

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 53603 of 2015

(Arising out of Order-in-Original No. RPR/EXCUS/000/COMM/023&024/ST/2015 dated 17 July, 2015 passed by the Commissioner of Central Excise & Customs, Raipur)

M/s SEW Infrastructure Limited
(Formerly known as 'M/s SEW Constructions Ltd.')

6-3-871, Snehalata, Begumpet

HYDERABAD – 500 016 (Telangana)

Appellant

VERSUS

Commissioner of Central Excise

Central Excise Bhawan, Dhamtari Road
RAIPUR – 492 001

Respondent

APPEARANCE:

Shri B.L. Narasimhan assisted by Ms. Poorvi Asati, Advocates for the Appellant
Shri Prashant Kumar, Authorized Representative of the Department

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R PRIYA, MEMBER (TECHNICAL)**

FINAL ORDER NO. 50640/2023

DATE OF HEARING/DECISION : 02.05.2023

JUSTICE DILIP GUPTA :

The order dated July 17, 2015 passed by the Commissioner, adjudicating two show cause notices dated August 29, 2006 and January 18, 2008 pursuant to the judgment and

order dated June 19, 2014 passed by the Chhattisgarh High Court in Tax Case No. 57 of 2011 and Tax Case No. 58 of 2011 initiated by the present appellant for quashing the order dated November 02, 2010 earlier passed by the Tribunal, has been assailed in this appeal.

2. To appreciate the issues that have been raised in this appeal, it would be appropriate to narrate certain essential facts.

3. The appellant claims to be an infrastructure construction company engaged in executing turnkey projects in various fields, such as, irrigation projects and power projects. M/s Bhilai Electric Supply Company Limited¹ is a company engaged in generation of electricity and it awarded a contract for setting up of a power plant to M/s Bharat Heavy Electricals Limited². BHEL sub-contracted a portion of the work to the appellant by a work order dated July 08, 2005. The job to be performed by the appellant under the work order was of land development which involves earth work, excavation, back filling, site levelling, grading and disposal.

4. A show cause notice dated August 29, 2006³ was issued to the appellant for the period July 2005 to August 2006 proposing a demand of service tax of Rs. 1,51,14,126/- on the allegation that the appellant had undertaken the activity of

1 Bhilai Electric

2 BHEL

3 first show cause notice

preparation of site for the power plant which would be covered under the category of 'site formation and clearance, excavation and earthmoving and demolition' services as defined under section 65(97a) of the Finance Act, 1944⁴ which was taxable under section 65(105)(zzza). The show cause notice was adjudicated upon by an order dated July 30, 2007 and the demand was confirmed. Payment of service tax through credit of Rs. 1,12,38,313/- was also rejected on the ground that the invoices against which credit was availed were not issued to the Bhilai premises of the appellant.

5. The second show cause notice dated January 18, 2008 was also issued to the appellant for the period from March 2006 to September 2006 on the same ground as the first show cause notice and it proposed a demand of Rs. 61,44,148/-. The credit of Rs. 1,16,86,444/- availed by the appellant was also denied. The second show cause notice was adjudicated by an order dated September 30, 2008 and the entire demand was confirmed.

6. The two appeals filed by the appellant before the Tribunal were decided by a common order dated November 02, 2010. In regard to the first appeal bearing number ST/92 of 2008, the Tribunal held as follows :

4 the Finance Act

"8. In conclusion, we hold as under :-

- (i) The appellant shall be liable to service tax in respect of the taxable service provided for the period 8th July, 2005 to 7th August, 2006
- (ii) The appellant shall be entitled to the cum-tax benefit subject to scrutiny of evidence by the Adjudicating Authority.
- (iii) The appellant is entitled to Cenvat credit of the input, if that is not otherwise deniable.
- (iv) Penalty shall be imposable under the respective provisions of the law as that shall be warranted.
- (v) Invoking of extended period was justified."

