

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70462 of 2017

(Arising out of Order-in-Original No.KNP-EXCUS-000-COM-063-16-17 dated 21/03/2017 passed by Commissioner of Customs, Central Excise & Service Tax, Kanpur)

M/s MHPL India Pvt. Ltd.,
(15/276, Civil Lines, Kanpur-208001)

.....Appellant

VERSUS

**Commissioner of Customs, Central Excise &
Service Tax, Kanpur**

....Respondent

(117/7, Sarvodaya Nagar, Kanpur)

APPEARANCE:

Shri Dharmendra Srivastava, Chartered Accountant for the Appellant

Shri Manish Raj, Authorised Representative for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.70234/2023

DATE OF HEARING : 25 October, 2023
DATE OF PRONOUNCEMENT : 07 December, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.KNP-EXCUS-000-COM-063-16-17 dated 21/03/2017 passed by Commissioner of Customs, Central Excise & Service Tax, Kanpur. By the impugned order following has been held:-

ORDER

- i. I confirm the demand of amount of **Rs.2,09,55,902/-** (Rupees Two Crore Nine Lac Fifty Five Thousand Nine Hundred Two only) (inclusive of Service Tax amounting to Rs. 2,03,45,536/- Education Cess amounting to Rs. 4,06,911/- & Sec. & Higher Edu.*

Cess amounting to Rs. 2,03,455/-) not paid by M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001 on the exempted services provided by them during the period from 01.04.2010 to 31.03.2015 and order for its recovery from them under Section 73(2) of the Finance Act, 1994 read with Rule 14 of CENVAT Credit Rules, 2004;

- ii. **I also confirm demand of Service Tax totally amounting to Rs.13,73,962/- (Rupees Thirteen Lakh Seventy Three Thousand Nine Hundred Sixty Two only) (Inclusive of Service Tax amounting to Rs. 13,33,944/- Education Cess amounting to Rs. 26,679/- & Sec. & Higher Edu. Cess amounting to Rs. 13,339/-) not paid/short paid by M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001 during the period from 01.04.2010 to 31.03.2015 and order for its recovery from them under Section 73(2) of the Finance Act, 1994;**
- iii. **I also confirm the demand of the wrongly availed & utilized CENVAT credit amounting to Rs. 20,66,961/- (Rupees Twenty Lac Sixty Six Thousand Nine Hundred Sixty One only) (inclusive of Service Tax amounting to Rs. 20,06,758/- Education Cess amounting to Rs. 40,135/- & Sec. & Higher Edu. Cess amounting to Rs. 20,068/-) during the period from 01.04.2010 to 31.03.2015 against M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001 and order for its recovery from them under Section 73(2) of the Finance Act, 1994 readwith Rule 14 of the CENVAT Credit Rules, 2004;**
- iv. **I also order for appropriation of the service tax amounting to Rs.24,72,000/- deposited by M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001 towards their liability of payment of service tax;**

- v. *I also order for recovery of interest at the appropriate rate from **M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001** in respect of amount/service tax mentioned at Sl. No. (i), (ii) and (iii) above under Section 75 of the Finance Act, 1994 read with Rule 14 of CENVAT Credit Rules, 2004. I also order for appropriation the amount of **Rs.9,46,320/-** already deposited by them towards their liability of interest,*
- vi. *I also order for recovery of interest amounting to **Rs.3,20,358/-** from **M / s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001** on the taxable amounts received by them in advance under Section 75 of the Finance Act, 1994. The interest amounting to **Rs.1,91,359/-** already deposited by the party towards their liability of interest on advance is hereby ordered to be appropriated towards their liability of interest as mentioned above,*
- vii. *I impose a penalty of **Rs.2,30,22,863/-** upon **M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur- 208001**, under Section 78 of Finance Act, 1994 read with Rule 15 of CENVAT Credit Rules, 2004 in respect of amount mentioned at (1) & (m) above for suppressing the value of taxable/exempted services and wrongly availed & utilization of CENVAT credit,*
- viii. *I also impose penalty of **Rs.13,73,962/- (Rupees Thirteen Lakh Seventy Three Thousand Nine Hundred Sixty Two only)** under Section 78 of Finance Act, 1994 upon **M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001** in respect of service tax amount mentioned at (1) above;*
- ix. *I do not impose any penalty upon **M / s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001** under Section 76 of Finance Act, 1994 for the reasons that penalty under Section 78 of the Finance Act, 1994 has already been imposed;*

- x. *I impose penalty of **Rs.10,000/- upon M/s MHPL India Private Limited, 15/276 Civil Lines, Kanpur-208001** under Section 77(1)(b) of Finance Act, 1994 for various acts of omission and commission as discussed above;*
- xi. *I impose penalty of **Rs. 10,000/- upon M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001** under Section 77(1)(d) of Finance Act, 1994 for various acts of omission and commission as discussed above;*
- xii. *I impose penalty of **Rs 10,000/- upon M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001** under Section 77(1)(e) of Finance Act, 1994 for various acts of omission and commission as discussed above;*
- xiii. *I do not impose any upon **M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001** under Section 77(1)(c) of Finance Act, 1994 for the reasons discussed hereinabove;*
- xiv. *I also impose a penalty of **Rs.5,000/- upon M/s MHPL India Private Limited, 15/276, Civil Lines, Kanpur-208001** under Rule 15A of CENVAT Credit Rules, 2004 for contravention of the CENVAT Credit Rules, 2004."*

2.1 Appellant is engaged in providing taxable services under the category of Works Contract Service, Goods Transport Agency Service and Construction Services other than residential complex including commercial or industrial buildings or civil structures. They are also availing Cenvat Credit facility on input and input services.

2.2 Acting on intelligence that appellants had been suppressing the taxable value in ST-3 returns for the year 2010-11 to 2013-14, team of officers caused a search at the premises of the appellant on 11.05.2015 and resumed certain documents. Statement of Shri Pyush Agarwal, Director of the Company was also recorded on spot. Appellant deposited service tax

amounting to Rs.24.72 lakhs including cess towards their liability of service tax in Challan No.10044 dated 12.05.2015. On the basis of the documents received, information furnished by the party and the statements of Shri Pyush Agarwal, Director of the appellant, it was observed by the revenue that-

- i. *M/s MHPL have shown in their ST-3 returns that they have provided the services under the category of Works Contract Service and Commercial or Industrial Construction Services during the material period of Show Cause Notice.*
- ii. *M/s MHPL have not issued the bills/invoices serially during the financial year.*
- iii. *M/s MHPL have acted as Contractor or sub-contractor and claimed the exemption in respect of Works contract Service under Sl. No. 29(h) of Notification No. 25/2012-ST dated 20.06.2012 [w.e.f. 01.07.2012].*
- iv. *M/s MHPL have claimed the exemption in respect of Works Contract Service and Commercial or Industrial Construction Services under category of being non-commercial and non-industrial activity and their completion and finishing services during the period from 01.04.2010 to 30.06.2012. And w.e.f. 01.07.2012, they have claimed the exemption for Government work etc. at Sl. No. 12, 13, 14 & 25 of Notification No. 25/2012-ST dated 20.06.2012.*
- v. *M/s MHPL have suppressed the Gross Value of services provided by them in their ST-3 returns on comparison with the figures reflected in the corresponding Balance-sheets.*
- vi. *M/s MHPL have wrongly reflected the figures of CENVAT credit taken on inputs and input services in their ST-3 returns.*
- vii. *M/s MHPL have short paid the service tax as they have not deposited the whole amount of service tax as collected from the service recipients or reflected in the bills/invoices raised by them.*

- viii. *M/s MHPL have wrongly availed the CENVAT credit on inputs, which was not available to them.*
- ix. *M/s MHPL have received the advance payment in respect of taxable services provided by them but they have deposited the service tax on the basis of bill/invoice issued by them.*
- x. *M/s MHPL are also not able to mention exact nature of work done against each project as there are multiple type of orders having variety of nature of work for each project. It is not possible to co-relate nature of work with each project and moreover project goes on for long period in multiple years as well and various nature of works are done. There is no such documentary proof indicating the value of goods and materials sold in respect of the individual recipients of service in case of exempted works contract/job-work. Whereas, in case of taxable service provided under works contract/job-receipts, the value of materials sold can be ascertained from sale invoices.*
- xi. *M/s MHPL have not mentioned the Service Tax Registration No. in the invoices/bill issued by them.”*

2.2 After completion of investigations, it was alleged that appellant have short paid the service tax are wrongly availed the Cenvat credit as detailed in the table bellow:-

Period	Value of Taxable Services/Exempted Services (in Rs.)	Short paid/not paid Service Tax/Amount including cess (in Rs.)
01.04.10-31.03.15	45,01,270	3,78,915
01.04.10-31.03.15	2,64,75,731	7,90,960
01.04.10-31.03.15	69,56,357	1,44,805
01.04.13-31.03.14	7,93,487	28,199
01.04.14-31.03.15	50,000	6,180
01.04.14-31.03.15	Diff. Amount	24,903
TOTAL	3,87,76,845	13,73,962
01.04.14-31.03.15	Wrongly availed Cenvat credit on inputs	17,57,961
01.04.14-31.03.15	Wrongly availed Cenvat	3,09,000

	credit on inputs	
TOTAL		20,66,961
01.04.10-31.03.15	Exempted services- 33,90,92,258	2,09,55,902

2.3 A show cause notice dated 15.10.2015 was issued to the appellant, asking them to show cause as to why-

- i. *"An amount of Rs.2,09,55,902/- (Rupees Two Crore Nine Lac Fifty Five Thousand Nine Hundred Two only) (inclusive of Service Tax amounting to Rs. 2,03,45,536/- Education Cess amounting to Rs. 4,06,911/- & Sec. & Higher Edu. Cess amounting to Rs. 2,03,455/-) not paid by them on exempted services provided by them during the period from 01.04.2010 to 31.03.2015 should not be demanded and recovered from them by invoking extended period under proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of CENVAT Credit Rules, 2004.*
- ii. *Service Tax totally amounting to Rs. 13,73,962/- (Rupees Thirteen Lakh Seventy Three Thousand Nine Hundred Sixty Two only) (Inclusive of Service Tax amounting to Rs. 13,33,944/- Education Cess amounting to Rs. 26,679/- & Sec. & Higher Edu. Cess amounting to Rs. 13,339/-) not paid/short paid by them during the period from 01.04.2010 to 31.03.2015 should not be demanded and recovered from them by invoking extended period under proviso to Section 73(1) of the Finance Act, 1994;*
- iii. *the wrongly availed & utilized CENVAT credit amounting to Rs. 20,66,961/- (Rupees Twenty Lac Sixty Six Thousand Nine Hundred Sixty One only) (inclusive of Service Tax amounting to Rs. 20,06,758/- Education Cess amounting to Rs. 40,135/- & Sec. & Higher Edu. Cess amounting to Rs. 20068 /-) during the period from 01.04.2010 to 31.03.2015 should not be demanded and recovered from them by invoking extended period under proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of CENVAT Credit Rules, 2004.*

