CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 52017 of 2015

[Arising out of Order-in-Original No. JOD-EXCUS-000-COM-0009-14-15 dated 20/03/2015 passed by The Commissioner of Central Excise, Jodhpur]

M/s Shree Mohangarh Construction Co.
Plot No. G-95-A, RIICO Industrial Area,
Near FCI Godown,
Jaisalmer, Rajasthan. **...Appellant**

Versus

The Commissioner of
Central Excise & Service Tax,
NCR Building, Statue Circle C-Scheme,
Jaipur, Rajasthan – 302 005. **...Respondent**

APPEARANCE:

Shri Om P. Agarwal, Chartered Accountant for the Appellant
Shri A. Thapliyal, Authorised Representative for the Department

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 05.03.2021
DATE OF DECISION: 12.03.2021

FINAL ORDER No. 51133/2021

P.V. SUBBA RAO

This appeal is filed assailing order-in-original No. JOD-EXCUS-000-COM-0009-14-15 dated 20/03/2015 passed by the Commissioner of Central Excise, Jodhpur.

2. The appellant is engaged in providing various services and has been discharging service tax. It was felt by the Department that they have not fully discharged their service tax liability and, therefore, the differential service tax needs to be recovered from them. Accordingly a show cause notice dated 19/05/2014 was issued to them demanding the same alongwith interest and proposing to impose penalties under Section 76 and 77 of the Finance Act, 1994.

3. After following the due process, the impugned order was passed by the learned Commissioner.

4. The demands which were raised in the show cause notice and confirmed in the order-in-original were as follows :-

Sl. No.	Category of Demand raised as per SCN dated 19/05/14 for F/Y 12-13	Nature of work	Para No. Of SCN 19-24	Demand raised as per SCN	Demand confirmed OIO dated 20/03/15 (Page 35-41) Amount	Para No. Of OIO
1	2	3	4	5	6	7
1	Commercial Construction	Commercial Construction	10(i)	3,11,604/-	3,11,604/-	16
2	Cargo Handling	Supply of goods	10(ii)	42,81,968/-	42,81,968/-	18
3	Cargo Handling	Transportation of goods	10(ii)	97,493/-	97,493/-	18
4	Supply of Tangible Goods	Supply of Tangible Goods	10(iii)	5,58,614/-	5,58,614/-	17
	Total			52,49,679/-	52,49,679/- +Interest+ Penalty u/s 76	

5. Learned Counsel for the appellant submits that for an earlier period in Service Tax Appeal No. 53280 of 2016 this Bench had passed Final order No. 50287 of 2019 dated 13 February 2019. In that order there were demands under :-

(i) commercial or industrial construction service;

(ii) supply of tangible goods service;

(iii) cargo handling service towards supply of sand;

(iv) cargo handling service towards transport limestone.

6. They had not contested the service tax liability under the heads of "supply of tangible goods service" and "commercial or industrial construction service". The service tax on the cargo handling service was set aside by this Bench. Para 15-16 of this order reads as follows :-

> "15. It is seen from the record that the appellant has already discharged the service tax as admitted by them under the category of Commercial or Industrial Construction Service, Supply of Tangible Goods Service as well as for Transportation of Goods under GTA. As discussed above, we have set aside the demands for service tax under the category of Cargo Handling Service. Since the entire liability has already been discharged by the appellant even prior to issue of show cause notice, we find no justification for imposition of penalty under section 76. Accordingly, we set aside the penalty.

16. In view of the above discussion, the appeal is allowed in the above terms".

7. Learned Counsel submits that even in the present case they are not contesting the demand under "supply of tangible goods service", but are contesting the demands under "cargo handling service" with respect to both the activities and the demand under "commercial and industrial construction service" (which they had not contested during the previous case). Learned Counsel explains the nature of the services provided with respect to each of the demands made in the show cause notice and confirmed through the impugned order. The first of these demands is on the alleged service of "commercial and industrial construction". He draws attention of the Bench to para 10 (i) of the show cause notice which states as follows :-

"*the assessee have realised an amount of Rs. 76,39,620/- against the service provided under the category of commercial or industrial construction service (including value of goods – material provided by the recipient of service) during the period 01/04/2012 to 31/03/2013. ..... after allowing abatement of 67% in terms of Notification No. 1/2006-ST dated 01/03/2006 from the said realised amount under taxable value comes to Rs. 25,21,075/- attracting service tax amounting to Rs. 3,11,604/-*".