7. In regard to the second appeal bearing number 851 of 2008, the Tribunal observed as follows :

"This appeal involves consequential issue of Appeal No. ST/92 of 2008 decided today in preceding paragraphs. There was demand of Rs. 61,44,148/- raised under the Finance Act, 1994 on the ground of short payment. We have noticed in Appeal No. 92/2008 that Cenvat credit claim of the appellant is subject to scrutiny for which we have issued direction. In view of such a direction, we have partly set aside the impugned order for scrutiny of Cenvat credit which is covered by this appeal. So far as the levy of demand of Service tax of Rs. 61,44,148/- which relates to the period March, 2006 to September, 2006 covered by two return periods, the learned AR submits that the gross value of service pertaining to the tax demand of Rs. 61,44,148/- has already been covered in the taxation in the appeal No. ST/92 of 2008 because the assessee has disclosed in its return this figure due to bifurcation of return periods. The same gross value has undergone taxation and cannot be doubly taxed. But learned Commissioner denied that. But Revenue supports order of Authority below.

2. Upon hearing the matter and pleading of both sides, we have remanded the matter in Appeal No. ST/92 of 2008 in the manner indicated aforesaid. Therefore consequence of appeal No. ST/92/2008 having bearing on this appeal, pleading of double taxation can be factually examined and both cases can be taken up for disposal commonly to appreciate totality of facts and circumstances. To grant a fair opportunity of defence, we make it clear to the appellant that the appellant shall appear before learned Adjudicating Authority and satisfy him that the gross value of service giving rise to tax

demand of Rs. 61,44,148/-have been included in the gross value covered by appeal No. ST/92 of 2008 so that there shall not be over lapping of demand. If the appellant fails to satisfy the authority, consequence as that shall be proper under law shall follow.

3. In view of aforesaid observations, we remand this matter to the learned Adjudicating Authority to grant fair opportunity of hearing to the appellant and reconsider the issue of over lapping demand as well as consider the Cenvat credit disallowance made by order-in-appeal No. ST/851 of 2008."

8. Both the appeals were disposed of with the following observations :

"4. We make it clear to the learned Adjudicating Authority that he shall have better opportunity to adjudicate both the matters so that facts involved in both case do not go unnoticed. Consequently both the appeals are disposed in the aforesaid manner as well as both the cross-objections are disposed."

9. Feeling aggrieved, the appellant filed two Tax Appeals before the Chhattisgarh High Court which were decided by a common judgment and order dated June 19, 2014. The relevant portion of the order passed by the Chhattisgarh High Court is reproduced below :

"19. The Tribunal has already remanded the matter back for re-decision; there appears to be substance in the submission of the counsel for the Assessee; in view of the same, all the findings recorded by the Tribunal against the Assessee are set aside. The AO may again decide both the cases afresh in accordance with law, without being influenced by any observations made in the judgment of the Tribunal or in this order. But before deciding the case, he will also record a finding on the following point :

'Whether the Service Tax has been deposited by BHEL for the services provided by the Assessee for the period in question or not'.

20. The Assessee will appear before the AO in the week commencing 21st July, 2014 and may file certified copy of this order. The AO may fix up another date for final hearing. We also give liberty to the Assessee to file fresh documents, if necessary.

21. With the aforesaid observations, both the tax cases are partly allowed and remanded back to the AO."

10. On remand, the Commissioner passed a fresh order dated July 17, 2015 on both the show cause notices.

11. In regard to the contention raised by the appellant that the appellant would not be liable to pay service tax as the nature of service that was provided by the appellant would fall in the category of 'works contract' service which became taxable only w.e.f. June 01, 2007, the Commissioner observed as follows:

"I find that the Noticee during the course of the instant denovo adjudication proceedings, in their written submissions dated 13-12-2014 have raised a plea that the services rendered by them were classifiable under "Works Contract" service as brought into tax net from 01-6-2007 and therefore the impugned services were not taxable prior thereto.

The plea is misplaced and not tenable in view of the fact that "Works Contract" service was brought into the tax net wef 01-06-2007 as also stated by the Noticee themselves. In the impugned proceedings against the Noticee the period involved i.e 08-7-2005 to 07-8-2006 in respect of the first Show Cause Notice dt.29-8-2006 and half yearly periods ended March' 2006 and September' 2006 in respect of the second Show Cause Notice dt.18-1-2008. As regards classification of services rendered by the Noticee during the material period, detailed discussions as at para 12.6 supra have brought home the fact that the impugned services were classifiable under "Site Formation" service."

12. In regard to the issue as to whether the appellant has correctly availed the CENVAT credit facility, the Commissioner observed as follows :

"17. The aspect of admissibility of Cenvat Credit to the Noticee has been dealt with at length in the earlier adjudication proceedings. However, as the case has been remanded with a direction to discuss the issue of Cenvat Credit availability, I am taking up the issue again.

