

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

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70434 of 2016

(Arising out of Order-in-Appeal No.NOI/SVTAX/000/APPEALS-i/434/2015-16 dated 11/01/2016 passed by Commissioner (Appeals) Central Excise & Service Tax, Meerut)

M/s NTPC Electric Supply Co. Ltd.,

(R & D Building, A-8A, Sector-24, Noida)

VERSUS

.....Appellant

Commissioner of Service Tax, Noida

(Opp. CCS University, Mangal Pandey Nagar, Meerut-250005)

....Respondent

APPEARANCE:

Shri Atul Gupta, Advocate for the Appellant

Smt Chitra Srivastava, Authorised Representative for the Respondent

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

FINAL ORDER NO.70757/2024

DATE OF HEARING : 25 July, 2024
DATE OF PRONOUNCEMENT : 22 November, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.NOI/SVTAX/000/APPEALS-i/434/2015-16 dated 11/01/2016 passed by Commissioner (Appeals) Central Excise & Service Tax, Meerut. By the impugned order, order-in-original No. 43/ST/ADC/Noida/2014-15 dt.31.03.2015 is upheld, holding as follows:-

"ORDER

1. *I hereby confirm the demand of service tax amounting to Rs, 8,83,834/- (Rupees Eight Lacs Eighty Three Thousands and eight Hundred Thirty Four only) (Rs.8,58,091/- as Service Tax plus Rs.17,162/- as*

education cess plus Rs,8,581/- as SHEC) against M/s NTPC Electric Supply Co Ltd., R&D Building, A-8A, Sector-24, Noida under section 73 (2) of the finance Act, 1994.

2. *I order for recovery of interest at the appropriate rate on the aforesaid amount under Section 75 of Finance Act, 1994.*
3. *I also impose a penalty of Rs. 17,67,668/-(Rs. Seventeen Lakhs Sixty Seven thousands & Six hundred Sixty eight only), twice the total demand liable to be paid under Section 78 of the Finance Act, 1994.*

2.1 The appellant is registered in service tax for providing taxable services viz. Consulting Engineering Service.

2.2 During the course of the audit of the records, it was found that an agreement no. 12 of 2008-09 dt.19.01.2009 was executed between Board of Trustees of Port of Cochin and the appellant According to the agreement, the work of 'Turnkey Construction/Commissioning of following was entrusted to the appellant.

- a) 11 KV Vallarpadam Switching Sub-Station;
- b) 11 KV, 300 Sq. mm underground 'XLPE' cable double circuit line - from Marine Drive Substation to /Vallarpadam Switching Station &
- c) 2 numbers 11KV Line bay extension GIS Sub-Station at KSEB end

Clause 2 of the agreement stipulated about "Scope of Service" according to which scope of work to be rendered by the appellant was to include design, engineering, procurement erection, testing, commissioning and works incidental thereto for the above mentioned project.

2.3 The appellant was to execute the project on 'Actual Cost Plus Basis' on behalf of M/s Cochin Port Trust. 'Actual Cost Plus Basis' was to mean actual executed cost of the project plus professional fee @12% on the actual executed cost of the

project. For the purpose of the execution of the work entire work of the construction could be divided by the appellant into one or more contract packages to be executed by various contractors and the appellant was authorized to award these contracts to various contractors on behalf of the client i.e. M/s Cochin Port Trust. The payment for cost of works and professional fee of 12% of the actual cost of works were to be paid by M/s Cochin Port Trust to the appellant as per specified schedule. The appellant was not to finance any portion of the work from his own funds. As stated above, the client M/s Cochin Port Trust paid management fee @ 12% of project cost to the appellant.

2.4 On perusal of the invoices raised by the appellant, it was observed by the audit that the appellant had provided the composite service to his client M/s Cochin Port Trust, Cochin and the same was covered under "Works Contract" services. The department was of the view that the appellant misled the department by short paying service tax under the garb of management/professional fee whereas work done by him as per the said agreement was covered under the purview of "Works Contract" and he was liable to pay service tax on the whole amount i.e. Project Cost + management/professional fee.

2.5 A show cause notice dated was issued to the appellant asking them to show cause as to why:

- i. The Service Tax amounting to Rs. 8,83,834/- (Rs.8,58,091/- Service tax +. Rs. 17,162/- E. Cess + Rs.8,581/- S& HE Cess) (Rupees Eight lakh Eighty three thousand Eight hundred Thirty Four only) should not be recovered from them under proviso to Section 73(1) of the Finance Act, 1994.*
- ii. Interest at the applicable rate in respect of above mentioned short payment of service tax, should not be charged and recovered from them under Section 75 of the Finance Act, 1994.*

iii. Penalty should not be imposed upon them under the Section 76 & 78 of the Finance Act, 1994.

2.6 The show cause notice was adjudicated as per the order in original referred in para 1 above.

2.7 Aggrieved appellant filed an appeal before the Commissioner (Appeal) which has been dismissed as per the impugned order.

2.8 Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Atul Gupta, Advocate for the appellant and Shri Tuleshwar Prasad & Shri Santosh Kumar, Authorized Representative for the revenue.

3.2 Learned counsel submitted that:

- No service tax is payable by the appellant in view of exemption notification issued under section 11C of the Central Excise Act, 1944. As the Appellant is providing services related to distribution of electricity these services are exempted from levy of service tax vide exemption Notification No. 45/2010-ST dated 20.07.2010 and Notification No. 11/2010 dated 27.02.2010 issued by the Central Government under the power granted upon it by the virtue of Section 83 of the Finance Act, 1994 read with Section 11C of Central Excise Act, 1944. Reliance is placed on the following decisions
 - Noida Power Co. Ltd. [2014 (33) S.T.R. 383 (Tri.-Del.)]
 - U.P. Rajkiya Nirman Nigam Ltd. [2016 (41) S.T.R. 0967 (Tri.-Del)]
 - M.P. Power Transmission Co. Ltd. [2011 (24) S. T.R. 67 (Tri.-Del.)]
 - Paschimanchal Vidyut Vitran Nigam Ltd. [2012-TIOL-1175-CESTAT- DEL]
 - Maharashtra State Electricity Distribution Co. Ltd. [2017 (49) S.T.R. 91 (Tri. -Mumbai)]

