CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT No.II

Service Tax Appeal No.70186 of 2021

(Arising out of Order-in-Appeal No.77/ST/Alld/2021 dated 04/03/2021 passed by Commissioner (Appeals) Central Excise & CGST, Allahabad)

M/s Prasad & Company, **.....Appellant**

(11-B, Strachy Road, Vasant Vihar, Allahabad-211001)

VERSUS

Commissioner of Central Excise &

CGST, Allahabad **....Respondent**

(38, M.G. Marg, Civil Lines, Allahabad-211001)

APPEARANCE:

Shri Arun Srivastava, Advocate for the Appellant

Shri Santosh Kumar, Authorised Representative for the Respondent

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

FINAL ORDER NO.70607/2025

DATE OF HEARING : 14 July, 2025

DATE OF DECISION : 14 July, 2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.77/ST/Alld/2021 dated 04/03/2021 passed by Commissioner (Appeals) Central Excise & CGST, Allahabad. By the impugned order, Order-in-Original No.11/JC/ST/AUDIT/KNP/2020 dated 28.02.2020 has been upheld holding as follows:-

"ORDER

1. I confirm demand of service tax (including cess) of Rs.83,42,676/- (Rupees Eighty Three Lac Forty Two Thousand Six Hundred Seventy Six only) on provision of services declared in the ST-3 returns for the period October 2013 to March 2017 and shown in the ledger account of works contract for the period April 2017 to June

2017 along with interest payable thereon under Section 75 of the Finance Act, 1994 by determining the same as dues from the party under Section 73(2) of the Act;

2. I confirm demand of service tax (including cess) of Rs.6.813/- (Rupees Six Thousand Eight Hundred Thirteen only) on provision of Supply of Tangible Goods services along with interest payable thereon under Section 75 of the Finance Act, 1994 by determining the same as dues from the party under Section 73(2) of the Act. Service tax of Rs.6,813/- deposited towards aforesaid dues may be appropriated;

3. I confirm the demand of service tax (including cess) of Rs. 14,028/- (Rupees Fourteen Thousand Twenty Eight only) on receipt of legal services of advocates along with interest payable thereon under Section 75 of the Finance Act, 1994 by determining the same as dues from the party under Section 73(2) of the Act, ibid. Service tax of Rs.14,028/-deposited towards aforesaid dues may be appropriated;

4. I confirm the demand of service tax (including cess) of Rs 7,250/- (Rupees Seven Thousand Two Hundred Fifty only) on the brokerage/ commission received along with interest payable thereon under Section 75 of the Finance Act, 1994 by determining the same as dues from the party under Section 73(2) of the Act, ibid. Service tax of Rs.7,250/-deposited towards aforesaid dues may be appropriated;

5. I confirm the demand of interest amounting to Rs.39,432/- (Rupees Thirty Nine Thousand Four Hundred Thirty Two only) payable under Section 75 of the Finance Act, 1994 on delayed payment of service tax as dues from the party under Section 73(2) of the Act, ibid. Interest of Rs.39,432/- deposited towards aforesaid dues may be appropriated;

6. I impose penalty total amounting to Rs.83,70,767/- (Rupees Eighty Three Lac Seventy Thousand Seven Hundred Sixty Seven only) for the aforesaid non-payment of service tax upon the party under Section-78(1) of the Finance Act, 1994;

7. I impose penalty of Rs.10,000/- (Rupees Ten Thousand only) for non-filing of ST-3 return for the period April'2017 to June'2017 upon the party under Section-77(2) of the Finance Act, 1994;"

2.1 Appellant is registered with the department and is engaged in providing Works Contract Services and "Erection, Commissioning & Installation Services".

2.2 During the course of audit, it was observed that the appellant had rendered Fabrication & Erection Works to M/s Meja Urja Nigam Pvt Ltd Allahabad, M/s Unitech Machines Limited, M/s Thermax Limited, M/s Kanpur Fertilizers & Cement Ltd, M/s Indian Farmers Fertilizer Cooperative Ltd. Paradeep Unit, M/s Elecon EPC Projects Ltd, M/s Simaon India Limited.

2.2 As per terms & condition of the contract Cement, Steel & Pipes used in the execution of the works were supplied by the service recipient to the appellant free of cost. Appellant has to arrange only consumable such as welding electrodes, filler wire, tungsten rod, cutting wheel, oxyacetylene gas, Argon gas, cotton waste etc. for completing the work.

2.3 The appellant has wrongly classified the services under works contract service & paid service tax after claiming abatement of 60% on the gross amount charged for execution of Fabrication & Erection works. By doing so appellant has short paid service tax amounting to Rs.1,37,61,683/-.

