CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 867 of 2012

[Arising out of No. 24 & 25/2011/ST dated 30/12/2011 passed by Commissioner of Central Excise & Customs, Cochin]

KUNNEL ENGINEERS AND CONTRACTORS PVT LTD
M.G.ROAD, RAVIPURAM, KOCHI.16 — Appellant(s)

VERSUS

C.C.,C.E.& S.T-COCHIN-CCE
C R BUILDING,
I S PRESS ROAD, ERNAKULAM,
COCHIN,
KERALA
682018 — Respondent(s)

Appearance:

Shri G. Natarajan, Advocate — For the Appellant

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

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Date of Hearing: 10/03/2020
Date of Decision:19/06/2020

Final Order No. 20367 /2020

Per : S.S GARG

The present appeal is directed against the impugned order dt. 30/12/2011 passed by the Commissioner of Service Tax whereby the Commissioner confirmed the demand raised in 2 show-cause notices dt. 22/07/2010 and 20/10/2010. The learned Commissioner has passed the following orders confirming the demands:-

In respect of show-cause notice dt. 22/07/2010:-

i. I hereby deny the benefits under Notifications No.15/2004-ST dt. 10/09/2004, 18/2005-ST dt. 07/06/2005 and 1/2006-ST dt. 01/03/2006 during the period from 01/12/2005 to 31/03/2009 claimed by M/s. Kunnel Engineers and Contractors (P) Ltd.

ii. I order that the services provided by the assessee from 01/06/2007 to 31/03/2009 are classifiable under "Construction of Complex Service (Residential)" or "Commercial or Industrial Construction Service", and reject the classification made by the assessee under "Works Contract Service" and to disallow the option for payments of Service Tax and Education Cess under "Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007" for the ongoing project prior to 01/06/2007 for the period from June 2007 to March 2009.

iii. I hereby confirm an amount of Rs.12,49,16,628/- (Rupees twelve crore forty nine lakh sixteen thousand six hundred and twenty eight only) being service tax, education cess and higher & secondary education cess short paid by the assessee on the taxable services rendered during the period 01/12/2005 to 31/03/2009, under proviso to Section 73(2) of the Finance Act, 1994 (as detailed in annexure B to the show-cause notice).

iv. I order that the assessee shall pay interest at the appropriate rate on the amount confirmed above under Section 75 of the Finance Act, 1994;

v. I impose a penalty on the notice under Section 76 of the Finance Act, 1994, calculated @ Rs.100/- (Rupees one hundred only) for every day starting from the due date till 17/04/2006 and thereafter i.e. from 18/04/2006 @ Rs.200/- (Rupees two hundred only) or 2% of such tax per month, whichever is higher, till 10/05/2008, subject to a ceiling that the total amount of the

penalty payable under Section 76 shall not exceed the service tax, education cess and secondary & higher education cess payable for the period;

vi. I impose a penalty of Rs.5000/- (Rupees five thousand only) on the notice under Section 77 of the Finance Act, 1994, for the contravention of Section 70 of the said Act.

vii. I hereby impose a penalty of Rs.12,49,16,628/- (Rupees twelve crores forty nine lakhs sixteen thousand six hundred and twenty eight only) on the assessee under Section 78 of the Finance Act, 1994 with an option to pay 25% of this penalty, if the amount confirmed above, interest confirmed and reduced penalty under this Section are paid within 30 days from the date of communication of this order.

In respect of show-cause notice dt. 21/10/2020:-

i. I order that the services provided by the assessee from 01/04/2009 to 31/03/2010 in respect of the ongoing projects as on 01/06/2007 (for which service tax was paid before 01/06/2007 under "Construction of Complex (Residential) Service" or "Construction of Commercial & Industrial Buildings or Civil Structures Service") are classifiable under "Construction of Complex (Residential) Service" or "Construction of Commercial & Industrial Buildings or Civil Structures Services" and deny the benefit under Notifications No.1/2006-ST dt. 01/03/2006 for violation of the conditions stipulated therein and disallow the option for payments of service tax and education cess under "Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007" for the period April 2009 to March 2010.

