CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.II

Service Tax Appeal No.70714 of 2025

(Arising out of Order-in-Appeal No.527/ST/Alld/2022 dated 31/10/2022 passed by Commissioner (Appeals) Customs, Central Excise & CGST, Allahabad)

M/s Rajendra Pratap Singh, **.....Appellant**
(Sahson, Belwa, Sahson, Phulpur-221507)

VERSUS

Commissioner of Central Excise &

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

(38 MG Marg, Civil Lines, Allahabad-211001)

APPEARANCE:

Request for adjournment, for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

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

FINAL ORDER NO.70866/2025

DATE OF HEARING : 19 November, 2025
DATE OF DECISION : 19 November, 2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.527/ST/Alld/2022 dated 31/10/2022 passed by Commissioner (Appeals) has uphold the Order-in-Original No.97-ST/DC/Div-I/Alld/2021-22 dated 11.03.2022.

2.1 Appellant is registered with the Department under the Registration No.AKVPS6303HSD002 for providing taxable services as defined by Section 65B (44) of the Finance Act, 1994 read with Section 66B of the Act.

2.2 On the basis of specific information that appellant had provided taxable services during the year 2014-15 and have

short paid service tax. An inquiry was initiated and letters dated 03.04.2017, 22.01.2018, 30.11.2018 and 06.05.2019 were written to them, requesting to provide required documents for examining the issue. Thereafter, summon was also issued to the appellant on 11.07.2019. Appellant vide letter dated 24.07.2019 again requested for one time appearance and provide the required documents but appellant failed to appear. Thereafter, vide letter dated 29.08.2019 was again requested to provide documents but appellant do not provide the necessary information. Department called the information from the Income Tax Department for the period 2014-15 to 2017-18. Income Tax Department vide letter dated 27.05.2019 provided the copies of Form 26-AS for the period from Financial Year 2014-15 to 2017-18.

2.3 From the data received from the Income Tax Department it is seen that appellant have received consideration during the said period on which TDS has been deducted under Section 194C of the Income Tax Act, 1961 relates to payment made to the contractors/sub contractors for providing various services. Thus, it was observed that appellant have short paid service tax as detailed in table below:-

Year	Receipts as per 26-AS	Service Tax including Cess	
		Rate (%)	Payable
2014-15	9085367	12.36	1122951
01.04.15 to 31.05.15	311897	12.36	38550
01.06.15 to 14.11.15	3010201	14.00	421428
15.11. 15 to 31.03. 16	4572975	14.50	663081
01.04. 16 to 31.05. 16	798038	14.50	115716
01.06. 16 to 31.03. 17	11278880	15.00	1691832
01.04.17 to 30.06.17	1987965	15.00	298195
Total	31045323		4351753

2.4 A Show cause notice dated 23.09.2019 was issued to the appellant, asking them to show cause as to why-

> *"(i) The Service Tax (including various cess as applicable) amounting to Rs.43,51,753/-should not be demanded and*

recovered from them under proviso to Section 73 (1) the Finance Act, 1994.

(ii) The due interest on the amount of service tax mentioned at (i) should not be demanded and recovered from them under Section 75 of the Finance Act, 1994.

(iii) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 for failure to pay service tax & suppressing the facts and value of taxable services with intent to evade payment of service tax.

(iv) Penalty should not be imposed upon them under Section 70 of the Finance Act, 1994 readwith Rule 7C of the Service Tax Rules, 1994."

2.5 The said show cause notice was adjudicated as per the Order-in-Original dated 11.03.2022 holding as follows:-

"ORDER

(i) I hereby confirm the demand of service tax amounting to Rs.1,05,452/- (including Education Cess and S & H. Ed. Cess) under the provisions of proviso to Section 73(1) of Finance Act, 1994 along with interest under section 75 of the Act.

(ii) I impose a penalty of Rs. 1,05,452/-against the party under Section 78 of the Act.

(iii) I impose penalty of Rs 5,800/- under Section 77 read with Rule 7C of the Service Tax Rules, 1994 for each default of not filing ST-3 returns."

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

2.7 Aggrieved appellant have filed this appeal.

3.1 A written request praying for adjournment has been received in the matter.

3.2 As I find that the issue involve herein is in very narrow compass, the matter is taken up for consideration after hearing Shri Santosh Kumar, learned Authorized Representative

appearing for the Revenue, who reiterates the findings recorded in the impugned order.