- iv. *the service Tax amounting to Rs. 24,72,000/- deposited by them should not be appropriated towards their liability of payment of service tax.*
- v. *Interest at the appropriate rate should not be charged and recovered from them in respect of amount/service tax mentioned at Sl. No. (i),(ii) and (iii) above under Section 75 of the Finance Act, 1994 read with Rule 14 of CENVAT Credit Rules, 2004. The interest amounting to Rs.9,46,320/- deposited by the party towards their liability of interest may not be appropriated and*
- vi. *Interest amounting to Rs. 3,20,358/- on advance amount received by them should not be charged and recovered from them under Section 75 of the Finance Act, 1994. The interest amounting to Rs. 1,91,359/- deposited by the party towards their liability of interest on advance amount may not be appropriated and*
- vii. *Penalty under Section 78 of Finance Act, 1994 read with Rule 15 of CENVAT Credit Rules, 2004 should not be imposed upon them in respect of amount mentioned at (1) & (i) above for suppressing the suppressing the value of taxable/exempted services and wrongly availed & utilization of CENVAT credit and*
- viii. *Penalty under Section 78 of Finance Act, 1994 should not be imposed upon them in respect of service tax amount mentioned at (0) above;*
- ix. *Penalty under Section 76 of Finance Act, 1994 should not be imposed upon them for their failure to collect and pay the service tax, in accordance with the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994;*
- x. *Penalty under Section 77(b) 77(c). 77(d) and 77(e) of Finance Act, 1994 should not be imposed upon them for their various acts of omission and commission as discussed above,*

xi. Penalty under Rule 15A of CENVAT Credit Rules, 2004 should not be imposed upon them for contravention of CENVAT credit Rules as discussed above.”

2.4 This show cause notice has been adjudicated as per the impugned order referred in para 1 above. Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Dharmendra Srivastava learned Chartered Accountant appearing for the appellant and Shri Manish Raj, Authorised Representative appearing for the revenue.

3.2 Arguing for the appellant learned Counsel submits that demand has been categorized in the following categories. Some of the categories as indicated in table bellow, some of which are admitted and they are disputing only the demands which are shown in the table as not admitted. The ground for such claim is also indicated in the said table:-

SR. No.	Amount of Demand Confirmed	Basis Confirmation of as per O-in-O	Relevant para of O-in-O	Grounds of Appellant	Remarks
1	28199.00	There is nonpayment of service tax on Goods Transport Agency Service.	Para 86.1 (page NO. 87)	Individual freight was less than Rs.750/- or Materials were supplied FOR basis	Tax admitted
2	6180.00	Nonpayment of tax on legal fees of advocate under RCM	Para 86.2	Admitted and liable to appropriate from deponent	-do-
3	24903.00	There is short payment as per calculation of department	Para 86.3 (Page No. 87)	Admitted and liable to appropriate from deponent	-do-
4	378915.00	In absence of exact correlation between work orders and corresponding Invoices issued by the appellant, it is not possible to ascertain that work contracts are original contracts and eligible for exemption	Para 86.5 (1) to para 86.5 (IV)	As per Annexure Q-1 works contract services provided to educational society or to Governments for non commercial project which are exempt U/s 65 (105) (zzzza) till 30/06/2012 and there after vide entry no. 12 mega exemption notification 25/2012	Disputed
5	790000.00	In absence of any clear cut demarcation in the contracts, how	Para 86.6 (II) Page no. 90	Sale of Goods is not liable to service tax and falls under negative list. Relied on various	Disputed

		appellant arrived at these figures is not clear. They cannot be allowed to divide the works contract as per their convenience		Judgments of Honorable Supreme Court	
6	144805.00	As per Annexure Q-3, the appellant failed to provide relevant clause/sub clause of Mega exemption Notification	Para 86.7 (II)	In case of Amount of Rs. 1238232/- received from Sunil Charitable Society and Rs. 139697/- from Green earth IIT Bus Stand both were not intended for commerce or Industry hence exempted	Tax admitted
7	1757961/-	Availment of Cenvat credit on input during the impugned period despite of barring in explanation 2 to Rule 2A (ii) of works contract composition scheme.	Para 87.1	Said credit was availed inadvertently which has been paid prior to issued of SCN along with interest	-do-
8	309000.00	Party availed credit of Rs. 309000/- on basis of debit note.		-do-	-do-
9	20955902.00	Since party is engaged in rendering of taxable and non taxable services and failed to maintain separate record hence liable to pay tax under Rule 6(3) on total exempt services of Rs. 339092258/-	Para 88.1 to 88.9	The Party availed eligible credit on input service however preferred to reverse entire credit to avoid litigation Party relied on Judgement of Honorable Allahabad tribunal in case of M/s APCO Intratech Ltd. Appeal No. ST/56050/2014-CU DB	Disputed

3.3 Learned Authorized Representative appearing for the revenue reiterates the submissions findings recorded by the Original Authority in the impugned order.

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

4.2 We are only taking those parts of the order which is under dispute by the appellant. The said para of the order is reproduced bellow-

86.5(i). *Firstly, I shall be considering the demand of Rs.3,78,915/-, which has been detailed in Annexure Q-1 of*

the demand notice. I have observed that the service tax has been demanded on works' contract bills issued to M/s KTL Pvt. Ltd., M/s Sunil Charitable Society, M/s Babu Banarasi Das Educational Society, M/s UPRRN Ltd. and The Regional Sports Officer, Green Park, Kanpur. The details of bills clearly show that the services provided by the party were liable to be classified under the category of Work's Contract Services. I have observed that these services were for providing services of erection and installation of steel/aluminium structures, canopy, construction of false ceiling, structures, structural glazing etc. On perusal of the Table -1 and 2 of the notice, it was seen that the party has mentioned the name of the project and main heading in respect of nature of work/contract. However, on perusal of the Work-Orders/contract/agreement/ Quotation, Supply Order, Paper Orders submitted by the party and resumed from their premises on the day of search, an Annexure-O to the notice has been prepared, wherein the details/nature of work along with other details of some contract/work order have been tabulated. On perusal of the said Annexure, it was seen that in most of the cases, they have done the work relating to supply, fabrication, fitting and erection; Polycarbonate Sheet structure fabricated and erected, structural glazing fabricated and erected; fixing of ACP including cutting and framing and their fixing: copper earthing including material, exhaust fan with all fitting for completion of work including insulation and cover; fixing of signage plate, welding and fixing of stair plate, Roof trusses with sheeting (Addition, alteration and final finish); Providing and fixing of Aluminium structural curtain wall glazing, Cat walk above stage; rain water pipe, Trusses for structural glazing: Flashing for gutters, Bottom grid for False Ceiling suspender, VIP porch structure with top sheet and wire; ACP exterior Top Band & Porch Cladding. Carpet Flooring: Wooden Flooring, False Ceiling at conference/Banquet hall

(Gypsum Designer Ceiling): Soft Fibre Tiles Designing, supply, fabrication and erection of steel trusses including cost of electrodes, gas all consumables etc, Construction of Entrance gate using steel, ACP with material and labour, Fabrication, Erection and Sheeting work: Acoustical False Ceiling: Supply and fixing of 10mm thick bronze polycarbonate sheet: Construction of polycarbonate hemispherical dome of dia meter 5480 outer to outer and height of 230mm at centre made of MS- SHS section as per enclosed structure drawing, Supply and fixing of Kalzip Aluminium Roofing: Providing and fixing hanging cantilever trusses with hilti make chemical anchors complete job; Finishing exterior wall with plastering. construction of polycarbonate skylight using MS pipes, Aluminium sections EPDM gasket, paint, primer and sheets, Installation and commissioning of 259 KVA D.G. Set, Toughened and reflective glass delivered and installed at site etc. Thus, on perusal of the exact nature of work as mentioned in the work orders, I have seen that most of the work relates to completion and finishing services, repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure. It is important to add here that the party has furnished the details of nature of work done by them in the Proforma E and F. On perusal of the said Proforma, it can be seen that they have provided the Name of Project and outline of 'Nature of work to be done under the head 'Nature of Contract particularly in Proforma - E, which pertained to Work Contract Service. The nature of contract/work as Original Labour work of construction activity has been mentioned in Proforma - F, which pertained to Construction Services (job-receipts). In fact, the party has not provided the exact correlation between the work orders and corresponding invoices issued by them. On perusal of the invoices, it can be seen that there is no reference of work order etc to correlate the same with the

Work order or otherwise. Thus, in absence of the same it is not possible to classify the each contract along with the corresponding invoices particularly when one or more projects of the same nature were under execution continuously for a long period. Thus, the claim made by the party that they have executed the original work in all case appears to be not correct in absence of exact co-relation between them. Moreover, the party has not submitted/provided any documents in support of their claim. They have simply mentioned the same in the profoma details submitted by them.

86.5(ii) *Thus, it appeared that in most of the cases, contracts are not isolated or stand alone contracts for original work, but the contracts consist of a number of different elements or supply of different services. These elements are in the nature of completion and finishing services under the facts and circumstances of the case. The service tax was charged on the entire bill value at the rates that were applicable to wok's contract from time to time, as the bills did not indicate the value of goods and services separately. The party in this regard has pleaded that these services were exempted from service tax, as these were the services provided to government organizations or educational institutions and non-commercial organizations for non-commercial and non-industrial purposes. It has been observed that the party had tried to explain that these were services of construction of a new building or civil structure or a part thereof or completions and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to construction of a new building or civil structure or a part thereof, which were not for Industrial or commercial use, which were not taxable. However, from perusal of the explanation given in the annexure-1 attached to the defence reply dated 06-01-2017 submitted by the party, I have failed to find any supporting document*

that indicates that the services provided by the party were construction of a new building or related services as described above.

