CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

<u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70248 of 2021

(Arising out of Order-in-Appeal No.62-ST-Alld-2021, dated -24/02/2021 passed by Commissioner (Appeals) CGST, Allahabad)

M/s Kumar Technocrats .....**Appellant**

(Prop Shri Anil Kumar Dwivedi
53/5k/4, Malviya Road, George Town,
Allahabad, Uttar Pradesh 211002)

VERSUS

Commissioner, CGST & Service Tax, Allahabad
....**Respondent**

(38, M.G. Marg, Allahabad, U.P.)

<u>APPEARANCE:</u>

Shri S.P. Ojha, Consultant for the Appellant

Shri Manish Raj, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**
HON'BLE MR. ANGAD PRASAD, MEMBER (JUDICIAL)

FINAL ORDER NO.70185/2025

DATE OF HEARING : 27.02.2025
DATE OF DECISION : 27.02.2025

<u>SANJIV SRIVASTAVA:</u>

This appeal is directed against the Order-In-Appeal No.62-ST-Alld-2021, dated-24/02/2021 passed by Commissioner (Appeals) CGST, Allahabad. By the Order-In-Original Commissioner has held as follows:-

ORDER

(i) I hereby confirm the demand of service tax amounting to Rs. 26, 03,819/- (including Education Cess and

S & H. Ed. Cess) under the provisions of proviso to Section 73(1) of Act, along with interest under section 75 of the Act.

(ii) I impose a penalty of Rs. 10,000/- against the party under Section 77(2) of the Act.

(iii) I impose a penalty of Rs. 26, 03,819/- against the party under Section 78 of the Act.

2.1 The Appellant is engaged in providing 'Works Contract Service' to various divisions of M/s Uttar Pradesh Power Corporation/ M/s Purvanchal Vidyut Vitran Nigam Ltd. located in Allahabad & Kaushambi.

2.2 As per Form 26AS Appellant had received a total amount of Rs.6,83,40,713/- during the period July 2012 to March 2016 for provision of said services. They did not paid any service tax and were not registered nor filed any ST3 Returns for the period July 2012 to September 2012.

2.3 Appellant did not paid service tax amounting to Rs.26,03,819/- on the consideration so received as detailed in the table below:-

Period	Gross value [Form 26AS]	Taxable value	Rate of S.Tax	Total S. Tax	S. tax payable	S. tax paid	S. tax short paid	Remarks
Jul'12. to Mar'13	6550225	6550225	12.36%	809608	404804	0	404804	50% payable by the party under RCM
2013-14	36210859	36210859	12.36%	4475662	2237831	1723712	514119	
2014-15	9556139	9556139	12.36%	1181139	590569	0	590569	
2015-16 (01.04.15 to 30.05.15)	4655588	4655588	12.36%	575431	287715	0	287715	
2015-16 (01.06.15 to 14.11.15)	7024640	7024640	14.00%	983450	491725	0	491725	
2015-16 (15.11.15 to 31.03.16)	4343262	4343262	14.50%	629773	314886	0	314886	
Total	68340713	68340713	-	8655062	4327531	1723712	2603819	-

2.4 A Show Cause Notice dated 07.04.2017 was issued to the Appellant asking them to show cause as to why:-

(a) Service Tax amounting to Rs. 26,03,819/- (Rupees Twenty six lakhs three thousand eight hundred and nineteen

only), including Education Cess and Secondary and Higher Education Cess, should not be demanded and recovered from them under the provisions of proviso to Section 73 (1) of Chapter V of the Finance Act, 1994 along with interest as applicable under Section 75 of the Act, ibid.

(b) Penalty should not be imposed upon them under section 77 (1) of the Act for violating the provisions of section 69 read with rule 4 of the Service Tax Rules, 1994.

(c) Penalty should not be imposed upon thera under Section 77(2) of Chapter V of the Finance Act, 1994 for contravention of section 70 of the Act readwith Rule 7 for default of not filing the statutory ST-3 return for the period July'12 to Sept. 12.