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

4.2 Impugned order records the findings as follows:-

> *"4.2 I have carefully gone through the facts of the case, the averments made at the time of personal hearing and all other materials/documents on record.*
>
> *It is observed in the impugned order that during the period 2014-15 to 2017-18 (Up to June'17), a demand of service tax of Rs. 1,05,452/- (including Cesses) has been confirmed by the adjudicating authority. However the appellant aggrieved with the said order has appealed against the same on the ground that demand of Rs. 105452/-charged under cleaning service is not justified as they have rendered Man Power Recruitment Agency Service.*
>
> *It is observed that analysis of the details of the documents/work orders available on records is required for ascertaining the correctness of the submission of the party. It is observed that the appellant is holder of service tax registration and have filed the statutory ST-3 returns from time to time during the relevant period. On perusal of the ST-3 returns details furnished in the impugned order, it is revealed that they filed ST-3 returns with mention of services rendered during the relevant periods. The services mentioned therein include Rent-a-cab Services, Cleaning services, Manpower Recruitment Agency Services and Maintenance & Repair Services. Thus there is no ambiguity in the fact that appellant was engaged in the activity of cleaning services during the relevant period.*
>
> *Now analysis of the work order allotted by the service recipient is required. It is observed from the details of the work Order No. 1515/204004140545 w.e.f 01.10.2013 to 30.09.2015 as under:*

Brief Order description: Sanitation Job in Public Building & Other Misc. Jobs in Town ship for a period of 2 years. It is amply indicates the nature of work allotted as Cleaning Services which resembles with description mentioned in the work order as Sanitation Job. Further at the Sr. No. 10 of Annexure-II regarding general terms and conditions of the work order, it is mentioned as under:

> *10. The contractor shall deploy the manpower as per IFFCO's requirement for the scope of work indicated in the work order. In case the job could not be completed by the said manpower, the contractor shall have to deploy additional manpower to complete the job without any additional cost to IFFCO.*

It is evident from the above term that main emphasis is on the completion of the job without any additional cost to IFFCO. Hence deployment of Manpower as per the requirement of IFFCO's requirement for the scope of work has to be done and completion of Job is essential condition in it. Therefore I hold that scope of work details specified in the Work order clearly shows that appellant has rendered cleaning services and not the Manpower Recruitment Agency Services as claimed in the instant appeal.

Further appellant has sought relief from demand of service tax amounting to Rs.1,05,452/-on the ground that taxable value of Rs. 631526/ on which demand has been confirmed in the impugned order, pertains to the cost of consumables during the course of providing cleaning services. In this regard, it is observed that list of consumables is elaborated in Annexure-III of the Work Order. However simultaneously at Sr. No. 14 of the Annexure-II of the Work Order is found to have mention as under:

14. Service Tax shall be paid extra against documentary evidence and contractors shall provide their service tax prior to commencement of the work."

Thus the appellant was supposed to have complied the condition of furnishing the documentary evidence to the service recipient and charged the service tax in the onse. In this regard, it would be relevant to mention that Rule 5 of Service Tax (Determination of Value) Rules, 2012 lays down the details of expenditure and cost borne by the service provider which have to be included or excluded while determining the value of taxable service. The said Rule provides that any expenditure or cost that are incurred by the service provider in the course of providing taxable services are treated as consideration for taxable service provided or agreed to be provided and shall be included in the value for the purpose of charging Service Tax on the said service.

Further it is also found that appellant has not adduced any documentary evidence in respect of the consumables stated to be used during the course of providing the cleaning services and service tax, was not received from the service recipient during the relevant period in respect of these consumables. Hence in absence of any documentary evidence I find no substance in submission of the appellate that this value pertains to consumables on which service tax is not leviable. Therefore I hold that service tax amounting to Rs.1,05,452/ has been rightly confirmed in the impugned order."

4.3 From the impugned order, it is evident that appellant was declaring various services namely Rent-a-cab Services, Cleaning services, Manpower Recruitment Agency Services and Maintenance & Repair Services and their ST-3 return. The demand made in respect of all the services has been dropped except in respect of certain amounts received towards the cleaning service.