86.5(iii). *It is also not clear from the contracts, as to whether these services were provided to government and were in the nature of exempted services detailed in any of the clauses of entry no.12 of the mega exemption notification no 25/2012-ST dated 20-06-2012. It is not clear from the precise explanation given by the party, as to how these structures were the part of any educational building or any building to be used by government for non-commercial or non-industrial purposes. On the contrary, I have observed that the services provided by the party were in nature of erection and installation of structures, whether prefabricated or otherwise and were liable to service tax as provided under the definition of taxable services of work's contract given under clause (ii) (a) of definition of explanation appended therewith. The said explanation has been reproduced by the party in their defence reply detailed supra, which I am not mentioning again to avoid repetition. Also I have failed to agree with the submissions of the party, as the same have not been supported with any concrete evidence that supports their submission. It is well known that educational societies or stadiums apart from being used for educational or sports purposes are also given on lease for organizing different activities on commercial level. **Thus, in absence of concrete supporting evidences, I cannot accept the party's submissions in their favour and hold that the services provided by the party are taxable in their hands.***

86.5(iv). *Further, the party, in its additional defence reply dated 09-02-2017, had claimed that the nature of work executed by them was required to be considered as 'original work', as defined in the explanation to Section 2A of the Service Tax (Determination of Value) Rules, 2006. It*

*appears that the party had tried to claim the aforesaid classification only for claiming benefit of payment of service tax on 40% of the taxable value instead of assessment done by the department under 70% of the taxable value. While examining the claim of the party, I have noticed that the party, in its defence reply dated 06-01-2017 (Annexure-1), had not mentioned the exact nature of work performed. The copies of bills issued by them have not been furnished so that actual description can be ascertained. I would like to note that onus to submit supporting documents to prove their claim for exemption rests upon the party. I have seen that in one case the work performed by them has been mentioned as structural glazing, wall paneling, false ceiling etc, which cannot be regarded as 'original work'. **Thus, in light of the facts discussed above, I record that it is not possible for me to extend the benefit claimed by the party and I hold that the party is liable to pay service tax amounting to Rs 3,78,915/- , as detailed in Annexure Q-1 to the impugned demand notice."***

4.3 On the issue referred in para 86.5 (i) to 86.5 (iv) appellant has disputed this demand only by saying that the works contract services provided to educational society or for non-commercial project which are exempted under Section 65 (105) (zzzza) till 30.06.2012 and thereafter vide entry no.12 in mega exemption notification No.25/2012. This entry is reproduced below:-

12. Services provided to the Government, a local authority or a governmental authority by way of construction , erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of –

- (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;*
- (b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and*

Archaeological Sites and Remains Act, 1958 (24 of 1958);

- (c) *a structure meant predominantly for use as*
 - (i) *an educational,*
 - (ii) *a clinical, or*
 - (iii) *an art or cultural establishment;*
- (d) *canal, dam or other irrigation works;*
- (e) *pipeline, conduit or plant for*
 - (i) *water supply*
 - (ii) *water treatment, or*
 - (iii) *sewerage treatment or disposal; or*
- (f) *a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65 B of the said Act;*

4.4 From perusal of the above entry, we do not find any merits in the submissions made by the counsel, there is no exemption to the works contract services provided to the educational society. It is settled law that an exemption notification should conclude strictly and it is for the person claiming exemption to establish that exemption is available to him. In the case of M/s Dilip Kumar and Company [2019 (361) ELT 577 (SC)] a 5 Judges Bench of Hon'ble Supreme Court observed as follows:-

"52. *To sum up, we answer the reference holding as under -*

- (1) *Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.***
- (2) *When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.*

(3) *The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."*

4.5 In view of the above, we do not find any merits in the submissions made by the appellant in this regard and uphold the demand made.

4.6 In respect of the demand of Rs 7,90,960/- which has been disputed by the appellant, following has been recorded in the impugned order:

"86.6 (i). Now, I am taking-up the demand raised for Rs.7,90,960/- as detailed in Annexure Q-2 to the notice, which has been worked out on the basis of Proforma-G submitted by the party during investigation, wherein the party has provided the details of job-receipt [Construction Services] and had shown the sale of material separately. On perusal of the Proforma-G, it has been noted that the party had provided the value of material sold without giving the details of invoices i.e. invoice number & date, except in two cases, where they have given the details of invoice, but date was not mentioned. They have also submitted the annexures to Job-bills/invoices in some cases. On perusal of the same, I have seen that they have not mentioned the details of exact invoice against, which the material was sold. In the absence of such exact details of invoices, it has become impossible to verify the information furnished by them. Thus, to arrive at the value of materials sold, the sale-invoices/Tax Invoices submitted by the party during enquiry have been consulted and the details of sale-invoices in respect of taxable job- receipts as reflected in the Proforma-G have been detailed in Annexure-H to the Notice. It has further been noticed that the party has also sold the materials subsequent to issuance of job-receipts bills/invoices, which indicates that party apart from executing works contract was also selling material. Thus, from the facts before me, I have ascertained that the party was executing works contract,

as well as, was selling material. The work contract was treated as completed after issuance of job-receipt bills/invoices in respect of any particular contract. Accordingly, while calculating this particular demand, the details of material sold to similar parties subsequent to issuance of job- receipt has not been taken into account. I agree that in some cases only material has been sold, which can be verified from the records and Proforma-G, but in general the contracts were entered into for execution of a particular job with material, which qualifies as work's contract for levy of service tax. However, very wisely, the party had divided the work's contract into two parts i.e. supply of goods and provision of services and had paid the service tax only on amount received under the job-receipts and had termed it as construction services. Thus, it appeared that such cases are covered under Works Contract service instead of Construction Services as claimed by the Party. I have seen that on the basis of Proforma-G submitted by the party and details contained in Annexure-H of the show cause notice, the details of taxable job receipt alongwith the details of material sold have been tabulated in Annexure Q-2 to the impugned notice, which contains the details like job-receipt bill/invoice number & date, name of buyer, amount of job-receipt, service tax paid, value of material sold, total value of material sold and amount of short paid service tax. The value of material sold in Col. No. 9 has been taken either from Proforma-G provided by the party or Annexure - H to the Notice. Thus, from the chart submitted by the party having the details of job-wise materials sold to their customer for execution of the said jobs, it had been noticed that the said activities of the party were very well covered under Work's Contract Service, as the transfer of property in goods was involved in the execution of said jobs instead.

86.6(ii). The party in this regard has claimed that the services provided by them were liable to be classified under Construction Service, which they have correctly classified in their ST-3 returns. I have seen that on this issue, no submissions were made by the party in their defence reply dated 06-01-2017, however, in defence reply dated 09-02-2017, the party had claimed that the tax liability has been discharged by them as per the law, in as much as, they have calculated the material value and service value separately and have discharged the service tax on service portion. They have also relied on various case laws already detailed in the portion 'case for the party' above, in support of their claim that they have divided the work's contract into material sale and provision of service, which is legally permissible. To that extent, I agree that legally the service tax can be paid on service portion, if the same is ascertainable, but for this, it is necessary to prove that the contract in this regard was clear enough to show the value of goods separately that were required in execution of works contract, as well as, also reflect the value of services separately. Secondly, on the goods supplied proper VAT/Trade Tax/Sales Tax has been discharged by the party, has also to be proved. In this case, the party had failed to provide any such documentary evidence, which shows that the goods were sold under some agreement to sell the goods. I have observed that the party during investigation has explained that they were also given 'supply orders' [apoorti adesh] apart from 'work orders' (Karya adesh), which means that works contract and sales contract were awarded separately, which were to be considered separately. I have noticed that on being asked to specify the project-wise exact nature of work done and their correlation with work orders/contract with the bills/invoices issued by them, they have shown their inability in providing any such detail. It has specifically been mentioned by them that it was not

possible to correlate nature of work with each period, as the project goes on for long period and similar nature of work is done simultaneously for various projects. In light of these facts, what I have arrived at is that when the party was not in a position to correlate the bills of material with the bills of contract, then how they worked out the value of material and value of service in respect of each works contract, is a mystery. No doubt, their claim that legally they were eligible to work out the value of goods and services embedded in work contract and then pay the service tax on service portion was legally acceptable, but in absence of any clear-cut demarcation in the contracts, how they arrived at these figures is not clear to me. In these circumstances, they cannot be allowed to divide the work contract as per their convenience. It is an undisputed fact that in the case of works contract, the transfer of ownership in property is incidental to execution of such contract. In the case of Larsen & Tubro Ltd. vs CST (2015) 318 ELT (Tribunal LB), it has been held that Works Contract, essentially and inherently, is a contract for service/work, where supply of material is incidental to the contract of work. I have failed to find that why the party had referred many numbers of case laws in their favour, when there is no dispute about payment of service tax on service portion, if it is clearly ascertainable from the contracts. It appears that the party had failed to understand the departmental allegation and had tried to twist the case in their favour only on the basis of case laws. In my opinion the case laws referred by the party are not relevant to the issue in hand, hence, the same cannot be considered for arriving at any conclusion.

86.6(iii). In the case before me, all the contracts executed by the party are primarily for execution of work and the supply of material with them is secondary objective, which confirms that the contracts in this case were works contract and not the contract for sale where the sale of

goods is primary objective. In my opinion, the department had correctly classified the party's activities under the category of works contract and had rightly demanded the service tax on combined value of service, as well as, material transferred while executing the contract after allowing abatement wherever applicable. The details given in Annexure Q-2 have correctly been worked-out by the department to arrive at the taxable value and differential service tax. Under the circumstances and also in light of the facts discussed above, I hold that the service tax amounting to Rs.7,90,960/- as detailed in Annexure Q-2 to the impugned demand notice, which the party has short paid by way of mis- classifying the services under construction services rather than the Works Contract services during the F.Y. 2010-11 to 2014-15, is liable to be recovered from the party."

4.7 On the issue in respect of this demand has been decided by the Commissioner by following the decision of Larger Bench of Tribunal in the case of Larsen & Tubro Ltd. [2015 (318) ELT 633 (Tribunal-LB)]. This decision of the Larger Bench of the Tribunal has been set aside by the Hon'ble Supreme Court reported at [2015 (39) STR (SC)] observing as follows:

"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 property in goods transferred in the execution of a works contract.

25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.

26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different

works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.

27. In fact, the speech made by the Hon'ble Finance Minister in moving the Bill to tax Composite Indivisible Works Contracts specifically stated :-

"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 levy service tax on services involved in the execution of a works contract. However, I also propose an optional composition scheme under which service tax will be levied at only 2 per cent of the total value of the works contract."

28. Pursuant to the aforesaid speech, not only was the statute amended and rules framed, but a Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was also notified in which service providers could opt to pay service tax at percentages ranging from 2 to 4 of the gross value of the works contract.

29. It is interesting to note that while introducing the concept of service tax on indivisible works contracts various exclusions are also made such as works contracts in respect of roads, airports, airways transport, bridges, tunnels, and dams. These infrastructure projects have been excluded and continue to be excluded presumably because they are conceived in the national interest. If learned counsel for the revenue were right, each of these excluded works contracts could be taxed under the five sub-heads of Section 65(105) contained in the Finance Act, 1994. For example, a works contract involving the

construction of a bridge or dam or tunnel would presumably fall within Section 65(105)(zzd) as a contract which relates to erection, commissioning or installation. It is clear that such contracts were never intended to be the subject matter of service tax. Yet, if learned counsel for the revenue is right, such contracts, not being exempt under the Finance Act, 1994, would fall within its tentacles, which was never the intention of Parliament.

30. It now remains to consider the judgment of the Delhi High Court in G.D. Builders.

31. In the aforesaid judgment, it was held that the levy of service tax in Section 65(105)(g), (zzd), (zzh), (zzq) and (zzzh) is good enough to tax indivisible composite works contracts. Various judgments were referred to which have no direct bearing on the point at issue. In paragraph 23 of this judgment, the second Gannon Dunkerley judgment is referred to in passing without noticing any of the key paragraphs set out hereinabove in our judgment. Also, we find that the judgment in G.D. Builders (supra) went on to quote from the judgment in Mahim Patram Private Ltd. v. Union of India, 2007 (3) SCC 668 = 2007 (7) S.T.R. 110 (S.C.), to arrive at the proposition that even when rules are not framed for computation of tax, tax would be leviable.

32. We are afraid that the Delhi High Court completely misread the judgment in Mahim Patram's case. This judgment concerned itself with works contracts being taxed under the Central Sales Tax Act. What was argued in that case was that in the absence of any rule under the provisions of the Central Act, the determination of sale price would be left to the whims and fancies of the assessing authority. This argument was repelled by this Court after setting out Sections 2(g) and 2(ja), which define "sale" and "works contract". The Court then went on to discuss Sections 9(2) and 13(3) of the Central Sales Tax Act. Section 9(2) of the Central Sales Tax Act provides :-

"Section 9. Levy and collection of tax and penalties. -

(2) Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, reassess, collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, reassess, collect and enforce payment of tax, including any interest or penalty, payable by a dealer under this Act as if the tax or interest or penalty payable by such a dealer under this Act is a tax or interest or penalty payable under the general sales tax law of the State; and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, rebates, penalties, charging or payment of interest, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly :

Provided that if in any State or part thereof there is no general sales tax law in force, the Central Government may, by rules made in this behalf make necessary provision for all or any of the matters specified in this sub-section."

33. Section 13(3) of the Central Sales Tax Act says :-

"The State Government may make rules, not inconsistent with the provisions of this Act and the rules made under sub-section (1), to carry out the purposes of this Act."

34. In the aforesaid judgment it was found that Section 9(2) of the Central Sales Tax Act conferred powers on officers of the various States to utilize the machinery provisions of the States' sales tax statutes for purposes of levy and assessment of central sales tax under the Central Act. It was also noticed that the State Government itself had been given power to make rules to carry out the purposes of the Central Act so long as the said rules were not inconsistent with the provisions of the Central Act. It was found that, in fact, the State of Uttar Pradesh had framed such rules in exercise of powers under Section 13(3) of the Central Act as a result of which the necessary machinery for the assessment of central sales tax was found to be there. The Delhi High Court judgment unfortunately misread the aforesaid judgment of this Court to arrive at the conclusion that it was an authority for the proposition that a tax is leviable even if no rules are framed for assessment of such tax, which is wholly incorrect. The extracted passage from Mahim Patram's case only referred to rules not being framed under the Central Act and not to rules not being framed at all. The conclusion therefore in paragraph 36(2) of the Delhi High Court judgment is wholly incorrect. Para 36(2) reads as follows :-

"(2) Service tax can be levied on the service component of any contract involving service with sale of goods etc. Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for computation, it does not follow that no tax is leviable." [at para 36]

35. The aforesaid finding is in fact contrary to a long line of decisions which have held that where there is no machinery for assessment, the law being vague, it would [not] be open to the assessing authority to arbitrarily assess to tax the subject. Various judgments of this Court

have been referred to in the following passages from Heinz India (P) Ltd. v. State of U.P., (2012) 5 SCC 443. This Court said :-

"This Court has in a long line of decisions rendered from time to time, emphasised the importance of machinery provisions for assessment of taxes and fees recoverable under a taxing statute. In one of the earlier decisions on the subject a Constitution Bench of this Court in K.T. Moopil Nair v. State of Kerala [AIR 1961 SC 552] examined the constitutional validity of the Travancore-Cochin Land Tax Act (15 of 1955). While recognising what is now well-settled principle of law that a taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Article 14, this Court found that the enactment in question was violative of Article 14 of the Constitution for inequality was writ large on the Act and inherent in the very provisions under the taxing section thereof. Having said so, this Court also noticed that the Act was silent as to the machinery and the procedure to be followed in making the assessment. It was left to the executive to evolve the requisite machinery and procedure thereby making the whole thing, from beginning to end, purely administrative in character completely ignoring the legal position that the assessment of a tax on person or property is a quasi judicial exercise."

Speaking for the majority Sinha, C.J. said: (K.T. Moopil case [AIR 1961 SC 552], AIR p. 559, para 9)

"9. ... Ordinarily, a taxing statute lays down a regular machinery for making assessment of the tax proposed to be imposed by the statute. It lays down detailed procedure as to notice to the proposed assessee to make a return in respect of property proposed to be taxed, prescribes the authority and the procedure for hearing any objections to the liability for taxation or as to the extent of the tax proposed to be levied, and finally, as to the right to challenge the regularity of assessment made, by recourse

to proceedings in a higher civil court. The Act merely declares the competence of the Government to make a provisional assessment, and by virtue of Section 3 of the Madras Revenue Recovery Act, 1864, the landholders may be liable to pay the tax. The Act being silent as to the machinery and procedure to be followed in making the assessment leaves it to the Executive to evolve the requisite machinery and procedure. The whole thing, from beginning to end, is treated as of a purely administrative character, completely ignoring the legal position that the assessment of a tax on person or property is at least of a quasi judicial character.” (emphasis supplied)

In Rai Ramkrishna v. State of Bihar [AIR 1963 SC 1667] this Court was examining the constitutional validity of the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961. Reiterating the view taken in K.T. Moopil Nair [AIR 1961 SC 552] this Court held that a statute is not beyond the pale of limitations prescribed by Articles 14 and 19 of the Constitution and that the test of reasonableness prescribed by Article 304(b) is justiciable. However, in cases where the statute was completely discriminatory or provides no procedural machinery for assessment and levy of tax or where it was confiscatory, the Court would be justified in striking it down as unconstitutional. In such cases the character of the material provisions of the impugned statute may be such as may justify the Court taking the view that in substance the taxing statute is a cloak adopted by the legislature for achieving its confiscatory purpose.

In Jagannath Baksh Singh v. State of U.P. [AIR 1962 SC 1563] this Court was examining the constitutional validity of the U.P. Large Land Holdings Tax Act (31 of 1957). Dealing with the argument that the Act did not make a specific provision about the machinery for assessment or

recovery of tax, this Court held: (AIR pp. 1570-71, para 17)

"17. ... if a taxing statute makes no specific provision about the machinery to recover tax and the procedure to make the assessment of the tax and leaves it entirely to the executive to devise such machinery as it thinks fit and to prescribe such procedure as appears to it to be fair, an occasion may arise for the courts to consider whether the failure to provide for a machinery and to prescribe a procedure does not tend to make the imposition of the tax an unreasonable restriction within the meaning of Article 19(5). An imposition of tax which in the absence of a prescribed machinery and the prescribed procedure would partake of the character of a purely administrative affair can, in a proper sense, be challenged as contravening Article 19(1)(f)."

(emphasis supplied)

In *State of A.P. v. Nalla Raja Reddy* [AIR 1967 SC 1458] this Court was examining the constitutional validity of the *Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision Act, 1962* (22 of 1962) as amended by the *Amendment Act* (23 of 1962). Noticing the absence of machinery provisions in the impugned enactments this Court observed: (AIR p. 1468, para 22)

"22. ... if Section 6 is put aside, there is absolutely no provision in the Act prescribing the mode of assessment. Sections 3 and 4 are charging sections and they say in effect that a person will have to pay an additional assessment per acre in respect of both dry and wet lands. They do not lay down how the assessment should be levied. No notice has been prescribed, no opportunity is given to the person to question the assessment on his land. There is no procedure for him to agitate the correctness of the classification made by placing his land in a particular class with reference to ayacut, acreage or even taram. The Act does not even nominate the appropriate

officer to make the assessment to deal with questions arising in respect of assessments and does not prescribe the procedure for assessment. The whole thing is left in a nebulous form. Briefly stated under the Act there is no procedure for assessment and however grievous the blunder made there is no way for the aggrieved party to get it corrected. This is a typical case where a taxing statute does not provide any machinery of assessment.” (emphasis supplied)

The appeals filed by the State against the judgment of the High Court striking down the enactment were on the above basis dismissed.

Reference may also be made to Vishnu Dayal Mahendra Pal v. State of U.P. [(1974) 2 SCC 306] and D.G. Gose and Co. (Agents) (P) Ltd. v. State of Kerala [(1980) 2 SCC 410] where this Court held that sufficient guidance was available from the Preamble and other provisions of the Act. The members of the committee owe a duty to be conversant with the same and discharge their functions in accordance with the provisions of the Act and the Rules and that in cases where the machinery for determining annual value has been provided in the Act and the rules of the local authority, there is no reason or necessity of providing the same or similar provisions in the other Act or Rules.

There is no gainsaying that a total absence of machinery provisions for assessment/recovery of the tax levied under an enactment, which has the effect of making the entire process of assessment and recovery of tax and adjudication of disputes relating thereto administrative in character, is open to challenge before a writ court in appropriate proceedings. Whether or not the enactment levying the tax makes a machinery provision either by itself or in terms of the Rules that may be framed under it is, however, a matter that would have to be examined in each case.” (at paras 15-21)

36. In a recent judgment by one of us, namely, *Shabina Abraham & Ors. v. Collector of Central Excise & Customs*, judgment dated 29th July, 2015, in Civil Appeal No. 5802 of 2005 = 2015 (322) E.L.T. 372 (S.C.), this Court held :-
"It is clear on a reading of the aforesaid paragraph that what revenue is asking us to do is to stretch the machinery provisions of the Central Excises and Salt Act, 1944 on the basis of surmises and conjectures. This we are afraid is not possible. Before leaving the judgment in *Murarilal's case* (*supra*), we wish to add that so far as partnership firms are concerned, the Income Tax Act contains a specific provision in Section 189(1) which introduces a fiction *qua* dissolved firms. It states that where a firm is dissolved, the Assessing Officer shall make an assessment of the total income of the firm as if no such dissolution had taken place and all the provisions of the Income Tax Act would apply to assessment of such dissolved firm. Interestingly enough, this provision is referred to only in the minority judgment in *M/s. Murarilal's case* (*supra*).

The impugned judgment in the present case has referred to *Ellis C. Reid's case* but has not extracted the real ratio contained therein. It then goes on to say that this is a case of short levy which has been noticed during the lifetime of the deceased and then goes on to state that equally therefore legal representatives of a manufacturer who had paid excess duty would not by the self-same reasoning be able to claim such excess amount paid by the deceased. Neither of these reasons are reasons which refer to any provision of law. Apart from this, the High Court went into morality and said that the moral principle of unlawful enrichment would also apply and since the law will not permit this, the Act needs to be interpreted accordingly. We wholly disapprove of the approach of the High Court. It flies in the face of first principle when it comes to taxing statutes. It is therefore necessary to reiterate the law as it

stands. In Partington v. A.G., (1869) LR 4 HL 100 at 122, Lord Cairns stated :

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute". (at paras 26 and 31)

37. We find that the Patna, Madras and Orissa High Courts have, in fact, either struck down machinery provisions or held machinery provisions to bring indivisible works contracts into the service tax net, as inadequate. The Patna High Court judgment was expressly approved by this Court in State of Jharkhand v. Voltas Ltd., East Singhbhum, (2007) 9 SCC 266 = 2007 (7) S.T.R. 106 (S.C.). This Court held :-

"Section 21 of the Bihar Finance Act, 1981, as amended states :

*"21. Taxable turnover. - (1) For the purpose of this part the taxable turnover of the dealer shall be that part of his gross turnover which remains after deducting therefrom -
(a)(i) in the case of the works contract the amount of labour and any other charges in the manner and to the extent prescribed;"*

Rule 13A of the Bihar Sales Tax Rules which was also amended by a notification dated 1-2-2000 reads as follows :

"13A. Deduction in case of works contract on account of labour charges. - If the dealer fails to produce any account or the accounts produced are unreliable deduction under sub-clause (i) of clause (a) of sub-section (1) of Section 21

on account of labour charges in case of works contract from gross turnover shall be equal to the following percentages..."

The aforesaid provisions have been adopted by the State of Jharkhand vide notification dated 15-12-2000 and thus are applicable in the State of Jharkhand.

Interpretation of the amended Section 21(1) and the newly substituted Rule 13-A fell for consideration of a Division Bench of the Patna High Court in Larsen & Toubro Ltd. v. State of Bihar [(2004) 134 STC 354]. The Patna High Court in the said decision observed as under :

"Rule 13-A unfortunately does not talk of 'any other charges'. Rule 13-A unfortunately does not take into consideration that under the Rules the deduction in relation to any other charges in the manner and to the extent were also to be prescribed. Rule 13-A cannot be said to be an absolute follow-up legislation to sub-clause (i) of clause (a) of Section 21(1). When the law provides that something is to be prescribed in the Rules then that thing must be prescribed in the Rules to make the provisions workable and constitutionally valid. In Gannon Dunkerley & Co. [(1993) 1 SCC 364 : (1993) 88 STC 204] the Supreme Court observed that as sub-section (3) of Section 5 and sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Act and the Rules were not providing for particular deductions, the same were invalid. In the present matter the constitutional provision of law says that particular deductions would be provided but unfortunately nothing is provided in relation to the other charges either in Section 21 itself or in the Rules framed in exercise of the powers conferred by Section 58 of the Bihar Finance Act.

In our considered opinion sub-clause (i) of clause (a) of Section 21(1) read with Rule 13-A of the Rules did not make sub-clause (1) fully workable because the manner and extent of deduction relating to any other charges has

not been provided/prescribed by the State.” (at paras 9-12)

38. Similarly, the Madras High Court in Larsen and Toubro Ltd. v. State of Tamil Nadu and Ors., [1993] 88 STC 289, struck down Rules 6A and 6B of the Tamil Nadu General Sales Tax Rules as follows :-

“... The eight principles are the criteria and the norms which every State legislation has to conform as per the decision of the Apex Court which has been already adverted to by us supra. In addition thereto, we have also referred to at considerable length the particular reasons assigned by the Apex Court while striking down section of the Rajasthan Sales Tax Act and rule 29(2) of the Rules made thereunder. The impugned rules 6-A and 6-B of the Rules, in our view, do not pass the above vital and essential test and the basic requirements laid down by the ratio of the decision of the Apex Court in Gannon Dunkerley’s case supra;. The impugned rules are squarely opposed to the ratio of the said decision and particularly the ratio laid down in conclusion Nos. 1, 2, 3, 6 and 7 of the decision in Gannon Dunkerley’s case [1993] 88 STC 204 supra; and also reiterated by the Apex Court in the second Builders Association of India case [1993] 88 STC 248 (SC); [1992] 2 MTCR 542. In the light of the above, we see no merit in the stand taken for the respondents relying upon the decisions reported in [1957] 8 STC 561 (SC) (A.V. Fernandez v. State of Kerala) and [1969] 23 STC 447 (Mad.) (Kumarasamy Pathar v. State of Madras) that the omission to exclude certain items relating to non-taxable turnovers is of no consequence and does not affect or undermine the validity of the impugned proceedings. Consequently, applying the ratio of the above decisions, we hereby strike down rules 6-A and 6-B as illegal and unconstitutional, besides being violative of sections 3 to 6, 14 and 15 of the Central Sales Tax Act and consequently unenforceable.

The provisions of section 3-B merely levied the tax on the transfer of property in goods involved in the execution of the works contract. The assessment, determination of liability and recovery had to be under the provisions of the Act read with the relevant rules. In exercise of rule-making power conferred under section 53(1) and (2)(bb), rules 6-A and 6-B came to be made and published. The rules miserably failed to provide the procedure and principles for effectively determining the taxable turnover, after excluding the items of turnover relating to such works contract which could not be subjected to levy of tax by the State in exercise of its power of legislation under entry 64 of the State List. Rule 6 by its own operation had no application in the matter of determination of liability under section 3-B since it has been made applicable only in respect of determining the taxable turnover of a dealer under section 3, 3-A, 4 or 5. Consequently, with our decision above striking down rules 6-A and 6-B of the Rules, there is no proper machinery provisions to determine the taxable turnover for purposes of section 3-B. The provisions of section 3-B, therefore, in the absence of the necessary rules for enforcing the same and determining the taxable turnover for the purposes of section 3-B is rendered dormant, ineffective and unenforceable. Such would be the position till sufficient provisions are made either in the Act itself or in the rules by virtue of the rule-making power to ignite, activate and give life and force to section 3-B of the Act.” (at paras 32, 33)

39. *And the Orissa High Court in Larsen & Turbo v. State of Orissa, (2008) 012 VST 0031, held that machinery provisions cannot be provided by circulars and held that therefore the statute in question, being unworkable, assessments thereunder would be of no effect.*

40. *Finally, in para 31, the Delhi High Court holds :-*

"The contention of the petitioners that the impugned notifications override the statutory provisions contained in Section 65(105), which defines the term "taxable service", Section 66, which it is claimed is a charging section, and Section 67, the valuation provisions of the Finance Act, 1994, has to be rejected. We have, as already stated above, rejected the argument of the petitioners on bifurcation/vivisect and held that as per the provisions of Section 65(105)(zzq) and (zzzh), service tax is payable and chargeable on the service element of the contract for construction of industrial and commercial complexes and contract for construction of complexes as specified and in case of a composite contract, the service element should be bifurcated and ascertained and then taxed. The contention that the petitioners are paying sales tax or VAT on material in relation to execution of the contract under composite contracts for construction of industrial/commercial complexes and construction contracts as specified under Section 65(105)(zzq) and (zzzh) therefore fails. The contention that there was/is no valid levy or the charging section is not applicable to composite contracts under clauses (zzq) and (zzzh) of Section 65(105) stands rejected. But the petitioners have rightly submitted that only the service component can be brought to tax as per provisions of Section 67 which stipulates that value of taxable service is the "gross amount charged" by the service provider for such services provided or to be provided by him and not the value of the goods provided by customers of service provider and the service tax cannot be charged on the value of the goods used in the contract."

41. We are afraid that there are several errors in this paragraph. The High Court first correctly holds that in the case of composite works contracts, the service elements should be bifurcated, ascertained and then taxed. The finding that this has, in fact, been done by the Finance Act,

1994 Act is wholly incorrect as it ignores the second Gannon Dunkerley decision of this Court. Further, the finding that Section 67 of the Finance Act, which speaks of "gross amount charged", only speaks of the "gross amount charged" for service provided and not the gross amount of the works contract as a whole from which various deductions have to be made to arrive at the service element in the said contract. We find therefore that this judgment is wholly incorrect in its conclusion that the Finance Act, 1994 contains both the charge and machinery for levy and assessment of service tax on indivisible works contracts.

42. It remains to consider the argument of Shri Radhakrishnan that post 1994 all indivisible works contracts would be contrary to public policy, being hit by Section 23 of the Indian Contract Act, and hit by Mcdowell's case.

43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.

44. We have been informed by counsel for the revenue that several exemption notifications have been granted qua service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of"

4.8 Undisputedly, the appellant in the present case was paying service tax under the category of 'Construction Services' in

respect of pure service provided as per the work order. Such contracts have been accepted by the Hon'ble Supreme Court. Supply of goods which is under a separate supply order cannot be clubbed with the value of the work order for demanding the service tax. Further, no co-relation has been established or shown in the impugned order so as to clearly show these supply in respect of the same work orders. In view of the above decision of the Hon'ble Supreme Court, we do not find any merits in this demand.