- H.T. Associates, 2016 (45) S.T.R. 305 (Tri. - Mumbai)
- Sri Rajyalakshmi Cement Products, [2017 (49) STR 91 (Tri. -Hyd)]
- The project cost received by the appellant is not consideration therefore, no service tax is leviable without receipt of consideration for providing taxable service.
- the service provided was not works contract service c. because no goods/ material was supplied. Reliance is placed on the decision of Hon'ble Supreme Court in the case of State of Andhra Pradesh v. Larsen & Turbo Ltd. 2008-TIOL-158-SC VAT.
- The service provided may be classifiable under 'erection, commissioning or installation service' simpliciter.
- The service provided may be classified as 'consulting engineer service' as the Appellant through its engineers providing advisory services in relation to project management to ensure timely supply of all materials and equipment for execution of power supply project and supervision of all activities such as storage handling of materials/ equipment at site, erection/ testing and commissioning by the concerned contractors and making of progressive payments to the contractors on behalf of CPTC. The supervision activities of the Appellant mentioned in view of the CBEC Trade Notice No. 53 CE (Service Tax)/97 issued vide C.No. CE-20/41/ST /Trade Notice/97 dated 04.07.1997, are covered under the definition of Consulting Engineer. Reliance is placed on following decisions:
 - Discom Ltd. [2010 (18) STR 464 (Tri.-Mum.)]
 - Prodorite Anticorrosive Ltd. [2008 (12) STR 618 (Tri.-Chennai)]
 - H.K. Rolling Mills Engg. P. Ltd. [2007 (6) STR 132 (Tri.-Mum)]
- The Appellant further submits that the service tax paid by the Appellant on the professional/ management fees

under 'Consulting Engineer Service' is accepted by the Department. The demand made is contradictory as the Department is accepting the service tax from the Appellant under 'Consulting Engineer Service' on one hand and on the other hand demanding service under 'Works Contract Service' on the total project cost including management/ professional fees.

- The service provided may be classified as port service The Appellant submits that the activity undertaken by the Appellant is more appropriately classifiable under 'Port Service' as per the amendment in 2010 which is retrospective in nature. Reliance is placed on the decision in the case of Adani Enterprise Ltd., [2014 (35) STR 741 (Guj.)]
- Service tax cannot be levied as service was provided in SEZ to SEZ. Reliance is placed on the following decisions:
 - Reliance Ports and Terminals Ltd [2015 (40) STR 200 (Tri- Ahmd.)]
 - Eon Khardi Infra. Pvt. Ltd. [2015 (9) BTR (Tri-Mumbai)]
 - Reliance Industries Ltd. [2016 (41) BR 465(Tri-Mumbai)]
- Extended period of limitation cannot be invoked as the appellant is a public sector undertaking and was under bonafide belief that they were required to pay service tax on the value of service provided. Reliance is placed on following case laws
 - Continental Foundation JT. Venture [2007 (216) ELT 177 (SC)]
 - PVR Ltd. [2021 (55) G.S.T.L.435 (Tri-Del.)]
 - Nepa Ltd [2013 (298) E.L.T 225 (Tri. - Del.)]
 - Bharat Yantra Nigam Ltd. [2014 (36) S.T.R. 554 (Tri. -Del.)]
 - Barmer Lignite Mining Company Ltd. [2019 (368) E.L.T. 188 (Tri. - Del.)]

- Penalty is not imposable. In any case the penalty if penalty was to be imposed the same was to be waived in terms of Section 80 as the appellant was having the view that on the amount reimbursed service tax was not payable.

3.3 The Authorized representative reiterated the findings recorded in the impugned order.

4.1 Have considered the impugned order along with the submissions made in appeal and during the course of argument.

4.2 Impugned order records the findings follows:

"5.1 I have carefully gone through the facts and records of the case as well as the submissions made by the appellant during the course of personal hearing. Taking into account the overall facts, merits of the case and the request of the appellant, I take up the matter for final decision. The issue to be decided in the instant case is the sustainability of demand of service tax amounting to Rs.8,83,834/- along with interest as well as imposition of penalty.

5.2 On going through the facts of the case, it is observed that the appellant is registered for providing services under 'Consulting Engineering Service'. The appellant was awarded the work of 'Turnkey Construction/Commissioning of (a) 11 KV Vallarpadam Switching Sub-Station; (b) 11 KV, 300 Sq. mm. underground XLPE' cable double circuit line - from Marine Drive Sub Station to Vallarpadam Switching Station & (c) 2 numbers 11KV Line bay extension GIS Sub-Station at KSEB by M/s Cochin Port Trust, Cochin under an agreement no. 12 of 2008-09 dt. 19.01.2009. Clause 2 of the agreement laid down the contents of "Scope of Service" according to which scope of work to be rendered by the appellant was to include design, engineering, procurement, erection, testing, commissioning and works incidental thereto for the above mentioned project. The appellant was to execute the

project on 'Actual Cost Plus Basis' on behalf of M/s Cochin Port Trust. 'Actual Cost Plus Basis' was to mean actual executed cost of the project plus professional fee @12% on the actual executed cost of the project. As per clause 4.3 of the agreement, total estimated cost of the project was Rs.431 lakhs. The payment for cost of works and professional fee of 12% of the actual cost of works to the appellant was to be made by M/s Cochin Port Trust. The appellant paid service tax under 'consulting engineering service' on the amount received as management fee which was 12% of the actual executed cost of project. However, on perusal of the invoices raised by the appellant, it was observed by the audit team that the appellant had provided the composite service to his client M/s Cochin Port Trust, Cochin and the same was covered under "Works Contract Service". The department was of the view that the appellant misled the department by short paying service tax under the garb of management/professional fee whereas work done by him as per the said agreement was covered under the purview of "Works Contract Service" and he was liable to pay service tax on the whole amount i.e. Project Cost + Management/professional fee. Accordingly, a show cause notice was issued to the appellant proposing demand of service tax amounting to Rs. 8,83,834/- under proviso to Section 73(1) of the Finance Act, 1994 along with interest due thereon under Section 75 ibid. Penalty under Section 76 and Section 78 ibid was also proposed. The adjudicating authority vide the impugned order confirmed the demand along with interest due thereon. He also imposed penalty amounting to Rs.17,67,668/- under Section 78 of the Finance Act, 1994. On the other hand, the appellant has inter alia contended that the activities of the appellant was not classifiable under 'Works Contract Service' in as much as for Works Contract Service', there has to be transfer of property in goods which is leviable to

Tax/VAT as sale of goods and in the present case, the appellant is not selling any goods to M/s Cochin Port Trust.

5.3 For the sake of convenience, the definition of 'Works Contract Service' as provided under Section 65(105)(zzzza) of the Finance Act, 1994 is reproduced as under:

"Section 165(105)(zzzza): "taxable service" means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation.