ii. I hereby confirm an amount of Rs.3,64,49,664/- (Rupees

three crore sixty four lakh forty nine thousand six hundred and sixty four only) being service tax, Rs.7,11,688/- (Rupees seven lakh eleven thousand six hundred and eighty eight only) education cess and Rs.3,68,066/- (Rupees three lakh sixty eight thousand and sixty six only) secondary and higher education cess short paid during the period 01/04/2009 to 31/03/2010, under Section 73(2) of the Finance Act, 1994.

iii. I order that the assessee shall pay interest at the appropriate rate on the amount confirmed above under Section 75 of the Finance Act, 1994;

iv. I impose a penalty on the notice under Section 76 of the Finance Act, 1994, calculated @ Rs.200/- (Rupees two hundred only) or 2% of such tax per month, whichever is higher, subject to a ceiling that the total amount of the penalty payable shall not exceed the service tax, education cess and secondary & higher education cess payable for the period.

2. Briefly the facts of the present case are that the appellant is a private limited company engaged in the business of providing construction service to its clients as per agreements executed by them. Appellants are also registered under the Central Excise for the purpose of payment of service tax and are engaged in construction of various commercial buildings as well as residential complexes. Service tax was imposed under 'Commercial or Industrial Construction Service' (CICS, for short) w.e.f. 10/09/2004, on Construction of Complex Services (Residential) (CCS, for short) w.e.f. 16/06/2005 and 'Works Contract Service' (WCS, for short) w.e.f. 01/06/2007. The appellant had been paying service tax on the taxable value determined after availing the exemptions in terms of Notification No.15/2004-ST dt. 10/09/2004, No.18/2005-ST dt. 07/06/2005 and No.1/2006-ST dt. 01/03/2006 which provide for 67% of abatement on the gross amount

charged, till 31/05/2007. From 01/06/2007, the appellant started paying service tax @ 2%/4% on the receipts under the Works Contract (Composition Scheme for payment of service tax) Rules, 2007 as notified vide Notification No.32/2007-ST dt. 22/05/2007. When service tax was introduced on CICS and CCS, it was the belief that composite contracts involving transfer of properties in goods as well as service, could be taxed under this head and abatement of 67% from value, by way of exemption has been granted and service tax payable on 33% of the value under these services. Accordingly, the appellant was paying service tax under CICS and CCS after availing 67% abatement from the value. Department entertained the view that the appellants are not entitled to claim the abatement of 67% from the value and show-cause notices were issued to the appellant alleging that they were not entitled to claim the abatement of 67% from the value, inasmuch as the gross amount charged by them, does not include the value of the goods used in the construction activities, as major materials like cement and steel are supplied by the customers themselves. Thus the show-cause notices proceeded to demand service tax under CICS and CCS on the entire value received by the appellant without extending any abatement and after adjusting the service tax already paid by the appellant. subsequently w.e.f. 01/06/2007, a new taxable service viz. Works Contract Service (WCS, for short) was introduced under Section 65(105)(zzzza) of the Finance Act, 1994 and simultaneously as per Rule 2A of the Service Tax (Determination of value) Rules, 2005 under WCS, service tax can be paid on the gross value – minus the value of transfer of property in goods on which VAT is payable. Alternatively under WCS (composition scheme for payment of Service Tax) Rules, 2007, service tax @ 2% (revised to 4% from 01/03/2008) can be paid on the gross amount. After the introduction of WCS from 01/06/2007 onwards, appellant had started paying service tax by classifying their service into WCS and under the composition scheme applicable thereto. As availment of cenvat credit on input services was allowed under WCS, the appellant

has started availing such cenvat credit also. This practice was followed by the appellant both in respect of existing contracts as on 01/06/2007 on which they were paying service tax under CICS/CCS by claiming 67% abatement and new contracts undertaken after 01/06/2007. The show-cause notices issued by the Revenue alleged that the service would continue to be classified under CICS/CCS and changing the classification into WCS midway is not permissible. Even in respect of fresh contracts after 01/06/2007, it was alleged that appellant is liable to classify the same only under CICS/CCS, since they have not exercised their option to pay the service tax under the composition scheme under WCS. Accordingly both in respect of the ongoing contracts and fresh contracts, demand of service tax has been made under CICS/CCS without granting the benefit of 67% abatement on the ground that some of the material were supplied by the customers. After following the due process, the Commissioner vide the impugned order confirmed the demand in both the show-cause notices.