2.4 Audit also observed that the appellant has received consideration of Rs.55,125/- from M/s Indian Farmers Fertilizer Cooperative Ltd, Paradeep for supply of Hydra but failed to pay service tax amounting to Rs.6,813/- under Supply of Tangible Goods Service.

2.5 The appellant has also failed to discharge service tax liability amounting to Rs.14,028/ on Legal Consultancy Service under reverse charge mechanism and service tax amounting to Rs.7,250/ under Business Auxiliary Services. The appellant had delayed payment of Service Tax during the years 2013-14 & 2016-17 on several occasions but did not pay interest amounting to Rs.39,432/- in terms of Section 75 of the Finance Act, 1994 on such delayed payment of service tax.

2.6 A show cause notice dated 10.04.2019 was issued to the appellant, asking them to show cause as to why-

> *"(a) The Service Tax amounting to Rs.1,37,61,663/- (RupeesOne Crore Thirty Seven Lakh Sixty One Thousand Six Hundred Eighty Three only) (Including Education Cess Secondary and Higher Education Cess SBC+ KKC), as mentioned in para 26 3 above, should not be demanded and recovered from them under proviso to sub section (1) of Section 73 of chapter V of the Finance Act, 1994 (erstwhile) by invoking extended period of limitation, along with interest in terms of section 75 of the Finance Act, 1994 and a penalty should not be imposed upon them under Section 78 of Chapter V of the Finance Act, 1994 for not paying service tax by willfully suppressing the facts from the department with intent to evade aforesaid amount of Service Tax. The aforementioned provisions of Finance Act, 1994 is applicable for the previous period by virtue of the Section 174 of the CGST Act.2017.*
>
> *(b) The Service Tax amounting to Rs.6,813/- (Rupees Six Thousand Eight Hundred Thirteen only) (including Education Ceas Secondary and Higher Education Cess), as mentioned in para 4 & 5 above, should not be demanded and recovered from them under proviso to sub section (1) of Section 73 of chapter V of the Finance Act, 1994 (erstwhile) by invoking extended period of limitation, along with interest in terms of section 75 of the Finance Act, 1994 and a penalty should not be imposed upon them under Section 78 of Chapter V of the Finance Act. 1994 for*

not paying service tax by willfully suppressing the facts from the department with intent to evade aforesaid amount of Service Tax. The aforementioned provisions of Finance Act, 1994 is applicable for the previous period by virtue of the Section 174 of the CGST Act.2017.

(c) The Service Tax amounting to Rs. 14,028/- (Rupees Fourteen Thousand Twenty Eight only)(including Education Cess Secondary and Higher Education Cess+ SBC+ KKC), as mentioned in para 6 & 7 above, should not be demanded and recovered from them under proviso to sub section (1) of Section 73 of chapter V of the Finance Act, 1994 (erstwhile) by invoking extended period of limitation, along with interest in terms of section 75 of the Finance Act, 1994 and a penalty should not be imposed upon them under Section 78 of Chapter V of the Finance Act, 1994 for not paying service tax by willfully suppressing the facts from the department with intent to evade aforesaid amount of Service Tax. The aforementioned provisions of Finance Act, 1994 is applicable for the previous period by virtue of the Section 174 of the CGST Act,2017

(d) The Service Tax amounting to Rs. 7250/- (Rupees Seven Thousand. Two Hundred Fifty only) (including SBC), as mentioned in para 8 above, should not be demanded and recovered from them under proviso to sub section (1) of Section 73 of chapter V of the Finance Act, 1994 (erstwhile) by invoking extended period of limitation, along with interest in terms of section 75 of the Finance Act, 1994 and a penalty should not be imposed upon them under Section 78 of Chapter V of the Finance Act, 1994 for not paying service tax by willfully suppressing the facts from the department with intent to evade aforesaid amount of Service Tax. The aforementioned provisions of Finance Act, 1994 is applicable for the previous period by virtue of the Section 174 of the CGST Act, 2017.

(e) The interest amounting to Rs.39,432/- should not be recovered from them in terms of section 75 of the Finance

Act, 1994. The aforementioned provisions of Finance Act 1994 is applicable for the previous period by virtue of the Section 174 of the CGST Act, 2017.

(f) Penalty under section 77(2) of the Finance Act, 1994 (erstwhile) read with Rule 7 of the Service Tax Rules, 1994 should not be imposed upon them for non-filing of ST-3 return for the period Apr 17 to June'17 The aforementioned provisions of Finance Act, 1994 is applicable for the previous period by virtue of the Section 174 of the CGST Act,2017."