(d) Penalty should not be imposed upon them under Section 78 of Chapter V of the Finance Act, 1994 for their willful and conscious suppression of facts with intent to evade payment of duty.

2.5 The Show Cause Notice has been adjudicated as per Order-In-Original referred in Para 1 above.

2.6 The Appeal filed by the Appellant has been dismissed as per the impugned order by the first appellate authority. Hence this Appeal.

3.1 We have heard Shri S.P. Ojha, Consultant for the Appellant and Shri Manish Raj, learned Authorized Representative for the Revenue.

3.2 Arguing for the Appellant learned counsel submits that

- the demand raised on differential value determined on the basis of the amount shown in 26AS and ST-3 returns is not sustainable. Reliance is placed on following decisions:-
    - Kush Constructions [2019 (24) GSTL 606 (Tri.Alld.)
    - Bhayana Builders (P) Ltd [2013 (32) STR 49 (Tri. LB)
    - Bhayana Builders P Ltd 2018 (10) GSTL 118 (S.C.)
    - Era infra Engineering Ltd [2018 (20) GSTL 767 (Delhi)]
- In any case as the Appellant is providing services alongwith supply of material the value of services portion should be determined after excluding the value of the

material supplied or on the basis of the Rule 2A(a) of the Work Contract Composition Scheme in terms of Rule 2A(ii)(A) of the Service Tax (Determination of Value) Rules, 2006.

3.3 Departmental Representative reiterates the findings recorded in the impugned order

4.1 We have considered the impugned order alongwith the submissions made in the appeal and during the course of argument.

4.2 The impugned order records the findings as follows:-

"4.2 Thus, in the present case there is no dispute regarding provision of works contract services rendered by the appellant. The only dispute is as to whether the appellant was eligible for the abatement of 60% on the total value of the Works Contract Services in terms of rule 2A(ii)(A) of the Service Tax (Determination of Value) Rules, 2006 without adding fair market value of all goods and services supplied in or in relation to the execution of the works contract. To decide the issue I would like to visit legal provisions for valuation of works contract services

4.3 The Rule 2A of Service Tax (Determination of Value) Rules, 2006, as amended, stipulates that subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

(i) Value of service portion in the execution of works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

Explanation:-………………………………….

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall

determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax, shall be payable on forty percent of the total amount charged for the works contract;

(B) in case of works contract, not covered under sub-clause (A), including works contract entered into for,-

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or

(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tilting or installation of electrical fittings of immoveable property,

Service tax shall be payable on seventy per centof the total amount charged for the works contract.]

Explanation 1:- For the purposes of this rule-

(a) Original works" means-

(i) all new constructions

(ii) all types of additions and alternations to abandoned or damaged structures on land that are required to make them workable

(iii) erection, commissioning or installation of plant machinery or equipment or structures, whether pre fabricated or otherwise,

(b) total amount" means the sum total of the gross amount charged for the works contract and fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(i) the amount charged for such goods or services, if any, and

(ii) the value added tax or sales tax, if any, levied thereon:

Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

Free Issue of Material by Service Receiver

4.4 Under works contracts, sometimes as per terms of contract, a service receiver may supply materials such as cement or steel free of cost or at reduced cost and contractor uses such materials for the execution of such works contract. Now the question arises as to whether the contractor is liable to pay service tax on value of material supplied by the service receiver if he chooses the composition scheme i e valuation under rule 2A(ii) of the Rules for payment of service tax on such contracts by claiming abatement. Answer to this question is provided in the definition of "total amount" provided under Explanation 1(b) of the Rule 2A(ii) of Valuation Rules which stipulates as under:

"total amount" means-

the sum total of the gross amount charged for the works contract and the <u>fair market value of all goods and services supplied in or in relation to the execution of the works contract</u>, whether or not supplied under the same contract or any other contract, after deducting-

(a) the amount charged for such goods or services, if any; and

(b) the value added tax or sales tax, if any, levied thereon.

The underlined portion of the definition makes it crystal clear that the contractor has to include the fair market value of free issue of materials while calculating service tax under works contract in case they claimed abatement of certain percentage.

