

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

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.70363 of 2022

(Arising out of Order-in-Appeal No.43-ST-ALLD-2022 dated 04/03/2022 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Allahabad)

M/s New Tech Electricals,

.....Appellant

(G-34, Road No.16, Udyog Kunj,
Site-V, Panki, Industrial Area, Kanpur)
VERSUS

Commissioner of Central Excise &

CGST, Kanpur

....Respondent

(38, MG Marg, Civil Lines, Allahabad)

APPEARANCE:

Shri Dharmendra Srivastava, Chartered Accountant for the Appellant
Shri A.K. Choudhary, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70802/2024

DATE OF HEARING : 02 December, 2024
DATE OF DECISION : 02 December, 2024

SANJIV SRIVASTAVA:

This Appeal is directed against Order-in-Appeal No.43-ST-ALLD-2022 dated 04/03/2022 of the Commissioner (Appeals) Customs, Central Excise & Service Tax, Allahabad. By the impugned order following has been held:

5. In view of the above, I modify the impugned Order dated 17.11.2021, as under:

- (i) Confirmation of demand of Service Tax (including Cesses) is reduced to Rs. 21,75,673/- along with interest;
- (ii) Penalty imposed upon the appellant, under Section 78 of the Act, is reduced to Rs. 21,75,673/-;
- (iii) Penalty of Rs. 10,000/- imposed under Sections 77(1)(d) shall remain unchanged; and

- (iv) Penalty of Rs. 10,000/- imposed under Sections 77(1)(c) for non furnishing of records and late fee of Rs. 20,000/- for non filing of ST-3 returns are set aside

1.2 By Order in Original No 23/ST/Adj/AC/D-I/2021 dated 17.11.2021 following was held:

"ORDER

- (i) *I order that the amount of Rs.2,17,66,168/- (Rupees Two Crore Seventeen Lakhs Sixty Six Thousand One Hundred and Sixty Eight only) charged and received by the party from their customers during the Financial Year 2014-15 to 2017-18 [01.10.2014 to 30.06.2017] in lieu of providing the taxable services, to be treated` as the taxable value of taxable services provided by them for the purpose of charging the service tax. Accordingly, I confirm the demand of Service Tax amounting to Rs.21,75,673/- (Inclusive of Service Tax, Education Cess and Higher & Secondary Education Cess/ Swachh Bharat/ Krishi Kalyan Cess) under the provisions of Section 73(2) of the Finance Act. 1994 invoking provisions of an extended period of demand against M/s New Tech Electricals, G-34,Road No.16, Udyog Kunj, Site-V, Panki, Industrial Area, Kanpur;*
- (ii) *I order that the amount of Rs.15,74,922/- was paid as freight by the party during the Financial Year 2014-15 to 2017-18 [01.10.2014 to 30.06.2017] in lieu of receiving the taxable services, to be treated as the taxable value of taxable services provided by them for the purpose of charging the service tax. Accordingly, I confirm the demand of Service Tax amounting to Rs.53,642/- (Inclusive of Service Tax, Education Cess and Higher & Secondary Education Cess/ Swachh Bharat/ Krishi Kalyan Cess) under the provisions of Section 73(2) of the Finance Act. 1994 invoking provisions of an extended period of demand against M/s New Tech Electricals, G-34,Road No.16, Udyog Kunj, Site-V, Panki, Industrial Area, Kanpur;*

- (iii) *I order that the amount of Rs.95,000/- was paid as advocate fees by the party during the Financial Year 2014-15 to 2017-18 [01.10.2014 to 30.06.2017) in lieu of receiving the taxable services, to be treated as the taxable value of taxable services provided by them for the purpose of charging the service tax. Accordingly, I confirm the demand of Service Tax amounting to Rs.13,597/- (Inclusive of Service Tax, Education Cess and Higher & Secondary Education Cess/ Swachh Bharat/ Krishi Kalyan Cess) under the provisions of Section 73(2) of the Finance Act, 1994 invoking provisions of an extended period of demand against M/s New Tech Electricals, G-34, Road No.16, Udyog Kunj, Site-V, Panki, Industrial Area, Kanpur;*
- (iv) *Interest at the appropriate rate for the relevant period till the payment of the Service Tax to be demanded and recovered from M/s New Tech Electricals, G-34, Road No.16, Udyog Kunj, Site-V, Panki, Industrial Area, Kanpur under the provisions of Section 75 of the Act;*
- (v) *I impose a Penalty of Rs.22,42,912/- (Rupees Nine Lakhs sixty-four Thousand fifty-six only) upon M/s New Tech Electricals, G-34, Road No.16, Udyog Kunj, Site-V, Panki, Industrial Area, Kanpur under Section 78 of the Finance Act, 1994 for the reasons as discussed above. Further, I give an option to the party to pay a 25% penalty of demand confirmed as provided in Section 78 of the Act, if Service Tax and Interest is paid within a period of 30 days of the date of receipt of this order. Further, the benefit of reduced penalty shall be available only if the amount of such reduced penalty is also paid within 30 days;*
- (vi) *I impose a penalty of Rs. 10,000.00 (Rupees Ten Thousand only) upon M/s New Tech Electricals, G-34, Road No.16, Udyog Kunj, Site-V, Panki, Industrial Area, Kanpur, under Section 77(1)(c) of the Finance Act, 1994 for failed to furnish the documents as desired by the department with intent to evade service tax;*