4.9 in respect of demand of Rs 2,09,55,902 Para nos.88.1 to 88.9 of the impugned order observe as follows:-

“88.1. Now. I am taking the issue of demand of amount on the exempted services provided by the party valued at Rs.33,90,92,258/-. The recoverable amount on the non-taxable value of services has been worked out to Rs.2,09,55,902/- ad the detailed calculation thereof is available in Annexure Q-5 to the impugned notice. I have observed that there is no dispute about the fact that the party was engaged in providing taxable, as well as, exempted services and also that the party availed CENVAT credit on inputs and input services, which were used in providing the taxable, as well as, exempted services. It is also an undisputed fact that the services, which were not liable to service tax in terms of Section 66 of the Finance Act, 1994, are also considered as exempted services. The allegation from the departmental side is that the party had violated the provisions of Rule 6 of the CENVAT Credit Rules, 2004, in as much as, while availing CENVAT credit facility they have not maintained any separate accounts in respect of availability and utilization of CENVAT credit to confirm that the CENVAT credit was availed only in respect of those inputs or input services, which were used in providing taxable services. The statement of Shri Piyush Agarwal, director of the company was recorded on 11-05-2015, which has been detailed in the portion captioned as brief facts of the case' above, wherein he has admitted

that they did not maintain separate accounts for taxable and exempted services as required under Rule 6 of CENVAT Credit Rules, 2004, although they were providing exempted services in respect of government projects. He has also admitted that they did not maintain the register of consumables, labour charges, hiring and rentals of machinery and tools, cost of establishment (or other similar expenses) of the contract relatable to supply of labour and services etc, for each work's contract, separately and maintained the records on consolidated basis. It has specifically been admitted by him that it was not practically possible to maintain such records project-wise/contract-wise in their business. Thus, the facts of case before me make it crystal clear that the party was well known about the provisions of availing CENVAT credit, but while availing CENVAT credit on input services did not take care of the provisions and started availing CENVAT credit on common inputs and input services and utilized the same towards payment of service tax.

88.2. *In this regard, while going through the party's version, I have noticed that the party had submitted that they were under bonafide belief that they were eligible to take CENVAT credit of service tax paid on input services, but they have deposited/paid the entire credit to avoid any litigation. It has further been pleaded that since they have debited/deposited the amount taken as CENVAT credit, it shall amount to not taking of credit. They have relied upon various case laws, which have already been mentioned in the section 'case for the party supra. I have considered the said case laws and have noticed that in the case of Chandrapur Magnet Wires (P) Ltd. and Hello Mineral Water (P) Ltd., the decision was given I respect of old set of rules, which were different from the present set of rules, as in new set of rules, various options have been provided for the assessee before starting availing CENVAT credit on common inputs, whereas there was no such facility*

available in old set of rules. In the case of *Bombay Dyeing & Mfg. Co. Ltd., Wartsila (1) Pvt. Ltd. and Mahindra & Mahindra Ltd. (all supra)*, the CENVAT credit was reversed prior to affecting clearances, whereas in this case the CENVAT credit has been reversed after the department detected the matter and started enquiry. In the case of *HMM Coaches Ltd (supra)*, it is not clear that at which juncture the CENVAT credit was reversed. **Therefore, for the difference in facts of the case, the case laws mentioned above are not applicable in this case and the same cannot be considered in party's favour.**

88.3. While considering issue for discussion, I have gone through the exact provisions of Rule 6 with effect from 01.04.2004 i.e. the date of notification of the CENVAT Credit Rules, 2004, and the changes made subsequently till date. I have observed that the provisions crafted under sub-rule (1) of Rule 6 of CCR, 2004 are explicitly clear and state that CENVAT Credit is not allowed on such quantity of input/input services, which are used in providing exempted services. As per sub-rule (2) of Rule 6 of the CENVAT Credit Rules 2004, the manufacturer or provider of output service, who has to maintain separate inventory of the inputs and input services, which were used in manufacture of exempted goods or for providing exempted services, which implies that no services on which CENVAT Credit was taken should be used in providing exempted services. Further, the Rule 6(3) provided that where the service provider, who are engaged in providing taxable and exempted services opt not to maintain separate records, shall have to follow any one of the options provided therein, which at the relevant period were either (i) to pay an amount at the appropriate percentage of the value of exempted services, as provided in the Rules from time to time or to pay an amount as determined under sub-rule (3A). Again for paying the amount determined under sub-rule 3A, it was provided to exercise option in writing to the

superintendent having jurisdiction over the premises/office of the assessee.

88.4 *I have observed from the records on file that the party availed CENVAT credit on various inputs and input services by overlooking the conditions of maintaining separate accounts of receipt & consumption, which was a strict obligation placed on the assessee and no deviation was allowed in respect of following the mandatory conditions/procedures laid down in law. Any failure in complying mandatory conditions would attract the consequence attached with it, as prescribed in the provisions. The words used in the rules are **"the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input services meant for use in the manufacture of dutiable final products or in providing output services and quantity of input meant for use in the manufacture of exempted goods or service."** The word 'shall' used therein reflects that following the procedure is mandatory and requires that the condition should be followed strictly and the legal responsibility to prove that they fully discharged their obligation lies upon them.*

88.5 *On perusal of records in the instant case, what I have noticed is that the party did not maintain separate records as envisaged in the Rule 6(2) of the CENVAT Credit Rules, 2004 in respect of inputs/input services used in providing of exempted/non-taxable services, as well as, in the taxable services. From the facts submitted by the party, I have noticed that they took CENVAT credit amount of duty paid on common inputs and service tax paid on common input services. On being asked, they have confirmed that they have availed the CENVAT credit of common inputs/input services used in providing taxable, as well as, exempted services and also informed that in their case, it was not possible to maintain separate*

accounts, as the services were of complex nature and it was not possible to ascertain the quantum of exempted or taxable service provide by them by using common input or input service. Further, I have seen that for the provider of taxable, as well as exempted services, sub-rule (2) of the Rules 6 states that such manufacturers **shall maintain** separate records for receipt and use of inputs/input services used for providing taxable services and take CENVAT credit only on that quantity of inputs/input services, which is intended for use in services on which tax is payable. I find that in the instant case, the party has taken CENVAT credit although it was known to them that they not in a position to maintain separate accounts and utilized the same for payment of service tax on taxable output services. I have observed that it was impossible to co-relate the quantum of input services consumed in the providing non-taxable services, especially when the party itself has admitted this fact. The facts discussed above make me to believe that they were not maintaining any separate record, which shows that the party had failed to comply with the mandatory provisions of Rule 6(2) of the CENVAT Credit Rules 2004 for maintaining separate records of inputs and input services

88.6. I have noticed that the party has contested that since, they have reversed the entire credit taken on common inputs, they are not required to any amount as demanded in the notice. To this extent, I am not in agreement with the party and observe that the party has either misunderstood the provisions of Rule 6 or has tried to manipulate the provisions to cover up their attempt to evade the payment of amount. In fact the provisions of Rule 6(2) are very simple and state that "**where a manufacturer or provider of output service avails of CENVAT credit in respect of any input or input services and manufactures such final products or provides such output service, which are chargeable**

to duty or tax as well as exempted goods or services, then manufacturer or provider of service shall maintain separate accounts for receipt, consumption and inventory of input and input services meant for use in the manufacture..." From the said Rule, it becomes very clear that if the service provider is providing taxable as well as exempted services and is taking credit **on any of the input or input services** then, they will have to maintain separate account of receipt, consumption and inventory of such input/inputs and input service or services used in manufacture of final product or for providing taxable services. If the manufacturer opts not to or fails to maintain separate accounts, the option available with the manufacturer are, as provided under Rule 6(3) of the said Rules, which are mandatorily required to be followed i.e. either to pay amount @ 5% or 6%, as the case may be, of the value of exempted goods or to pay an amount equivalent to the CENVAT credit attributable to the input or input services used in or in relation to the manufacture of exempted goods or used for providing exempted services subject to the conditions and procedure provided in sub-rule 3A. Therefore, in my opinion by stating that they did not maintain separate accounts, as it was not possible, the party has accepted departmental allegation that they have not followed the provisions of Rule 6(2) as well as Rule 6(3A), therefore they are liable to pay amount as provided in the Rule 6 (3) (1) of the said Rules.

88.7. I find that the party has contended that since, they have reversed the entire CENVAT credit, which is equivalent to non-availment of CENVAT credit, it can be considered that they have observed the conditions laid down under Rule 6 (2), therefore, provisions of Rule 6 (3) are not applicable to them. In this regard, I am not in agreement with the submissions of the party and would like to refer to the findings of certain higher judicial

forums, which are as follows, wherein the party's view has been disregarded and distinguished. Firstly, I place reliance on Hon'ble High Court, Mumbai's decision in the case of Commissioner of C. Ex. Thane-I V/s M/s Nicholas Piramal (India) Ltd. (2009(244) ELT.321(Bom.)) wherein it has been held that:-

"CENVAT/Modvat-Inputs, common inputs used in dutiable and exempted goods-Tribunal Larger Bench not right in allowing reversal of credit on inputs instead of payment of 8% or 10% of price of exempted goods as per rules-Rule 57C or Rule 57CC of erstwhile Central Excise Rules, 1944 not considered by Supreme Court in 1996(81)E.LT.3(S.C) and ratio therein not applicable to construe Rule 6 of Central Excise Rules, 2002 (now rule 6 of CENVAT Credit Rules, 2004) - Hardship in maintaining accounts or following rule not makes rule absurd or unjust-Difficulty realized and presumptive tax provided in rules-Rule 6(2) ibid mandatory applicable once dutiable and exempted final products manufactured from common inputs and credit can be availed only in terms of Rule 6(3) ibid-Credit admissible only as per method prescribed and assessee not having any choice of claiming or reversing credit-Impugned order holding payment of 8% or 10% amount not required if credit reversed on inputs used in exempted goods, not agreed with-Rule 57CC of erstwhile Central Excise Rules, 1944.

And in the para-13 of the aforesaid judgment, it was held by the Hon'ble High Court, Bombay that-

"On a consideration of Rule 57CC, it is clear that if inputs are used in the manufacture of goods, which are chargeable to duty as well as exempted goods such manufacturer shall pay an amount equal to eight percent of the price (excluding sales tax and other taxes, if any payable on such goods) of the

exempted final product charged by the manufacturer for the sale of such goods at the time of clearance from the factory unless the manufacturer in terms of sub Rule (9) maintain separate inventory and accounts of the receipt and of use of inputs in the manufacture of exempted goods. This rule as both the explanatory note to the Finance Bill and the Budget Speech was introduced on the realization that the procedure was cumbersome and it was difficult to determine whether the reversal of credit was proper or not. The delegate making the rule as also the Finance Minister were aware of the practical difficulties faced by the Industry.

Thus, if the manufacturer uses inputs in respect of both, manufacture of exempted goods and dutiable goods, then if no separate inventory is maintained for receipt and use, the manufacturer in respect of dutiable goods could take credit of the specified duty paid on such inputs, otherwise pay 8% of the price in terms of Rule 57C.

88.8. *I would also like to place reliance on case laws detailed as under, which further consolidate that in case no separate inventory is maintained for receipt & consumption of inputs used in the manufacture of dutiable/exempted product, manufacturer shall be liable to pay 10% 'amount' (or as applicable) on the value of exempted goods cleared:*

1. M/s Shreyans Industries Ltd. Vis Commissioner of Central Excise, Jalandhar reported in 2008 (232) ELT 291(Tri-Del.) in the Stay Order No. 665/2008-EX (PB), dated 26-6-2008 in Application No E/Stay/1086/2008 in Appeal No. E/1108/2008 holding that-

Stay/Dispensation of pre-deposit - CENVAT/Modvat - Inputs commonly used for both exempted and dutiable final goods-Assesses used inputs for exempted final products which are cleared based on end-use - Since inputs were stored together, accounts maintained by them

were held to be not reliable and not co-relatable to actual use of inputs for exempted goods - If 10% of amount is paid on such exempted goods, they are eligible to take credit remaining with them, such submission prima facie acceptable - Assesses having not made a prima facie case for full waiver, directed to deposit an amount of Rs. 65 lakhs within 12 weeks from date of order -Subject to said deposit, balance of duty stands waived - Rule 6 of Canvat Credit Rules, 2004- Section 35F of Central Excise Act, 1944. [para 5]

2 M/s Ghodawat Foods International Pvt. Ltd: Versus Commr. of C. Ex., Pune Final Order No. A/384/2008-WZB/C-li/(SMS), dated 15-4-2008 in Appeal No. E/700/2007 reported in 2208(229) ELT261(Tri-Mumbai) holding that-

Demand and penalty CENVAT/Modvat - Common Inputs used in manufacture of exempted as well as dutiable final product- separate account not maintained - 10% amount of the exempted products cleared from the factory manufactured by using such inputs payable-Demand upheld.-[paras 8, 10, 11]

3. M/s Bharat Heavy Electricals Ltd. V/s Commissioner of Cus. & C.Ex. Bhopal reported 2003 (160) E.L.T. 928 (Tri. - Del)-Final Order No. A/316/2003-NB (C), dated 24-6-2003 in Appeal No. E/1788/2001-NB(C) holding that-

CENVAT/Modvat - Modvat on inputs - Credit availed on inputs used for manufacture of conditionally exempted final product - No separate inventory and accounts maintained in respect of use of inputs in relation to manufacture of exempted final product - Appellants liable to pay an amount equal to 8% of the price of exempted final product at the time of its clearance as per Rule 57CC(1) of erstwhile Central Excise Rules, 1944 - However, such amount not payable in respect of period prior to insertion of Rule- 57CC ibid, [para 5]

4. M/s Eastern Medikit Ltd. Vis Commissioner of Central Excise, Gurgaon reported in 2009(242)ELT51(Tri- Del.) Final order No. 442/2009-SM(BR) (PB), dated 13.5.2009 in appeal No. E/.1897/2005-SM holding that,-

CENVAT/Modvat wrong availment of CENVAT/Modvat credit availed on common inputs used in dutiable and exempted goods-separate record or separate inventory of inputs not maintained-Though plea that CENVAT credit on inputs used in exempted goods not taken, but no documents in this regard produced-Liability to pay 8% not disputed.

88.9. *In the light of above facts, I am of the considered opinion that since, the party has not followed the conditions/procedure as laid down in the Rule 6 of the CENVAT Credit Rules, 2004. They have neither maintained any separate records for input or input services nor have they followed the procedure for proportionate reversal as laid down in Rule 6(3A) and, therefore, no other option was left for them, but to pay the amount at the prescribed rates as per Rule 6 (3) (i) of the said Rules. **From the above discussions, it is evident that the benefit sought by the party cannot be extended, as they have failed to prove their submissions. Therefore, I hold that demand of amount is liable to be confirmed and no benefit can be given to the party, as has been claimed for. Therefore, I hold that entire amount of Rs.2,09,55,902, is liable to be confirmed, as payable by the party"***

4.10 In respect of this demand, we observe that appellant had already deposited the entire amount taken by them as Cenvat credit. Undisputedly, Commissioner has recorded the same in para 88.2 reproduced above. Hon'ble Supreme Court in the case of Chandrapur Magnet Wires (Pvt.) Ltd [1996 (81) E.L.T. 3 (S.C.)] and Hon'ble Allahabad High Court has in case of Hello Mineral Water Pvt. Ltd [2004 (174) E.L.T. 422 (All.)] observed that once the Cenvat credit has been reversed then it is as good

as not taking the Cenvat credit. In the present case appellant have reversed the entire Cenvat credit prior to the issuance of the show cause notice. Thus situation is that the appellant have not at all taken any Cenvat credit and hence there cannot be any applicability of the provisions of Rule 6 (3) B of Cenvat Credit Rules for demanding the service tax in respect of the exempted services provided. In the case of M/s APCO Intratech Ltd. (Final Order No 72899/2018 dated 10.12.2018) Allahabad Bench has observed as follows:

"5. A further dispute arises as regards availment of input tax credit. Revenue has contended that inasmuch as, the appellant has availed composition scheme, it was not permissible to avail the Cenvat credit.

Learned Advocate appearing for the appellant submits that the said credit was reversed by them, thus leading to a situation as if no credit was availed. Though the adjudicating authority has accepted the fact of reversal of the credit but he has not extended the credit by observing that the said credit was not reversed within the time limit prescribed for filing a revised ST-3 return.

However, we do not find favour with the above stand of the Revenue. As per the settled law such reversal can be even at the appellate stage and as such would amount to non availment of credit. The expiry of the period of filing the revised ST-3 return has got no relation to the timing of reversal of credit."

In case of Mercedes Benz India (P) Ltd.[2015 (40) S.T.R. 381 (Tri. - Mumbai)] Mumbai Bench has held as follows:

"5.1 *We have observed that in Rule 6(3) prevalent at the relevant time, two options have been provided :-*

- (i) Payment of 5% on value of exempted services.*
- (ii) Payment of an amount equal to the Cenvat Credit amount attributed to input services used in or in relation to manufacture of exempted goods or provision of exempted services as provided under sub rule (3A)(b).*

It is observed that the appellant has availed the option provided under sub-rule (3)(ii) of Rule 6 and paid an amount as per sub-rule (3A) along with interest and intimated the same to the jurisdictional superintendent in writing vide letter dated 14-3-2012. From the perusal of the said letter, we observed that the appellant categorically stated in the said letter that payment of Cenvat Credit, which they have made alongwith interest is in accordance with Rule 6 (3A) of Cenvat Credit Rules. With this act of the appellant, it is clear that the appellant opted for the option as provided under Rule 6(3)(ii) of the Cenvat Credit Rules, 2004, in accordance to which, the appellant are supposed to an amount equivalent to Cenvat Credit on input service attributed to the exempted service in terms of Rue 6(3A). In the present case, the appellant has availed Cenvat credit in respect of common input services, which has been used in relation to the manufacture of the final product as well as for trading of bought out cars. Therefore they are supposed to pay an amount equivalent to Cenvat credit which is attributed to the input service used for exempted service i.e. sale of car. In our view, three options have been provided under Rule 6(3) and it is up to the assessee that which option has to be availed. Revenue could not insist the appellant to avail a particular option. In the present case the appellant have admittedly availed option as provided under Rule 6(3)(ii) and paid an amount as required under sub-rule (3A) of Rule 6. As regard the compliance of the procedure and conditions as laid down for availing option as provided under sub-rule (3)(ii), we find that foremost condition is that the appellant is required to pay an amount as per the formula provided under sub-rule (3A) on monthly basis. However, we find that as per the provision, payment on monthly basis is provisional basis, therefore it is not mandatory that whole amount or part of the amount was required to be paid on every month. The appellant though

belatedly calculated the amount required to be paid in terms provided under sub-rule (3A) of Rule 6, therefore to fulfill the condition, assessee should pay the said amount, which has been complied by the appellant.

5.2 *As regard the delay in payment, if any, the appellant have discharged the interest liability on such delay. Regarding the compliance as provided under Clause (a) of sub-rule (3A) of Rule 6 the appellant while exercising this option is required to intimate in writing to the Jurisdictional Superintendent, Central Excise, the following particulars namely :*

- (i) Name, address and registration No. of the manufacturer of goods or provider of output service;*
- (ii) Date from which the option under this clause is exercised or proposed to be exercised;*
- (iii) Description of dutiable goods or taxable services;*
- (iv) Description of exempted goods or exempted services;*
- (v) Cenvat credit of inputs and input services lying in balance as on the date of exercising the option under this condition.*

As per the submission of the appellant and perusal of their letter along with enclosed details, it is found that more or less all these particulars were intimated to the Jurisdictional Superintendent. The appellant has been filing their returns regularly on monthly basis to the department. On perusal of the copies of the such return submitted along with appeal papers, it is observed that the particulars, as required under clause (a) of sub-rule (3A) of Rule 6 has been produced to the range superintendent. Therefore all the particulars which are required to be intimated to the Jurisdictional superintendent while exercising option stand produced. Though these particulars have not been submitted specifically under a particular letter, but since these particulars otherwise by way of

return and some of the information under their letters has admittedly been submitted, we are of the view, as regard this compliance of Rule 6(3A), it stood made.

5.3 *As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should be expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6(3)(ii). The meaning of the option as argued by the Ld. Sr. Counsel is that "option of right of choosing, something that may be or is chosen, choice, the act of choosing". From the said meaning of the term 'option', it is clear that it is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same.*

5.4 *We find that the appellant admittedly paid an amount of Rs. 4,06,785/- plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub-rule (3A) of Rule 6 of Cenvat Credit Rules, therefore demand of huge amount of Rs. 24,71,93,529/- of the total value of the vehicle amounting to. Rs. 494,38,70,577/- sold in the market cannot be demanded. We are also of the view that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. The*

main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods. It is also observed that in either of the three options given in sub-rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5% will automatically be applied. Therefore we do not understand that when the appellant have categorically by way of their intimation opted for option provided under sub-rule (3)(ii), how Revenue can insist that option (3)(i) under Rule 6 should be followed by the assessee.

