

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

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70374 of 2019

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APPL- 1910-18-19 dated 07.01.2019 of the Commissioner Central Goods & Service Tax (Appeals) Noida)

**Commissioner of Central Excise &
CGST, Noida**

(C-56/42, Renu Tower, Sector-62, Noida-201309)
VERSUS

.....Appellant

M/s Lifeline Builders Pvt. Ltd.,

(Plot No.2A, Sector-94, Noida-201303)

....Respondent

APPEARANCE:

Shri Sarweshwar T. Khairnar, Authorised Representative for the
Appellant
None for the Respondent

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

FINAL ORDER NO.70251/2023

DATE OF HEARING : 01 December, 2023
DATE OF DECISION : 01 December, 2023

SANJIV SRIVASTAVA:

This appeal filed by revenue is directed against Order in Appeal No.NOI-EXCUS-001-APPL- 1910-18-19 dated 07.01.2019 of the Commissioner Central Goods & Service Tax (Appeals) Noida. By the impugned order following has been held:

"6. I have carefully gone through the case records, and the submissions made by the appellant. It was alleged that the appellant had not exercised any option under Rule 3 (3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 (in short WCR) and as there was no declared value of the contract undertaken

by the appellant as provided in Rule 3 (4) of said WCR, the service provided by the appellant was not classifiable under the category of Works Contract Service'. It was further alleged that construction of hotel was purely a commercial activity and it would fall under "Commercial or Industrial construction Service". It was also alleged that the appellant had not paid service tax correctly on the value of services as shown in the debit notes issued by the appellant debiting service recipient's account.

7. Under Section 65 (105) (zzzza) of the Finance Act 1994 defined the 'Works Contract Service'. The relevant part of the Explanation to the said Section reads as-

Explanation- For the purpose of this sub-clause, "works contract" means a contract wherein,

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*
- (ii) such contract is for the purposes of carrying out,*
 - a. ...*
 - b. construction of a new building, or a civil structure or a part thereof, or of a pipeline or primarily for the purposes of commerce or industry; or*

In the instant case, the appellant had executed a project development agreement with the service recipient on 01/09/2010 for the construction of a hotel which falls under clause (b) above as construction of a new building for the purposes of commerce. For the construction work the appellant had used various goods such as steel, and RMC on which applicable VAT/ Sales Tax was paid is evident from the sample invoices for the procurement of these goods submitted by the appellant. The property in the goods involved in the execution of the contract for the construction of the hotel involves transfer of the same on

the completion of the service. It is therefore evident that the twin conditions as provided under clause (i) and (ii) (b) of the above referred Explanation were fulfilled in the case of the service provided by the appellant. The said services have therefore been correctly classified as ' works contact service' and the service tax has accordingly been discharged by the appellant. The appellant had issued debit notes for the entire consideration including the amounts of VAT/ Sales Tax payable/paid, which was to be reimbursed by the service recipient.

8. Regarding exercise of the option as provided under Rule 3 (3) of the WCR, I find that Hon'ble CESTAT, Principal Bench, New Delhi in the case of Mehta Plast Corporation vs. CCE, Jaipur, reported in [2016 (44) S.T.R. 651 - (Tri. - Del.)] have held as under-

"Works Contract service - Composition scheme - Option whether to be given in writing - No such requirement of option in writing and mere payment of Service Tax under impugned scheme acts as an option - Impugned order set aside - Section 65(105)(zzzza) of Finance Act, 1994."

I also find that in terms of Rule 3(4) of the WCR, benefit of 'Works Contract Service' was not available if declared value was less than the gross amount charged. In the instant case, I find that in para 3.6 of the project development agreement dated 01.09.2010 entered between the appellant and M/s Vision Town Planners Pvt. Ltd., the service receiver was to pay an amount equivalent to actual plus 5% to the service provider apart from service tax, WCT and any other statutory taxes and levies. There is no allegation in the show cause notice that the appellant had charged/ realized any amount in excess of such declared/ agreed value of service from the recipient of service. I therefore hold that there was substantive compliance of the requirement of both the Rules 3(3) and 3(4) of the WCR. In view of the above I hold that the

appellant has correctly classified the service provided by him and paid the service tax accordingly. The demand of the service tax due to alleged wrong classification of the taxable service is therefore not sustainable. As the demand is not sustainable on merits, any further discussion on the limitation of time for raising the demand is not warranted

9. *Regarding alleged differences between the value of services as shown in three debit notes dated 31.3.2011, 31.3.2012, and 31.3.2013 and the value as declared in ST-3s submitted during the relevant period, I find that the issuance of debit note or credit note is an established accounting procedure wherein some transactions are accounted for in books of account of buyers and sellers. The appellant has contended that he had not received any payment from the recipient of service against those debit notes till date. In support of his contention he has produced copies of ledger accounts relating to the service receiver maintained for the period from 01/04/2010 to 31/01/2017 wherein the entries relating to such debit notes were still showing as cost of construction hotel project-recoverable'. He has also produced copies of bank statements of the relevant period wherein no receipt of money against such debit notes was reflected. The appellant has also pleaded that the service provided during 2010-11 for which debit note dated 31/03/2011 was issued was actually provided before introduction of POT Rules 2011 and service tax was required to be paid on receipt of payment basis in terms of Rule 6 of the Service Tax Rules 1944 and as no payment had been received against that part of service from the service receiver till date, the value of service was not declared in the ST-3s of the relevant period. It is also submitted that in spite of non-receipt of service consideration shown in subsequent debit notes dated 31/03/2012 and 31/03/2013, he had duly declared those values of services in ST-3s and paid*

service tax on accrual basis in terms of POT Rules 2011. I find that the appellant has considerably explained and clarified the apparent anomalies pointed out by the department in SCN and demand of service tax on the value of consideration of service as shown in the debit notes is therefore not sustainable.