(vii) I impose a penalty of Rs. 10,000.00 (Rupees Ten Thousand only) M/s New Tech Electricais,G-34,Road No.16, Udyog Kunj, Site-V, Panki, Industrial Area, Kanpur, under Section 77(1)(d) of the Act ibid upon the party for their alleged failure to pay the Service Tax electronically against the services provided by them;

(viii)I impose a penalty of Rs. 20,000.00 (Rupees Twenty Thousand only) upon M/s New Tech Electrlicals,G-34,Road No.16, Udyog Kun), Site-V, Panki, industrial Area, Kanpur under Section 70 of the Finance Act, 1994 read with Rule 7C of Service Tax Rules 1994 for not filing ST-3 returns for the period from April 2017 to June 2017."

2.1 The appellant is registered with the department under Service Tax registration No.AAFFN1594FST001 for providing services taxable under Finance Act,1944.

2.2 On the basis of information received from the Income Tax Department, an enquiry has been initiated against the appellant and record has been called for. The appellant has produced copy of balance sheet/profit & loss account, FORM 26As, ITR for the F.Y 2014-15 to 2017-18 and sample copy of work order/agreement entered into with Dakshinanchal Vidyut Vitran Ninam Ltd (in short DVVNL).

2.3 On scrutiny of documents submitted by the appellant, it was noticed that the value shown in ST-3 return does not match with the value shown under the head job work as reflected in the profit & loss account & FORM 26AS. The appellant failed to produce proper reply in respect of difference between FORM 26AS & ST-3 returns, therefore, service tax liability has been calculated on the entire value of Rs 2,17,66,168/- as reflected in FORM 26AS for the F,Y 2014-15 (Oct2014 to March2015) to 2017-18 (upto June'2017) which comes to Rs. 30,40,891/- but as per ST-3 returns the appellant has paid service tax amounting to Rs. 8,65.218/- only during the said period, thus, they have short paid service tax amounting to Rs. 21,75,673/- during the period Oct' 2014 to June 2017.

2.4 The appellant has also failed to pay service tax of Rs. 53,642/- under GTA services and service tax of Rs. 13,597/- on the audit fee paid during the period Oct' 2014 to June'2017 and also an amount of Rs 13,597/- as service tax on the audit fees paid by them.

2.5 A show cause notice dated 23.06.2020 was issued to appellant asking them to show cause as to why:

- (i) an amount of Rs.2,17,66,168/- (Rupees Two Crore Seventeen Lakhs Sixty Six (i) Thousand One Hundred and Sixty Eight only) received as per Form-26AS from their customer/service receiver during the Financial Year 2014-15 to 2017-18 [01.10.2014 to 30.06.2017] in lieu of providing the taxable services should not be treated as the value of taxable services provided by them and accordingly. why the short paid Service Tax amounting to Rs.21,75,673/- (Inclusive of Service Tax, Education Cess and Higher & Secondary Education Cess/ Swachh Bharat/ Krishi Kalyan Cess) should not be demanded and recovered from them under the provisions of Section 73(1) of the Finance Act. 1994 invoking provisions of extended period of demand.*
- (ii) Service Tax amounting to Rs.53,642/- by treating the taxable value of Rs. 15,74,922/- as per profit & Loss account should not be demanded and recovered from the party against Freight paid by them during the period covered in the Show Cause Notice under the provisions of Section 73(1) of the Finance Act. 1994 invoking provisions of extended period of demand;*
- (iii) Service Tax amounting to Rs.13,597/- by treating the taxable value of Rs. 95,000/- should not be demanded and recovered from the party against the Audit Fee paid by them during the period covered in the Show Cause Notice under the provisions of Section 73(1) of the Finance Act. 1994 invoking provisions of extended period of demand;*
- (iv) interest-at the appropriate rate for the relevant period till the payment of the Service Tax should not be demanded*

and recovered from them under the provisions of Section 75 of the Act;

- (v) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 for the reasons as discussed above*
- (vi) a penalty under Section 77(1)(c) of the Act ibid should not be imposed upon the party as the party failed to furnish information and documents called for by the Central Excise officer*
- (vii) a penalty under Section 77(1)(d) of the Act ibid should not be imposed upon the party as they failed to pay the Service Tax electronically against the services provided by them;*
- (viii) a penalty under Section 77(2) of the Act ibid should not be imposed upon the party as they failed to file Service Tax Return for the period April'2017 to June'2017.*

2.6 Show Cause Notice was adjudicated as per order in original referred in para 1.2 above. In appeal filed by the appellant, First Appellate authority modified the order in original to the extent as indicated in the impugned order referred in para 1 above.

2.7 Aggrieved appellant has filed this appeal.

3.1 I have heard Shri Dharmendra Srivastava Chartered Accountant for the appellants and Shri A.K. Choudhary Authorised Representative for the revenue.

3.2 Arguing for the appellant learned Counsel submits that-

- Two issues are involved in the appeal in respect of the services provided to the M/s Ramky Infrastructure, he admits that the service tax has been correctly demanded and he would not press the appeal in that regards.
- In respect of the second issue undisputedly Commissioner (Appeals) has himself observed that certain work order/agreements entered into with M/s Dakshinanchal Vidyut Vitran Nigam Ltd. certain goods such as paint, caustic, welding materials, MS Plates, soap, cutting gasser etc., have been consumed in providing the service and the property in these goods have passed on to the service recipient.

- as the property in the good consumed has been on to the service recipient the services provided would merit classification as work contract service, as has been held in various decisions
- As these services are classifiable as work contract services the benefit of composition scheme would be available and the appellant would be liable to pay service tax to the tune of 50% only and remaining amount would be payable by the service recipient under reverse charge mechanism..

3.3 Learned Authorised Representative reiterates the findings recorded in the orders of the lower authorities.

4.1 I have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 Impugned order records the findings as follows:

"4.2 The appellant has contested that demand of service tax on the basis of balance sheet/profit & loss account/FORM 26AS is not sustainable. I observe that in the instant case the appellant has submitted copy of balance sheet/profit & Loss account/FORM 26AS for the F.Y 2014-15 to 2017-18 vide letter dated 04.10.2019. Since copy of entire work order/agreement, bills/ invoices were not submitted to the department to ascertain exact nature of services rendered by them and to examine abatement or exemption available to them. It is on record (Para No.5 of the SCN that the department has written letter dated 14,10.2019, 25.10.2019 and summons dated 24.01.2020, 11.02.2020 and 09.02.2020 to the appellant for furnishing relevant information/documents but no compliance has been made on the part of the appellant. Last letter dated 29.05.2020 was issued by the department to furnish information/documents within three days but again the appellant has not responded, therefore, department has no option but issue SCN on the basis of documents submitted by the appellant vide letter dated 04.10.2019. Thus, I find no force in the contention of the appellant.

4.3 The appellant has contested that .the works Contract Services provided to M/s EWD Jhansi are covered under Rule 2A(ii) of the Service Tax (Determination of Value) Rules,2006 and appellant is eligible for abatement of 30% on the gross value and also eligible for partial reverse charge benefit as provided under notification No. 30/2012-ST dated 20.06.2012. I observe that the appellant has entered into agreement with M/s DVVNL, Agra for repairing of damaged/burnt transformers at their Workshops As per terms and conditions of the agreement all the stock materials required for the work shall be arranged by the Electricity Department except the items such as paint, caustic, welding materials, MS plate, soap, cutting gasser etc. I observe that Section 65B (54) defines "Works Contract" as under:

"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 purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property"

4.3.1 From the above, it is evident that first part of the definition mandates that there must be transfer of property in goods in the contract while executing the contract, I no transfer of property is involved then it is not covered under works contract Therefore, if service provider is providing only consumables like paint, caustic, welding materials, MS plate, soap, cutting gasser etc, then it is not covered in works contract as property of goods is not transferred but goods are consumed. Further, the appellant has also not produced any bill/invoice to substantiate their claim. that service rendered by them comes under works contracts services and their service tax liability is restricted to 50%

only in terms of notification No.30/2012-ST dated 20.06.2012 Thus, I find no force in the contention of the appellant

4.4 The appellant has further contested that the main contract was awarded to M/s Ramky Infrastructure by the U.P Jal Nigam Kanpur for supply, laying, jointing, testing, commissioning o PSC feeder main, construction of water pump, water treatment plant etc and they have provided services to M/s Ramky Infrastructure as sub-contractor which are covered under clause (e) of entry 12 as well as clause (a) of the entry No. 25 of the mega exemption notification No. 25/2012-ST dated 20.06.2012.