5.5 *As discussed above and in the facts of the case that actual Cenvat credit attributed to the exempted services used towards sale of the bought out cars in terms of Rule 6(3A) comes to Rs. 4,06,785/- where as adjudicating authority demanded an amount of Rs. 24,71,93,529/-. In our view, any amount, over and above Rs. 4,06,785/- is not the part of the Cenvat Credit, which required to be reversed. The legislator has not enacted any provision by which Cenvat credit, which is other than the credit attributed to input services used in exempted goods or services; can be recovered from the assessee."*

4.11 In view of the decisions as above we do not find any merits in the impugned order demanding the reversal by application of Rule 6 (3) (i).

4.12 Impugned order records that extended period in the present case has to be upheld. The relevant paragraphs of the order are reproduced bellow:-

90.1. *Now coming to the issue of limitation, I have noticed that had suppressed/mis-declared the correct value of Taxable Services and Exempted Services in respect of*

Works Contract and Construction Services, which have been provided by them provided by them. I have noticed that in their ST-3 returns filed for the period under consideration, there was a significant variation between the figures reflected in their Balance-sheet and corresponding ST-3 returns. The correct figures of taxable service in respect of freight paid by them were not reflected in their ST-3 returns. The figures of Legal Expenses paid to an Advocate or firm were also not reflected in ST-3 returns. They have also suppressed the fact from the department that in some cases of private projects they have executed the work with materials and mis-classified the said activity under Construction services instead of Works contract services with intent to evade payment of tax, although Shri Agarwal in his statement stated that they have classified the construction work along with material, under Works Contract services. The fact of not maintaining the separate accounts in respect of Taxable and exempted services as required under Rule 6(3) of CENVAT Credit Rules have also been suppressed from the department. I have noticed that the party had wrongly availed and utilized the CENVAT credit on input and input services, which were not admissible to them. The facts of providing of taxable services and actual income received there from have been willfully suppressed/mis-declared from the knowledge of the department with intent to evade payment of service tax, even though they were in full knowledge of the facts and provisions that CENVAT credit was not admissible on inputs. It was also well known to the party that it was not possible for them to maintain separate accounts in respect of taxable as well as non- taxable services. In lights of the facts stated above, it gets confirmed that the party had not disclosed all the services and the taxable value provided by them in their ST-3 returns for assessment. The value of taxable service and exempted services had escaped

assessment. The party had willfully and deliberately suppressed the gross value of taxable services/exempted services rendered by them, with intent to evade payment of Service Tax. Had the departmental officers not initiated the inquiry against the party, the said non-payment of Service Tax and amount to be paid on exempted services would have escaped from the eyes of department. In the instant case, they failed to discharge their duties and responsibilities as required under the provisions. Therefore, the allegations from the department that they had willfully not deposited the applicable service tax, gets confirmed. It also gets confirmed that they did so with intent to evade payment of service tax.

90.2. *I have noticed that the party has challenged invocation of provisions of extended period under Section 73(1) of the Finance Act, 1994 by stating that the demand was time barred and also they did not suppress or misrepresent the facts. It has been claimed that whatever they have claimed as CENVAT credit was legal and was taken under bonafide belief that CENVAT credit was admissible to them. I do not agree with the submissions of the party, in as much as, no reasons have been provided by the party, as to how they were under the reasonable bonafide belief that they were legally eligible to avail CENVAT credit, when they themselves have admitted that they were not in position to maintain separate accounts in respect of taxable and non-taxable services provided by them. From the analysis of nature of services provided by the party. I have noticed that the contracts for sale of construction material and services to government were exempted from levy of services tax whereas, the works contract services in respect of commercial and industrial construction were taxable and this fact was well known to the party, still the party availed CENVAT credit on entire input services without observing the provisions of Rule 6 of the CENVAT Credit Rules, 2004 and did not declare the fact*

of providing non-taxable services in their returns. Also they availed CENVAT credit on inputs, which was not available to the party. The burden to show that there was any reasonable cause rests upon the assessee, but the party in this case has not brought any fact on record to prove any reasonable cause. It gets confirmed from the findings of Hon'ble Tribunal in the case of M/s Bajaj Travels Ltd. vs CCE [2012(25) STR 417(Del)] that burden to prove reasonable cause rests upon the party. I notice that it is on records that the party suppressed the facts described above from the department and also did not disclose crucial facts in their statutory filed ST-3 returns. It is, therefore, evident that there was deliberate withholding of essential information from the department, consciously and purposefully to evade payment of Service Tax, and therefore, the argument extended by the party cannot be accepted. The plea of the party that they were under bonafide belief cannot be accepted for the reason that they never brought these facts in the knowledge of the department and sought any clarification. Even if the plea is accepted for the sake of discussion that the party was under bonafide belief then, why they did not deposit the appropriate amount and demonstrated their positive gesture, as soon as the department started proceedings for recovery.

90.3. *It is an admitted fact on record that the facts regarding providing taxable, as well as exempted services came to the knowledge of the department only when enquiry was started. Hon'ble CEGAT in the case of Agrico Engineering Works vs. CCE [2000(122) ELT 891 (CEGAT)] has held that "No suppression' cannot be pleaded unless there is something on record to show that they pointed out some fact to Revenue and even after the discovery of that fact, Revenue has not taken any action." It has also been held by Hon'ble CEGAT in the case of Alaska Tyres vs. CCE [2002(145) ELT 329 (CEGAT)] that it is for assessee to*

*disclose all material facts to department otherwise the larger period can be invoked. In the instant case, at no point of time, the party came forward to disclose any information to the department. Hence, on the basis of the facts of the case and in view of referred case laws, it is clear that the party never made a specific disclosure of their activities. In fact, had the present case not been investigated, the department would never have come to know of the said activities and the revenue would have suffered. **Thus, the facts clearly suggest that the party willfully suppressed the vital facts as pointed out here-in-above from the department with intent to evade the payment of the Service Tax and I hold that this is a fit case for invoking the proviso to Section 73(1) of the Finance Act, 1994 readwith Rule 14 of the CENVAT Credit Rules, 2004 for recovery of tax/amount, as the case be, for the extended period.***

Appellant do not seriously dispute the said findings accordingly we are of the view that extended period has been rightly invoked in the present case.

4.13 Thus, in terms of our findings and as admitted by the party following tax liability needs to be confirmed:-

S No	Amount of Demand Upheld 'Rs	Reason for upholding
1	28199.00	Admitted and paid
2	6180.00	Admitted and paid
3	24903.00	Admitted and paid
4	378915.00	Para 4.5
5	144805.00	Para 4.5
6	1757961.00	Admitted and paid
7	309000.00	Admitted and paid
Total	2649963.00	

4.14 It is also settled position in law that if the tax has not paid by the due date demand for interest is to be upheld. Accordingly, we hold that interest in respect of the demand as admitted and upheld by us, needs to be confirmed against the appellant.

4.15 As we uphold the extended period of limitation as application for these demands in our view penalty imposed under

Section 78 needs to be imposed in respect of the amounts confirmed in our order. Accordingly, penalty under Section 78 is reduced to total Rs 26,49,963/-. In respect of the penalty imposed under Section 78 demand for interest under section 75 we would rely upon the decision of Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills Ltd. [2009 (238) ELT 3 (SC)] observing as follows:

"11. In a case of non-payment, short-payment or erroneous refund of duty normally three issues are likely to arise relating to (i) recovery, (ii) interest and (iii) penalty. The three issues are dealt with under Section 11A (Recovery of duties), Section 11AA (Interest for the period from three months after the determination of duty payable till the date of payment of duty), section 11AB (Interest for the period from the first day of the month succeeding the month in which duty was payable till the payment of duty) and Section 11AC (Penalty for short levy or non levy of duty).

Section 11A reads as follows :

"11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or [erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder], a Central Excise Officer may, within [one year] from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, [as if] for the words ["one year"], the words "five years" were substituted :

Explanation. - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of [one year] or five years, as the case may be.

[(1A) When any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under Section 11AB and penalty equal to twenty-five per cent of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice.]

(2) The [Central Excise Officer] shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

Provided that if such person has paid the duty in full together with, interest and penalty under sub-section (1A), the proceedings in respect of such person and other

persons to whom notice are served under sub-section (1) shall, without prejudice to the provisions of section 9, 9A and 9AA, be deemed to be conclusive as to the matters stated therein :

Provided further that, if such person has paid duty in part, interest and penalty under sub-section (1A), the Central Excise Officers, shall determine the amount of duty or interest not being in excess of the amount partly due from such person.]

[(2A) Where any notice has been served on a person under sub-section (1), the Central Excise Officer, -

(a) in case any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty, where it is possible to do so, shall determine the amount of such duty, within a period of one year; and

(b) in any other case, where it is possible to do so, shall determine the amount of duty of excise which has not been levied or paid or has been short-levied or short-paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub-section (1)

(2B) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty [on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer] before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid :

Provided that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1. - Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short-paid or was erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.

Explanation 2. - For the removal of doubts, it is hereby declared that the interest under section 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section.

(2C) The provisions of sub-section (2B) shall not apply to any case where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.]

(3) For the purposes of this section -

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means, -

[(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid -

- (A) *where under the rules made under this Act a periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;*
- (B) *where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;*
- (C) *in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;]*
- (b) *in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;*
- (c) *in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.]"*

From sub-section 1 read with its proviso it is clear that in case the short payment, non payment, erroneous refund of duty is unintended and not attributable to fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made under it with intent to evade payment of duty then the Revenue can give notice for recovery of the duty to the person in default within one year from the relevant date (defined in sub-section 3). In other words, in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. But in case the non-payment etc. of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priori the period for which duty can be demanded gets extended to five years.

16. The other provision with which we are concerned in this case is Section 11AC relating to penalty. It is as follows :

[11AC. Penalty for short-levy or non-levy of duty in certain cases.- where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :

[Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the

consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect -

Explanation. - For the removal of doubts, it is hereby declared that -

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

17. The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "...by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped

duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."

4.16 Further, Commissioner has not imposed any penalty under Section 76 of the Finance Act, 1994 as clear penalty under Section 78. Further, he has imposed penalties under Section 77 (1) B E C and Rule 15 of Cenvat Credit Rules, these penalties of civil nature for procedural contraventions and modifications which are justified in this case. Accordingly, we uphold the penalties under these sections too.

4.17 Impugned order is modified accordingly as indicated above.

5.1 Appeal is partially allowed.

(Pronounced in open court on-07/12/2023)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)