17.1 The facts of the case reveal that the Noticee had availed total Cenvat Credit of Rs.11686444/- (Basic Rs.11505298/- plus Ed. Cess of Rs.181146/-) on the various items and Services. The invoices corresponding to the same are devoid of the mention of the registered premises of the Noticee either as a customer or the consignee. Further, the documents mentioned at serial no.5 and 9 of the Annexure to the Show Cause Notice are not the invoices issued under Rule 11 of the Central Excise Rules 2002 but are simply the commercial invoices issued by the suppliers. Thus, statutory requirements have not been fulfilled for admissibility of credits.

17.3 I find that the Noticee had not contested the allegations at the adjudication stage. However in response to the letter C.No.CEx/Jmi-/ST/Misc/Rep/07/126 dt. 28.02.2007 of the Range Officer, they vide their letter dt. 19.03.2007 had submitted that they had correctly taken the credit as the machineries procured by them for their other projects through the impugned invoices had been diverted to Bhilai. Regarding the diversion of the machineries to Bhilai they neither submitted any document either to the Superintendent or during the course of the original adjudication as also during the present de-novo proceedings. Under the circumstances the credit availed by the Noticee cannot be considered as proper and lawfully valid."

13. It is this order dated July 17, 2015 passed by the Commissioner that has been assailed in this appeal.

14. Shri B.L. Narasimhan, learned counsel appearing for the appellant assisted by Ms. Poorvi Asati submitted that the

Commissioner committed an illegality in holding that the work performed by the appellant would be covered under the category of 'site formation and clearance, excavation and earthmoving and demolition' services inasmuch as the service rendered by the appellant under the work order dated July 08, 2005 would fall under 'works contract' service which became taxable only w.e.f June 01, 2007. In this regard, learned counsel has placed the work order dated July 08, 2005 as also the decisions of the Supreme Court in **Commissioner, Central Excise & Customs vs M/s Larsen & Toubro Ltd. and others**⁵ and **Total Environment Building Systems Pvt. Ltd. vs Deputy Commissioner of Commercial Taxes**⁶.

15. Learned counsel also contended that the CENVAT credit could not have been denied to the appellant merely on a technical ground that the invoices were issued in the name of other offices of the appellant. Learned counsel also submitted that penalty could not have been imposed on the appellant.

16. Shri Prashant Kumar, learned authorized representative appearing for the Department, however, supported the impugned order and submitted that it does not call for any interference in this appeal. Learned authorized representative, elaborating his submissions, contended that from a bare perusal of the work order it is more than apparent that the nature of work

5 2015 (8) TMI 749 – Supreme Court

6 2022 (63) GSTL 257 (SC)

performed by the appellant would fall under the category of 'site formation' service and that the Commissioner was justified in holding that the appellant could not have taken CENVAT credit.

17. We have considered the submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department.

18. The resolution of dispute in the present appeal would depend upon the nature of work that was to be performed by the appellant under the work order dated July 08, 2015. It would, therefore, be useful to reproduce the relevant portion of the work order awarded by BHEL to the appellant and the same is as follows :

“Job : **LAND DEVELOPMENT** (EARTH WORK
ESCAVATION, BACKFILLING, SITE LEVELING, GRADING,
DISPOSAL ETC) COMPLETE AT BHILAI ELECTRIC SUPPLY
COMPANY PRIVATE LIMITED EXPANSION OF BHILAI
POWER PROJECT (2X250MW), UNIT 1&2 AT BHILAI,
DIST-DURG (CHATTISGARH)
xxxxxxx xxxxxxxx xxxxxxxx

01. **ACCEPTED RATES**
Accepted rates are specified in Annexure-A to this letter
of award, according to which the total estimated value of
work based on item rates works out to **Rs.
11,29,71,195/-** (Rupees Eleven Crore, Twenty nine
Lakhs, Seventy One Thousand, One Hundred Ninety five
only).”

19. Annexure 'A' to the work order gives details of the work to be performed by the appellant and the amount to be paid. The description of the work to be carried and amount to be paid is as follows :

		"2x250 MW THERMAL POWER STATION	
		Expansion of BHILAI Power project	
SL. NO.	ST.NO.	DESCRIPTION	AMOUNT
	100	EARTH WORK IN EXCAVATION, BACKFILLING AND DISPOSAL AS PER SPECIFICATION, DRAWINGS AND AS DIRECTED BY ENGINEER FOR THE FOLLOWING :-	
		SITE LEVELING & GRADING	
1.	101	Earth work in Stripping of top Soil upto an average depth of 200mm below existing ground level so as to exclude all debris, grass, vegetation, bushes, trees, roots and organic materials etc. including dressing to specified levels & grades and compacting graded/stripped surface by manual or mechanical means, approaches, stacking/disposal of surplus excavated material within a lead of 1km etc. complete as per specification, drawing and as directed by the engineer.	5,043,600
2.	102(a)	Earth work in excavation for leveling and grading upto 2m depth below ground level in all types of soil including laterite, moorum, ash etc. which can be excavated by means of crow bar, pick axe etc. but does not require chiseling or (and) blasting including setting out, dressing the sides, leveling to grade and ramming/compacting the bottom, leveling, approaches, stacking/disposal of surplus excavated material within a lead of 1km etc. complete as per specification, drawing and as directed by the engineer.	9,593,280
3.	102(b)	Earth work in excavation for leveling and grading beyond 2m & upto 4m depth below ground level in all types of soil including laterite, moorum, ash etc. which can be excavated by means of crow bar, pick axe etc. but does not require chiseling or (and) blasting including setting out, dressing the sides, leveling to grade and ramming/compacting the bottom, leveling, approaches, stacking/disposal of surplus excavated material within a lead of 1km etc. complete as per specification, drawing and as directed by the engineer.	548,775
4.	103	Disposal of surplus excavated earth beyond an initial lead of 1km and upto a lead of 5 km including leveling the disposal material etc. all complete as per specification and as directed by the engineer.	45,000
5.	105	Earth work in filling for leveling and grading using selected excavated earth (obtained from compulsory excavations inside the project site) on prepared surface obtained by compacting with mechanical means including setting out, filling in horizontal layers not exceeding 250mm in compacted thickness, spreading, sorting, breaking clods, watering, compacting with proper moisture content to achieve a minimum 95% maximum dry density obtained by standard Proctor test, dewatering (if required), testing, approaches, finishing to required lines, grades and slopes, leveling etc. complete as per specification, drawing and as directed by the engineer.	4,860,540

		2x250 MW THERMAL POWER STATION	
		Expansion of BHILAI Power project	
SL. NO.	ST.NO.	DESCRIPTION	AMOUNT
6.	106	Earth work in excavation for leveling and grading using borrowed good earth (borrowed good earth to be arranged by the contractor at his own cost) on prepared surface obtained by compacting with mechanical means including setting out, excavation of fill material, loading, transportation, unloading, filling in horizontal layers not exceeding 250mm in compacted thickness, spreading, sorting, breaking clods, watering, compaction with proper moisture content to achieve a minimum 95% maximum dry density obtained by standard Proctor test, dewatering (if required), testing, approaches, finishing to required lines, grades and slopes, leveling etc. complete as per specification, drawing and as directed by the engineer.	92,880,000
		TOTAL AMOUNT	112,971,195
		Rs. Eleven Crore, Twenty nine Lakhs, Seventy One Thousand, One Hundred Ninety five only.	

S.M. BORKAR
MANAGER/PUR”

20. What transpires from a perusal of Annexure ‘A’ is that the work order is a composite contract comprising services as well as goods. This would be clear from serial no. 6 which mentions ‘Earth work in excavation for levelling and grading using borrowed good earth’. It specifies that borrowed good earth has to be arranged by the contractor at its own cost. There can be no manner of doubt that the work order comprises both the service element as well as the goods element.

21. Keeping this in mind that it has to be examined whether the work to be performed would actually fall under the category of ‘site formation’ service. ‘Site formation’ has been

defined in section 65(97a) of the Finance Act in the following manner :

“(97a) site formation and clearance, excavation and earthmoving and demolition” includes, —

- (i) drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or
- (ii) soil stabilization; or
- (iii) horizontal drilling for the passage of cables or drain pipes; or
- (iv) land reclamation work; or
- (v) contaminated top soil stripping work; or
- (vi) demolition and wrecking of building, structure or road,

but does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies;]”

22. The Supreme Court in **Larsen & Toubro** in paragraph 24 drew a distinction between the service contracts simpliciter and a composite works contracts which would involve both services and goods and held that it is only w.e.f. June 01, 2007 that composite contracts can be subjected to levy of service tax and not before this date. The relevant portions of the judgment are reproduced below :

“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.

40. Finally, in para 31, the Delhi High Court holds :-

"The contention of the petitioners that the impugned notifications override the statutory provisions contained in Section 65(105), which defines the term "taxable service", Section 66, which it is claimed is a charging section, and Section 67, the valuation provisions of the Finance Act, 1994, has to be rejected. We have, as

already stated above, rejected the argument of the petitioners on bifurcation/vivisection and held that as per the provisions of Section 65(105)(zzq) and (zzzh), service tax is payable and chargeable on the service element of the contract for construction of industrial and commercial complexes and contract for construction of complexes as specified and in case of a composite contract, the service element should be bifurcated and ascertained and then taxed. The contention that the petitioners are paying sales tax or VAT on material in relation to execution of the contract under composite contracts for construction of industrial/commercial complexes and construction contracts as specified under Section 65(105)(zzq) and (zzzh) therefore fails. The contention that there was/is no valid levy or the charging section is not applicable to composite contracts under clauses (zzq) and (zzzh) of Section 65(105) stands rejected. But the petitioners have rightly submitted that only the service component can be brought to tax as per provisions of Section 67 which stipulates that value of taxable service is the "gross amount charged" by the service provider for such services provided or to be provided by him and not the value of the goods provided by customers of service provider and the service tax cannot be charged on the value of the goods used in the contract."

43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services."

23. The view expressed by the Supreme Court in the aforesaid decision was reiterated by the Supreme Court in **Total Environment Building Systems** and the relevant paragraphs of the judgment are reproduced below :

“20. Service tax was introduced in India vide the Finance Act, 1994. Service tax is legislated by Parliament under the residuary entry i.e. Entry 97 of List I of the Seventh Schedule of the Constitution of India read with Article 248 of the Constitution. The service tax provisions have the following basic scheme:

- (i) Section 65 of the Act provides for taxable services;
- (ii) Section 66 of the Act provides for the charge of service tax by the person designated as “the person responsible for collecting the service tax” for the Government;
- (iii) Section 67 of the Act provides for the value of taxable service which is to be subjected to 5% service tax; and
- (iv) Section 68 of the Act provides for the collection and payment mechanism for service tax.

It is necessary to trace the evolution of charging service tax on works contract as discerned by this Court in the aforesaid judgments. While considering the rival contentions of the parties, it is also necessary to examine the issue of levying service tax on contracts said to be in the nature of works contract, both prior to, and following the introduction of an express charging provision to impose tax on works contract although we are concerned with the period prior to the definition of works contract w.e.f. 1st June, 2007 to Finance Act, 1994. This is with reference to the following judgments :

- (a) xxxxxxxx xxxxxxxx xxxxxxxx
- (b) xxxxxxxx xxxxxxxx xxxxxxxx
- (c) xxxxxxxx xxxxxxxx xxxxxxxx
- (d) xxxxxxxx xxxxxxxx xxxxxxxx
- (e) xxxxxxxx xxxxxxxx xxxxxxxx
- (f) Thus, Works Contract Services were brought under the service tax net as per an amendment to of the Finance Act, 1994 by introduction of Clause (zzzza) to Section 65(105). The said introduction was made pursuant to the Finance Act, 2007, which expressly made the service component in such works contract liable to service tax w.e.f. 1st June, 2007. The amendment was made to the said section of the Finance Act, 1994 by which works contract which were indivisible and composite could be split so that only the labour and service element of such contracts would be taxed as service tax.

22. As already noted, the definition of works contract was brought under the service tax net as per Section 65(105)(zzzza) of the Finance Act, 1994 by the insertion of the said definition. The said introduction

was made pursuant to the Finance Act, 2007, which expressly made the service element in such works contract liable to service tax w.e.f. 1st June, 2007. By the said amendment, works contract which were indivisible and composite could be split so that only the labour and service element of such contracts would be taxed under the heading "Service Tax".

23. It is in the above backdrop that the definition of Works contract inserted for the first time by virtue of Section 65(105)(zzzza) under the Finance Act, 2007 assumes significance and has to be applied w.e.f. 1st June, 2007. Thus, on and from the enforcement of the amendment in the Financial Year 2007, i.e. 1st June, 2007 the tax on the service component of works contract became leviable. Therefore, till then it was not so leviable as there was no concept of works contract under the said Act.

24. Recognizing this aspect of the matter in *Larsen and Toubro Ltd.* (supra), this Court held that Service Tax on works contract was not leviable, meaning thereby, that such tax on the service component of works contract as defined above did not attract Service Tax prior to the amendment.

26. Therefore, reliance placed by the assesseees in the present case on the aforesaid judgments is just and proper. On the other hand, the contention of Ms. Diwan, Learned ASG to the effect that even prior to the aforesaid amendment being made to the Finance Act, 1994 service tax on works contract was leviable is not correct. It was being levied on purely service contract and not on service element of works contract as there was no definition of a works contract till then. Hence, the amendment made to the Finance Act, 1994 by insertion of the definition of works contract as under clause (zzzza) is not clarificatory in nature. Having found that the Service Tax was not at all leviable on service element of a works contract, Parliament felt the need for the amendment and was so incorporated by the Finance Act, 2007.

27. Thus, the judgment in *Larsen and Toubro Ltd.* (supra) has been correctly decided and does not call for a re-consideration insofar as the period prior to 1st June, 2007 is concerned. In view of the above discussion, I agree with the result arrived at by His Lordship M.R. Shah J. vis-a-vis allowing all civil appeals under consideration except Civil Appeal No. 6792 of 2010 which is dismissed. No costs."

24. It has been found as a fact that the work order in the present case, involves both supply of services as also goods. It is, therefore, a composite contract. In view of the decisions of the Supreme Court in **Larsen & Toubro** and **Total Environment Building Systems** it has to be held that the services performed by the appellant under the work order would fall in the category of 'works contract' service and not 'site formation' service. The finding of the Commissioner on this issue, therefore, cannot be sustained and is set aside.

25. The next issue that arises for consideration in this appeal is as to whether the appellant would be justified in availing CENVAT credit.

26. A provider of taxable service shall be allowed to take CENVAT credit under rule 3 of the CENVAT Credit Rules, 2004⁷ on the service tax leviable under section 66 of the Finance Act. The relevant portion of rule 3(I) of the 2004 Rules is reproduced below:

"3. (I) A manufacturer or producer of final products or a provider of output service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of-

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act :

(ii)	xxxxxx	xxxxxx	xxxxxx
(iii)	xxxxxx	xxxxxx	xxxxxx
(iv)	xxxxxx	xxxxxx	xxxxxx
(v)	xxxxxx	xxxxxx	xxxxxx
(vi)	xxxxxx	xxxxxx	xxxxxx
(vii)	xxxxxx	xxxxxx	xxxxxx
(viii)	xxxxxx	xxxxxx	xxxxxx

(ix) the service tax leviable under section 66 of the Finance Act;

7 the 2004 Rules

paid on –

- (i) any input or capital goods received in the factory of manufacture of final product or [by] the provider of output service on or after the 10th day of September, 2004; and
- (ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004,”

27. The Commissioner had examined documents to ascertain whether the appellant was justified in availing CENVAT credit, but in view of the finding recorded in this order that the appellant would not be liable to pay service tax, the appellant cannot avail the benefit of rule 3(I) of 2004 Rules.

28. Learned counsel for the appellant, however, pointed out that the appellant had reversed the CENVAT credit availed by it and, therefore, this issue is only academic in nature.

29. Learned counsel for the appellant also submitted that in any view of the matter the penalty imposed on the appellant for wrong availment of CENVAT credit needs to be set aside.

30. This submission of learned counsel for the appellant deserves to be accepted. The issue of tax liability of a sub-contractor in cases where the main contractor had paid service tax was subject matter to litigation and, therefore, no mala fides can be attributed to the appellant. The penalty imposed on the appellant, therefore, deserves to be set aside.

31. Interest cannot be imposed on the appellant as demand of service tax is not sustainable and credit was reversed by the appellant.

32. Thus, for all the reasons stated above, the confirmation of demand of service tax deserves to be set aside and is set aside. The imposition of penalty and interest also deserves to be set aside and is set aside. The appeal is, accordingly, allowed to the extent indicated above.

(Dictated & pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)