8. Learned Counsel would submit that from the above, it is very clear that what they had rendered was "works contract service" which, as per the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Central Excise and Customs, Kerala versus Larsen & Toubro Limited – 2015 (39) S.T.R. 913 (S.C.)** cannot be charged to service tax under any other head including CICS. In fact, this point was raised by them before the learned Commissioner and it has been explained that they had discharged service tax under works contract service. However, this contention was not accepted by the learned Commissioner on the ground that they had not fulfilled the conditions laid down in Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. Relevant paras 16.01, 16.02 of the impugned order were as follows :

"16.01 It is seen that a demand of Rs. 3,11,604/- has been raised under Commercial or Industrial Construction Service (including value of goods/material provided by the recipients of service). The services

relate to providing and laying PCC in foundation for M/s Enercon India Ltd. and Construction of boundary wall of solar plant for Lanco Solar Thermal Power Project. The demanded tax has been calculated after allowing abatement to the assessee. I find that the assessee has nowhere contended that the services provided by them are not taxable under Commercial or Industrial Construction Service. The assessee has only contended that they have already paid service tax amounting to Rs. 16,12,345/- under Works Contract Service against the work/work order for which service tax has also been demanded under Commercial or Industrial Construction Service.

16.02 In this regard, I find that for payment of service tax under Works Contract Service, the assessee has to fulfil the conditions laid down in Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 and one of the conditions laid down in these Rules is that the assessee has to opt for payment of service tax under these Rules. The assessee has although contended that they have already paid up their tax liability under Works Contract Service, they have nowhere shown that their services were classifiable under Works Contract Service and they have also not shown that they had fulfilled the conditions like exercising option which is necessary for payment of service tax under these Rules. In view of the above, I find that when on an activity the service tax liability has been paid up by the assessee under a different service than under which the demand has been made, the amount of such tax already paid by the assessee is liable to the appropriated under the service under which demand was made and the activity has been found to fall under the service under which demand was made. From para 12 of the Show Cause notice reveals that the assessee have paid service tax amounting to Rs. 9,33,557/- (including cesses) and interest amounting to Rs. 15,587/- during Financial Year 2012-2013 and thus, this amount has been proposed for appropriation into the Government account. In view of this, I find that the assessee is liable to pay service tax of Rs. 3,11,604/- under Commercial or Industrial Construction Service. As such, the amount of service tax of Rs. 3,11,604/- is liable to be appropriated into the Government Account in terms of Section 73 (2) of the Finance Act, 1994 from the amount of service tax of Rs. 9,33,557/- already paid by them and as proposed in the Show Cause Notice".

9. Learned Counsel would argue that there is no doubt that their contract was in the nature of works contract and it involved both supply of goods and rendition of services. Both the show cause notice and the order-in-original acknowledged this. However, the demand was confirmed under "commercial and industrial construction service" which is not sustainable and, therefore, this demandneeds to be set aside.

10. As far as the demand of service tax under cargo handling service is concerned, it is on account of two alleged services ; (i) supply of raw material like river sand and crusher grit to M/s Enercom India Ltd. ; (ii) transportation of 40mm size limestone from RSMMs Sanu Mines to M/s GLPL, Barmer. The nature of these two contracts is correctly indicated in para 10 (ii) of the show cause notice, as above. Having stated that one contract was for supply of river sand and another is for transportation of

limestone the demand has nevertheless been made under "cargo handling services" and confirmed in the impugned order. Identical demand for the earlier period was set aside by this Bench in the aforesaid final order No. 50287 of 2019 dated 13 February 2019 paras 12 and 13 of which are reproduced below :-