I observe that the clause (e) of entry No. 12 of the mega exemption notification exempts the services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal. Further, the clause (a) of the entry No.25 of the said notification exempts the services provided to Government, a local authority or a governmental authority by way of (a) water supply, public health, sanitation conservancy, solid waste management or slum improvement and up-gradation. From the above legal provisions, it can be seen that clause (e) of entry 12 and clause (a) of the entry No.25 of the said notification exempts the services provided to Government, a local authority or a governmental authority only. In the instant case the appellant has provided services to M/s Ramky Infrastructure, therefore, said clauses are not applicable in the instant case. Further, the appellant has not provided any work order/contract awarded by M/s Ramky Infrastructure neither during the filing the instant appeal nor at the time of personal hearing. A letter dated 21.02.2022 was also send to the appellant for providing work order/contract awarded by M/s Ramky Infrastructure

but the appellant has not provided any documents. Thus, I find no force in the submission of the appellant

4.5 In view of the above discussion, I am of the considered view that the appellant is liable to pay service tax amounting to Rs. 21,75,673/- along with interest."

4.3 The findings recorded in para 4.4 of the impugned order in respect of the services provided to M/s Ramky Infrastructure have not been contested and pressed during the argument on appeal. In absence of any challenge to the same they are upheld.

4.4 In respect of the demand made in respect of the services provided to Dakshinanchal Vidyut Vitran Nigam Ltd (DVVNL) appellant has claimed that the services provided by them should be classified under the category of Work Contract Service and the liability to service tax be assessed accordingly. In the impugned order in para 4.3 it has been specifically recorded that at the time of providing the taxable service certain goods were consumed and the property in those goods was transferred to the service recipient. That being so, I find that the issue is well settled that said service is to be treated as a work contract services. In case of Agrawal Colour Advance Photo System [2020 (38) G.S.T.L. 298 (M.P.)], Hon'ble Madhya Pradesh High Court has held as follows:

"13. From the aforesaid discussion, it would emerge that the crux of the substantial question of law No. 1 which has arisen for consideration is : "whether for the purposes of service tax the value of photography service can be determined separately from the value of certain consumables and chemicals which are used on the paper for printing the image and whether such printed photograph can be said to be a sale of goods in terms of Article 366(29A)(b) of the Constitution". In this regard, before considering the first limb of the contention of Learned Counsel for the appellants that in view of amended Article 366(29A) of the Constitution, the material and consumables used in photography will qualify as sale, it would be apt to

refer to relevant clauses of the definition clause as contained in Article 366(29A) of the Constitution and other enactments, which read as under :-

"366. (29A) 'tax on the sale or purchase of goods' includes -

*(a) *** *** ****

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

**** *** ****

The aforesaid definition of "sale" has been adopted by the M.P. VAT Act, 2002. Sub-clause (ii) of Section 2(u) of the said Act, which is relevant for the purposes of present controversy, is reproduced as under :-

"2(u) "Sale" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or for other valuable consideration and includes -

**** *** ****

(ii) a transfer of property in goods whether as goods or in some other form, involved in the execution of works contract;

Section 2(h) of the Central Excise Act, 1944 defines "sale" and "purchase" as any transfer of possession for consideration by one person to another. Section 2(h) of the Act is reproduced as under :-

"2(h) "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;"

14. According to the Learned Counsel for the appellants, the material and consumables are embedded in the photograph when it is transferred to the customers. The Larger Bench of the Tribunal erroneously held that the consumables and chemicals used for providing such service disappear when the photograph emerges and concluded

that value of photography service includes all elements which bring that to the deliverable stage. As noticed earlier, the stand of the appellants is that under sub-clause (b) of Clause (29A) of Article 366 of the Constitution, in execution of works contract, the tax which is paid on the sale or purchase of goods should be on the transfer of property in goods only. The photograph is completed through developing and printing process by using the consumables and chemicals, which are the essential ingredients without which the photography cannot be completed. Therefore, when value of photography paper upon which an image is printed and certain consumables and material with which the photography is done, can be separated from the photography service then both the elements cannot be remixed for the purposes of service tax particularly when the VAT is levied on the material, consumables and chemicals which are used in the photography service.