3. Heard both the parties and perused the records.

4.1. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the issue involved in the present case is no more res integra and has been settled by the Apex Court in the case of CST Vs. L&T Ltd. [2015(39) STR 913 (SC)] which has laid down the law on various aspects of levy of service tax on WCS. Further he submitted that the Supreme Court has held that since as per Section 67, service tax is leviable on "gross amount charged". The levy of service tax on CICS and CCS would be applicable only in case of pure service contracts and composite contracts involving transfer of property in goods would be liable to service tax only under WCS from 01/06/2007 as statutory mechanism to arrive at the value of service has been

prescribed only under WCS from 01/06/2007. The Supreme Court further held that abatement notification / exemption notification, which are issued by the Government cannot determine the scope of levy, in the absence of such exemption, the entire amount including the value of transfer of property in goods would be liable to service tax which is constitutionally impermissible. He further submitted that the Apex Court decision was relied upon by the CESTAT, Chennai in the case of Real Value Promoters Ltd. Vs. CCE [2018-TIOL-2867-CESTAT, Chennai wherein the facts involved are identical to the present case and the CESTAT, Chennai held that the composite contract can be subjected to service tax only under WCS post 01/06/2007 and any demand under CICS/CCS on such composite contracts post 01/06/2007 is not sustainable. He further submitted that the CESTAT, Chennai has relied upon the following decisions wherein the demands under CICS/CCS for the period post 01/06/2007 have been set aside.

i. URC Constructions Vs. CCE[2017(50) STR 147 (Tri. Chennai)]
ii. Mantri Developers Vs. CCE [2014(36) STR 944 (Tri. Bang.)]
iii. Skyway Infra Projects Vs. CST [2018-TIOL-360-CESTAT-MUM]
IV. Srishti Constructions Vs. CCE [2018-TIOL-CESTAT-CHD]
v. CST Vs. Swadeshi Construction Company [2018-TIOL-1096-CESTAT-DEL]
vi. Logos Construction Pvt. Ltd. Vs. CST [2018-TIOL-2716-CESTAT-MAD]

4.2. He further submitted that in view of the law laid down by various Benches of the Tribunal cited supra, the demand of service tax under CICS/CCS for the period prior to 01/06/2007 as well as post 01/06/2007 is not at all sustainable and liable to be set aside. He further submitted that the appellant in fact post 01/06/2007 has been paying service tax under WCS under composition scheme both in respect of ongoing contracts as well as fresh contracts. He further submitted that apart from cement and steel supplied by the customers, all other goods required for construction have been supplied by the appellant which is not in dispute and to that extent,

there is an element of transfer of property of goods involved in the contracts and the appellant is also paying appropriate VAT thereon.

4.3. Learned counsel submitted that without prejudice to the foregoing stand, benefit of 67% abatement under CICS and CCS has been denied to the appellant on the ground that the gross amount charged by the appellant does not include the value of all goods, as cement and steel are supplied by the customers. In this connection, the appellant relied upon the decision of the Larger Bench of the Tribunal in the case of Bhayana Builders Pvt. Ltd. Vs. CCE [2013(32) STR 49 (Tri. LB)] rendered on 06/09/2013 wherein it has been held that while claiming abatement of 67% under these services, the value of materials supplied by the customers need not be included. This decision has also been upheld by the Hon'ble Supreme Court vide 2018(10) GSTL 118 (SC). He further submitted that after the decision of Apex Court in L&T Ltd. cited supra, such contracts are not at all liable to service tax under CICS/CCS thereby the question of abatement is not at all relevant. The decision of Larger Bench of the Tribunal was prior to the decision of Hon'ble Supreme Court in L&T case. Hence even assuming but not admitting that the appellant is not liable to pay service tax under CICS/CCS, the demand confirmed on the appellant by denying the benefit of abatement, on the ground that the value of material supplied by the customers are not part of the amount charged by the appellant, are not at all sustainable in law. He also submitted that the provision for adding the value of material supplied by the customers has been specifically added only under WCS composition scheme vide Notification No.23/2009-ST dt. 07/07/2009 and it has been specifically stated that this would not apply for the contracts awarded prior to this date. He further referred CBIC circular bearing No.128/10/2020 dt. 24/08/2010 which clarified that in respect of ongoing contracts, the classification would change to WCS post 01/06/2007, though the benefit of composition scheme is not available. Learned counsel submitted that the demand confirmed by

the Commissioner under CICS/CS is contrary to this clarification. He further submitted that even in respect of contracts, commenced after 01/06/2007 where the appellant has paid the service tax under composition scheme of WCS, the same has been denied and the demand is confirmed under CICS/CCS. He further submitted that in the absence of any specific manner in which the option for composition scheme has to be opted, the payment of tax under the scheme and filing of return as such itself would amount to exercise of option. For this submission, he relied upon the following decisions:-

i. ABL Infrastructure Limited Vs. CCE&ST [2015(38) STR 1185 (Tri. Mum.)]
ii. Mehta Plast Corporation Vs. CCE&ST [2016(44) STR 651 (Tri. Del.)]

4.4. Learned counsel also submitted that the demand for the period from December 2005 to March 2009 has been raised by issue of show-cause notice on 22/07/2010 and hence the entire demand is by way of invocation of extended period. He further submitted that the appellant have been paying service tax under CICS/CCS by claiming abatement though no service tax was held to be payable by the Supreme Court in such cases subsequently. Further the levy of service tax on construction related activities has undergone several changes during the relevant period and even the CBEC has recognized such changes in various circulars issued. Further the appellant have not suppressed any information from the Department and has been regularly filing the returns and supplying the information as and when asked by the Department. In such circumstances, there is no justification for invoking the extended period of limitation and the demand is liable to be set aside on the ground of time bar also. He also submitted that similar issue has been raised for the earlier period also and hence extended period cannot be invoked and the demand is liable to be set aside.

5. On the other hand, the learned AR reiterated the findings of the impugned order and submitted that even prior to 01/06/2007 from which WCS was 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 01/06/2007 when WCS was introduced. This can only mean that after 01/06/2007 also such services are liable to service tax being composite contracts.

6.1. After hearing both sides and perusal of the material on record and after going through the various decisions relied upon by the appellant, we find that it is not in dispute that earlier, appellant was paying service tax under CICS and CCS after availing 67% abatement from the value in terms of Notification No.15/2004 dt. 10/09/2004, No.18/2005 dt. 09/06/2005 and Notification No.01/2006 dt. 01/03/2006. The benefit of abatement was sought to be denied on the ground that the appellant had not included the value of material supplied free of cost by the service recipient. This issue is no longer res integra in the light of the Larger Bench decision of the Tribunal in the case of Bhayana Builders Pvt. Ltd. cited supra wherein it has been held that while claiming abatement of 67% under these services, the value of material supplied by the customers need not be included. This decision of the Larger Bench has been upheld by the Apex Court reported in 2018(10) GSTL 118(SC). Further we find that from 0/06/2007, a new taxable service viz WCS was introduced under Section 65(105)(zzzza) of the Finance Act, 1994. Here it is necessary to reproduce the definition of WCS introduced w.e.f. 01/06/2007 by insertion of Section 65(105)(zzzza):-

> *Section 65(105)(zzzza):-*
>
> *"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"

The Explanation of the said provision also contained the definition of WCS. After the introduction of WCS, the appellant had started paying service tax by classifying their services into WCS and started availing the benefit of (Composition scheme for payment of service tax) under Service Tax Rules, 2007. Revenue raised the objection by issuing show-cause notices alleging that the appellant is liable to pay service tax under CICS/CCS only and changing the classification into WCS midway is not permissible. So much so, the Revenue was of the view that even in respect of the fresh contracts after 01/06/2007, the appellant was liable to classify the same only

under CICS/CCS. Since they have not exercised their option to pay service tax under the composition scheme under WCS and accordingly both in respect of ongoing contracts as well as fresh contract, demand of service tax has been confirmed under CICS/CCS without granting the benefit of 67% abatement on the ground that some of the material were supplied by the customers.