10. In view of the above discussion and findings the impugned Order-In-Original No. 73/ST/ADDL.COMM/NOIDA/ 2016-17 dated 17/03/2017 is set aside, and the appeal bearing no. 1032/ST/Noida/APPL/NOIDA/ 2017-18 dated 14/07/2017 filed by M/s. Lifeline Builders Pvt. Ltd., Plot No. 2A, Sector-94, Noida, (UP) is allowed."

2.1 The respondent were registered with the department and were providing services classifiable under the category of "Work Contract Services" as defined under Section 65(105)(zzzza) of the Finance Act, 1994 and other taxable services

2.2 During the course of audit of the records for the period December 2010 to June 2012 it was noted that they had short paid the service tax by them under the category of "Commercial or Industrial Construction Services", by misclassifying there services as "Work Contract Services", and by availing the benefit of the Work Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

2.3 As the respondent were availing the CENVAT Credit the benefit of Notification No 1/2006-ST dated 01.03.2006 was also not available to them.

2.4 Respondent had issued debit notes as detailed below and service tax short paid in respect of these debit notes is as calculated in the table below:

S No.	Debit Note dated	Taxable Value	Rate	S. Tax Payable	Service Tax paid	Service Tax short paid
1	31.03.2011	39098423	10.30	4027138	-	4027138
2	31.03.2012	122333791	10.30	12600380	5011603 (Cenvat Credit)	7588777

3	31.03.2013	971543	12.36	120083	-	120083
TOTAL .		162403757		16747601	-	11735998

2.5 On examination of the ST-3 submitted by the respondents for the period

- October 2010 to March 2011& October 2012 to March 2013 vis-à-vis the debit notes dated 31.03.2011 & 31.03.2013, it was noticed that the respondent has filed a NIL return in both cases in respect of Work Contract Services' and not reflected the taxable value as reflected in these debit notes and failed to discharge the service tax liability.
- October 2011 to March 2012, the respondent had shown taxable value as Rs. 12,16,40,863/- which does not match with the taxable value of Rs. 12,23,33,791/- as per debit not dated 31.03.2012. The respondent had paid service tax of Rs 50,11,603/- through Cenvat credit as per their ST-3 return and hence short paid an amount of Rs. 75,88,777/- against total Service Tax liability of Rs. 1,26,00,380/- for the F/year 2011-12.

2.6 As per revenue the respondent had failed to determine the correct taxable value in the ST-3 return by misclassifying and claiming the benefit of Work Contract Work Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, the services rendered by them they suppressed the taxable value of the same with a clear intent to evade payment of Service Tax, therefore, differential amount of Service Tax to the tune of Rs. 1,17,35,998/ under the category of 'Commercial or Industrial Construction Service' was required to be recovered from the respondent by invoking the extended period of limitation under the proviso to Section 73 of the Finance Act,1994. The appellant also rendered themselves liable for penal action under Section 78 of the Finance Act, 1994 for contravention of the aforesaid provisions and suppression of material facts with intent to evade payment of Service Tax.

2.7 A show cause notice dated 14.03.2016 was issued to the appellant asking them to show cause as to why-

- i. Differential Service Tax amounting to Rs.1,17,35,998/- (Rupees One Crore Seventeen Lakhs, Thirty Five Thousand, Nine Hundred and Ninety Eight Only) including Education Cess, and Secondary and Higher Education Cess should not be demanded and recovered from them under sub-section (1) of Section 73 of the Finance Act, 1994 read with proviso thereof
- ii. Interest should not be demanded in terms of Section 75 of the Finance Act, 1994 in respect of above said amount.
- iii. Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994

22.8 The show cause notice was adjudicated as per the *Order-In-Original dated 17/03/2017 Additional Commissioner Service Tax Noida, holding s follows:*

- 1) I confirm Service Tax demand amounting to Rs. 1,17,35,998/- (Rs One Crore Seventeen Lac Thirty Five Thousand Nine Hundred and Ninety Eight only) under Section 73(2) of the Finance Act, 1994 and order to be recovered from them, along with applicable interest under Section 75 of the Finance Act, 1994 as amended
- 2) I impose penalty of Rs. 1,17,35,998/- (Rs One Crore Seventeen Lac Thirty Five Thousand Nine Hundred and Ninety Eight only) under Section 78 of the Finance Act, 1994 as they have willfully and deliberately suppressed the facts of not discharging due service tax & order to be recovered from them.

The adjudged dues may be deposited forthwith.

2.9 Respondents challenged this order before Commissioner (Appeal) who vide impugned order allowed the appeal.

2.10 Aggrieved revenue has filed this appeal against the impugned order urging following grounds:

- Period involved in this case is Dec 2010 to June 2012 i.e. prior to the negative list regime.
- During the relevant period the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was applicable.
- Rule 3(3) and 3(4) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 provides that :-

(3) The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.

(4) The option under sub-rule (3) shall be permissible only where the declared value of the works contract is not less than the gross amount charged for such works contract.