4.4 The demand against the appellant in respect of the cleaning services have been confirmed by invoking extended period of limitation. Appellant has claimed that the amounts against which they had not paid the service tax, were the amounts, towards consumables used by them for providing the cleaning services. Evidently, the observation made in the impugned order to effect that appellant was filing ST-3 return declaring the cleaning services in the return and also the fact that appellant have not collected any service tax in respect of the amount of Rs.6,31,526/- on which demand of Rs.1,05,452/- has been confirmed against them, is enough to establish that appellant entered in a bonafide belief that this amount is not leviable to service tax.

4.5 The issue in respect of leviability of service tax on the value of consumables, consumed while providing the taxable services is no longer res-integra. In the case of M/s Agrawal Color Advance Photo System [2020 (38) GSTL 298 (MP)] Hon'ble High Court has observed as follows:

> *10. In view of the aforesaid factual background, a moot question before the Learned Authorities below was: as to whether the appellant-assessee was entitled to the benefit of Notification No. 12/2003-S.T., dated 20-6-2003. In order to appreciate the said controversy, it would be expedient to reproduce the relevant portion of the circular, which reads as under :-*
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> *"Notification No. 12/2003-S.T., dated 20-6-2003. - In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under Section 66 of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials.*

Provided that the said exemption shall apply only in such cases where -

(a) no credit of duty paid on such goods and materials sold, has been taken under the provisions of the Cenvat Credit Rules, 2004; or

(b) where such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials."

Perhaps there had been some representation from Punjab Color Lab Association, Jalandhar and thereafter, clarification was sought by certain photographic associations whether the value of materials consumed during the provision of service by the service provider for rendering the service is also excludable from the value of taxable service. Thereupon, a Clarificatory Circular M.F. (D.R.) F. No. 233/2/2003-CX, dated 3-3-2006 was issued, which reads, thus :-

"3. The matter has been examined by the Board. The intention of the Notification No. 12/2003-S.T., dated 20-6-2003 is to provide exemption only to the value of goods and material sold subject to documentary evidence of such sale being available. Therefore, in case, the goods are consumed during the provision of service and are not available for sale, the provision of the said notification would not be applicable. Therefore, in supersession of clarification to contrary, it is clarified that goods consumed during the provision of service, that are not available for sale, by the service provider would not be entitled to benefit under Notification No. 12/2003-S.T., dated 20-6-2003."

11. The contention of the assessee before the Tribunal was that the term "sale" in Notification dated 20-6-2003 includes "deemed sale" under Article 366(29A) of the Constitution and therefore, if a service contract is a works contract then no service tax can be charged on the goods component. The Tribunal while dealing with the arguments of both the sides

and various pronouncements on the subject of valuation of photography services found that its earlier judgments required reconsideration and therefore, referred the matter to the Larger Bench. In respect of the Notification dated 20-6-2003, the referring Bench was of the view that in a service of photography there is no sale of goods involved and service element is dominant. The word 'sale' in the Notification has to be interpreted on the basis of its definition as given in Section 2(h) of the Act, which by virtue of Section 65(121) of the Finance Act is applicable to service tax. It was further opined that when there is no primary intention of the parties to sell paper, consumable or chemical in providing photography service there is no room left to plead [fiction of Article 366(29A)(b) of the Constitution] in absence of any such sale of these commodities as goods. It further rejected the contention and held that the word "sale" in Notification would not cover "deemed sale" under Article 366(29A) of the Constitution and it is of no relevance inasmuch as Notification does not override statutory provision. The Larger Bench was in agreement with the said view when it held that expression "sold" in the Notification would not include "deemed sale" of goods and material consumed by the service provider while generating and providing service, unless an assessee has discharged burden of proof adducing evidence showing value of goods and material actually sold and satisfied the conditions of Notification. However, the Larger Bench opined that value of taxable service of photography depends on the facts and circumstances of each case as the Finance Act does not intend taxation of goods and materials sold in the course of providing all the taxable services.

12. There is no dispute to the proposition that the Notification does not override the statutory provision and hence, it is required to be seen as to whether the conclusion drawn by the Tribunal that term 'sold' appearing in Notification has to be interpreted using the definition of

'sale' in the Central Excise Act, 1944 and not as per the meaning of "deemed sale" under Article 366(29A)(b) of the Constitution, is correct or not.