For the purposes of this sub-clause, 'works contract' means a contract wherein, transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and such contract is for the purposes of carrying out, erection, commissioning or installation of plant, machinery, equipment or

- a) structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, ductwork and sheet metal work, thermal insulation, sound insulation, fire proofing or waterproofing, lift and escalator, fire escape staircases or elevators; or*
- b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or*
- c) construction of a new residential complex or a part thereof; or*

- d) completion and finishing services, repair, alteration, renovation or restoration of or similar services, in relation to (b) and (c); or
- e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

Perusal of clause (e) above makes it clear that turnkey projects including engineering, procurement and construction or commissioning (EPC) projects are squarely covered under the definition of 'Works Contract Service'. The words 'Turnkey project/contracts' have been defined in Black's Law Dictionary as follows "Engineering procurement & construction contract A fixed price, schedule-intensive construction contract- typically used in the construction of single purpose project, such as energy plants- in which the contractor agrees to a wide variety of responsibilities, including the duties to provide for the design, engineering procurement and construction of the facility; to prepare start up procedures; to conduct performance tests; to create operation manuals; and to train people to operate the facility - EPC contract - Also termed turnkey contract." In the instant case, perusal of agreement no. 12 of 2008-09 dt. 19.01.2009 clearly reveals that what was awarded to the appellant was work of turnkey project i.e. Turnkey Construction/Commissioning of 11 KV Vallarpadam Switching Sub-Station etc. and the scope of the said work as enumerated in clause 2.0 of the said agreement included design, engineering, procurement, erection, testing, commissioning and works incidental thereto for the above mentioned project. Thus, description of the work as well as scope of the work as enumerated in the said agreement clearly indicates that the turnkey project awarded to and executed by the appellant was specifically covered by the definition of 'works contract service' as stipulated in clause (e) of Section 65(105)(zzzza) of the Finance Act, 1994. In the case of turnkey contract, a wide

variety of responsibilities and activities are involved. It may involve work of commissioning or erection, but that is only incidental to main contract. It may involve technical consultancy or testing also, but that is also to main contract. In such case, there is no contract for 'commissioning and installation' or technical consultancy' and hence cannot be taxable under those heads. Hence, in view of the above facts, services in the instant case can be appropriately classifiable under works contract service' and not under 'Consulting Engineering Service'. It is more so when it is seen that the appellant was awarded a turnkey project' and in order to execute the said project, the appellant was inter alia required to carry out on a turnkey basis the work of designing, preparation of bill of materials, procurement of goods/equipments, supervision of activities like storage, handling of materials/equipment, erection/testing and commissioning etc. In this context, I find support from the decision of Hon'ble Tribunal in the case of Gupta Energy Pvt. Ltd Vs. CCE, Nagpur [2015 (37) STR 273 (Tri-Mumbai)] wherein contract of Turnkey Project for design, engineering, testing, supply, erection, commissioning of plant and machinery was held covered under scope of 'works contract service'. Further, if the contention of the appellant that he was covered under 'Consulting Engineering Service' is accepted, it would lead to a situation where the appellant would be providing the services to himself. Such a situation is not called for. For the same reasons as discussed herein above, the contention of the appellant that the services provided by him is covered under 'Port Services' ie also not tenable. During the material period, "Port Service" was defined "as any service rendered by a port or other port or any person authorized by such port or other port, in any manner, in relation to a vessel or goods." The facts of the case reveal that the services provided by the appellant are neither in relation to vessel nor goods.

5.4 The appellant has contended that for 'works contract service', property in the goods must get transferred and should be liable to tax as sale of goods. However, in the instant case, he is not selling any goods to his client i.e. M/s Cochin Port Trust, In this regard, it is observed on perusal of sample invoices as submitted by the appellant that goods/equipment used in execution of the Turnkey Project were liable to tax as sale of goods and have actually suffered VAT at appropriate rate. For example, invoice no. A2Z/NESCL/VM-615/Supply/003 dt. 29.10.2009 and invoice no. A2Z/NESCLVM-615/Supply/004 dt. 05.10.2009 clearly indicates payment of VAT @4% on value of goods sold. Further, clause 1.7 of the said agreement (Agreement no.12 of 2008-09) stipulates that " Equipment/material" shall mean the equipment/material procured by the NESCL (i.e. the appellant) for this work including spares, testing equipment etc.; to be finally handed over to the owner". These equipment/materials were finally used in the execution of the project. Also, as per clause 11.0 of the said agreement, the project after being completed and commissioned was to be handed over by the appellant to M/s Cochin Port Trust From the above facts, it thus transpires that there was transfer of property in goods which was exigible to sales tax/VAT. In this context, I find support from the decision of Hon'ble Tribunal in the case of Gammon India Ltd. Vs. CCE, Nagpur [2015(37) STR 225 (Tri-Mumbai)] wherein on the issue of 'transfer of property of goods', it has been held as under:

"Works Contract service - Composite contract - Supply contract for supply of goods namely transmission towers and service contract for execution of Tower Package A2 for Mewad-Wardha Part of 765 KV.S/C Seoni-Wardha Transmission Line - Department's plea that materials get consumed in process of erection and installation, and therefore, there is no sale of goods, not acceptable - A

significant percentage of total contract work under the service contract" involves material component - Thus, there is transfer of property in goods involved in execution of service contract - Goods in service contract leviable to tax as sale of goods - Service contract entered into by appellants with Power Grid Corporation of India Ltd., covered under Works Contract category - Section 65(105)(zzzza) of Finance Act, 1994.

Accordingly, on the basis of various clauses of the said agreement such as description of work, Scope of service and other provisions enumerated therein, it is observed that the services rendered by the appellant squarely falls within the ambit of the works contract service'

5.5 The appellant has further contended that since he is engaged in setting up for sub-stations which are for distribution of electricity. Thus by ensuring that the infrastructure is set up, he is engaged in providing services in relation to distribution of electricity and as per notification no. 45/2010-ST dt.20,07,2010, no service tax was payable by him.

For the sake of clarity, the said notification is reproduced as under:

"Electricity -- Exemption to all taxable services relating to transmission of electricity till 26-2-2010 and distribution of electricity till 21-6-2010

Whereas, the Central Government is satisfied that a practice was generally prevalent regarding levy of service tax (including non-levy thereof), under section 66 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as 'the Finance Act'), on all taxable services relating to transmission and distribution of electricity provided by a person (hereinafter called the service provider') to any other person (hereinafter called "the service receiver'), and that all such services were liable to service tax under

the said Finance Act, which were not being levied according to the said practice during the period up to 26th day of February, 2010 for all taxable services relating to transmission of electricity. and the period up to 21st day of June, 2010 for all taxable services relating to distribution of electricity;

Now, therefore, in exercise of the powers conferred by section 11C of the Central Excise Act, 1944 (1 of 1944), read with section 83 of the said Finance Act, the Central Government hereby directs that the service tax payable on said taxable services relating to transmission and distribution of electricity provided by the service provider to the service receiver, which was not being levied in accordance with the said practice, shall not be required to be paid in respect of the said taxable services relating to transmission and distribution of electricity during the aforesaid period."