15. However, it needs to be examined whether Article 366(29A)(b) of the Constitution is attracted in the present case, for which, it is to be necessarily seen whether the photography service is a works contract.

16. This aspect of the matter has been considered by a three-Judge Bench of the Apex Court in Civil Appeal No. 1145/2006 (State of Karnataka, etc. v. M/s. Pro. Lab & Others) decided on 30th January, 2015 [2015 (321) E.L.T. 366 (S.C.)] wherein challenge put forth was to the constitutional validity of Entry 25 of Schedule-VI to the Karnataka Sales Tax Act, 1957. The Apex Court took note of six sub-clauses of Clause (29A) of Article 366 of the Constitution of India and elaborately discussing its earlier decisions and the case law on the subject, rejected the contention of the State that processing of photography was a contract for service simpliciter with no element of goods at all and, therefore, Entry 25 could not be saved by taking shelter under clause (29A) of Article 366 of the Constitution. It was further observed that Entry 54 of List II of Schedule

VII of the Constitution of India empowers the State Legislature to enact a law taxing sale of goods. Sales tax, being a subject matter into the State List, the State Legislature has the competency to legislate over the subject. The relevant extract contained in paras 18 to 23 of the said judgment reads as under :-

"18. It is amply clear from the above and hardly needs clarification that the Court was of the firm view that two Judges Bench judgment in Rainbow Colour Lab and Another v. State of Madhya Pradesh and Others (2000) 2 SCC 385 did not lay down the correct law as it referred to pre 46th Amendment judgments in arriving at its conclusions which had lost their validity. The Court also specifically commented that after 46th Amendment, State is empowered to levy sales tax on the material used even in those contracts where "the dominant intention of the contract is the rendering of a service, which will amount to a Works Contract".

19. In view of the above, the argument of the respondent assesseees that Associated Cement Companies Ltd. v. Commissioner of Customs, (2001) 4 SCC 593, (ACC Ltd. case) did not over-rule Rainbow Colour Lab's case (supra) is, therefore, clearly misconceived. In fact, we are not saying so for the first time as a three-member Bench of this Court in M/s. Larsen and Toubro and Another v. State of Karnataka and another (2014) 1 SCC 708 has already stated that ACC Ltd. had expressly over-ruled Rainbow Colour Lab while holding that dominant intention test was no longer good test after 46th Constitutional Amendment. We may point out that Learned Counsel for the respondent assesseees took courage to advance such an argument emboldened by certain observations made by two-member Bench in the case of C.K. Jidheesh v. Union of India, wherein the Court has remarked that the observations in ACC Ltd. were merely obiter. In Jidheesh, however, the Court did not notice that this very argument had been

rejected earlier in Bharat Sanchar Nigam Ltd. v. Union of India (2006) 3 SCC 1. Following discussion in Bharat Sanchar is amply demonstrative of the same :

"46. This conclusion was doubted in Associated Cement Companies Ltd. v. Commissioner of Customs, (2001) 4 SCC 593 saying :

"The conclusion arrived at in Rainbow Colour Lab case (2000) 2 SCC 385, in our opinion, runs counter to the express provision contained in Article 366(29A) as also of the Constitution Bench decision of this Court in Builders Assn., of India v. Union of India - (1989) 2 SCC 645.

47. We agree. After the 46th Amendment, the sale element of those contracts which are covered by the six sub-clauses of Clause (29A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. Therefore, in 2005, C.K. Jidheesh v. Union of India - (2005) 8 SCALE 784 held that the aforesaid observations in Associated Cement (supra) were merely obiter and that Rainbow Colour Lab (supra) was still good law, it was not correct. It is necessary to note that Associated Cement did not say that in all cases of composite transactions the 46th Amendment would apply"

20. In M/s. Larsen and Toubro, the Court, after extensive and elaborate discussion, once again specifically negated the argument predicated on dominant intention test having regard to the statement of law delineated in ACC Ltd. and Bharat Sanchar Nigam Ltd. cases. The reading of following passages from the said judgment is indicative of providing complete answer to the arguments of the respondent assessee herein :

"64. Whether contract involved a dominant intention to transfer the property in goods, in our view, is not at all material. It is not necessary to ascertain what is the dominant intention of the contract. Even if the dominant intention of the contract is not to transfer the property in

goods and rather it is the rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if it otherwise has elements of works contract. The view taken by a two-Judge Bench of this Court in Rainbow Colour Lab (supra) that the division of the contract after Forty-sixth Amendment can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer of property takes place as an incident of contract of service is no longer good law, Rainbow Colour Lab (supra) has been expressly overruled by a three-Judge Bench in Associated Cement.

65. *Although, in Bharat Sanchar, the Court was concerned with sub-clause (d) of Clause (29A) of Article 366 but while dealing with the question as to whether the nature of transaction by which mobile phone connections are enjoyed is a sale or service or both, the three-Judge Bench did consider the scope of definition in Clause (29A) of Article 366. With reference to sub-clause (b) it said : "Sub-clause (b) covers cases relating to works contract. This was the particular fact situation which the Court was faced with in Gannon Dunkerley-I (State of Madras v. Gannon Dunkerley & Co., AIR 1958 SC 560) and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in Gannon Dunkerley-I was directly overcome". It then went on to say that all the sub-clauses of Article 366(29A) serve to bring transactions where essential ingredients of a 'sale' as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchase or sale for the purposes of levy of sales tax.*

66. *It then clarified that Gannon Dunkerley-I survived the Forty-sixth Constitutional Amendment in two respects. First, with regard to the definition of "sale" for the purposes of the*

Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29A) operate and second, the dominant nature test would be confined to a composite transaction not covered by Article 366(29A). In other words, in Bharat Sanchar, this Court reiterated what was stated by this Court in Associated Cement that dominant nature test has no application to a composite transaction covered by the clauses of Article 366(29A). Leaving no ambiguity, it said that after the Forty-sixth Amendment, the sale element of those contracts which are covered by six sub-clauses of Clause (29A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying.

67. *In view of the statement of law in Associated Cement and Bharat Sanchar, the argument advanced on behalf of the Appellants that dominant nature test must be applied to find out the true nature of transaction as to whether there is a contract for sale of goods or the contract of service in a composite transaction covered by the clauses of Article 366(29A) has no merit and the same is rejected.*

68. *In Gannon Dunkerley-II (Gannon Dunkerley and Co. and others v. State of Rajasthan and others (1993) 1 SCC 364), this Court, inter alia, established the five following propositions : (i) as a result of Forty-sixth Amendment the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and the other for supply of labour and service and as a result of such contract which was single and indivisible has been brought on par with a contract containing two separate agreements; (ii) if the legal fiction introduced by Article 366(29A)(b) is carried to its logical end, it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a*

deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services; (iii) in view of sub-clause (b) of Clause (29A) of Article 366, the State legislatures are competent to impose tax on the transfer of property in goods involved in the execution of works contract. Under Article 286(3)(b), Parliament has been empowered to make a law specifying restrictions and conditions in regard to the system of levy, rates or incidents of such tax. This does not mean that the legislative power of the State cannot be exercised till the enactment of the law under Article 286(3)(b) by the Parliament. It only means that in the event of law having been made by Parliament under Article 286(3)(b), the exercise of the legislative power of the State under Entry 54 in List II to impose tax of the nature referred to in sub-clauses (b), (c) and (d) of Clause (29A) of Article 366 would be subject to restrictions and conditions in regard to the system of levy, rates and other incidents of tax contained in the said law; (iv) while enacting law imposing a tax on sale or purchase of goods under Entry 54 of the State List read with Article 366(29A)(b), it is permissible for the State legislature to make a law imposing tax on such a deemed sale which constitutes a sale in the course of the inter-State trade or commerce under Section 3 of the Central Sales Tax Act or outside under Section 4 of the Central Sales Tax Act or sale in the course of import or export under Section 5 of the Central Sales Tax Act; and (v) measure for the levy of tax contemplated by Article 366(29A)(b) is the value of the goods involved in the execution of a works contract. 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. 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 works and not the cost of acquisition of the goods by the contractor.

69. In Gannon Dunkerley-II, sub-section (3) of Section 5 of the Rajasthan Sales Tax Act and Rule 29(2)(1) of the Rajasthan Sales Tax Rules were declared as unconstitutional and void. It was so declared because the Court found that Section 5(3) transgressed the limits of the legislative power conferred on the State legislature under Entry 54 of the State List. However, insofar as legal position after Forty-sixth Amendment is concerned, Gannon Dunkerley-II holds unambiguously that the States have now legislative power to impose tax on transfer of property in goods as goods or in some other form in the execution of works contract.

70. The Forty-sixth Amendment leaves no manner of doubt that the States have power to bifurcate the contract and levy sales tax on the value of the material involved in the execution of the works contract. The States are now empowered to levy sales tax on the material used in such contract. In other words, Clause (29A) of Article 366 empowers the States to levy tax on the deemed sale."

21. To sum up, it follows from the reading of the aforesaid judgment that after insertion of clause (29A) in Article 366, the Works Contract which was indivisible one by legal fiction, altered into a contract, is permitted to be bifurcated into two: one for "sale of goods" and other for "services", thereby making goods component of the contract exigible to sales tax. Further, while going into this exercise of divisibility, dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial. It follows, as a sequitur, that by virtue of clause (29A) of Article 366, the State Legislature is now empowered to segregate the goods part

of the Works Contract and impose sales tax thereupon. It may be noted that Entry 54, List II of the Constitution of India empowers the State Legislature to enact a law taxing sale of goods. Sales tax, being a subject-matter into the State List, the State Legislature has the competency to legislate over the subject.

22. Keeping in mind the aforesaid principle of law, the obvious conclusion would be that Entry 25 of Schedule VI to the Act which makes that part of processing and supplying of photographs, photo prints and photo negatives, which have "goods" component exigible to sales tax is constitutionally valid. Mr. Patil and Mr. Salman Khurshid, Learned Senior Counsel who argued for these assessees/respondents, made vehement plea to the effect that the processing of photographs etc. was essentially a service, wherein the cost of paper, chemical or other material used in processing and developing photographs, photo prints etc. was negligible. This argument, however, is founded on dominant intention theory which has been repeatedly rejected by this Court as no more valid in view of 46th Amendment to the Constitution.

23. It was also argued that photograph service can be exigible to sales tax only when the same is classifiable as Works Contract. For being classified as Works Contract the transaction under consideration has to be a composite transaction involving both goods and services. If a transaction involves only service i.e. work and labour then the same cannot be treated as Works Contract. It was contended that processing of photography was a contract for service simplicitor with no elements of goods at all and, therefore, Entry 25 could not be saved by taking shelter under clause (29A) of Article 366 of the Constitution. For this proposition, umbrage under the judgment in B.C. Kame's case (Assistant Sales Tax Officer and others v. B.C. Kame, Proprietor Kame Photo, AIR 1977 SC 1642) was sought to be taken wherein this Court held that the work

involving taking a photograph, developing the negative or doing other photographic work could not be treated as contract for sale of goods. Our attention was drawn to that portion of the judgment where the Court held that such a contract is for use of skill and labour by the photographer to bring about desired results inasmuch as a good photograph reveals not only the aesthetic sense and artistic faculty of the photographer, it also reflects his skill and labour. Such an argument also has to be rejected for more than one reasons. In the first instance, it needs to be pointed out that the judgment in Kame's case was rendered before the 46th Constitutional Amendment. Keeping this in mind, the second aspect which needs to be noted is that the dispute therein was whether there is a contract of sale of goods or a contract for service. This matter was examined in the light of law prevailing at that time, as declared in Dunkerley's case as per which dominant intention of the contract was to be seen and further that such a contract was treated as not divisible. It is for this reason in BSNL and M/s. Larsen and Toubro cases, this Court specifically pointed out that Kame's case would not provide an answer to the issue at hand. On the contrary, legal position stands settled by the Constitution Bench of this Court in Kone Elevator India Pvt. Ltd. v. State of Tamil Nadu and Ors. (2014) 7 SCC 1. Following observations in that case are apt for this purpose :

"On the basis of the aforesaid elucidation, it has been deduced that a transfer of property in goods under Clause (29A)(b) of Article 366 is deemed to be a sale of goods involved in the execution of a Works Contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made. One thing is significant to note that in Larsen and Toubro (supra), it has been stated that after the constitutional amendment, the narrow meaning given to the term "works contract" in Gannon Dunkerley-I (supra) no longer survives at present.

It has been observed in the said case that 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, for the additional obligations in the contract would not alter the nature of the contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. It has been further held that 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" because nothing in Article 366(29A)(b) limits the term "works contract" to contract for labour and service only."

17. The view expressed by the Apex Court in Bharat Sanchar Nigam Limited's case (supra) that after the 46th Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying, was reiterated by the Apex Court in M/s. Pro. Lab's case (supra). Thus, the finding of the Tribunal that in Bharat Sanchar Nigam Limited's case (supra) the Apex Court has only given the passing remarks and did not overrule either C.K. Jidheesh (supra) or Rainbow Colour Lab and Another v. State of Madhya Pradesh and Others, (2000) 2 SCC 385 = 2001 (134) E.L.T. 332 (S.C.), is unsustainable, as it had been categorically held in Bharat Sanchar Nigam Limited's case (supra) that these judgments do not lay down correct law.

18. The next contention of the Learned Counsel for the appellants was that appellants having once paid the VAT under the State Act as works contractor on the material and chemicals consumed in photography service, cannot be charged service tax on the same value. To bolster his submission, he placed reliance upon the judgment in Safety

Retreading Company Private Ltd. (supra). In the facts of the said case, the assessee was engaged in business of tyres on job work basis and had been paying 30% service tax only on the labour component shown in invoices after deducting 70% towards material cost on the gross re-treading charges billed in terms of Notification No. 12/2003-S.T., dated 20-6-2003. A show cause notice dated 24-1-2008 was issued to the assessee alleging suppression of value of taxable services with intention to evade payment of service tax and proposing recovery of service tax together with interest and penal action under the provisions of Sections 76, 77 and 78 of the Finance Act, 1994. The said deduction of 70% was denied by the Commissioner and demand of service tax was confirmed on the assessee along with interest and penalty. The appeal preferred by the assessee was considered and decided by a three-member Special Bench of the Tribunal reported as Safety Retreading Company (P) Ltd. v. Commissioner of Central Excise, Salem, (2012) 34 STT 64 (Chennai) = 2012 (26) S.T.R. 225 (Tribunal), wherein coupled with the Notification No. 12/2003-S.T., dated 20-6-2003 a similar issue was considered by the Larger Bench of the Tribunal: "whether in a contract for retreading of tyres, service tax is leviable on the total amount charged for retreading including the value of the materials/goods that have been used and sold in the execution of the contract or exemption to material component therein can be granted". The question was whether maintenance and repair service can be treated as service under "works contract" for service tax purposes. The Appellate Tribunal by majority view, upheld the demand, inter alia, on the ground that 'maintenance and repair service' being a specific service is to be treated as service under "works contract" for service tax purposes. On appeal, the Apex Court set aside the said majority view of the Special Bench of the Tribunal and held that Section 67 of the Finance Act clarifies that costs of parts or other material, if any, sold (deemed sale) to

customer while providing maintenance or repair service is excluded from service tax subject to furnishing adequate and satisfactory proof by the assessee and this position has been further clarified in Notification dated 20-6-2003 and C.B.E. & C. Circular dated 7-4-2004. It was held that component of gross turnover in respect of which assessee had paid taxes under local Act with which it has registered as works contractor is excluded from service tax.

19. In view of the law laid down by the Apex Court in M/s. Pro. Lab's case (supra), it can be safely held that photography service, which has both the elements of goods and services is covered under works contract. Thus, in a works contract which involves transfer of property, the provisions as contained in Article 366(29A) of the Constitution are attracted. Therefore, in the light of sub-clause (b) of Clause (29A) of Article 366 of the Constitution, in execution of a works contract when there is transfer of property even in some other form than in goods, the tax on such sale or purchase of goods is leviable. In this view of the matter, after the 46th Amendment, there is no question of dominant nature test applying in photography service and the works contract, which is covered by Clause (29A) of Article 366 of the Constitution where the element of goods can be separated, such contracts can be subjected to sales tax by the States under Entry 54 of List II of Schedule II. Once that is so, value of photographic paper and consumables cannot be included in the value of photography service for the purposes of imposition of service tax. Thus, in the light of the judgment of the Apex Court in M/s. Pro Lab (supra), wherein it is held that part of processing and supplying of photographs, photo prints and negatives, which have "goods" component exigible to sales tax is constitutionally valid, it is held that value of photography service has to be determined in isolation of cost of goods such as photography paper, consumables and chemicals with which image is printed, negatives and other

material which has "goods" component liable to sales tax. Accordingly, the substantial question of law No. 1 is answered in favour of the assessee and against the Revenue.

4.5 In view of the above decision I am of the view that the services provided by the appellant to DVVNL are in nature of "Work Contract Services" and should be assessed accordingly, by allowing the benefit of composition scheme and partial reverse charge as per Notification No 30/2012-ST.

4.6 In view of the discussions as above the demand made needs to be recomputed by treating the services provided to DVVNL as work contract service. For limited purpose of re-computation of demand matter is remanded back to the original authority. The penalty imposed under section 78 is also set aside, to be recomputed after re-computation of the demand.

4.7 All other parts of impugned order not challenged are upheld.

5.1 Appeal partially allowed and the matter remanded to original authority for re-computation of demand and penalty under Section 78.

5.2 As the matter is substantially old original authority should decide the matter in remand proceedings within three months of the receipt of this order.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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