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

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

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

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

*** *** ***

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

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

*** *** ***

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

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

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

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

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

16. This aspect of the matter has been considered by a three-Judge Bench of the Apex Court in Civil Appeal No. 1145/2006 (State of Karnataka, etc. v. M/s. Pro. Lab & Others) decided on 30th January, 2015 [2015 (321) E.L.T. 366 (S.C.)] wherein challenge put forth was to the constitutional validity of Entry 25 of Schedule-VI to the Karnataka Sales Tax Act, 1957. The Apex Court took note of six sub-clauses of Clause (29A) of Article 366 of the Constitution of India and elaborately discussing its earlier decisions and the case law on the subject, rejected the contention of the State that processing of photography was a contract for service simplicitor with no element of goods at all and, therefore, Entry 25 could not be saved by taking shelter under clause (29A) of Article 366 of the Constitution. It was further observed that Entry 54 of List II of Schedule VII of the Constitution of India empowers the State Legislature to enact a law taxing sale of goods. Sales tax, being a subject matter into the State List, the State Legislature has the competency to legislate over the subject. The relevant extract contained in paras 18 to 23 of the said judgment reads as under :-

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

contract is the rendering of a service, which will amount to a Works Contract".

19. In view of the above, the argument of the respondent assessees that Associated Cement Companies Ltd. v. Commissioner of Customs, (2001) 4 SCC 593, (ACC Ltd. case) did not over-rule Rainbow Colour Lab's case (supra) is, therefore, clearly misconceived. In fact, we are not saying so for the first time as a three-member Bench of this Court in M/s. Larsen and Toubro and Another v. State of Karnataka and another (2014) 1 SCC 708 has already stated that ACC Ltd. had expressly over-ruled Rainbow Colour Lab while holding that dominant intention test was no longer good test after 46th Constitutional Amendment. We may point out that Learned Counsel for the respondent assessees took courage to advance such an argument emboldened by certain observations made by two-member Bench in the case of C.K. Jidheesh v. Union of India, wherein the Court has remarked that the observations in ACC Ltd. were merely obiter. In Jidheesh, however, the Court did not notice that this very argument had been rejected earlier in Bharat Sanchar Nigam Ltd. v. Union of India (2006) 3 SCC 1. Following discussion in Bharat Sanchar is amply demonstrative of the same :

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

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

47. We agree. After the 46th Amendment, the sale element of those contracts which are covered by the six sub-clauses of Clause (29A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature

test applying. Therefore, in 2005, C.K. Jidheesh v. Union of India - (2005) 8 SCALE 784 held that the aforesaid observations in Associated Cement (supra) were merely obiter and that Rainbow Colour Lab (supra) was still good law, it was not correct. It is necessary to note that Associated Cement did not say that in all cases of composite transactions the 46th Amendment would apply"

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

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

65. Although, in Bharat Sanchar, the Court was concerned with sub-clause (d) of Clause (29A) of Article 366 but while dealing with the question as to whether the nature of

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

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

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

68. In Gannon Dunkerley-II (Gannon Dunkerley and Co. and others v. State of Rajasthan and others (1993) 1 SCC 364), this Court, inter alia, established the five following propositions : (i) as a result of Forty-sixth Amendment the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and the other for supply of labour and service and as a result of such contract which was single and indivisible has been brought on par with a contract containing two separate agreements; (ii) if the legal fiction introduced by Article 366(29A)(b) is carried to its logical end, it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services; (iii) in view of sub-clause (b) of Clause (29A) of Article 366, the State legislatures are competent to impose tax on the transfer of property in goods involved in the execution of works contract. Under Article 286(3)(b), Parliament has been empowered to make a law specifying restrictions and conditions in regard to the system of levy, rates or incidents of such tax. This does not mean that the legislative power of the State cannot be exercised till the enactment of the law under Article 286(3)(b) by the Parliament. It only means that in the event of law having been made by Parliament under Article 286(3)(b), the exercise of the legislative power of the State