Perusal of the above makes it clear that service tax pertaining to only those taxable services relating to transmission and distribution of electricity was not required to be paid in respect of which under a general practice, service tax was not levied. It is observed that the situation in the instant case is totally different. The scope of work/services to be undertaken by the appellant as per the agreement was to include design, engineering, procurement, erection, testing, commissioning and works incidental thereto for the Turnkey Project. As already discussed above services provided by the appellant was squarely covered under 'works contract service'. Therefore, services provided in construction of Turnkey Projects cannot be stretched to cover it under services related to transmission and distribution of electricity because construction of Turnkey Project is much before the stage of transmission and distribution of electricity. Apart from above, it is relevant to mention that the appellant is

a subsidiary of NTPC and in the instant case it is clear that he has not been entrusted with any work of transmission or distribution of electricity as is evident from the 'scope of service' mentioned in the agreement. The appellant has also submitted a copy of Notification no. KSERC/II/LP-10/2009 dt. 18.01.2010 issued by Kerala State Electricity Commission to say that M/s Cochin Port Trust is a deemed distribution Licensee under Electricity Act, 2003 to distribute electricity in Port Trust Area in Wellington Island, Kochi. However, on perusal of Para (3) of Part-II, Grant of license of the said notification, it is noticed that it clearly mentions "The license shall come into force with effect from 13th March 2010.". This fact reveals that M/s Cochin Port Trust was authorized for distribution of electricity on or after 01.03.2010. In the instant case, on perusal of the invoice as mentioned in the impugned order, it is found that the period of dispute was from 15.01.2009 to 06.01.2010 i.e. well before granting authorization to distribute the electricity. Therefore, it is clear that during the disputed period, M/s Cochin Port Trust was not authorized for any work of distribution of electricity. In this context, it is also relevant that Notification no 32/2010-ST dt. 22.06.2010 also exempted taxable service for distribution of electricity for the subsequent period as enumerated in Notification no. 45/2010-ST subject to the condition that the taxable service was to be provided by a Distribution Licensee/franchisee' etc. which was authorized to distribute power only under the "Electricity Act, 2003". Thus, the intention of the Government was to exempt only those taxable services relating to distribution of electricity which was provided by 'Distribution Licensee/franchisee' etc. authorized under the "Electricity Act, 2003". In the instant case, no documentary evidence has been produced by the appellant to show that he was 'Distribution Licensee/franchisee' etc. authorized under the "Electricity

Act, 2003" to provide his services in Port Trust Area in Wellington Island, Kochi. Therefore, in view of above facts, benefit of notification no. 45/2010-ST does not appear to be admissible to the appellant.

In this context, it is pertinent to mention here that Hon'ble High Court and Tribunals have persistently held that service tax on Turnkey Projects pertaining to power projects/electricity transmission lines was payable under 'works contract service'. In the case Gammon India Ltd. Vs. .CCE, Nagpur [2015(37) STR 225 (Tri-Mumbai)], it is seen that the concerned appellant was awarded contracts for supply of transmission towers for electricity as well as erection, commissioning and installation of such towers by M/s Power Grid Corporation of India Ltd. The period of dispute was April 2008 to March 2012. Hon'ble Tribunal held the activities as 'works contract service' liable to payment of service tax. The appellant in this case was paying service tax on the service contracts under 'works contract service'. It is thus observed that although the work was related to transmission of electricity service tax was being paid under 'works contract service'. Similarly, in the case of Multi Engineering & Scientific Corporation Vs. Bihar State Electricity Board [2015 (39) STR 414 (Pat.)], concerned appellant entered into an agreement with Bihar State Electricity Board for construction of foundation of Anchor Towers of 220 KV/DC transmission line for electricity. The period of dispute was upto the year 2009. With introduction of 'works contract service' w.e.f. 01.06.2007, the concerned appellant paid service tax on such activities under 'works contract service'. Hon'ble High Court neither interfered with the classification of the taxable service nor the payment of service under 'works contract service'. In the above cases pertaining to 'works contract service' relating to transmission of electricity, Hon'ble Court/Tribunal did not extend the benefit of the said notification no. 45/2010-ST which shows that the

same was not applicable in such type of cases. Apart from above, payment of service tax in the instant case by the appellant himself albeit under consultancy services' reveals that it is not a case where service tax was not payable under notification no. 45/2010-ST. Various case-laws as referred by the appellant in this regard are distinguishable in view of the above facts. In view of the above contention of the appellant for extending the benefit under notification no, 45/2010-ST is not tenable.

5.6 One of the contentions of the appellant is that he is not liable to pay service tax under 'works contract service' as the services, if any, provided by him is provided in Port Based Special Economic Zone (PBSEZ) and services provided in SEZ or for SEZ operations are exempt from payment of service tax. In this regard, it is observed that provisions of SEZ Act regarding exemption from payment of service tax are not directly applicable to the Service Tax. In such cases, for providing exemption to taxable services provided to a developer or unit of SEZ, a corresponding notification under Section 93 of the Finance Act, 1994 is issued by the Central Government on being satisfied that it is necessary in the public interest. It is observed that in the instant case, the appellant has not stated any such exemption notification issued under Section 93 of the Finance Act, 1994 which exempted taxable services provided. Furthermore, any exemption notification issued for providing exemption to taxable services provided to a developer or unit of SEZ stipulates various mandatory conditions to be satisfied and detail procedures to be observed. The services provided in any SEZ are required to be in relation to the authorized operations and also to be approved from the Approval Committee. The developer or units of SEZ claiming exemption has to prove that these services have been actually used in the specified services in relation to the authorized operations Unless such conditions are satisfied,

no exemption can be extended. As the appellant has failed to state as to which exemption notification exempts his service as also not produced any documentary evidence to show that condition of the said exemption notification, if any, have been satisfied, his contention that the services provided by him are exempt from payment of service tax cannot be accepted. As regards contention regarding no service tax is leviable without receipt of consideration, it is noticed that the client M/s Cochin Port Trust vide his letter no CAD/Taxes Cell/Service Tax/CERA2010 dt. 08.12.2010 has clearly informed the concerned Superintendent of Central Excise, Cochin that "It is confirmed that in addition to the consultancy work, NTPC Electric Supply Ltd. were entrusted with the contract work for the project." Against providing such composite work, the appellant charged the amount in his invoices under the head 'Fee' from his client. It is observed that service tax has been calculated on the basis of such gross amount charged as 'Fee'. Further, Provisions of Section 67(i) clearly stipulates that service tax shall be charged on the gross amount charged by the service provider. Therefore, it is seen that calculation of service tax is in line with the provisions of law. As regards appellant working as 'pure agent', the above mentioned letter dt.08.12.2010 of the client M/s Cochin Port Trust stating that the appellant was awarded contract work of the Turnkey Project as well as services provided by the appellant in terms of scope of work as enumerated in the said agreement clearly reveal that the appellant was not acting as a 'pure agent' in as much as various conditions stipulated in Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006 were not satisfied by the appellant.