2.7 The said show cause notice was adjudicated as per the Order-in-Original dated 28.02.2020 referred in para 1 above.

2.8 Aggrieved appellant have filed appeal before Commissioner (Appeals) which has been dismissed as per the impugned order.

2.9 Aggrieved appellant have filed this appeal.

3.1 We have heard Shri Arun Srivastava, Advocate for the appellant and Shri Santosh Kumar, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned Counsel submits that-

- Value of such goods/material supplied free of cost by recipient is not to be included in 'gross amount' because no price is charged for them by assessee/service provider. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Bhayana Tax Builders [2018 (10) G.S.T.L 118 (S.C)];
- It has been held that the subsequent SCN was nothing but repetition to earlier SCN with slight variations. Subsequent SCN leads to re-opening of issue which is not permissible. Reliance is placed on the decision of Hon'ble Supreme Court in the case VICCO LABORATORIES [2007 (218) E.L.T. 647 (S.C.)]
- SCN cannot be issued on the same issue and for the same period twice grounds. It is presumed that the SCN has been issued after thorough inquiry of facts. Reliance is

placed on the decision of this Tribunal in the case of Siddharth Tubes Ltd.[2004 (170) E.L.T. 331 (Tri-Del)];

- In case of change of stand of standing the department / long practice, the demand can only be made prospectively i.e. from the date of issue of SCN. Even 6 month limitation period as provided under the C.Ex Rules 1944 read with Section 11A is not available. Reliance is placed in the case of Steel Authority of India Ltd., Durgapur [1985 (22) E.L.T 487 (Tri-LB)] (Upheld by Hon'ble Supreme Court0.
- Demand for the two assessments for same period are not permissible. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Duncans Industries Ltd. [2006 (201) E.L.T 517 (S.C)];
- Suppression of facts cannot be imputed to the Appellant, when the facts were already in knowledge department. There can be no suppression in the subsequent show cause notice. Reliance is placed on the decision of Hon'ble Supreme in the case of Nizam Sugar Factory [2008 S.T.R. 314 (S.C.)];
- In the absence of any amendment in law or judicial pronouncement, the reclassification should be effective from the date of issuance of SCN. Reliance is placed on the decision of this Tribunal in the case of Rainbow Industries (P) Ltd. [2002-TIOL-476-SC-CX];
- Even if the material is consumed, it is considered to be deemed sale and is covered under works contract. Reliance is placed on the decision of Hon'ble M.P. High Court in the case of Agrawal Colour Advance Photo System [2020 (38) G.S.T.L. 298 (M.P.)].

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

4.1 We 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:-

"4.1 I have gone through the facts of the case, the averments made at the time of personal hearing and all other material/ documents available on records. First of all I decide the contention of the appellant that two show cause notices can not be issued for the same period demanding service tax on the same category of services even for separate reason. I observe that the appellant has contested the Department has earlier issued SCN dated 16.10.2018 demanding service tax amounting to Rs. 14,99,405/ on the same category of services for the period April 2013 to March 2017 by invoking extended period of limitation, therefore, second SCN was bad in law and barred by limitation. On the other hand Department has argued that first SCN was issued by the Range Office on the basis of third party information received from the income tax department vis-à-vis ST-3 returns filed by the appellant. The appellant has not provided any works orders/ contract to the Range office to ascertain exact nature of services rendered by them. However, during the course of audit conducted by the Department it was noticed that services rendered by the appellant do not covered under Works Contract Services & appellant has wrongly taken abatement of 60% on the total amount in their ST-3 returns without fulfilling the conditions and appellant has also charged service tax on full value in their Bills/Invoices raised for the execution of works contract services. Therefore, the Department has issued second show cause notice on different facts within the stipulated period of five years as provided under the Finance Act, 1994 applicable in case of suppression of facts with intent to evade payment of service tax. Thus, I find no infirmity in issuance of second show cause notice within stipulated time provided under the Act.

4.2 I further observe that in the present case, it is on record that the appellant had rendered Fabrication & Erection Works to M/s Meja Urja Nigam Pvt Ltd Allahabad, *M/s Unitech Machines Limited, M/s Thermax Limited, M/s Kanpur Fertilizers & Cement Ltd, M/s Indian Farmers Fertilizer Cooperative Ltd, Paradeep Unit, M/s Elecon EPC Projects Ltd, M/s Simaon India Limited. As per terms & condition of the contract Cement, Steel & Pipes used in the execution of the work contract will be supplied by the service recipient to the appellant free of cost. The appellant has to arrange only consumable such as welding electrodes, filler ware, tungsten rod, cutting wheel, oxyacetylene gas, Argon gas, cotton waste etc. Therefore, it was contested by the Department that the appellant was not entitled to claim abatement on the gross amount charged for the said contracts on the grounds that (i) the aforesaid services are not provided in execution of "works contracts" as there were no transfer of property in goods involved in the execution of contracts inasmuch as the appellant has only supplied consumables used in execution of these contracts and (ii) since in the instant case, Cement, Steel and Pipes used in the execution of contracts has been supplied by the service recipients free of cost. Thus, even if the services rendered by the appellant falls under "works contract services then the appellant was eligible for the abatement only if fair market value of the goods supplied by the service recipients in or in relation to the execution of the works contract has been included in the total amount of the works contract. On the other hand, the appellant argued that they were eligible for the abatement of 60% on the total value of the Works Contract Services in terms of rule 2A(6)(A) of the Service Tax (Determination of Valuej Rules, 2006 in the light of the decision of the Hon'ble Supreme Court in the case of M/s Bhayana Builders (P) Ltd Vs CCE Delhi.*