- The respondent had short paid the amount of Service Tax payable by them under the category of "Commercial or Industrial Construction Services", as the respondent were developer of a hotel building by misclassifying the services rendered by them as "Work Contract", without fulfilling the Conditions prescribed under Rule- 3(3) and 3(4) of the Work Contract (Composition scheme for payment of Service Tax) Rules 2007, as they have not exercised such option under rule 3(3) of the Work Contract (Composition scheme for payment of Service Tax) Rules 2007 in respect of a works contract prior to payment of service tax in respect of the said works contract.
- As per Article 3 of the agreement there is no declared value of the work contract and the Construction of Hotel is purely a commercial construction activity which would fall

under the service category of "Commercial or Industrial Construction Services"

- The "commercial or industrial construction" is defined under Section 65(25b) of the Finance act, 1994(as it was relevant at the time of activity) as *"construction of new building or civil structure or a part thereof used or to be used primarily for; or occupied, or to be occupied, primarily withcommerce or industry."* However the activity undertaken by the respondent falls under the category of "commercial or industrial construction" and the respondent is liable to be taxed under that category only. Since the activity undertaken by the respondent do not falls under the category of "work contract service", the respondent also cannot avail benefits of taxation methodology provided under "Work Contract/Composition Scheme for Payment of service Tax rules, 2007". Accordingly, the questions that the respondent not given any intimation to the department under Rule 3(3) of Rules ibid or not having any fixed or declared value as envisaged under Rule 3(4) of Rules ibid are also of less importance.
- From the plain reading of Notification No 1/2006-ST dated 01.03.2016 it is evident that one of the essential condition of the above notification that Cenvat credit of Service Tax on input services had not been availed by the assessee for providing such service. In the present case, the respondent not only had availed CENVAT credit on input services of contractors etc., the same had also been used to discharge the liability of output service. As the respondent were availing the CENVAT credit benefit of this notification could not have been extended to them.

3.1 None appeared on the behalf of respondent when the appeal was posted for hearing. However as we find that the issue is in very narrow compass, the same has been taken up for consideration after hearing Shri S T Khairnar, Authorized Representative for the revenue in terms of Rule 21 of CESTAT Procedure Rules, 1982, reproduced below:

"RULE 21. Hearing of appeals ex parte. — Where on the day fixed for the hearing of the appeal or on any other day to which the hearing is adjourned the appellant appears and the respondent does not appear when the appeal is called on for hearing, the Tribunal may hear and decide the appeal ex parte."

3.2 Learned authorized representative reiterated the arguments advanced in the appeal filed by the revenue.

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

4.2 The issue involved in the present case can be summarized as follows:

- a. Whether the respondent was correct in classifying his services under the category of Work Contract Service"
- b. Whether the benefit of Work Contract (Composition scheme for payment of Service Tax) Rules 2007 could have been extended to the appellant for determination of the taxable value of services provided.

4.3 The relevant terms of the "Project Development Agreement" between the respondents and their clients have been reproduced in the order in original which state as follows:

Article 1 Definitions And Interpretation

1.1 Definitions

Unless repugnant or contrary to the context hereof, the following terms, when capitalized, shall have the meanings assigned herein when used in this Agreement. When not capitalized, such words shall be attributed their ordinary meaning.

1.1.1 'Agreement' means this Project Development Agreement;

Article 2 Possession and Development

- 2.1 *The actual, physical, vacant and peaceful possession of the land has been handed over to the Developer by the Owner as of Effective Date. The Developer shall be irrevocably and exhaustively permitted and authorized and implement the Project upon the Land in accordance with this Agreement either directly or through its agents, employees, associates or through any third party it may deem fit.*
- 2.2 *The parties agree that the Developer shall have the rights to design, construct and commission the Project on the Land which shall include without limitation, (i) the right of Developer or its duly authorized representatives to enter upon the Land and carry out developments and improvements on or below the Land as per the Management Contract and subject to applicable laws in force.*
- 2.3 *The Owner authorizes the Developer to represent the Owner before Hyatt in respect of all matters relating to the development of the Project in line with the Management Contract.*
- 2.4 *The Owner is aware that the Developer is required to apply for licenses or the sanction of layout/ building plans and obtain all other necessary permissions required to develop the Project on the Land. The Owner undertakes and agrees to do all such deeds, acts and things and execute all such applications, forms, undertakings and documents required to obtain the above mentioned sanctions and/ or permissions, at the sole cost and expenses of the Owner.*
- The owner may also empower the developer through a board resolution to fulfill the obligations contemplated herein.*
- 2.5 *The right, title and interest in the Land and the Project shall vest in the Owner and the Developer*

shall act as agent of the Owner to develop the Project in terms of this agreement.

Article 3 Considerations

- 3.1 *All costs and expenses to be incurred in relation to procuring the Approvals required for the Project shall be borne by the Developer. The entire cost of development/construction of the Buildings, including fees or other payments (including statutory dues to workmen, employees etc) payable to the Architect, engineers, contractors, staff and workmen shall be borne by and paid for by the Developer.*
- 3.2 *Any/all mobilization advance and or material advance paid to a contractor/sub contractor or supplier etc for execution of contract or purchase of materials the Developer shall be reimbursed by the Owner on a demand.*
- 3.3 *All costs and expenses as detailed in article 3.1 above and paid for by the Developer shall be reimbursed by the Owner to the Developer on a quarterly basis The Developer shall raise quarterly bills of all the costs and expenses incurred on the development of the Project during every quarter by the 15th day of the succeeding quarter and the Owner shall reimburse the same within 15 days from the date of the bill to the Developer apart from any statutory taxes and levies as applicable under the law.*
- 3.4 *The Owner shall reimburse the Developer quarterly against the bills and or against the receipts, for Service Tax, Welfare Cess as per the requirement of The Building and Other Construction Workers Welfare Cess Act 1996 and Work Contract Tax @4% or any other tax as per applicable law.*

3.5 *The Owner will deduct Income Tax at source as per applicable law at the time of making the reimbursement payment to the Developer.*

4.4 Adjudicating authority has also reproduced the text of the debit notes issued by the respondent in respect of which these demands are made. For clarity one of such debit note dated 31st March, 2011 is reproduced as below:-

M/s Vision Town Planners Pvt. Ltd 31st March, 2011
1-202,Parsvnath Gardenia
Sector 61, Noida. UP-201305

Subject: Construction of Grand Hyatt, Sector 94 Noida

Dear Sir.

This has reference to Project Development agreement dated 1 September 2010 and clause in Article 3 on page 4

In terms of agreement clause, we are enclosing Debit Note for Rs.4,10,92,700/- for the period ending March31, 2011 on account of amounts paid to Architects/ Consultants/ Sub Contractors/ Steel Purchases and various services etc. for developing Hotel Project [Grand Hyatt] in Sector 94, Noida.

Hence, we have debited your account by Rs.4,10,92,700.00 (Rs. Four Crore Ten Lacs Ninety Two Thousand Seven Hundred ,Only) as on March31.2011 on account of Construction Cost paid/ Profit,

Margin / VAT / Service Tax etc. as per Annexure -1 Attached.

Kindly arrange to make the payment of Rs 4,10,92,700/- at the earliest.

Best Regards

For Lifeline Builders Pvt Limited

(Authorised Signators)

Encl: Annexure-

Note: Details of WCT deducted from various contractors & Deposited the same in Authority is enclosed for your reference. Please note, you will deduct TDS on total Payment and WCT on Margin amount of Rs.654542/- (on being amounts Paid to Construction Contractors) only.

Annexure

LIFE LINE BUILDERS PVT LTD		
COST OF CONSTRUCTION GRAND HYATT, NOIDA-AS ON 31.03.2011		
PAYMENT OF CONSULTANCY/ SECURITY CHARGES	8,036,433.00	
PAYMENT TO CONTRACTORS	13,080,840.00	
PAYMENT TO SUPPLIERS	7,303,282.00	
PAID FOR NON TAXABEL SERVICES	6,806,038 .00	
Total	37,236,593.00	37,236,593.00
Add Margn @ 5%		1,861,830.00
Add VAT on Steel @ 5%		383,422.00
Add: Service Tax @ 4.12%		1,610,855.00
Grand Total		41,092,700.00

4.5 From the perusal of the above terms of agreement and debit note in dispute it is quite evident that the agreement between the respondent and their client is a contract for supply of material along with the provision of services. It is settled law that "work contract service" is different from a plain service as there is transfer of property as well as service simultaneously, as has been held in the following cases.

- i. Larsen and Turbo [2015(39) S.T.R 913 (SC)]
- ii. Sobha Developer Limited [2017-VIL-09-SC]
- iii. M/s Bagai Construction [2014 TIOL 3094 CESTAT DEL]
- iv. Nagarjuna Construction Co. Ltd. [2012 (28) S.T.R. 561 (S.C.)]
- v. Alstom Projects India Ltd., [2011 (23) S.T.R. 489 (Tribunal)]

4.6 In the case of Larsen and Turbo, supra Hon'ble Supreme Court while making the distinction between the "work contract services" and other similar services has clearly held as follows:

"15. *A reading of this judgment, on which counsel for the assessee heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting*

therefrom charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub-paras (f), (g) and (h). Under each of these paras, a bifurcation has to be made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor's accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost, expenses and profit as would be attributable in the works contract to the transfer of property in goods in such contract. This being the case, we feel that the learned counsel for the assesseees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in

the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts.

16. *At this stage, it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm. This position is well reflected in *Bharat Sanchar Nigam Limited v. Union of India*, (2006) 3 SCC 1 as follows :-*

"No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite

contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in Larsen & Toubro v. Union of India [(1993) 1 SCC 364] : (SCC p. 395, para 47) :-

"The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods."

For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. As was held by us in Gujarat Ambuja Cements Ltd. v. Union of India [(2005) 4 SCC 214], SCC at p. 228, para 23 :-

"This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field." (at paras 88 and 89)

17. *We find that the assesseees are correct in their submission that a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In Gannon Dunkerley, 1959 SCR 379, this Court recognized works contracts as a separate species of contract as follows :-*

"To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment." (at page 427)

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.

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."*

4.7 In view of the decision of Hon'ble Supreme Court as above we are in agreement with the finding arrived in the impugned order to effect that the contract/ agreement between the respondent and their client was a work contract agreement And

the services provided by them would fall under the category of 'Work Contract Service.'

4.8 Having held that the services provided by the appellant fall in the category of work contract service and they are well within their right to determine the value of taxable service provided as per "Work Contract(Composition Scheme for Payment of service Tax rules, 2007". Revenue has in their appeal stated that the benefit of composition scheme is not available to the respondent as he has not opted for the scheme by making requisite declaration under the Rule 3 (3) of the said rules, declaring the value of the contract before payment of service tax by availing this scheme. However impugned order relies upon the decision of Delhi Bench in case of Mehta Plast Corporation [2016 (44) STR 651 (T-Del)], holding as follows:

"The benefit of payment of service tax under the Works Contract Scheme for erection and commissioning or installation services stand denied to the appellant on the ground that they have not filed any written option to avail said works contract scheme composition scheme benefit. The period involved in the present appeal is 2009-2010.

2.*I find that identical proceedings were initiated against the appellant for the earlier period from 2006-2009, the matter stands concluded by the Commissioner vide his order dated 20-7-2011, he has dropped the same, which read as under :-*

From the above, it is observed that there is no "10.2 requirement to file the intimation in writing for payment of service tax under 'Composition Scheme'. In this case, the noticees have not filed any intimation to the department in writing but the noticees have paid the service tax @ 4.12% prevalent at that time after availing the benefit of notification No. 32/2007-S.T. The act of the noticee for payment of service tax @ 4.12% shows their wish to opt for composition scheme. I find that the payment of service tax @ 4.12% itself shows that they have opted

composition scheme for all the contracts. Further the noticees have not paid any service tax in respect of any contract in any other services. The entire payment after calculation of service tax @ 4.12% has been made under composition scheme of Works Contract Services. In view of above, I allow the benefit of composition scheme as the noticees fulfil the condition as mentioned in the notification No. 32/2007-S.T., dated 22-5-2007."

3.*As rightly observed by the Commissioner in his above referred order, the option to be exercised is not required to be exercised in writing and the very fact of payment of duty under the composition scheme reflects upon the option of the assessee. As such, I find no reason to deny the benefit. Accordingly, the impugned orders are set aside and appeal allowed with consequential relief to the appellant."*

4.9 In case of ABL Infrastructure Pvt. Ltd [2015 (38) S.T.R. 1185 (Tri. – Mumbai)] following was held:

"6.3 *Having viewed that the appellant have executed the new contract w.e.f. 5-6-2007 and the activity is eligible to be classified as a Works Contract Service, we may now examine whether they are eligible for paying duty at the lower rate under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. The objection of Revenue is that the appellant has not fulfilled the condition of Rules. For convenience, Rule 3 is extracted below: -*

"The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract."

The above Rule requires that the provider who opts to pay tax under the Rule shall exercise such option prior to

payment of Service Tax. We find force in the appellant's contention that the fact that they had started paying tax under the Works Contract Composition Scheme is quite evident from the rate of tax reflected in the ST-3 returns. In any case, they had exercised option on 26-9-2007, the substantial benefit cannot be denied for procedural deficiency of delay in opting for Works Contract Service by a specific declaration under Rule 3. More so, when no format has been prescribed for making/exercising an option nor has it been specified as to whom the option must be addressed. We agree that the fact of paying Service Tax at the composition rate in the returns filed by them, is enough indication to show that they have opted for payment under the Works Contract Composition Scheme. Reliance is placed on the case of Bridge and Roof Company (supra), wherein it was held as under: -

"After hearing both sides, duly represented by Shri Bipin Garg, learned Advocate appearing for the appellant and Shri K.K. Jaiswal, learned AR appearing for the Revenue, we find that the Revenue's main objection is absence of option exercised by the appellant before they started paying duty under the works contract. However, we find that as the appellant applied for registration under works contract, the same amount would amount to exercise of option in the absence of any format laid in the said rule for exercising said option. Similarly, we find favour in the appellant's contention that the restriction under Rule 3(3) of the said rules is for availing credit in respect of input and not input service."

We have also seen Board's Circular and the judgment of Nagarjuna Construction (supra) relied upon by Revenue. The facts there are different because there the situations were that a single and same contract was in existence before 1-6-2007 and after 1-6-2007. In the present case, we have held above that the appellant was executing work

in a new contract from 5-6-2007 and was therefore eligible under the category of Works Contract Service. We, therefore, set aside the demands of Service Tax."

4.10 Affirming the decision of Mumbai Bench as above, Hon'ble Kolkata High Court has in the case of Larsen & Turbo[(2023) 2 Centax 327 (Cal.)] held as follows:

"10. *Thus, Rule 3(1) of the scheme gives an option to the person liable to pay service tax to discharge his service tax liability in terms of the scheme by paying an amount equivalent to 2% of the gross amount charged for the works contract. Sub rule (3) of Rule 3 states that a person who opts to pay service tax under the composition scheme shall exercise such option prior to payment of service tax and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract. The argument of the department is that the option to pay service tax under the composition scheme shall be exercised prior to the payment of service tax and the appellant having not exercised the option prior to 26-3-2008 is required to pay service tax at the rate of 4% and not 2%. The department further proceeds to state that this short payment is intentional to evade payment of duty and therefore extended period of limitation can be invoked. The cardinal principle of interpretation has taught us to read the rule in its entirety to ascertain the true meaning and intention of the legislation. If that be so sub rule (3) of Rule 3 of the scheme cannot be read in isolation. It is required to be read in conjunction with sub rule (1) of Rule 3.*

11. *Sub-rule (1) of Rule 3 is substantive portion of the rule which provides for an option to be exercised by the person liable to pay service tax. By virtue of the said rule, the person liable to pay service tax has an option to discharge the liability by paying the amount equivalent to 2% of the gross amount charged for the works contract instead of*

paying service tax at the rate specified in Section 66 of the Act. On a reading of sub rule (1) of Rule 3 shows that the option exercisable by this person liable to pay service tax is exercised by paying service tax at the 2% instead of rates specified in Section 66. Sub rule (3) of Rule 3 states that the provider of the taxable service who opts to pay service tax under the composition scheme shall exercise such option prior to the payment of service tax. If rule 3(1) and (3) and read in conjunction and harmoniously, the intention of the scheme is to give an option to the provider of taxable service to discharge his service tax liability by paying an amount equivalent to 2%. This being the substantive part of the scheme, sub rule (3) which is a machinery provision has to give life to the substantive part of the rule namely Rule 3(1) and that would mean that the option shall be exercised by paying the amount equivalent to 2% of the gross amount charged for the works contract. It is the submission of the learned senior standing counsel that the crucial words in sub rule (3) of Rule 3 is "opts" and "prior to payment of service tax". Thus, the department would contend that the option has to be exercised by the provider of taxable service prior to the payment of service tax. If that be so the rule should provide in what manner the provider of taxable service has to exercise such option. Admittedly no procedure has been laid down under the rule and there is no statutory form for exercise of such option. This has been held so by learned Single Bench, against which the revenue are not on appeal. In the absence of statutory format can the department be heard to say that the option should be exercised in a particular fashion and cannot be by conduct, that is by paying the service tax equivalent to 2% of the gross amount charged for the works contract.