5.7 The appellant has contended that a portion of the payment received by him was towards goods sold during the course of execution of the project and value of such goods sold was liable to be excluded for calculating

amount of service tax. In this context, it is seen that while calculating amount of service tax, this aspect has been considered. It may be noted that vide Notification no. 32/2007-ST dt. 22.05.2007, Works Contract (Composition Scheme for payment of service tax) Rules, 2007 was introduced to simplify the payment of service tax under 'works contract service'. This scheme prescribed a lower rate of 4% for calculation of service tax on the gross amount including value of goods used in relation to the execution of works contract plus value of all the services. On perusal of show cause notice, it is noticed that the amount of service tax has been calculated at a lower rate i.e @ 4% instead of normal rate of 10%. In DOF no. 334/13/2009-TRU dt. 06.07.2009, it was inter alia clarified that "The reason for prescribing lower rate under the scheme is that the service provider need not bifurcate the gross value of works contract. It was expected that the gross value should be shown to include the total value of materials as well as services used in providing the taxable services... Perusal of the above reveals that while calculating amount of service tax, value of goods sold has been adequately considered. As regards availability of cenvat credit it is observed that availing of cenvat credit is subject to fulfillment of certain conditions, procedures and limitation as provided in Cenvat Credit Rules, 2004 and accordingly this aspect cannot be considered at this stage. The appellant has also contended that cum-tax benefit should be extended to him. In this regard, it is noticed that there is no dispute that the appellant has not paid service tax on charges pertaining to works contract service received by him. Therefore, what has not been paid by the appellant directly cannot be allowed to him indirectly. In this regard, I find support from the decision of Hon'ble Supreme Court in the case Of Amrit Agro Industries Ltd. Vs. CCE, Ghaziabad [2007 (2100) ELT 183 (SC)] wherein it was categorically held as under

"Valuation (Central Excise) - Recomputation of quantum of duty Cum-duty price - Unless it is shown by manufacturer that price of goods includes excise duty payable by him, no question of exclusion of duty element from price will arise for determination of value under Section 4(4)(d)(i) of Central Excise Act, 1944 - One cannot go by general implication that wholesale price would always mean cum-duty price, particularly when assessee had cleared the goods during relevant years on basis of exemption Notification No. 4/97-C.E."

On perusal of the above, it is clear that unless it is shown by the appellant that service tax on charges pertaining to works contract service has been paid by him, there is no question of allowing cum-tax benefit. Since there is no dispute about non-payment of service tax by the appellant, the ratio of the above case is squarely applicable to the facts of the present case and accordingly cum-tax benefit cannot be allowed to the appellant. However, it is pertinent to mention here that service tax paid by the appellant on consultancy service has been adjusted while calculating the amount of demand of service tax.

5.8 The appellant has further contended that the extended period of limitation cannot be invoked because the appellant was regularly filing ST-3 returns. It was also contended that the appellant was under bona fide belief that no service tax was payable under 'works contract service'. In this context, it is noticed that the appellant has not disclosed to the department the details of the gross amount charged as shown in his invoices either in ST-3 return or through any other document. He has also not given any basis as to how he developed/entertained such a bona fide belief. There is nothing as to what reasonable steps he took to arrive at his claimed bonafide belief; whether he sought any legal advice or whether he

consulted some professional or ascertained the industry practice. Bonafide or reasonable belief has to be an informed belief of a reasonable person. For a service provider of his stature something positive has to be shown to demonstrate that he had made reasonable efforts or had taken reasonable steps to ascertain legal position with regard to non-taxability of the services against which he received amount as 'Fee' for the purpose of forming this purported reasonable belief. Mere presumption can never be equated to "bona fide belief",

5.9 It is observed that the appellant is following self-assessment procedure and in terms of provisions of Section 70(1) of the Finance Act, 1994; he was required to assess the tax correctly and pay the same. However, he failed to do so. The fact of charging gross amount over and above 12% amount of project cost had not been disclosed to the department thereby suppressing vital material facts from the department. The issue could be detected only at the time of audit of records of the appellant. Thus, non-disclosing of relevant information clearly tantamounts to conscious withholding of information on the part of the appellant which can be only with intention to evade payment of service tax. Under the circumstances, there can be no doubt that there was suppression of facts and also contravention of various provisions of Service Tax Law. In this context, it is also relevant to mention here that Hon'ble High Court in the case of Kapsons Electro Stampings Vs. Commissioner of Central Excise [2015 (39) STR 745 (P&H)] has categorically held "Demand- Limitation-Evasion of tax detected on basis of audit conducted on a sister concern - in such case, prima facie, extended period of limitation is invokable." Similarly, it is seen that Hon'ble High Court of Gujarat in the case of Cema Electric Lighting Products India P.Ltd. Vs. CCE [2015(37)STR718(Guj.)] has held that when the concerned appellant had not furnished details

the extended period of limitation was correctly invoked. Apart from above, Hon'ble Tribunal in the case of Gupta Energy Pvt. Ltd. Vs. CCE , Nagpur [2015 (37) STR 273 (Tri-Mumbai)] has also held that "Failure to indicate payment of service work contract in service tax returns filed - Suppression of facts established." In view of the above facts, I am of the opinion that extended period of limitation has been correctly invoked. It is more so when it is seen in the context of the self-assessment regime where the government has placed greater reliance and trust on the assessee and made it the responsibility of the assessee to comply with the various provisions of law correctly. Further, as the appellant has suppressed the material facts with intent to evade payment of service tax as discussed herein above, he shall also be liable to imposition of penalty under Section 78 of the Finance Act, 1994. Here, it is pertinent to mention that for imposing penalty, provisions of Section 78 ibid nowhere differentiates on the basis of the constitution of a company, whether private or otherwise. It is settled law that when the language of the statute is clear and unambiguous, it should be given effect to. There is nothing like intendment. Hon'ble Supreme Court in the case of Bansal Wire Industries Ltd. Vs. State of UP [2011(269)ELT145(SC)] has clearly observed that "It is a settled principle of law that the words used in the section, rule or notification should not be rendered redundant and should be given effect to... in a taxing Act one has to look merely at what is clearly said and there is no room for any intendment. In a taxing statute nothing is to be read in, nothing is to be implied, one can only look fairly at the language used." Apart from above, it is observed that appellant being a registered assessee for a long time and well versed in Service Tax matters chose not to declare the gross amount received in ST-3 returns. He also did not take the advice of the department. In fact he did not

even make any query to the department as to whether the Service Tax would be leviable on the gross amount received in respect of the said services. His activity very transparently reflected the works contract service provided by him. Thus, the appellant of such a stature has failed to put forth any reasonable cause for non-payment of service tax for such a long period, hence his contention for not imposing penalty under provisions of Section 80 of the Finance Act, 1994 is also not tenable

5.10 The appellant has placed reliance on several case laws. In this regard, it is observed that in none of the relied upon cases, issue of detection of non-payment of service tax on account of non-disclosing of gross amount charged under works contract service pertaining to turnkey project has been considered. They also do not deal with any situation where relevant information including true nature of work undertaken by him was not provided by the appellant thus consciously withholding material information. Hence, the facts in the instant case are different and distinguishable from those as relied upon by the appellant and hence the ratio of those decisions is not applicable to the present case. It is a settled position in law that ratio of a decision can be applied to another case only when the fact /situation is identical because one additional or different fact may make vital difference between conclusions in two cases. The Hon'ble Supreme Court in the case of CCE v. Alnoori Tobacco Products .- 2004 (170) E.L.T. 135 (S.C.) has held that - Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed.... These observations must be read in the context in which they appear to have been stated....Judges interpret statutes, they do not interpret judgments. They interpret words of statute, their words are not to be interpreted as statutes`. The Supreme Court further observed that "circumstantial flexibility, one additional or different fact may make a

world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper³

5.11 In view of the above discussion and the decisions of the Hon'ble Courts /Tribunals, I am of the opinion that the services rendered by the appellant squarely falls Within the ambit of the 'works contract service' and there is no need to interfere with the impugned order of the adjudicating authority."

4.3 From the agreement entered between the appellant and CTPC it is evident that the said contract provided for the provision of services on cost plus basis, a fact noted in para 5.2 of the impugned order. It is also noted that cost plus means the actual cost of the project plus professional fees at the rate of 12% (i.e. Rs 431 crore + 12% as professional fees). The amounts were received by the appellant from CPTC toward actual cost of project for paying to the Third-party contractors engaged in carrying actual implementation and execution of the activities. The agreement clearly provided all the expenses of implementation and execution of the activities was upon the service recipient. The contract awarded by the appellant to A2Z contractors on behalf of Cochin Port and even works contract TDS under VAT Act and Income Tax TDS under Income Tax Law were deducted by the appellant on behalf of CPTC by using the details of CPTC. Hence, the amount received from the CPTC is for payment to A2Z.

4.4 In terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006 the Appellant qualifies as a pure agent on the service charges and not on the and service tax was payable only amount received by the Appellant to be passed on to the contractors. As per Agreement dated 19.01.2009 the ownership of the entire work vested with CPCT and the Appellant was carrying out the activities for payment of Management Fees only. In terms of the Rule 5(2) the expenditure or costs incurred by the said service provide (i.e. the Appellant) as a pure agent of

the recipient of service will be excluded from the value of the taxable service subject to the satisfaction of the specified conditions.

4.5 As all the conditions specified in Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006 are satisfied, the appellant acted as a pure agent and so no service tax can be levied on the consideration paid by the service recipient. In the case of National Informatics Centre Service Inc. 2019 (22) GSTL 394 (Tri- Del.) Delhi bench observed:

"17. Thus, it is evident that the respondent has acted only as an implementing agency and the disbursed the payments to the vendor's on behalf of Department of Information and Technology, Government of India and others, acted as a pure agent. It is established law that the expenses incurred as a pure agent are not liable to be included in the gross value of services under section 67 of the Finance Act read with Rule 5 of STR 2006. Further, the respondent has rightly discharged the service tax liability on the administrative charges charged and received from the Government Department, as implementing agency, and has also paid service tax in respect of other services under the head "Consultancy Engineering Services". Further, the appellant paid service tax on the income recognized in their accounts and has shown in the profit and loss account. The Revenue has erred in demanding service tax on the gross amount received from Department of Government of India, out of grant-in-aid.

18. The Id. counsel further relied on the ruling of Coordinate Bench of this Tribunal in Foster Wheeler Energy Ltd versus CCE - 2007 (7) STR 443 (Tribunal-Ahmd.), wherein under similar facts and circumstances, this Tribunal observed that from reading of the agreement between the parties, it indicates that Foster is not involved in actual execution of the project. The project management functions relating to the project continued to

be with Petronet L& G Ltd., which was engaged in the business of setting and operating LNG terminal for receiving storage degasification etc. It was Petronet, which have entered into an EPC contract with the Japanese company to develop, design, engineer and procure equipment, materials and supplies to erect and construct storage tanks of 5 MMTPA capacity with potential to expand. The EPC contract also envisaged other works and involved offshore supply, offshore services, onshore supply, onshore services and construction and erection. Petronet had entered into an agreement with Foster for project management consultancy in relation to setting up and operating the LNG terminal and required to advise and assist in relation to the execution of the project. Foster was in the role of advisers/consultant to petronet so that the work of EPC contractors are as per the requirement and standards envisaged by Petronet. This Tribunal held that from a close reading of the agreement and the report submitted by Foster in the records, sought to maintain, are all of technical nature and, therefore, there is no doubt that the services rendered are essentially, predominantly in the field of engineering. Accordingly, it has been rightly held that Forster rendered services of Consulting Engineer.

19. The learned Counsel also relied on the ruling of another Coordinate Bench of this Tribunal in the case of M/s. IRCON International Ltd. versus CCE, Patna- 2017 (4) TMI 903 CESTAT-KOLKATA. Accordingly, the Id. Counsel urges that the appeal of Revenue is without merits as the activities of the respondent/assessee are not liable to be classified under ECIS. It is further urged that under similar facts and circumstances, for the subsequent period, the Revenue has accepted the contentions of the respondent/ assessee and has not raised any demand. The Id. Counsel has also relied on the Trade Notice No.53 – CE- ST/97 of the New Delhi Commissionerate dated 4th of July 1997, wherein giving clarification, it is provided "Consulting

Engineer” means any professionally qualified engineer or engineering firm, who either directly or indirectly renders any advice consultancy or technical assistance, in any manner, to a client in one or more disciplines of engineering. The taxable service rendered by a Consulting Engineer means any service provided to a client by a Consulting Engineer in relation to advise consultancy or technical assistance, in any manner, in one or more disciplines of engineering.

20. The Id. Counsel also points out that from the copy of pro forma invoice dated 16.02.2002 raised on the Principle – NIC, a Government of India Enterprises, wherein they have given the quotations for various items required for computerization , and the said invoice have shown 7% administrative charges, on the invoice amount. Further, they have paid the service tax on such administrative charges.

21. The Id. Counsel further states that the show cause notice is bad and not maintainable for invoking the extended period of limitation. The appellant is a regular assessee registered with the Service Tax Department, for consulting engineer services, and filed their returns from time to time and have maintained proper books of accounts and have recorded all the transactions therein, which is an admitted fact. Thus, in the facts and circumstances, the conditions precedent for invocation of extended period, being not available like suppression, fraud, intention to evade the duty liability etc, the show cause notice is fit to be held not maintainable.

22. Having considered the rival contentions, we are satisfied that the respondent has provided only „Consulting Engineer Services“, on which they have discharged the service tax liability. We further find that the work order issued by the Government Department is in the nature of cost plus contract, wherein the respondent has been

appointed as the implementing agency on behalf of the Government Department and the money has been received as a trustee. Further, the respondent is liable to account for every single rupee spent for on behalf of the Government. They are not entitled to appropriate a single rupee more than the agreed 7% as agency charge or administrative charges. Further, the activity of the respondent is held to be in the nature of pure agent. As such, no service tax can be demanded on the amount of advance received and /or on the amount spent out of that advance for the purpose of the project. It is also an admitted fact that the respondent has themselves not done any erection, commissioning or installation. Such work has been done by the vendors and/or by agencies appointed by the respondent /assessee. We further find that the assessee/respondent herein has only done the work of advising and assisting the sponsoring agency in selecting various vendors, who would supply and /commission various items of work. The personnel, working with the respondent, are also by and large professionally equipped computer engineers."