4.3 Now, I come to first point as to whether services rendered by the appellant come under works contract services or not. I have gone through the contents of the *various contracts submitted by the appellant along with their appeal, which are discussed as under:*

4.3.1 M/s Unitech Machiness Ltd has awarded contract No. P-311/WO/14/00078 dated 13.02.2015 to the appellant for Installation of LDO & HFO Storage Tank at Meja Thermal Power Project. The clause 1(a) of the general conditions of contract provides scope of contractor's work which stipulates that "unloading of all material, handling, shifting and receipt of material from our/client's stores, stocking of materials and keeping of materials in safe custody including provision of security staff, transportation of materials from site works to works place as directed by the site in charge" and clause 1(b) provides that all type of tools and tackles, equipment's, consumables, machineries required for fabrication, erection, testing & commissioning of tanks". Further, clause 10(b) provides that all consumables like gas, welding electrodes, grinding wheel, oil brush, kerosene etc will be arranged by the appellant & clause 16 provides that the appellant will be issued material against proper receipts.

4.3.2 M/s Kanpur Fertilizers & Cement Ltd has awarded contract No. KFCL/WO/Pipe work/2013/1 dated 02.02.2013 to the appellant for Pipe Welding and Laying/ Erection Work of Pipe. The clause 1.1 of the scope of work stipulates that the scope of work consists of providing all resources such as manpower, handling equipment's, tools & tackles, consumables, supervision, etc as required for carrying out Pipe Welding and Laying/ Erection Work of Pipe and clause 1.2 provides that all consumables including welding rods, grinding wheel, cutting & gases sand etc as required to carry out work shall be arranged by the appellant clmase 7.1 provides that the Steel, Pipes, Primer Paint as required shall be provided by M/s KFCL free of cost basis.

4.3.3 M/s Indian Farmers Fertilizers Cooperative Ltd, Paradeep Unit, Odisha has awarded contract No.

1010/252004132622 dated 02.04.2013 to the appellant for Fabrication & Erection of Pipes. As per scope of work the rate has been quoted for erection & fabrication only.

4.3.4 M/s Thermax limited, Pune has awarded contract No. WWS/SMG?630272 dated 08.07.2014 to the appellant for Fabrication & Erection of mild steel structure. As per scope of work the rate includes shot blasting & cleaning surfaces and all consumables like gas, welding rods, connection bolts, nuts, washers etc. The actual quantity of structural steel going into job shall be paid. The value of steel is not part of the contractual amount for erection & fabrication work.

4.3.5 M/s Meja Urja Nigam Pvt Ltd, Allahabad has awarded contract No. MUNPL/CAM /Contracts/11-12/LOA/49 dated 14.10.2016 to the appellant for the Balance Critical Works of Main Plant, CW and Offsite Civil Worles Package for Meja TPP- Fabrication & Erection Works. The clause 9.1 of the scope of work provides that the appellant shall secure the material issued by the owner free of cost. Note 7 of the schedule of items specifically provides that "Free issue material would be issued only for quantities mentioned against items No. 26(a)(i)"

4.3.6 From the aforementioned contracts provided by the appellant it is evident that all the materials are supplied free of cost to the appellant during the execution of works contract and appellant has provided consumables only. I observe that the Section 658 (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 sule 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."

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. If no transfer of property is involved then it is not covered under works contract. Since in the present case the appellant has provided only consumables like welding rods, grinding wheel, cutting & welding ganes, sand, oil brush, kerosene etc, thus, it is not covered in works contract as property of goods is not transferred but goods are consumed.

