, for the period post 01.06.2007 in case of composite contracts are not at all sustainable and liable to be set aside. Reliance is placed on the following decisions, wherein the demands under CICS/CCS for the period post 01.06.2007 have been set aside.

- a) URC Constructions Vs CCE – 2017 (50) STR 147 Tri-Chennai
- b) Mantri Developers VS CCE – 2014 (36) STR 944 Tri-Bang.
- c) Skyway Infra Projects VS CST - 2018-TIOL-360-CESTAT-MUM

- d) Srishti Constructions VS CCE - 2018-TIOL-337-CESTAT-CHD
- e) CST VS Swadeshi Construction Company - 2018-TIOL-1096-CESTAT-DEL
- f) Logos Construction Pvt. Ltd. VS CST 2018 (6) TMI 1361 - CESTAT CHENNAI

3.11 In the subject appeal, all the demands confirmed are in respect of composite contracts (commercial buildings, residential buildings, service provided to buyers and service provided to landowners). If the plea that such demands under CICS and CCS for the period both prior to and post 01.06.2007 is not sustainable is upheld, there is no need to advance any further arguments specific to the projects in question.

4. The above arguments advanced by the Id. counsel Shri Natarajan was adopted by Id. counsel Shri Raghavan Ramabhadran and Id. consultant Shri Ramachandra Rao.

5. On the other hand, the Id. AR Shri A. Cletus has made oral and written submissions, which can be broadly summarized as under:-

5.1 That even prior to 1.6.2007 from which date Works Contract Services were introduced in the Finance Act, 1994, the construction services like CICS and CCS were subject to levy of service tax. These services have not been deleted or omitted from the Act *ibid* after 1.6.2007 when works contract service was introduced. This can only mean that after 1.6.2007 also

such services (CICS / CCS) are leviable to service tax being composite contracts.

5.2 The argument of the appellants that these services were introduced prior to 1.6.2007 and as per the decision of Larsen & Toubro (supra) these services would take in only pure service contracts and not composite contracts is erroneous.

6. Heard both sides.

7. The crux of the contentions put forward by appellants is that Union Government has for the first time decided to tax the service component of composite contracts such as Works Contract only with effect from 1.6.2007. The definition of Commercial Constructions Service (CICS / CCS) have not undergone any change after introduction of service tax on works contracts. While pure construction services (not composite involving supply of goods) which are not in the nature of works contract would be liable to service tax, prior to 1.6.2007, those in the nature of works contract (composite involving supply of goods) would be subject to levy only with effect from 1.6.2007. Let us proceed to examine the same.

7.1 Commercial or industrial construction was made exigible to service tax by insertion of Section 65(25b) of the Finance Act with effect from 1.7.2003. The definition when introduced read as under:-

The said definition was amended with effect from 1.7.2010 vide Notification No. 24/2010-ST dated 22.6.2010 as under:-

“25(b) commercial or industrial construction”] means -

(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”

7.2 Construction of Complex Service (CCS), defined under section 65(30a) ibid during the period of dispute as under:-

“construction of complex” means -

(a) construction of a new residential complex or a part thereof; or

(b) completion and finishing services in relation to residential complex 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; or

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;”

7.3 ‘Residential Complex’ was defined in section 65(91a) ibid during the disputed period as under:-

“residential complex” means any complex comprising of -

(i) a building or buildings, having more than twelve residential units;

(ii) *a common area; and*

(iii) *any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,*

located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

the purposes of this clause, - Explanation. - For the removal of doubts, it is hereby declared that for

(a) *“personal use” includes permitting the complex for use as residence by another person on rent or without consideration;*

(b) *“residential unit” means a single house or a single apartment intended for use as a place of residence;”*

7.4 The taxable service of works contract was introduced with effect from 1.6.2007 by insertion of section 65(105)(zzzza). The Explanation to the said provision also contained the definition of “works contract”. Section 65(105)(zzzza) read as under:-

“To any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation. - For the purposes of this sub-clause, “works contract” means a contract wherein, -

(i) *transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*

(ii) *such contract is for the purposes of carrying out, -*

(a) *erection, commissioning or installation of plant, machinery, equipment or structures, whether prefabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or*

(b) *construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or*

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects”

7.5 There was considerable litigation on the issue whether service tax can be levied on indivisible works contract prior to its introduction from 1.6.2007 which was finally settled by the Hon'ble Apex Court in the case of Commissioner of Central Excise Vs. Larsen & Toubro Ltd. reported in 2015 (39) STR 390 (SC). The Hon'ble Apex Court held that the taxable services of 'consulting engineer' under section 65(105)(g) of the Finance Act; erection, 'commission and installation services' under section 65(105)(zzd) of the said Act; 'technical testing and analysis' under section 65(105)(zzh) *ibid*; 'construction services' under section 65(105)(zzq); construction of complex services under section 65(105)(zzzh) would refer only to service contracts *simpliciter* and not to composite works contracts; that these five taxable services only would qualify without any other element. The Hon'ble Supreme Court also observed that with introduction of works contract service as a separate taxable service, statutory mechanism to exclude the value of transfer of property of goods has been prescribed. The Apex Court held that since the Finance Act had not laid down any charge or machinery to levy and assess service tax on indivisible works

contract prior to 1.6.2007, the levy on such composite works contract prior to that date has no constitutional validity.

7.6 The Larsen & Toubro (supra) judgment has been followed by this Tribunal in many numbers of cases to set aside the demand of service tax on services like commercial or industrial construction service, construction of complex service etc. involving composite contract of both material supply as well as service element prior to 1.6.2007.

7.7 In the present appeal also, there is no dispute that the construction activities are in the nature of composite works contract. The appellants being involved in the construction of the same projects prior to and after 1.6.2007, for example, even in the show cause notice dated 20.10.2009 (relating to Appeal No. ST/723/2010), taxable value has been calculated at 33% of gross amount received which is an implicit admission that that activity involved both material supply as well as value services. Another ground for demand is that the appellants have not exercised their option for payment of service tax under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. In any case, the show cause notices implicitly agree that the work performed by the appellant is in the nature of composite works contract only. Based on the Hon'ble Apex Court judgment in Larsen & Toubro, such composite works contract then will not be liable to service tax levy prior to 1.6.2007. On the same ratio, such composite contracts even for

the period after 1.6.2007 disputed in these appeals will still have to be held as composite works contract only and not pure service simpliciter contracts that could be classified under commercial or industrial construction service, or construction of complex service. To put in another way, to merit being classified as CICS or CCS, the service provider concerned will be rendering only service simpliciter without any other element in them namely without any material or goods supply involved. That is definitely not the case in the facts of these appeals. The activities of the appellants will therefore continue to be in the nature of composite works contract services and hence even after 1.6.2007 for the periods disputed in these appeals they cannot be brought within the fold of commercial or industrial construction service or construction of complex service as proposed in the show cause notices and confirmed in the impugned orders.

7.8 On the contrary, being composite works contracts, they will necessarily fall within the ambit of works contract service as defined under section 65(105)(zzzza) *ibid*. It is possibly with this intent in mind that the lawmakers have included in the definition of works contract, erection and commissioning service, commercial or industrial construction service, construction of complex service and in addition turnkey projects including EPC projects within the definition of Works Contract Service.

7.9 At this juncture, it is worthwhile to reproduce excerpts from the Union Finance Minister's budget speech in 2007:-

"State Governments levy a tax on the transfer of property in goods involved in the execution of a works contract. The value of services in a works contract should attract service tax. Hence, I propose to an optional composition scheme under which service tax will be levied at only 2 per cent of the total value of the words contract".

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.

7.11 The Id. AR Shri A. Cletus has tried to counter this contention by stating that works contract service is service / activity which would be of a general nature whereas the

construction activities defined in Commercial or Industrial Construction Services, Construction of Complex Service and Construction of Residential Complex etc. are of special nature. He took support of the maxim '*generalia specialibus non derogant*' – 'general things do not derogate special things'. The counsel for appellants have submitted that as per Section 65A of the Act *ibid*, classification of service shall be based on the specific entries and the more specific description of service has to be preferred. He invited our attention to CBEC's Circular 128/10/2010 dated 24.8.2010 which is reproduced as under:-

"The matter has been examined. As regards the classification, with effect from 1-6-2007 when the new service 'Works Contract service' was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service prior to 1-6-2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of Section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date."

7.12 Thus, for example, while construction of a new residential complex as a service simpliciter would find a place under section 65(105)(30b) of the Act, the same activity as a composite works contract will require to be brought under section 65(105)(zzzza) Explanation (c). For both these categories for the definition of residential complex, the definition given in section 65(105)(91a) will have to be adopted as discussed above will have to be taken into account.

7.13 We find sustenance in arriving at this conclusion by a number of decisions of the Tribunal in which it has held as under:-

a. In the case of Commissioner, Service Tax, New Delhi Vs. Swadeshi Construction Company – 2018-TIOL-1096-CESTAT-DEL, the Tribunal in para 7 has held as under:-

“7. We note that in the present case, the SCN was issued on 27.05.2011. On that date, both the tax entries, namely, Commercial or Industrial Construction Service and Works Contract Service, were available in the Finance Act, 1994. The SCN did mention this in the first para itself. However, the proposal for tax demand was specifically made under Commercial or Industrial Construction Service under Section 65 (105) (zzq) of the Finance Act, 1994. In such situation, we note that it cannot be a case of simple mentioning of wrong provisions of law as submitted by the Revenue. Apparently, the tax liability of composite works contract is to be considered under works contract services only as per legal position settled by the Hon'ble Apex Court in M/s L&T Limited. Even in the appeal, the Revenue submitted that the respondent were engaged in construction services liable to tax under tax entry Section 65(105) (xxq). The grievance of the Revenue is with reference to commercial nature of the construction undertaken by the respondent and not on the correct classification of taxable activity.”

b. In the case of Skyway Infra Projects Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai – 2018-TIOL-360-CESTAT-MUM, in respect of identical issue for the period from 2005 to 2012, the Tribunal in para 7 has held as under:-

“7. On careful consideration of the submissions made by both the sides, we find that the issue falls for consideration is whether the services rendered by the appellant in respect of 52 contracts entered with various Govt. authorities need to be taxed under MMRC/CICS/ECIS or otherwise. It is on record and undisputed that the adjudicating authority has specifically held that all the 52 contracts which has been executed by the appellants are with material. Learned Counsel was correct in bringing to our notice that the said findings of the adjudicating authority that the appellant is eligible for abatement of 67% of the value of the goods is in itself the acceptance of the fact that the contracts were

executed with material. It is also on record that the Revenue has not contested these findings of the adjudicating authority before the Tribunal. If that be so, even when the Revenue authorities are accepting the facts that the contracts executed by the appellant are nothing but works contracts, for the period in question, entire case of the Revenue in the show-cause notice stands demolished by the Apex Court in the case of Larsen & Toubro Ltd. (supra). In the said judgment, their Lordships have very categorically laid down the law that the works contract cannot be vivisected for the confirmation of demand under various other services. On this ground itself, the entire demand confirmed by the adjudicating authority is liable to be set aside and we do so."

c. In the case of URC Construction (P) Ltd. Vs. Commissioner of Central Excise, Salem – 2017 (50) STR 147, the Tribunal in paragraphs 9, 10 and 11 has held as under:-

"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 properly 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."

d. In the case of Logos Construction Pvt. Ltd. Vs. Commissioner of Central Excise as reported in 2018 (6) TMI 1361, the Tribunal has held as under:-

"5.1 The payment upto 01.06.2007 will get extinguished on account of the law that has been laid down by the Apex Court in the case of Larsen & Toubro Ltd., (supra), relied upon by the Ld. Counsel. So ordered.

5.2 The Ld. Counsel has been at pains to point out that on-going projects which were only in the nature of works contract prior to 01.04.2007 cannot be brought under different category of Construction Services and CICS subsequently. We find merit in his arguments. The SCN has proposed demand of service tax liability only under these two categories and not under Works Contract service. The demand confirmed in the impugned order under these categories namely under construction service for the period 10.09.2004 to 16.06.2005 under CICS for the period 16.06.2005 to 30.09.2008 cannot also sustain and are therefore set aside. So ordered

5.3 For the period 01.04.2008 to 30.09.2008, the demand confirmed is Rs. 26,88,611/-. We note that the appellant has not contested the liability under works contract for this period. The only argument brought forth by the Ld. Counsel is that they have discharged an amount of around Rs. 82 lakhs under this category after the visit of the departmental officers and therefore an amount of Rs. 36,88,611/- demanded in the impugned order should be considered as

having been discharged. We find merit in his argument and hence the demand of Rs. 26,88,611/- under works contract service for the period 01.04.2008 to 30.09.2008 is required to be considered as having been paid, albeit subsequent to the visit of the officers. However, the interest liability if any that arise on this amount if not paid already will have to be discharged by the appellants. So ordered."

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.

9. The next issue that arises for consideration is with regard to the demand raised for the reason that appellants did not intimate the department about their intention to opt for payment of service tax under composition scheme under Works Contract Service. The Tribunal vide Final Order No. 50871/2018 dated 6.3.2018 in the case of Vaishno Associates Vs. Commissioner of Central Excise had occasion to consider this issue and held for sole reason of not filing the intimation opting to pay service under Works Contract Service, the demand cannot sustain. Similar view was taken in Bridge & Roof Co. Ltd. Vs. Commissioner of Central Excise, Jaipur vide Final Order No. 58254 & 58255/2017 dated 1.12.2017. Following these decisions, we answer the issue in favor of appellants.

10. The impugned orders are therefore set aside and appeals allowed with consequential benefit, if any, as per law

(Pronounced in court on 18.09.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

Rex