12. *Before we go into legal aspect as to how the courts have interpreted similar provision, we shall touch upon the certain facts which would be relevant. The return in Form*

ST3 for the relevant year have been filed before us and by way of illustration, we have taken up form ST3 for the period October 2007 to March 2008. Under the column works contract services, there are several questions which have been asked and information has been called for. In para A2, the question is whether the assessee is liable to pay service tax on his taxable service as a service provider or a service receiver. The appellant has indicated that they are liable to pay service tax as a service provider. Para C1 requires the assessee to mention as to whether they have availed benefit of any exemption notification, the answer should be either yes or no. If answer to Para C1 is yes in Para C2, the assessee is required to furnish the notification number. The assessee has indicated that they availed the benefit of notification no. 32 of 2007 which is the composition scheme, referred above. Para (F) of the return deals with the value of taxable service, service tax payable and gross amount charged. Under the said column, the appellant has given the service tax rate wise breakup details and indicated in respect of services the tax had been paid at 2% under composition scheme. The proof of payment of tax along with the challan numbers. have also been given in the return. Admittedly, the assessing officer has accepted the return submitted by the assessee and has not raised any objection of any short payment of service tax in respect of such contracts where the appellant availed the option to discharge the service tax liability under the composition scheme. Thus, it can never be the case of the respondent department that the appellant failed to disclose their availment of the benefit under the composition scheme. Having steered clear of this factual issue, we will consider as to in what manner similar provisions have been dealt with by other High Courts in statutes which are pari materia.

13. *In T. Azhakesan v. State Tax Officer and Others 2021 SCC Online Mad 10505, the Division Bench of the High*

Court of Madras considered a similar issue, but, arising under the provision of the Tamil Nadu Value Added Tax Act, 2006. The said Act also contained a similar provision stating that the option should be exercised by the dealer prior to payment of tax. Similarly, under the said Act, there was no prescribed form for exercising such option. This issue was considered and the same was decided in favour of the dealer therein. The relevant portion of the judgment is herein below:

The appellant's case is that when they filed their return under the provisions of the TNVAT Act in Form-L, they have exercised such an option and they have paid tax at 2% being lumpsum payment in terms of Section 6(1) of the TNVAT Act. The Assessing Officer did not raised query and the returns were accepted along with the proof of payment of tax. It is much after when the Enforcement Wing inspected the business premises of the appellant, they pointed out several effects, one of which, which is the subject matter in these appeals is with regard to the absence of an option letter for payment of tax under Compounding Scheme in terms of Section 6(2) of the TNVAT Act. The moot question would be whether the option letter may be in writing or can it be inferred that the dealer having paid lumpsum tax at 2% while filing his return, is deemed to have been exercised option in terms of Section 6(1) of the TNVAT Act.

Identical issue came up for consideration in the case of K Ramsamy [supra]. In the said case, as that of the appellant before us, the petitioner therein was a registered dealer under the provisions of the Tamil Nadu General Sales Tax Act [TNGST Act]. Two issues arose for consideration in the said writ petition, first of which would be relevant, namely whether the Assessing Officer in the said case was justified in holding that the said petitioner has not opted to pay tax under section 7-C of the TNGST

Act. The dealer in the said case had filed the return and paid the tax at 2% and the return was processed and the nature of work done by the petitioner therein being works contract, the benefit of Section 7-C of the TNGST Act was extended and the rate of tax was fixed at 2% and the returns were accepted. Subsequently the assessment was sought to be revised by invoking the power under section 55 of the TNGST Act and revised orders were passed, in which the Assessing Officer took a stand that the petitioner therein has not opted to pay tax under section 7-C of the TNGST Act. Thus, the Court framed the question as to whether the dealer was required to exercise an option to pay tax under section 7-C of the TNGST Act by means of a separate letter or a petition. It also noted that under the provisions of the TNGST Act and the rules framed thereunder, there is no prescribed format or procedure as to how the option should be exercised. After taking note of the decision of the Hon'ble Division Bench in the case of Kikani Exports RIM [supra], wherein it was held that in the absence of any separate form provided for under the Rules or a separate method provided for exercising option to pay tax under section 7-C of the TNGST Act, it can be safely concluded that the assessee by filing a return and paying tax at compounded rate has exercised the option under the said provision and therefore the Assessing Authority committed error in holding that the dealer did not exercised his option and accordingly, the said question was answered in favour of the dealer. The operative portion of the order reads as follows:

In this regard, useful reference can be made to the decision of the Hon'ble Division Bench of this Court in the case of Commissioner of Income-tax v. Kikani Exports Private Limited, in TCA No. 330 of 2013 etc. batch dated 9-9-2014. The substantial question of law, which arose for consideration before the Hon'ble Division Bench was whether the return of income filed by the assessee under

section 139(1) of the Income-tax Act claiming depreciation can be treated as exercising of option before the due date as prescribed in second proviso to Rule 5 (1A) of the Income-tax Rules. This question was answered in favour of the assessee and against the revenue on the following terms:-

Short of petition, the issue that arise for consideration is for the purpose of claiming depreciation, whether the assessee should exercise an option before the due date in the manner other than by filing return of income in terms of sub section (1) of Section 139 of the Income-tax Act. According to the Revenue, each one of the assessee should file a separate application or a letter indicating their intention to avail depreciation in terms of Section 32 read with Rule 5(1) of the Income-tax Rules and since the assessee in each case has not exercised such an option before the due date for furnishing the return of income, they will not be entitled to the benefit of Rule 5(1) but depreciation only under Rule 5(1A) Appendix 1A.