6.2. We may note here that there was considerable litigation on the issue whether service tax can be levied on individual WCS prior to its introduction from 01/06/2007 and the same was finally settled by the Hon'ble Apex Court in the case of CCE Vs. L&T Ltd. cited supra. In this case, the Apex Court laid down the law on various aspects of levy of service tax on WCS. The Apex court has held that since as per Section 67, service tax is laviable on "gross amount charged". The levy of service tax on CICS/CCS would be applicable only in case of pure service contracts whereas composite contracts involving transfer of property in goods would be liable to service tax only under WCS from 01/06/2007 as statutory mechanism to arrive at the value of service has been prescribed only under WCS from 01/06/2007. The Apex Court held that since the Finance Act had not laid down any charge or machinery to levy and assess service tax on individual WCS prior to 01/06/2006, hence the levy on such composite WCS prior to that date has no constitutional validity. The decision of L&T Ltd. cited supra has been followed by the Tribunal in large number of cases to set aside the demand of service tax on services like CICS, CCS etc. involving composite contracts of both material as well as service element prior to 01/06/2007. In the present appeal also, there is no dispute that the construction activities are in the nature of composite work and hence the decision of the Apex Court in L&T Ltd. is squarely applicable to the facts of the present case. By following the ratio of the Apex Court decision cited supra, it has been held by Chennai CESTAT in the case of Real Value Promoters Pvt. Ltd. cited supra that a composite contract can be subject to service tax only under WCS

post 01/06/2007 and any demand under CICS/CCS on such composite contracts is not sustainable. Here it is pertinent to reproduce the finding of the Tribunal recorded in para 8 which is reproduced herein below:-

> *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.*

6.3. Further we find that CBIC has in its subsequent circular

bearing No.128/10/2020 dt. 24/08/2010 clarified that in respect of ongoing contracts, the classification would change to WCS post 01/06/2007, though the benefit of composition scheme is not available. Hence the demand confirmed by the Commissioner under CICS/CCS is contrary to this clarification and the reliance placed on earlier circular No.98/1/2008 dt. 04/01/2008 is not valid. It is pertinent to note that after the decision of the Apex Court in L&T Ltd. cited supra wherein it has been held that prior to 01/06/2007, composite contracts are not at all liable to set aside under CICS/CCS, any tax paid by the appellant under these categories of services is a payment under a mistake of law. In the case of L&T Ltd., it has been held that since no service tax was payable prior to 01/06/2007, opting for composition scheme under WCS is not barred, even if tax was wrongly paid prior to 01/06/2007.

7. The next issue that arise for consideration is with regard to demand raised for the reason that the appellant did not intimate the Department about their intention to opt for payment of service tax under composition scheme under WCS. The Tribunal vide Final order No.50871/2018 dt. 06/03/2018 in the case of Vaishno Associates Vs. CCE [2018-TIOL-1486-CESTAT-DEL] had occasion to consider this issue and held that for sole reason of not filing the intimation opting to pay service tax under WCS, the demand cannot sustain. Similar view was taken in Bridge & Roof Co. Ltd. Vs. CCE, Jaipur [2018-TIOL-30-CESTAT-DEL]. Further in the cases of ABL Infrastructure Ltd. cited supra and Mehta Plast Corporation cited supra also, it has been held by the Tribunal that substantial benefit cannot be denied for procedural deficiency of delay in opting for WCS.

8. As far as bar of limitation is concerned, we find that demand for the period from December 2005 to March 2009 has been raised by issue of show-cause notice on 22/07/2010 which is beyond the normal period of one year from the due date for filing the return.

The Revenue has invoked extended period of limitation alleging suppression by the appellant. We may note that appellants have been paying service tax under CICS and CCS by claiming abatement though no service tax was held to be payable. Further the levy of service tax on construction related activities has undergone several changes which led to lot of litigation during the relevant period and even the CBIC has recognized such confusions in various circulars issued by them. In such circumstances, we do not find any justification for invoking the extended period of limitation and the demand for the period from December 2005 to March 2009 is set aside being barred by limitation.

9. In view of our discussion above, we are of the considered opinion that in view of the decision of the Apex Court in L&T Ltd. cited supra, the impugned order is liable to be set aside and we do the same. Appeal of the appellant is allowed by setting aside the impugned order.

(Order was pronounced
in Open Court on **19/06/2020**)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

Raja...