4.5 Thus, the intention of law is to cover all the supplies made by service receiver in valuation under composition scheme i.e. service tax paid on certain percentage of value, whether it is free of chargeable from service receiver. The *reason behind this is that the abatement allowed under the said rule is quite substantial and contractor could not misused the provision by supplying valuable material free of cost & material having lesser value has been taken into account while rendering works contract services. To add conviction to above concept, it should be noted that even an oral agreement is a contract as per Indian Contracts Act, 1872. In fact, the performance of supply of free material itself becomes free consent between both the parties and deemed contract can be implied. Hence, the value of free issue of material shall be included even if there is no such written contract.*

4.6 The appellant has heavily relied upon judgment of the Hon'ble Supreme Court given in the case of M/s Bhayana Builders (P) Ltd Vs CCE, Delhi (2018 (10) GSTL 118 (SC)). In the said case the respondents are engaged in providing Commercial or Industrial Construction Service and availed benefit of Notification No. 15/2004-ST dated September 10, 2004 which provides that service tax is to be calculated on the value which is equivalent to 33% of the gross amount charged. This notification was amended vide another Notification No. 4/2005-ST dated March 01, 2005 whereby an explanation was added to the original notification which stipulates that the gross amount charged shall include the value of goods and material supplied and provided or used by the provider of construction services for providing such service. The question, therefore, which has fallen for consideration in the said case was as to whether, the value of goods/material supplied or provided free of cost by a service recipient and used for providing the taxable service of construction or industrial complex, is to be included in computation of gross amount (charged by the service provider), for valuation of the taxable service, under Section 67 of the Act and for availing the benefits under Notification No. 15/2004-ST dated September 10, 2004 as amended by Notification No. 4/2005-ST dated March 01, 2005 (whereby an Explanation was added to Notification No. 15/2004-ST), *To answer the sad question the Hon'ble Supreme Court has held as under,*

> *"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.*
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> *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 grosss amount has a causal connection with the amount that is charged by the service provider as that becomes the element of taxable service*
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> *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."*

From the above in can be seen that said judgment was pronounced by the Hon'ble Supreme Court for the dispute arises before introduction of the negative list regime. In the said case Hon'ble Supreme Court has observed that the "Notification No. 15/2004- ST date 10.09.2004 stipulates that service tax is to be calculated on 33% of gross amount charged from service recipient. Though Explanation added to Notification ibid w.e.f March1, 2005 included value of goods & materials supplied by service providers/assessee in gross amount charged, it did not deal with value of goods and material supplied or provided by the service recipient". However, determination of value of service portion in the execution of works contract has been substituted by the Service Tax (Determination of Value) (Second Amendment) Rules, 2012 w.e.f 01.07.2012. The definition of "total amount" provided under Explanation 1(b) of the Rule 2A(ii) of the said Valuation Rules is as under:

"total amount" means-

the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(a) the amount charged for such goods or services, if any, and

(b) the value added tax or sales tax, if any, levied thereon

In can be seen that after introduction of negative list regime i.e. w.e.f 01.07.2012, the valuation aspect in case of works contract services has been completely changed. Now abatement has been calculated on "total amount" which includes gross amount charged & the fair market value of all goods and services supplied in or in relation to the execution of the works contract. The Hon'ble Supreme Court judgment affirming CESTAT order in the case of M/s Bhayana Builders relates to service tax levy for the period prior to 01.07.2012 wherein abatement was calculated on

> *the gross amount charged only, there was no provision to add value of goods and material supplied or provided by the service recipient. In the new tax era, as relevant to present case, it has been specifically provided under the Valuation Rule that fair market value of all goods and services supplied in or in relation to the execution of the works contractshould be added for claiming abatement under said rules, therefore, present case is clearly distinguishable from the facts mentioned in the case decided by the Hon'ble Supreme Court. Thus, decision given by the Apex Court is not squarely applicable in the present case.*

4.3 Undisputedly the Appellant is engaged in providing works contract service. As the services provided by the Appellant are alongwith supply of material they are work contract services and the Appellant would be eligible for the abatement as per Rule 2A(A). In case of Commissioner of **C.Ex. & Cus., Kerala V/s Larsen & Toubro Ltd. reported as 2015 (39) S.T.R. 913 (S.C.)** following has been held:-

> ***15.*** *A reading of this judgment, on which counsel for the assessees 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 assessees 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 (2) S.T.R. 161 (S.C.), as follows :-*

"No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in Larsen & Toubro v. Union of India [(1993) 1 SCC 364] : (SCC p. 395, para 47) :-

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

which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods."

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

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

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

"To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money

consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment." (at page 427)

18. *Similarly, in Kone Elevator India (P) Ltd. v. State of T.N. - (2014) 7 SCC 1 = 2014 (34) S.T.R. 641 (S.C.) = 2014 (304) E.L.T. 3 (S.C.), 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 = 2014 (34) S.T.R. 481 (S.C.) = 2014 (303) E.L.T. 3 (S.C.), 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]. 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 assessees' 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, 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, 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.*

4.4 Impugned order seeks to distinguish the decision of the Hon’ble Supreme Court in case of Bhayana Builders by referring to amendments made by Service Tax (Determination of Value) (second Amendment) Rules 20112 w.e.f from 01.07.2012. Though reproduced in the impugned order, we reproduce the same again:

"total amount" means-

the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(a) the amount charged for such goods or services, if any, and

(b) the value added tax or sales tax, if any, levied thereon”

Prior to this amendment, Explanation to Rule 3 (1) of The Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 read as follows:

Explanation.- For the purposes of this sub-rule, gross amount charged for the works contract shall be the sum,

(a) Including

(i) The value of all goods used in or in relation to the execution of the works contract, whether supplied under any other contract for a consideration or otherwise; and

(ii) The value of all the services that are required to be provided for the execution of the works contract;

The Explanation under consideration of the Hon’ble Apex Court is reproduced below:

"Notification No. 4/2005-S.T. was issued on March 1, 2005, introducing an Explanation at the end of Notification No. 15/2004-S.T. This Explanation reads :

"Explanation. - For the purposes of this notification, the "gross amount charged" shall include the value of goods and materials supplied or provided or used by the provider of the construction service for providing such service."

From perusal of the above three texts it is evident that throughout the intention of the government was to add the value of all the material supplied or consumed by the service provider in providing the said services. The underlying test was that the value of the material that is supplied by the service provider or consumed by the service provider on his own account for providing the services need to be added to the gross value or the total amount for determining the taxable value after allowing the abatement. It was never intended to add the value of free supply material to determine the gross amount or total amount. The values were to be added even if the material was provided under the same contract or separate contract. In case of Era Infra Engineering Hon'ble Delhi High Court has held as follows:

"6. *This Court is of the opinion that the explanation to Item No. 7 of the Notification - which is been impugned in this case is worded in a neutral manner; it directs the inclusion of the gross value of the goods to the extent that goods are bought by the contractor, there can be no quarrel in its application. However, the problem in this case is that the petitioner claims that the goods were in fact supplied free of cost for the construction activity undertaken by its principal or the service recipient. In the light of the Intercontinental Consultants (supra) and Bhayana Builders (supra), the petitioner's grievance is well founded. It is accordingly held that in cases where goods are supplied free of cost by the service recipient to the construction contractor of the service provider, the value of such goods shall be excluded from the gross amount in terms of explanation to Item No. 7 of the Notification 1 of 2006."*

4.5 In the case of Bhayana Builders (P) Ltd. reported at 2018 (10) GSTL 118 (SC) the Hon'ble Supreme Court held as under:-

> ***"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 sub-section (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, sub-section (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 sub-section (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."*

4.6 From the plain reading of the above judgments it is quite evitable that the value of the material supplied for providing the services needs to be excluded from the gross amount charged. Impugned order has sought to distinguish the judgment of the Hon'ble Supreme Court, however, we do not find any merits in the manner in which the said decision has been distinguished. Once it is held that the services provided by the Appellant are works contract services the provisions of Rule 2A(A) will come into picture and the taxable value shall be determined in accordance with the said rules after allowing abatement as provided.

4.7 Further we find that the appellant was registered with the department from 19.03.2013 and was filing the service tax returns. It is only for a brief period of July 2012 to September 2012 that the appellant had not filed any return. These facts are noted in the show cause notice itself. If the appellant had been filing the service tax returns throughout then invocation of extended period of limitation for making this demand cannot be justified as the appellant cannot be accused of suppression with intent to evade payment of tax without specifying the reasons. In the present case we find that the demand has been made on the basis of the information received from the income tax authorities. On the basis of 26AS statement of the appellant the demand has been made. In case of Kush Constructions [2019 (24) GSTL 606 (T-All)] following has been held:

> *"On perusal of record, we note that the appellants were registered with the Service Tax Department and also they were filing ST-3 returns. Revenue has compared the figures reflected in the ST-3 returns and those reflected in Form 26AS filed in respect of the appellant as required under the provisions of Income-tax Act, 1961. We note that without further examining the reasons for difference in two, Revenue has raised the demand on the basis of difference between the two. We note that Revenue cannot raise the demand on the basis of such difference without examining the reasons for said difference and without establishing that the entire amount*

received by the appellant as reflected in said returns in the Form 26AS being consideration for services provided and without examining whether the difference was because of any exemption or abatement, since it is not legal to presume that the entire differential amount was on account of consideration for providing services. We, therefore, do not find the said show cause notice to be sustainable."

4.8 In case of Sbi Life Insurance Company Ltd. [2024 (389) E.L.T. 284 (Tri. - Mumbai)], Mumbai Bench has held as follows:

> ***"7.*** *In view of our observation as above and having regard to the findings of the Commissioner noted above, which speak a lot about the defects in the Show-cause notice that has formed the foundation of this proceedings, we have got no hesitation to go with the order passed by the Commissioner in setting aside the demand etc. raised in the show cause notice dated 16-4-2019. Further the basis of demand is purely taken from the difference between the value shown in the Service Tax Returns and income shown in the Income-tax Return. In this context it is worth reproducing the finding of this Tribunal made in the case of Umesh Tilak Yadav v. Commissioner of Central Excise, Nagpur reported in 2023 (11) TMNI 473-CESTAT Mumbai = (2024) 15 Centax 161 (Tri. - Mumbai), the relevant portion of which reads.*
>
> *We have carefully gone through the record of the case and Para-4 submissions made. The demand was raised invoking the provisions of sub-section (1) of Section 73 of Finance Act, 1994. The said provision of Finance Act empowers Revenue for recovery of service tax which has not been levied or which has not been paid or which has been short levied or which has been short paid or which has been erroneously refunded. Therefore, the first step for Revenue is to establish that a specific amount to be demanded through show cause notice by invoking the said provision is service tax either not paid or short paid or not levied or short levied. Therefore, it is essential to establish that the*

value on which such service tax is calculated is the value under Section 67 and the same is derived from the consideration received by the appellant out of the activity which has to satisfy definition of service under sub-section (44) of Section 65B of Finance Act, 1994. Such type of examination of the facts and arriving at the prima facie view that the appellant had received the consideration by providing service is missing in the show cause notice. We, therefore, hold that the said show cause notice dated 26-6-2020 is not sustainable in law

8.*Hence, in view of irregularity in the show cause and the non-sustainability of demand purely on the basis of difference between ST-3 return and Income-tax returns of any other period, without any further examination to establish that the difference is on account of consideration received towards discharge of services, the following order is passed.*

THE ORDER

9.*The appeal is dismissed and the order passed by the Commissioner in Order-in-Original No. 45/SN/COMMR-Audit-III/CGST&CEX/2021 vide order dated 30-3-2021 is hereby confirmed."*

4.9 We do not find any merits in the impugned order.

5.1 Appeal is allowed.

(Operative part of the order is pronounced in open court)

Sd/-

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Sd/-

(ANGAD PRASAD)
MEMBER (JUDICIAL)

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