4.6 In the case of Rajcomp Info Service Limited [Final Order No. 50148-50150/2022 dated 18.02.2022] following was held:

"41. What follows from the aforesaid discussion is that the amount received by the appellant from the State Government for payment to vendors is not a consideration for any service said to be rendered by the appellant to the State Government and, therefore, no service tax could be levied. This is for the reason that the amount which the appellant has received is not a consideration for provision of any service. The appellant was appointed merely as a Nodal Agency to supervise and monitor the overall execution of the projects. In fact, the amount paid by the State Government Department to the appellant are reimbursements which cannot be subjected to levy of

service tax and in any view of the matter the appellant was acting as a pure agent as all the conditions stipulated in rule 5(2) of the Valuation Rules are satisfied."

4.7 The phrase 'for such service' is required to be understood to mean that the consideration should necessarily have a direct nexus with the service. Thus, only such an amount can be subjected to service tax which represents a consideration for provision of service. Further in case of Larsen and Toubro ITD. [2015-TIOL-187-SC-ST] Hon'ble Supreme Court observed as follows:

"14. Crucial to the understanding and determination of the issue at hand is the second Gannon Dunkerley judgment which is reported in (1993) 1 SCC 364 = 2002-TIOL-103-SC-CT-CB. By the aforesaid judgment, the modalities of taxing composite indivisible works contracts was gone into. This Court said :-

"On behalf of the contractors, it has been urged that under a law imposing a tax on the transfer of property in goods involved in the execution of a works contract under Entry 54 of the State List read with Article 366(29-A)(b), the tax is imposed on the goods which are involved in the execution of a works contract and the measure for levying such a tax can only be the value of the goods so involved and the value of the works contract cannot be made the measure for levying the tax. The submission is further that the value of such goods would be the cost of acquisition of the goods by the contractor and, therefore, the measure for levy of tax can only be the cost at which the goods involved in the execution of a works contract were obtained by the contractor. On behalf of the States, it has been submitted that since the property in goods which are involved in the execution of a works contract passes only when the goods are incorporated in the works the measure for the levy of

the tax would be the value of the goods at the time of their incorporation in the works as well as the cost of incorporation of the goods in the works. We are in agreement with the submission that measure for the levy of the tax contemplated by Article 366(29-A)(b) is the value of the goods involved in the execution of a works contract. In Builders' Association case [(1989) 2 SCC 645 : 1989 SCC (Tax) 317 : (1989) 2 SCR 320] = 2002-TIOL-602-SC-CT it has been pointed out that in Article 366(29-A)(b), "[t]he emphasis is on the transfer of property in goods (whether as goods or in some other form)". (SCC p. 669, para 32: SCR p. 347). This indicates that though the tax is imposed on the transfer of property in goods involved in the execution of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of a works contract. We are, however, unable to agree with the contention urged on behalf of the contractors that the value of such goods for levying the tax can be assessed only on the basis of the cost of acquisition of the goods by the contractor. Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. We are also unable to accept the contention urged on behalf of the States that in addition to the value of the goods involved in the execution of the works contract the cost of incorporation of the goods in the works can be included in the measure for levy of tax. Incorporation of the goods in the works forms part of the contract

relating to work and labour which is distinct from the contract for transfer of property in goods and, therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by Article 366(29-A)(b).

Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. This would mean that labour charges for execution of works, [item No. (i)], amounts paid to a sub-contractor for labour and services [item No. (ii)], charges for planning, designing and architect's fees [item No. (iii)], charges for obtaining on hire or otherwise machinery and tools used in the execution of a works contract [item No. (iv)], and the cost of consumables such as water, electricity, fuel, etc. which are consumed in the process of execution of a works contract [item No. (v)] and other similar expenses for labour and services will have to be excluded as charges for supply of labour and services. The charges mentioned in item No. (vi) cannot, however, be excluded. The position of a contractor in relation to a transfer of property in goods in the execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax,

the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. The charges mentioned in item No. (vii) relate to the various expenses which form part of the cost of establishment of the contractor. Ordinarily the cost of establishment is included in the sale price charged by a dealer from the customer for the goods sold. Since a composite works contract involves supply of materials as well as supply of labour and services, the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services. 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. Similar apportionment will have to be made in respect of item No. (viii) relating to profits. The profits which are relatable to the supply of materials can be included in the value of the goods and the profits which are relatable to supply of labour and services will have to be excluded. This means that in respect of charges mentioned in item Nos. (vii) and (viii), the cost of establishment of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be excluded. The amount so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the

charges towards labour and services which would cover-

- (a) Labour charges for execution of the works ;*
- (b) amount paid to a sub-contractor for labour and services;*
- (c) charges for planning, designing and architect's fees;*
- (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;*
- (e) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and*
- (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;*
- (g) other similar expenses relatable to supply of labour and services;*
- (h) profit earned by the contractor to the extent it is relatable to supply of labour and services.*

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards

the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts." (at paras 45, 47 and 49)

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 assessee 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 = 2006-TIOL-15-SC-CT-LB, 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] = 2005-TIOL-53-SC-ST, 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 = 2002-TIOL-493-SC-CT-LB*, 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)

18. Similarly, in *Kone Elevator India (P) Ltd. v. State of T.N., (2014) 7 SCC 1 = 2014-TIOL-57-SC-CT-CB*, this Court held :-

"Coming to the stand and stance of the State of Haryana, as put forth by Mr Mishra, the same suffers from two basic fallacies, first, the supply and

installation of lift treating it as a contract for sale on the basis of the overwhelming component test, because there is a stipulation in the contract that the customer is obliged to undertake the work of civil construction and the bulk of the material used in construction belongs to the manufacturer, is not correct, as the subsequent discussion would show; and second, the Notification dated 17-5-2010 issued by the Government of Haryana, Excise and Taxation Department, whereby certain rules of the Haryana Value Added Tax Rules, 2003 have been amended and a table has been annexed providing for "Percentages for Works Contract and Job Works" under the heading "Labour, service and other like charges as percentage of total value of the contract" specifying 15% for fabrication and installation of elevators (lifts) and escalators, is self-contradictory, for once it is treated as a composite contract invoking labour and service, as a natural corollary, it would be works contract and not a contract for sale. To elaborate, the submission that the element of labour and service can be deducted from the total contract value without treating the composite contract as a works contract is absolutely fallacious. In fact, it is an innovative subterfuge. We are inclined to think so as it would be frustrating the constitutional provision and, accordingly, we unhesitatingly repel the same." (at para 60)

19. *In Larsen & Toubro Ltd. v. State of Karnataka, (2014) 1 SCC 708 = 2013-TIOL-46-SC-CT- LB, this Court stated:-*