It is relevant to note that while filing the return of income, a procedure has been prescribed for claiming depreciation as pointed out above. The assessee has to set out the manner in which depreciation is claimed for the assessment years in question. All the details required for claiming depreciation under various heads are set out thereunder. Rule 5 of the Income-tax Rules is in relation to determination of profits and gains of business or profession and deprecation forms part of such determination. Therefore, there cannot be an option exercised in isolation (i.e.) deprecation with regard to determination of profits and gains of business or profession in the manner other than the procedure prescribed under section 139(1) of the Income-tax Act. The assessee is liable to file the return of income and claim deprecation in accordance with the various provisions and state in exactitude what he claims

under different heads of deprecation. Schedules DOA and DEP in Form ITR # 6 contain the break up of various heads under which deprecation can be claimed. All that the second proviso to Rule 5(1A) of the Income-tax Rules states is that the assessee has to exercise the option before the due date for furnishing the return of income. In other words, if the option is exercised after furnishing of the return of income under sub-section (1) of Section 139, it is of no avail. This assumes importance, as no procedure is prescribed for exercising the option. Form ITR-6 gives the methodology on which deprecation can be claimed and therefore, the statute did not provide for any other method to exercise the option except through filing of that an option should be exercised separately would make the returns filed meaningless."

The above referred decision can very well be applied to the facts of the present case, as under the TNGST Act or the Rules framed thereunder, there is no separate form provided or any separate method provided for exercising the option to pay tax under section 7-C of the TNGST Act. Therefore, it can be safely concluded that the assessee by filing a return and paying tax under Section 7-C of the TNGST Act amounts to exercising option under the said provision. Thus, the respondents committed an error in holding that the petitioner did not exercise his option. Therefore, the first question is answered in favour of the petitioner and against the revenue.

We are informed that the above order has become final as the revenue has not carried the matter on appeal.

The only distinction in the case on hand is that the present assessment is under the provisions of the TNVAT Act and the said Act does not provide for any separate procedure or method of form of application for exercising option under section 6(1) of the Act. Therefore, it is to be held that the appellant/dealer having filed their return in Form-

L had opted to pay lumpsum tax at 2% is deemed to have exercised his option to pay tax at compounded rates in terms of Section 6(1) of the TNVAT Act.

The above decision would squarely apply to the facts and circumstances of the case before us.

14. *In GE T and N India Limited v. Commissioner of Central Excise and Service Tax, Large Tax Payer Unit, Chennai in C.M.A. No. 2032 of 2019 dated 16-12-2019, 2020 (34) G.S.T.L. 176 (Mad.) the High Court of Madras, identical issue was considered and the Division Bench approved the view taken by the tribunal in the case of Vaishno Associates v. CCE & ST [2018] VIL 2017 [2018] 91 taxmann.com 371/ 66 GST 557 (New Delhi - CESTAT) Jaipur² wherein the court considered the composition scheme and pointed out that no format has been prescribed for making/exercising an option nor has it been specified as to whom the option must be addressed, the fact of the paying service at composition rate in the return filed by the service provider is enough indication to show that they have opted for payment under the works contract composition scheme.*

15. *While on this issue, it will be beneficial to refer to the decision of the Hon'ble Supreme Court in Commissioner of Central Excise v. Hari Chand Shri Gopal and Others [2011] SCC 236 in the said decision, the doctrine of substantial compliance was explained. It was held that doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship, in the cases where the party does all that he can reasonably expected of it, but failed or faulted in some minor or in consequence aspect which cannot be described "essence" or the "substance" of the requirements. It was further pointed out that substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute and the court should determine whether the*

statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objective for which it was passed. We are informed that there are several decisions of the tribunal which have held on the above lines and those decisions have attained finality and one such decision being in the case of ABL Infrastructure Private Limited v. Commissioner of Central Excise, Nashik 2015 (2) TMI 801 CESTAT Mumbai. Thus, it can be safely held that the payment of tax under the composition scheme upon notification of the scheme vide a notification no. 32 of 2007 dated 26-5-2007 by filing the return and paying tax at the compounded rate of 2% is sufficient compliance of exercise of option under the scheme and therefore the subject contracts for which tax had been remitted by the appellant at the rate of 2% is permissible and acceptable under law.

16. *The next aspect is whether the extended period of limitation could have been invoked. The disputed period can be divided into two the first of which being from March 2008 to March 2012. For this period, the show cause notice for the periods from March 2008 to March 2011 have all been issued after a long delay as the show cause notices were issued on 17-4-2013. The said show cause notice also covered the period from April 2011 to September 2011 and October 2011 to March 2011 but for such period the show cause notice was within the time permitted. The question would be whether extended period of limitation could have been invoked in the facts and circumstances of this case and courts have held that such extended period of limitation can be invoked only when that there is a deliberate intention to evade payment of tax and it does not empower the department to invoke the extended period on the sole ground of omission. In several decisions, the Hon'ble Supreme Court has pointed out that every non-payment or non-levy of duty does not attract extended period and there must be a deliberate default;*

mere non-payment of duties is not equivalent to collusion or willful misstatement or suppression of facts. More importantly, if the alleged contravention has been culled out from the records available, the question would be whether the extended period of limitation could be invoked. Admittedly, the assessing officer of the appellant had not pointed out any error and the returns were accepted and the payment of tax was also accepted. It is only the audit department which had raised such a query and such query was raised based on the available records with no new or fresh tangible material. Therefore, the department invoking the extended period of limitation, for the period indicated above, is thoroughly flawed and illegal. For the disputed period from April 2011 to March 2013, there is no delay in issuance of show cause notice. The learned advocate appearing for the appellant on instructions submits that the appellant will pay the differential amount of service tax for the said period that is from April 2012 to June 2012, July 2012 to September 2022 and October 2012 to March 2013 at the appropriate rates. Since the service tax had been paid only at the rate of 2 %, the appellant agrees to pay interest thereon. The learned advocate submits that the court may consider the case and direct that the penalty should not be levied under section 78 of the Act. We are not able to accede such a prayer as it is beyond the scope of the prayer sought for in the writ petition nor such contention appears to have been raised in the writ petition. However, we give liberty to the appellant to raise all contentions both on law and facts in the event there is proposal to levy penalty for the aforementioned period.