4.4 1 further observe that the Department has alleged in Para 2 of the show cause notice that bills raised by the appellant reveals that they have arbitrarily claimed service tax 12.36%, 14.5% & 15% on some billa & @ 4.94%, 5.6% & 6% on other bills. Thus, it is Department's contention that even if services rendered by the appellant comes under Works Contract Service they are not entitled for abatement of 60% on the gross amount charged because fair market value of the free supply of the materials such as Cement, Steels & Pipes has not been included in the total amount charged for the works contract. In regard, I observe that 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

4.5 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 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.

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 contractin case they claimed abatement of certain percentage.

4.6 Thus, the intention of law is to cover all the supplies made by service receiver in valuation under composition scheme Le 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 a 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.

4.7 The appellant has 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 said 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.

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 bej by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of taxable service

Thirdly, even when the explanation was added vide notification dated March 01, 2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount *charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged.*

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 10.09.2014 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.c.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

It can be seen that after introduction of negative list regime Le 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 contract should 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.*

5. I further observe that the appellant has not contested service tax liability of Rs. 6,813/-under Supply of Tangible Goods Service, Service tax liability of Rs. 14,028/ on Legal Consultancy Service under reverse charge mechanism, Service tax liability of Rs. 7250/- under Business Auxiliary Services and interest amounting to Rs. 39,432/- in terms of section 75 of the Finance Act, 1994 on such delayed payment of service tax. Therefore, these issues do not require any intervention at appellate stage.

6. ....

6.2 Rather, from the facts of the case, it is observed that appellant was registered with the Department & filed ST-3 by taking abatement not eligible to them, whereas under the self-assessment procedure specified in the statute, they were required to assess & pay their Service Tax liability correctly, on their own. The short payment of Service Tax could be detected only during the course of audit conducted by the Department. Thus, it is a clear case *of suppression of facts and contravention of the statutory provisions, with intent to evade payment of Service Tax. Thus, I find that extended period of limitation has been rightly invoked in this case for confirming the demand of Service Tax and imposing penalty under Section 78 of the Act. Further, I also observe that the appellant has not disclosed proper & correct information in the ST-3 returns for the relevant period, hence failed to comply with the statuary provisions of Finance Act, 1994, therefore, penalty imposed by the adjudicating authority u/s 77(2) of the Act is justified."*

4.3 From the above facts we find that the issues for consideration in the present case is in respect of demand made under the category of Erection and Fabrication Services and whether the subsequent show cause notice issued for the subsequent period is barred by the limitation.

4.4 We would like to take the issue of limitation first. We find that the appellant has contested and stated that a show cause notice for the same period in respect of the same services had not been issued to the appellant. Thus, the second show cause notice which has been issued to them is without any jurisdiction and would be barred by limitation. To butters the arguments they have relied upon following decisions:-

- VICCO LABORATORIES [2007 (218) E.L.T. 647 (S.C.)];
- Siddharth Tubes Ltd.[2004 (170) E.L.T. 331 (Tri-Del)];
- Steel Authority of India Ltd., [1985 (22) E.L.T 487 (Tri-TB)];
- Duncans Industries Ltd. [2006 (201) E.L.T 517 (S.C)];
- Nizam Sugar Factory [2008 S.T.R. 314 (S.C.)];
- Rainbow Industries (P) Ltd. [2002-TIOL-476-SC-CX];

4.5 In the present case, we observe that in the present case, the present-second show cause notice has been issued pointing to ascertain new facts which came to knowledge of the revenue authorities subsequent to the issuance of the first show cause notice. On the facts which were not considered by the department at the time of issuance of the first show cause notice permitted by the second show cause notice to be issued. This issue has been considered by the Hon'ble Supreme Court in the case of UOI Vs VICCO Laboratories 2007 (218) ELT 647 (SC) wherein Hon'ble Supreme Court has observed that the second show cause notice cannot point any new facts but the repetition of the previous show cause notice issued wherein new facts have come to the light.

4.6 The decision in the case of M/s Steel Authority of India Ltd. 1985 (22) ELT 487 (Tri.-Del.) is also not applicable to the present set of facts for the reason that there is no change in the opinion of the department. It is the case where new facts have been brought to the light.

4.7 The decision on the Hon'ble Supreme Court in the case of M/s Duncans Industries Ltd. 2006 (201) ELT 517 (SC) was not on the issue of the show cause notice and it was in respect of issue settled under 'Kar Vivad Samadhan Scheme-1998'.

4.8 Hon'ble Supreme Court in the case of M/s Nizam Sugar Factory [2008 (9) STR 314 (SC)], has observed that appellant has not knowledge of authorities when first show cause notice was issued then second show cause notice cannot be issued invoking the extended period of limitation.