under Entry 54 in List II to impose tax of the nature referred to in sub-clauses (b), (c) and (d) of Clause (29A) of Article 366 would be subject to restrictions and conditions in regard to the system of levy, rates and other incidents of tax contained in the said law; (iv) while enacting law imposing a tax on sale or purchase of goods under Entry 54 of the State List read with Article 366(29A)(b), it is permissible for the State legislature to make a law imposing tax on such a deemed sale which constitutes a sale in the course of the inter-State trade or commerce under Section 3 of the Central Sales Tax Act or outside under Section 4 of the Central Sales Tax Act or sale in the course of import or export under Section 5 of the Central Sales Tax Act; and (v) measure for the levy of tax contemplated by Article 366(29A)(b) is the value of the goods involved in the execution of a works contract. Though the tax is imposed on the transfer of property in goods involved in the execution of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of a works contract. Since, the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works and not the cost of acquisition of the goods by the contractor.

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

to impose tax on transfer of property in goods as goods or in some other form in the execution of works contract.

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

4.5 Without going into merits of the case, I would observe that they are entered in a bonafide belief was well founded. In view of the above, invoking the extended period of limitation for making this demand could not justified.

4.6 Hon'ble Supreme Court in the case of M/s UNIWORTH TEXTILES LTD. 2013 (288) ELT 161 has held as follows:-

*"**21.** The Revenue contended that of the three categories, the conduct of the appellant falls under the case of "willful misstatement" and pointed to the use of the word "misutilizing" in the following statement found in the order of the Commissioner of Customs, Raipur in furtherance of its claim :*

"The noticee procured 742.51 kl of furnace oil valued at Rs. 54,57,357/- without payment of customs duty by misutilizing the facility available to them under Notification No. 53/97-Cus., dated 3-6-1997"

***22.** We are not persuaded to agree that this observation by the Commissioner, unfounded on any material fact or evidence, points to a finding of collusion or suppression or misstatement. The use of the word "willful" introduces a mental element and hence, requires looking into the mind of the appellant by gauging its actions, which is an indication of one's state of mind. Black's Law Dictionary, Sixth Edition (pp 1599) defines "willful" in the following manner :-*

"Willful. Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass…

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done…"

23. *In the present case, from the evidence adduced by the appellant, one will draw an inference of bona fide conduct in favour of the appellant. The appellant laboured under the very doubt which forms the basis of the issue before us and hence, decided to address it to the concerned authority, the Development Commissioner, thus, in a sense offering its activities to assessment. The Development Commissioner answered in favour of the appellant and in its reply, even quoted a letter by the Ministry of Commerce in favour of an exemption the appellant was seeking, which anybody would have found satisfactory. Only on receiving this satisfactory reply did the appellant decide to claim exemption. Even if one were to accept the argument that the Development Commissioner was perhaps not the most suitable repository of the answers to the queries that the appellant laboured under, it does not take away from the bona fide conduct of the appellant. It still reflects the fact that the appellant made efforts in pursuit of adherence to the law rather than its breach.*

24. *Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of bona fide conduct, by observing that "the appellants had not brought anything on record" to prove their claim of bona fide conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. This Court observed in Union of India v. Ashok Kumar &*

Ors. - (2005) 8 SCC 760 that "it cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."

25. *Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the fides of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In Aban Loyd Chiles Offshore Limited and Ors. (supra), this Court made the following observations :*

"21. This Court while interpreting Section 11-A of the Central Excise Act in Collector of Central Excise v. H.M.M. Ltd. (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement of suppression of fact with intent to evade the payment of duty. It has been observed :

'...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how

the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'

It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held :

...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso...." (Emphasis supplied)

26. *Hence, on account of the fact that the burden of proof of proving mala fide conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a willful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant."*

4.7 Following decisions also hold against invocation of extended period of limitation in case where the person

entertained a bonafide belief with regards to non taxability of services provided or exempted nature of services.:-

- Anand Nishikawa Co. Ltd. [2025 (188) ELT 149];
- Infinity Infotech Parks Ltd. [2014 (36) STR 37];
- Chennai Petroleum Corporation Ltd. [2007 (211) ELT 193];

4.8 In view of the above, I find that demand is hit by limitation and the findings recorded in the impugned order in this regard cannot stand in the eyes of law. The impugned order is set aside.

5.1 Appeal is allowed.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp