

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
BANGALORE**

REGIONAL BENCH – COURT NO.1

S. Tax Appeal No. 01037 of 2009

Arising out of Order-in-Original No. 35/2009/ST, Dated 16/10/2009 passed by Commissioner of Central Excise, Customs & Service Tax, Cochin.

M/s. Lee Builders
PMC XIV/489, 1st Floor,
Knampuram Building,
M. C. Road, Perumbavoor,
Cochin-683542

Appellant (s)

VERSUS

Commissioner of Central Excise, Customs & Service Tax, Cochin
C. R. Building,
I. S. Press Road,
Cochin-682018

Respondent (s)

APPEARANCE :

Shri Sam Derrick, Advocate for the Appellant

Shri K. B. Nanaiah, Asst. Commissioner (AR) for the Respondent

CORAM:

HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 20370/2020

Date of Hearing : 05 March 2020

Date of Decision : 02.07.2020

PER P. K. CHOUDHARY:

The instant appeal has been filed by the assessee, M/s. Lee Builders, against demand of service tax under the category of "Commercial Construction or Industrial Service" for the period from September 2004 to September 2007 vide Order-in-Original dated 16.10.2009 passed by the Ld. Commissioner, Central Excise & Service Tax, Cochin, along with interest under Section 75 of the Finance Act, 1994 (the Act) and penalties under Section 76, 77 and 78 of the Act.

2. Briefly stated, the facts of the case are that the appellant is engaged in undertaking commercial construction and is also registered with the Service Tax Department since November 2004. Show Cause Notice dated

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28.07.2008 (SCN) was issued since they did not deposit service tax under the category of "Commercial Construction or Industrial Service" and also did not file any return for the period 2004-05 and 2005-06 in respect of the contracts awarded prior to 10.09.2004 (i.e. the date of introduction of service tax levy on commercial construction service). The appellant deposited service tax under the category of "Works Contract Service" which was introduced w.e.f. June 2007 under the composition scheme under which tax can be paid at the concessional rate of 2% which has also been disputed by the Department on the ground that classification could not be changed from "Commercial Construction or Industrial Service" to "Works Contract Services" in respect of the existing contracts for availing the facility to pay tax at concessional rate. Demand was confirmed as proposed in the SCN along with interest and penalty vide the Order-in-Original dated 16.10.2009 which is under challenge in this appeal.

3. Shri Sam Derrick, Advocate appeared for the appellant and Shri K. B. Nanaiah, Asst. Commissioner (AR) appeared for the Revenue.

4. The Ld Advocate submitted that the demand is not sustainable prior to June 2007 under the category of "Commercial Construction or Industrial Service" in view of the decision of the Apex Court in the case of CCE, Kerala vs. Larsen & Toubro Ltd. [2015 (23) STR 913 (SC)]. He also relied on the decisions in the case of K. K. Lonapan vs. CCE, Mangalore [2019 (25) GSTL 478 (Tri-Bang)] and Vensa Infrastructure Ltd. vs. Com. of Service Tax, Hyderabad [2019 (31) GSTL 460 (Tri-Hyd)]. He further submitted that service tax has been rightly paid under the category of Works Contract Service effective from June 2007 and therefore, no further service tax can be demanded. He accordingly prayed that demand be set aside and the appeal be allowed.

5. The Ld. DR appearing for the Revenue reiterated the findings made by the Ld. Commissioner and supported the impugned order.

6. Heard both sides and perused the appeal records.

7. We find that the issue is squarely covered by the Hon'ble Supreme Court's decision in the case of Larsen & Toubro (Supra) relied by the appellant wherein it has categorically been held that no service tax can be demanded on construction services prior to introduction of 'Works Contract Service' in June 2007 wherein there is a supply of goods and service.

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We have perused the impugned order wherein the Ld. Commissioner in para 41 has observed that "the assessee has supplied materials while providing the service". Based on said observation, the Ld. Commissioner has extended the benefit of abatement of 67% to arrive at the value of taxable service to raise demand under the category of "Commercial Construction or Industrial Service". We are therefore satisfied that the services provided by the appellant is a composite service involving supply of goods and not construction service simpliciter and hence, the same is legally classifiable under the category of "Works Contact Service". Therefore, we are of the view that the assessee has rightly paid service tax under the said category effective from June 2007 which has also been appropriated in the impugned order and thus, the contention of the Revenue that tax on existing contracts prior to June 2007 could not be paid under Works Contact is not tenable.

8. In view of the above findings, the demand raised in the impugned order under the category of "Commercial Construction or Industrial Service" cannot be sustained and hence, set aside. Interest and penalties are also set aside. Appeal filed by the assessee is therefore allowed.

(Pronounced in the open Court on 02.07.2020)

(P. K. Choudhary)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Pooja