4.9 The decision in the case of M/s Rainbow Industries (P) Ltd. 2002-TIOL-476-SC-CX is a judgment where price list was accepted by the department and without the amendment of the price list the demand could not have been made. In case of Proctor and Gamble [2004 (165) ELT 5 (MP)] Hon'ble Madhya Pradesh High Court has observed as follows:

> *"However, if certain new facts come into the knowledge of the Department afterwards, the accepted/approved declaration/lists can always be opened and if it is found that these new facts were earlier suppressed or wilfully misstated by the assessee, then the approval of the past five years can be reopened and differential duty if any is recoverable in terms of the proviso to Section 11A(1) of*

*the Act. Relying upon J.K. Synthetics Ltd. v. Union of India, [1981 (8) E.L.T. 328 (Del.)], it was held that principles of res judicata or estoppel, are not applicable to tax matters. In the instant case, it is observed that the assessee had not filed any price declarations during 1993-94, 1995-96 and 1996-97 up to 4-9-1997. They had filed a price list on 27-11-1992 claiming the assessable value on the basis of Chartered Accountant's Certificate dated 26-11-1997 without adding or disclosing the profit margin to the Department. It was only when the Department verified/scrutinized their balance-sheets, it came to the knowledge of the Department that they had made certain profits during the period in question but had not included the same in the assessable value declared by them. Thus, the suppression or wilful misstatement on their part is clearly proved and, therefore, the proviso to Section 11A(1) is rightly applicable in this case and so the demand raised vide notice dated 3-7-1998 is not hit by time limitation. The second notice dated 3-7-1998 is for the period April and May 1998, the returns for which were filed in May and June, 1998 respectively and so it is also not hit by time limitation as the demand has been raised with*in *six months time period. Thus, no demand is time barred.*"

4.10 In the present case for the reason that the certain facts which were not brought to the knowledge of the department at the time of first show cause notice and were suppressed, case for invoking the extended period of limitation has been rightly made out. In case of LSM Export [2015 (315) E.L.T. 407 (Del)] Hon'ble Delhi High Court has held as follows:

3. *On the date when factory/unit of the appellant was inspected/searched, the physical stock available was short of quantities which ought to have been available. Further, goods actually available in the premises were not recorded in the books. Shortage noticed, was treated as sold in domestic tariff area. Statements of Lalit Mohan, dated 17th November, 2003, 19th November, 2003 and 20th*

November, 2003, accepting the said sales without invoice have been referred to. Documents produced subsequently after four months did not inspire confidence and could not be the basis for accepting the alibi of the appellant. The first show cause notice was issued for duty not paid on manufacture/processed goods cleared, whereas the second show cause notice included the duty payable on the imported goods cleared without processing. The appellant had not been able to produce evidence to show processing. The appellant had set up 100% export oriented unit for export of processed during fruits including spices, pista oil, clove powder and black pepper powder. He had imported almonds in shell, cloves, cardamom, cumin seeds and raisins without duty under bond with the obligation that the processed goods would be exported. The appellant had just one room in their factory address and there was no space and other facility to process imported good. No accounts were maintained for imported, processed or sold stock.

4. *The second "legal" contention raised by the appellant in the present appeal is that the second show cause notice dated 6th December, 2006, enhanced the duty demand. This vitiates the adjudication order as well as the impugned order. We have considered the said contention, but again find that the tribunal has correctly recorded that the enhanced demand was on account of examination of records and new facts coming to light for the Revenue. In these circumstances, the second show cause notice was issued. This notice was in fact akin to rectification or corrigendum to the original show cause notice. Tribunal has also mentioned that the original show cause notice did not take into account the Special Duty of Customs while computing quantum of duty evaded. It has been recorded that the second show cause notice itself was within five years from the disputed period and, thus, the question of limitation did not arise. This is not factually disputed.*

4.11 In case of Arti Electrodes Pvt. Ltd [2009 (246) ELT 570 (T-Del)] following has been held:

> ***7.3*** *Regarding invocation of extended period, learned advocate heavily relied on decision of Hon'ble Supreme Court in the case of Nizam Sugar Factory cited supra. In the said case, first show cause notice demanding duty for the period February, 1978 to September, 1982 was issued on 28-2-1984 and second show cause notice dated 16-7-87 was issued for later period namely 1982-83 to 1986-87. In that context, the Hon'ble Supreme Court held that subsequent show cause notices on same or similar facts could not be issued alleging suppression of facts on the part of the assessee. In the present case, the facts are entirely different. Here the first show cause notice did not deal with any demand of duty for the earlier period where clearance were effected without registration with Central Excise department and without following the Central Excise formalities. The first show cause notice mainly focused on offence relating to goods seized on 27-3-97 and was issued in the context specific time limit of six months for issue of show cause notice prescribed in the law. Further the statement taken from Shri S.S. Gulati dated 15-9-97 was not relied upon in the first show cause notice. We also find detailed submissions of various dealers have been relied upon in the show cause notice dated 10-11-2000 which have not been relied upon in the first show cause notice as the same were not directly relevant to issues dealt with in the first show cause notice. We agree that the first show cause notice and second show cause notice proceed on the basis that the value of clearance has exceeded Rs. 30 lakhs. To that extent, the learned Advocate is correct in saying that some facts are common. Though the foundation for the cases in both the show cause notices appears to be the same, we do not agree that both the show cause notices are on identical facts. We also find that the facts of this case are not same as facts in*

the case of Rattan Steel Works & anr. relied upon by the learned advocate. In that case, there is a clear finding that investigation was completed in April, 1997 and the show cause notice was issued on 11-8-98 and that the confessional statements of the partner/assessee in the said case were retracted immediately after recording the statements. This is not the case in the present case.

4.12 In case of Peico Electronics And Electricals Ltd [1994 (71) E.L.T. 1053 (Tribunal)], following has been observed:

> ***47.*** *As per show cause notice the fresh facts have come to light and they had been taken on record. In the case of Bramec Surie (P) Ltd. v. C.C.E., 1986 (25) E.L.T. 79 (Tribunal) the Tribunal had held that issues already concluded in earlier proceedings could be reopened in subsequent proceedings for another period of time if emerging fresh materials give a new dimension to the matter. It was added that limitation in such cases was to be computed from the date of issue of the last show cause notice.*
>
> ***48.*** *The appellants were working under the self removal procedure under which a good deal of trust is reposed on the tax payers. While filing of a price list in the prescribed form was obligatory under Rule 173C of the Rules, the requirement of prior approval was limited to only few situations. The assessee was required to declare in the price list that the particulars furnished therein were true and complete to the best of their knowledge and belief.*
>
> ***49.*** *As we have discussed above the show cause notice issued in this case is a detailed one, and a reading of the same would show that the notice issued was clearly the one on the basis of which a notice could be issued within the extended period of limitation under the proviso to Section 11-A of the fact, as observed in similar circumstances by the Hob'ble Supreme Court in the case of*

Union of India v. Mahashvari Woollen Mills, 1993 AIR SCW 483.

4.13 Thus we do not find any merits in this ground taken by the appellant.

4.14 Now, we are coming to the issue with regards to classification of the services under the category of Work Contract or else-wise under the category of Fabrication and Erection services. We find that this issue was considered by the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. 2015 (39) STR 913 (SC) by holding as follows:-

*"**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.*

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

26. *We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element* *attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.*

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

"State Governments levy a tax on the transfer of property in goods involved in the execution of a works contract. The value of services in a works contract should attract service tax. Hence, I propose to levy service tax on services involved in the execution of a works contract. However, I also propose an optional composition scheme under which service tax will be levied at only 2 per cent of the total value of the works contract."

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

29. *It is interesting to note that while introducing the concept of service tax on indivisible works contracts various exclusions are also made such as works contracts in respect of roads, airports, airways transport, bridges, tunnels, and dams. These infrastructure projects have been excluded and continue to be excluded presumably because they are conceived in the national interest. If learned counsel for the revenue were right, each of these excluded works contracts could be taxed under the five sub-heads of Section 65(105) contained in the Finance Act, 1994. For example, a works contract involving the construction of a bridge or dam or tunnel would presumably fall within Section 65(105)(zzd) as a contract which relates to erection, commissioning or installation. It is clear that such contracts were never intended to be the subject matter of service tax. Yet, if learned counsel for* *the revenue is right, such contracts, not being exempt under the Finance Act, 1994, would fall within its tentacles, which was never the intention of Parliament."*

4.15 Admittedly, the appellant has provided certain materials/consumed certain materials in providing these services. The property in these materials was transferred to the recipient of service. Thus the services provided by the appellant qualify as Work Contract Services in terms of the law laid down by the Hon'ble Supreme Court. Further we observe that the services provided by the applicant were in relation to fabrication and erection of certain structures for the service recipient. These services were not qua on turnkey basis for providing the fabricated/ erected structure. Some of the material for the said structure was provided by the service recipient, and appellant undertook the fabrication/ erection jobs using the requisite material provided by him.

4.16 Hon'ble Supreme Court in the case of M/s Bhayana Builders 2018 (10) GSTL 118 (SC) has held as follows:-

*"**15.** It was argued that payment received in 'any form' and 'any amount credited or debited, as the case may be...' is to be included for the purposes of arriving at gross amount charges and is leviable to pay service tax. On that basis, it was sought to argue that the value of goods/materials supplied free is a form of payment and, therefore, should be added. We fail to understand the logic behind the aforesaid argument. A plain reading of Explanation (c) which makes the 'gross amount charges' inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words 'in any form of payment' are by means of issue of credit notes or debit notes and book adjustment. With the supply of free goods/materials*

by the service recipient, no case is made out that any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, 'any amount credited or debited, as the case may be', to any account whether called 'suspense account or by any other name, in the books of accounts of a person liable to pay service tax' would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider.

16.*In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider.*

17.*Faced with the aforesaid situation, the argument of the Learned Counsel for the Revenue was that in case the assessees did not want to include the value of goods/materials supplied free of cost by the service recipient, they were not entitled to the benefit of notification dated September 10, 2004 read with notification dated March 1, 2005. It was argued that since building construction contract is a composite contract of providing services as well as supply of goods, the said notifications were issued for the convenience of the assessees. According to the Revenue, the purpose was to bifurcate the component of goods and services into 67% : 33% and to provide a ready formula for payment of service tax on 33% of the gross amount. It was submitted that this percentage of 33% attributing to service element was prescribed keeping in view that in the entire construction project, roughly 67% comprises the cost of material and 33% is the value of services. However, this figure of 67% was arrived at keeping in mind the totality of goods and materials that are used in a construction project. Therefore, it was incumbent upon the assessees to include the value of goods/material supplied free of cost by the service recipient as well otherwise it would create imbalance and disturb the analogy that is kept in mind while issuing the said notifications and in such a situation, the AO can deny the benefit of aforesaid notifications. This argument may look to be attractive in the first blush but on the reading of the notifications as a whole, to our mind, it is not a valid argument.*

18.*In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the* *gross amount. Secondly, the language itself demolishes the argument of the Learned Counsel for the Revenue as it says '33% of the gross amount 'charged' from any person by such commercial concern for providing the said taxable service'. According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient. Obviously, no amount is charged (and it could not be) by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of 'taxable service'. Thirdly, even when the explanation was added vide notification dated March 1, 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'.*

19.*Matter can be looked into from another angle as well. In the case of Commissioner, Central Excise and Customs, Kerala v. M/s. Larsen & Toubro Ltd. - (2016) 1 SCC 170 = 2015 (39) S.T.R. 913 (S.C.). This Court was concerned with exemption notifications which were issued in respect of 'taxable services' covered by sub-clause (zzq) of clause (105) read with clause (25b) and sub-clause (zzzh) of clause (105) read with clause (30a) and (91a) of Section 65 of Chapter V of the Act. This Court in the aforesaid judgment in respect of five 'taxable services' [viz. Section*

65(105)(g), (zzd), (zzh), (zzq) and (zzzh)] has held as under :

A close look at the Finance Act, 1994 "23. would show that the fixed 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".

Further, while referring to exemption notifications, it observed :

...Since the levy itself of service tax "42. has been found to be non-existent, no question of any exemption would arise."

It is clear from the above that the service tax is to be levied in respect of 'taxable services' and for the purpose of arriving at 33% of the gross amount charged, unless value of some goods/materials is specifically included by the Legislature, that cannot be added."

4.17 In the case of M/s Agarwal Color Advance Photo System 2020 (38) GSTL 298 (MP) Hon'ble Madhya Pradesh High Court have held as follows:-

*"**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.

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.*

20. *Having answered the substantial question of law No. 1 in favour of the assessee, the substantial question of law No. 2, which already stands concluded while dealing with the question of law No. 1, is also answered in favour of the assessee and it is held that the term 'sale' appearing in exemption Notification No. 12/2003-S.T., dated 20-6-2003 would also include "deemed sale" as defined by Article 366(29A)(b) of the Constitution."*

4.18 Impugned order refers to the amendment made in 2012 whereby "total amount" has been defined. The said definition of total amount has been referred in the impugned order.

4.19 From perusal of the definition, it is clear that market value of services supplied in or in relation to exclusion of work contract, needs to be added. However, admittedly, appellant has provided Work Contract Services for which they have not received supply of any material for execution of the work contract. The Work Contract was in relation to erection and fabrication by employing the materials as referred earlier only for execution of these works, whatsoever was material required and consumed was provided by the service provider and not the service recipient, this is undisputed fact and noted in the order of lower authority. The nature and value of the service needs to be determined qua the service provided and not by addition of imaginary amounts which do not form the part of work undertaken. Thus, the addition of the value of material which is not part of the Work Contract Services provided by the appellant is without any legal basis. Impugned order holding contrary, falls on this account.

4.20 As we do not find any merits in the demand made, though we uphold the impugned order on limitation, the impugned order needs to be set aside.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

(ANGAD PRASAD)
MEMBER (JUDICIAL)

akp