> "12. The demand under the Cargo Handling Service has dealt with two types of orders executed by the appellant. One type of orders were executed for supply of materials such as river sand and crusher grit. We have perused some of the purchase orders received by the appellant for this activity. The purchase order clearly shows that the contract was for supply of material and can by no stretch of imagination, be considered as for providing Cargo Handling Service. Hence, no service tax is payable for this activity under the category of Cargo Handling Service. We set aside the demand made under this category for a total amount of Rs. 40,27,357/-.
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> 13. The demand amounting to Rs. 32,86,411 has also been made under the category of Cargo Handling Service for the activity covered by the second set of contracts. A perusal of some of the contracts executed for this activity reveals that the appellant was required to transport limestone from the mines to the premises of Customer. A cursory perusal of the contract indicates that it is for mere transportation of limestone and the activity of loading and unloading of the material was incidental to the transportation of the goods. As such, we are of the view that the activity is clearly covered by the service of Goods Transportation Agency and cannot be considered as Cargo Handling Service. Further, it is noted that the appellant has claimed to have discharged the service tax under the category of GTA for this activity, after availing abatement available to the extent of 75%. The adjudicating authority is directed to verify this fact. We find no justification for raising demand under the category of Cargo Handling Services on this activity and hence this part of demand is set aside".

11. Learned Counsel would submit that there is no doubt that the nature of contract in the first case is for supply of river sand and loading unloading etc. which are related to such supply cannot be called cargo handling service. The second set of contracts were for transportation of limestone which necessarily involved some loading and unloading. The nature of contract being one of transportation, the demand cannot be sustained under cargo handling service.

12. The last demand is of supply of tangible goods service in respect of their JCB and tractor which they have supplied to M/s M/s Enercom India Ltd. project. He submits that they are not contesting the demand under this head.

13. Learned Counsel also contested the imposition of the penalty on them.

14. Learned Departmental Representative reiterates the findings of the Original Authority.

15. We have carefully considered the records of the case and submissions made by both sides.

16. There is no dispute on the facts of the case. The demand under "Commercial and Industrial Construction Service" was made on an activity which admittedly involved both supply of goods and rendering services. In fact, an abatement towards the cost of goods was also given in the show cause notice and the impugned order. It has now been well settled by the Hon'ble Supreme Court in the case of **Larsen & Toubro Ltd.** (supra) that "works contract service" is separate specie of contract known to commerce and it cannot be equated either with a contract for sale of goods or a contract for supply of services simplicitor. Service tax can only be demanded on Works Contract services after the introduction of a charge on works contract service and not under any other head either before the introduction of the service or thereafter. Learned Commissioner records in his order that the appellant has paid service tax under "works contract service composition scheme", but contended that they have not fulfilled the conditions required under works contract composition scheme. Even if they had not fulfilled the conditions, there is no case for the Department to charge service tax on this service under any other head. Therefore, the demand of service tax under the head of Commercial and Industrial Construction Service needs to be set aside and we do so.

17. As far as the demand of service tax under cargo handling service is concerned, it is on two counts – (i) supply of river sand (ii) transportation of limestone from mines.

18. The first contract is supply of river sand; it is not for loading or unloading any cargo. Needless to say that if somebody has to supply river sand it has to loaded into the truck and unloaded it at the customer's destination. The nature of the contract remains to be one of supply of river sand and it cannot change into a contract for some other service. As far as the second part is concerned, the contract is evidently for transportation of goods and the appellant has been discharging service tax under Goods Transport Agency service. Merely because transportation also requires the appellant to load and unload goods, it cannot be said that the appellant has performed cargo handling service. This view with respect to the demand for an earlier period for these

services was already taken by this Bench in Final order No. 50287 of 2019 and we find no reason to deviate from it.

19. The third demand is on "supply of tangible goods service" which the appellant is not contesting and it needs to be upheld. Interest, if any, payable under Section 75 of the Finance Act, 1994 also needs to be paid on this amount. As bulk of the demands have already been set aside, invoking the powers under Section 80, the penalty imposed under Section 76 is set aside. In view of the above, the impugned order is upheld to the extent of demand in service tax on supply of tangible goods service amounting to Rs. 5,58,614/- along with interest, as applicable. The remaining part of the impugned order is set aside.

20. The appeal is disposed of as herein above, with consequential benefits, if any.

(Order pronounced in open court on 12/03/2021.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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