"In our opinion, the term "works contract" in Article 366(29-A)(b) is amply wide and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of contract. Parliament had such

wide meaning of "works contract" in its view at the time of the Forty-sixth Amendment. The object of insertion of clause (29-A) in Article 366 was to enlarge the scope of the expression "tax on sale or purchase of goods" and overcome Gannon Dunkerley (1) [State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd., AIR 1958 SC 560: 1959 SCR 379] = 2002-TIOL-493-SC-CT-LB. Seen thus, even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract. The additional obligations in the contract would not alter the nature of contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of works contract are satisfied in a contract then irrespective of additional obligations, such contract would be covered by the term "works contract". Nothing in Article 366(29-A)(b) limits the term "works contract" to contract for labour and service only. The learned Advocate General for Maharashtra was right in his submission that the term "works contract" cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into existence some "works". We are also in agreement with the submission of Mr K.N. Bhat that the term "works contract" in Article 366(29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Parliament had all genre of works contract in view when clause (29-A) was inserted in Article 366." (at para 72)

20. We also find that the assessee's argument that there is no charge to tax of works contracts in the Finance Act, 1994 is correct in view of what has been stated above.

21. *This Court in Mathuram Agrawal v. State of M.P., (1999) 8 SCC 667, held :-*

"Another question that arises for consideration in this connection is whether sub-section (1) of Section 127-A and the proviso to sub-section (2)(b) should be construed together and the annual letting values of all the buildings owned by a person to be taken together for determining the amount to be paid as tax in respect of each building. In our considered view this position cannot be accepted. The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter.

This construction, in our considered view, amounts to supplementing the charging section by including something which the provision does not state. The construction placed on the said provision does not flow from the plain language of the provision. The proviso

requires the exempted property to be subjected to tax and for the purpose of valuing that property alone the value of the other properties is to be taken into consideration. But, if in doing so, the said property becomes taxable, the Act does not provide at what rate it would be taxable. One cannot determine the rateable value of the small property by aggregating and adding the value of other properties, and arrive at a figure which is more than possibly the value of the property itself. Moreover, what rate of tax is to be applied to such a property is also not indicated." (at paras 12 and 16)

22. Equally, this Court in *Govind Saran Ganga Saran v. CST*, 1985 Supp SCC 205 = 2002-TIOL-589-SC-CT, held :-

"The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity." (at para 6)

23. To similar effect is this Court's judgment in *CIT v. B.C. Srinivasa Setty*, (1981) 2 SCC 460 = 2002-TIOL-587-SC-IT-LB, held :-

"Section 45 charges the profits or gains arising from the transfer of a capital asset to income tax. The asset must be one which falls within the contemplation of

the section. It must bear that quality which brings Section 45 into play. To determine whether the goodwill of a new business is such an asset, it is permissible, as we shall presently show, to refer to certain other sections of the head, "Capital gains". Section 45 is a charging section. For the purpose of imposing the charge. Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by Section 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by Section 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the Income Tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative

difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head." (at para 10)

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."

4.8 Any other amount, which is not a consideration for provision of service, cannot be subjected to service tax. In case

Intercontinental Consultants and Technocrats Private Limited
[2018 (10) G.S.T.L. 401 (SC)] Hon'ble Supreme Court observed:

"24) In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 01, 2006) or after its amendment, with effect from, May 01, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service."

4.9 In case of Bhayana Builders Private Limited [2018 (10) GSTL 118 (S.C.)] Hon'ble Supreme Court observed as follow:

"13) A plain meaning of the expression 'the gross amount charged by the service provider for such service provided or to be provided by him' would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words 'for such service provided or

to be provided' by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to subsection (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider/assessee. Though, subsection (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.

14) We may note at this stage that Explanation (c) to subsection (4) was relied upon by the learned counsel for the Revenue to buttress the stand taken by the Revenue and we again reproduce the said Explanation hereinbelow in order to understand the contention:

(c) "gross amount charges" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called 'suspense account' or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]"

[emphasis supplied]

15) It was argued that payment received in 'any form' and 'any amount credited or debited, as the case may be...' is to be included for the purposes of arriving at gross amount

charges and is leviable to pay service tax. On that basis, it was sought to argue that the value of goods/materials supplied free is a form of payment and, therefore, should be added. We fail to understand the logic behind the aforesaid argument. A plain reading of Explanation (c) which makes the 'gross amount charges' inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words 'in any form of payment' are by means of issue of credit notes or debit notes and book adjustment. With the supply of free goods/materials by the service recipient, no case is made out that any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, 'any amount credited or debited, as the case may be', to any account whether called 'suspense account or by any other name, in the books of accounts of a person liable to pay service tax' would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider.

16) In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service

recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider.

17) Faced with the aforesaid situation, the argument of the learned counsel for the Revenue was that in case the assesseees did not want to include the value of goods/materials supplied free of cost by the service recipient, they were not entitled to the benefit of notification dated September 10, 2004 read with notification dated March 01, 2005. It was argued that since building construction contract is a composite contract of providing services as well as supply of goods, the said notifications were issued for the convenience of the assesseees. According to the Revenue, the purpose was to bifurcate the component of goods and services into 67%:33% and to provide a ready formula for payment of service tax on 33% of the gross amount. It was submitted that this percentage of 33% attributing to service element was prescribed keeping in view that in the entire construction project, roughly 67% comprises the cost of material and 33% is the value of services. However, this figure of 67% was arrived at keeping in mind the totality of goods and materials that are used in a construction project. Therefore, it was incumbent upon the assesseees to

include the value of goods/material supplied free of cost by the service recipient as well otherwise it would create imbalance and disturb the analogy that is kept in mind while issuing the said notifications and in such a situation, the AO can deny the benefit of aforesaid notifications. This argument may look to be attractive in the first blush but on the reading of the notifications as a whole, to our mind, it is not a valid argument.

18) In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the learned counsel for the Revenue as it says '33% of the gross amount 'charged' from any person by such commercial concern for providing the said taxable service'. According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient. Obviously, no amount is charged (and it could not be) by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of 'taxable service'. Thirdly, even when the explanation was added vide notification dated March 01, 2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount

charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged'."

4.10 As we find that in the present case the contract between the appellant and service recipient was a contract for provision of consulting engineer service and the consideration for provision of the said service was equivalent to 12% of the total value of the cost of contract. Appellant had discharged the service tax on the said value while discharging their liability. Hence, the demand made by treating the services as Work Contract Service by adding the entire value of the contract which was on cost plus basis cannot be upheld in view of the decisions as referred above.

4.11 As we find that the issue can be decided on the merits of the demand itself in the favour of appellant, we set aside the demand on merits. As demand has been set aside on the merits of the demand, we are not recording any findings on the other issues raised including invocation of extended period of limitation. Since we set aside the demand of service tax penalty imposed is also set aside.

5.1 The appeal is allowed.

(Order pronounced in open court on- 22 November, 2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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