17. *Mr. Maiti, learned senior standing counsel appearing for the revenue referred to the decision of the Hon'ble Supreme Court in Nagarjuna Constructions Company Limited v. Government of India 2012 (28) S.T.R. 561 (SC) for the proposition that the appellant having failed to*

exercise the option prior to the payment of tax is not entitled to the benefit of the composition scheme at 2%. On this aspect, we have already interpreted Rule 3(1) and (3) of the composition scheme and given our reasons as to how there has been compliance of the rule and in the absence of any statutory form for exercise of option, the filing of the return, mentioning the relevant notification number and payment of tax at the compounded rate is sufficient compliance of exercise of option under the scheme. That apart, we note the facts in Nagarjuna Constructions to be entirely different. Since the appellant therein had already paid the taxes and did not opt to pay the service tax under the composition scheme but later sought for such a benefit which was negated. Therefore, the said decision is inapplicable to the facts and circumstances of the case on hand.

18. *As noticed by us above, the substantial part of the order passed by the learned Single Bench ensures in favour of the appellant, the department having accepted such portion of the judgment cannot be heard to argue contrary to what has been held against them. The learned Single Bench has in no uncertain terms recorded that the service tax was paid of 2% and duly received by the department prior to 1-3-2008. Further it has been held that the rates of tax as increased would be prospective and shall not affect the pending contracts. Further it has been held there is no prescribed mode for exercising option. The court had also noted Rule 6 of the service tax rules which provides that the service tax shall be paid on or before 6th of every month, following the months the payment are received for such taxable service; Rule 7 which states that the return shall be filed on half yearly basis on or before 25th day of the month following the particular year. Further the argument made by the department by referring to the contracts entered into by the appellant with third parties was rejected holding that the clauses in*

the said contract which requires the appellant to accept the enhanced rates of tax if any during the subsistence of contracts cannot help the department for the purpose of considering the construction of the composition scheme. As the appellant has freedom to enter into contract and in the absence of the contract being contrary to the public policy, it is binding between contracting parties and cannot in any manner assist the department."

4.11 In the case of Harsh Constructions [2020 (37) G.S.T.L. 217 (Tri. – Mumbai)] Mumbai Bench held as follows:

"2.*Brief facts of the case are that the appellant is engaged in providing works contract service and for that purpose, was registered with the jurisdictional Service Tax authorities. During scrutiny of ST-3 returns for the period October, 2010 to March, 2011, the Service Tax Department observed that the appellant had paid service tax @ 4% of taxable value, without filing any option for payment of such amount of service tax on composition scheme, as provided under Rule 3 of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. The department interpreted that since no option under Rule 3 of the rules had been exercised by the appellant, it should be liable to pay the service tax @ 10.30%. Accordingly, show cause proceedings were initiated against the appellant, seeking for recovery of the short paid service tax amount along with interest and for imposition of penalties. The matter was adjudicated against the appellant vide order dated 5-11-2012, wherein service tax demand of Rs. 27,07,015/- was confirmed under Section 73 of the Finance Act, 1994 alongwith interest under Section 75 of the Act. Besides, the adjudication order also imposed penalty under Section 76 of the Act. On appeal, the Learned Commissioner (Appeals) vide the impugned order dated 29-4-2013, has upheld confirmation of the adjudged demand on the*

ground that no option had been exercised by the appellant for payment of the amount provided under the Composition Scheme. He has also considered additional ground that the appellant availed and utilized Cenvat credit for the purpose of payment of the composition amount, which is not permissible under the statute.

3. *On perusal of the relevant ST-3 returns available in the case file, we find that the appellant had exercised the option for availing the Composition Scheme inasmuch as it had declared the tax payable at 4%. Since, the appellant has specifically mentioned about the rate prescribed under the Composition Scheme, the same should be considered as compliance in terms of Rules, 2007 regarding availment of the option for the Composition Scheme. Besides, we also find that no specific format or application has been prescribed either in the statute or by any circular issued by the Board, under which the option has to be exercised. Thus, non-filing of specific declaration before opting for the scheme is to be considered as a mere procedural lapse, for which the substantive right provided under the statute for payment of composition tax cannot be whittled down. Further, we also find that though the appellant had availed the cenvat credit of service tax paid on the input services, but the same was reversed and the reversal particulars were duly reflected in the period ST-3 returns. Hence, we are of the considered view that the adjudged demands confirmed on the appellant cannot be sustained.”*

4.12 Further impugned order also concludes that respondent has not received any consideration from his clients in respect of the two debit notes dated 31.03.2012 and 31.03.2013 against which this demand, but has included the value of these services in his ST-3 return as per the Point of Taxation Rules, 2011 and has paid service tax on these services provided. This finding recorded in the impugned order has not been challenged. Further for the debit note dated 31.03.2011, it is observed that

this debit note is for the period prior to introduction of the POT, 2011 and the service tax was to be paid only on realization of the service consideration. Commissioner (Appeal) has in the impugned order consideration of the bank statements and the ledgers of the respondent have concluded that the respondent have not received the service consideration. Revenue has in their appeal not challenged the above findings.

4.13 We do not find any merits in the appeal filed by the revenue.

5.1 Appeal is dismissed.

(Operative part of the order pronounced in open court)

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

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp