

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

PRINCIPAL BENCH, COURT NO. 1

SERVICE TAX APPEAL NO. 51189 OF 2018

[Arising out of Order in Appeal No. 47(AG) CE/JDR/2018 dated 29.01.2018
passed by the Commissioner (Audit) Central Excise & CGST, Jodhpur]

RAJ CONSTRUCTION COMPANY

Appellant

B- 43, Shree Bhawan, Talwandi,
Kota (Rajasthan)

Vs.

**COMMISSIONER OF CGST & CENTRAL
EXCISE-UDAIPUR**

Respondent

142-B, Hiran Magri, Sector-11,
Udaipur

Appearance:

Present for the Appellant : Ms. Nikita Jaju, Advocate

Present for the Respondent: Shri Anand Narayan, Authorised Representative

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 59396 /2024

Date of Hearing : 16/10/2024

Date of Decision: 29/10/2024

P.V. SUBBA RAO:

1. **M/s. Raj Construction Company¹** filed this appeal to
assail the Order in Appeal² dated 29.01.2018 passed by the
Commissioner (Appeals) whereby he upheld the Order in Original³
dated 21.11.2012 passed by the Assistant Commissioner and
rejected the appellant's appeal.

1 the appellant
2 the impugned order
3 OIO

2. The appellant had provided services of construction of residential complexes but had not registered with the Service Tax department or paid any service tax.

3. Acting on intelligence, the Assistant Commissioner sent letters and reminders to the appellant, who, in reply, sent letter dated 2.2.2011 giving details of the work done by it during the period 2006-07 to 2009-10 along with its annual reports. It also submitted work order wise details of the payments received from 1.4.2006 to 31.3.2011.

4. Analysing the above data, the Assistant Commissioner came to a tentative conclusion that the appellant had rendered taxable service of 'construction of residential complexes' chargeable to service tax under section 65(105) (zzzh) of the Finance Act, 1994⁴ and issued a Show Cause Notice⁵ dated 21.11.2012 demanding service tax of Rs. 46,08,851 invoking extended period of limitation under the proviso to section 73(1) of the Act along with interest under section 75 of the Act. The SCN also proposed to impose penalties on the appellant under sections 76, 77 and 78 of the Act.

5. The appellant opposed the SCN but the proposals therein were confirmed in the OIO passed by the Assistant Commissioner which was upheld by the impugned order passed by the Commissioner (Appeals). The Commissioner (Appeals) specifically recorded that all the services rendered by the appellant were under 'works contracts' as they included the use of materials also but he declined to give abatement towards the use of materials as

4 **Act**
5 **SCN**

the appellant had not opted for composition as per Rule 3(3) of the Works Contract (Composition scheme for payment of Service Tax) Rules, 2007. Aggrieved, the appellant filed this appeal.

Submissions on behalf of the appellant

6. Learned counsel for the appellant made the following submissions:

i) The appellant had provided the services to the Government of Rajasthan through the nodal agency Rajasthan State Road Development and Construction Corporation Ltd.⁶ .

ii) The services which it had rendered were:

- a) Construction of 48 quarters for police at GRP Campus, Nareli Ajmer
- b) Construction of 37 staff quarters at SRG Hospital, Jhalawar
- c) Construction of 3 staff quarters at SRG Hospital, Jhalawar
- d) Construction of stell gate for boundary and car parking for 37 staff quarters at SRG Hospital, Jhalawar
- e) Construction of 16 police quarters at Thana Kotwali, Bundi

iii) There is no dispute that these services were rendered in relation to residential complexes. The term 'residential complex' defined in section 65(91a) of the Act specifically excludes complexes intended for personal use of a person. As per Explanation (a) to this section, 'personal use' includes permitting the complex for use as residence by another person on rent or without consideration. It reads as follows:

(91a). "residential complex" means any complex comprising of-

- (i) a building or buildings, having more than twelve residential units;
- (ii) a common area; and
- (iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging

any other person for designing or planning of the layout, and **the construction of such complex is intended for personal use as residence by such person.**

Explanation.-For the removal of doubts, it is hereby declared that for the purposes of this clause,-

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;

iv) All the complexes which the appellant had constructed were for the government hospitals and for the police department to be used as quarters for their employees. Therefore, they squarely fall under the definition of 'personal use' as per the Explanation(a) to section 65(19a) of the Act and therefore, do not fall under the definition of 'residential complex' and hence no service tax was payable and the appellant had accordingly not paid any service tax.

v) The SCN is also time barred as it was issued beyond the normal period of limitation of 18 months.

vi) The impugned order may therefore be set aside.

Submissions on behalf of the Revenue

7. Learned authorised representative for the Revenue vehemently supported the impugned order and asserted that it calls for no interference.

Findings

8. We have considered the submissions advanced by both sides and perused the records. The questions which fall for consideration are:

a) Were the services of construction of the residential complexes for the government hospitals and the police department rendered by the appellant as 'works contracts' chargeable to service tax under the head 'construction of

residential complex service' without abatement towards the value of the goods used?

b) If so, was the extended period of limitation correctly invoked in the SCN?

c) Whether penalties were correctly imposed on the appellant?

9. It is undisputed that all these contracts were works contracts, i.e., contracts for providing services including transfer of property in the goods. In the impugned order in paragraph 8, the Commissioner (Appeals), inter alia, recorded as follows:

".....In all these work orders, there is also transfer of property in goods involved in the execution of such contracts and thus, there is no doubt that the services provided by the appellant falls under 'Works Contract Services'. "

10. In paragraph 12 of the impugned order, the Commissioner (Appeals) examined if the appellant could be given the benefit of Works Contract (Composition Scheme for payment of Service tax) Rules, 2007 but held in negative because the appellant had not opted for the benefit as per Rule 3(3), *ibid*.

11. We find that the first issue to be examined is the nature of 'works contracts' and the extent to which service tax can be levied on them.

12. The nature of 'works contracts' came up before the Supreme Court in **State of Madras vs. Gannon Dunkerley & Company (Madras) Ltd.**⁷ (Civil Appeal No. 210 of 1956, decided on 1-4-1958). The Government of the State of Madras had levied sales tax on the goods used in execution of works contracts by builders

treating the use of such goods as deemed sale of goods. The legislative competence of the State Government to levy such a tax was challenged. Supreme Court decided that there was no implicit sale of materials in a building contract under a works contract. However, if the parties enter into two different contracts- one for the sale of the goods to be used and another for the service, then there will be a sale of goods. Therefore, the Supreme Court held that the power of the State Government to levy Sales Tax did not extend to levying tax on the goods used in works contracts. The relevant portions of this judgement are reproduced below:

"42. We are unable to agree with this contention. If the words "sale of goods" have to be interpreted in their legal sense, that sense can only be what it has in the law relating to sale of goods. The ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the legislature must be taken to have intended that they should be understood in that sense. **In interpreting an expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law. It has been already stated that, both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another.** We are accordingly of opinion that on the true interpretation of the expression "sale of goods" there must be an agreement between the parties for the sale of the very goods in which eventually property passes. In a building contract, the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, and as will presently be shown there is in such an agreement neither a contract to sell the materials used in the construction, nor does property pass therein as movables. **It is therefore impossible to maintain that there is implicit in a building contract a sale of materials as understood in law.**

54. The contention that a building contract contains within it all the elements constituting a sale of the materials was sought to be established by reference to the form of the action, when the claim is in *quantum meruit*. It was argued that if a contractor is prevented by the other party to the contract from completing the construction he has, as observed by Lord Blackburn in *Appleby v. Myres* [(1867) L.R. 2 C.P. 651], a claim against that party, that the form of action in such a case is for work done and materials supplied, as appears from Bullen & Leake's Precedents of Pleadings, 10th Ed., at pp. 285-286, and that showed that the concept of sale of goods was latent in a building contract. **The answer to this contention is that a claim for quantum meruit is a claim for damages for breach of contract, and that the value of the materials is a factor relevant only as furnishing a basis for assessing the amount of compensation.** That is to say, the claim is not for price of goods sold and delivered but for damages. That is also the position under Section 65 of the Indian Contract Act.

56. The statement of the law was quoted with approval by the Privy Council in *Beni Ram v. Kundan Lall* [(1899) L.R. 26 I.A. 58] and in *Narayan Das Khettry v. Jatindranath* [(1927) L.R. 54 I.A. 218]. **But these decisions are concerned with rights of persons who, not being trespassers, *bona fide* put up constructions on lands belonging to others, and as to such persons the authorities lay down that the maxim recognised in English law, *quicquid plantatur solo, solo credit* has no application, and that they have the right to remove the superstructures, and that the owner of the land should pay compensation if he elects to retain them. That exception does not apply to buildings which are constructed in execution of a works contract, and the law with reference to them is that the title to the same passes to the owner of the land as an accretion thereto. Accordingly, there can be no question of title to the materials passing as movables in favour of the other party to the contract.** It may be, as was suggested by Mr. Sastri for the respondents, that when the thing to be produced under the contract is moveable property, then any material incorporated into it might pass as movable, and in such a case the conclusion that no taxable sale will result from the disintegration of the contract can be rested only on the ground that there was no agreement to sell the materials as such. But we are concerned here with a building contract, and in the case of such a contract, the theory that it can be broken up into its component parts and as regards one of them it can be said that there is a sale must fail both on the grounds that there is no agreement to sell materials as such, and that property in them does not pass as movables. **To sum up, the expression "sale of goods" in Entry 48 is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible - and that is its**

norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale.

57. This conclusion entails that none of the legislatures constituted under the Government of India Act, 1935, was competent in the exercise of the power conferred by Section 100 to make laws with respect to the matters enumerated in the Lists, to impose a tax on construction contracts and that before such a law could be enacted it would have been necessary to have had recourse to the residual powers of the Governor-General under Section 104 of the Act. And it must be conceded that a construction which leads to such a result must, if that is possible, be avoided. Vide *Manikkasundara v. R.S. Nayudu* (1946 FCR 67, 84). It is also a fact that acting on the view that Entry 48 authorises it, the States have enacted laws imposing a tax on the supply of materials in works contracts, and have been realising it, and their validity has been affirmed by several High Courts. All these laws were in the statute book when the Constitution came into force, and it is to be regretted that there is nothing in it which offers a solution to the present question. **We have, no doubt, Art. 248 and Entry 97 in List I conferring residual power of legislation on Parliament, but clearly it could not have been intended that the Centre should have the power to tax with respect to works constructed in the States.** In view of the fact that the State Legislatures had given to the expression "sale of goods" in Entry 48 a wider meaning than what it has in the Indian Sale of Goods Act, that States with sovereign powers have in recent times been enacting laws imposing tax on the use of materials in the construction of buildings, and that such a power should more properly be lodged with the States rather than the Centre, the Constitution might have given an inclusive definition of "sale" in Entry 54 so as to cover the extended sense. But our duty is to interpret the law as we find it, and having anxiously considered the question, we are of opinion that there is no sale as such of materials used in a building contract, and that the Provincial Legislatures had no competence to impose a tax thereon under Entry 48. **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 case, there are really two agreement, 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.**

58. In the result, the appeal fails, and is dismissed with costs."

13. Thus, composite works contracts are a separate type of contracts distinct from contracts for sale of goods or for supply of services. Since at the relevant time, the State Governments could only levy tax on sale of goods, works contract services were held to be outside the legislative competence of the State legislatures. Since 'works contracts' were neither in the State List (List II) nor in the Union List (List I) of the Seventh Schedule to the Constitution, they fell under the residual entry (entry 97 of List I) and the power to tax them was with the Union.

14. Thereafter, Parliament passed the twenty sixth amendment to the Constitution and inserted clause (29-A) in Article 366 (Definitions clause of the Constitution) enlarging the scope of 'tax on the sale or purchase of goods' as follows:

(29A)"tax on the sale or purchase of goods" includes—

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (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;**
- (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

15. This amendment enlarged the power of the State Governments to tax transfer of property in goods used in the works contracts. Consequently, works contracts no longer were in the residual category (entry 97 of List I) to the extent of the power to tax the property in goods transferred. Rest of the power, i.e., the power to tax the service component of the works contracts continued to be with the Union. **Thus, after the 26th Amendment to the Constitution, the Union could tax only the service component of works contracts and States could only tax goods element of the works contracts.** It was held by the Supreme Court in **Commissioner of C. EX. & CUS., Kerala Vs. Larsen & Toubro Ltd.**⁸ 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

⁸ 2015 (39) S.T.R. 913 (S.C.)

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 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)

16. Therefore, the finding of the Commissioner (Appeals) in the impugned order that since the appellant had not opted for the composition as provided in the Rules, the entire amount received for the works contracts should be treated as consideration and service tax should be collected on the total value of works contracts including the value of goods is not correct. This is because the power of taxation of the Union does not, after the twenty sixth amendment to the Constitution, extend to tax the value of the goods used in works contracts. The Act and the Rules cannot be interpreted so as to tax the value of the goods used in works contracts.

17. We now address the more fundamental question as to whether service tax could be charged under the head 'construction of residential complexes' when such services were rendered as part of 'works contracts'. The power of the Union to levy tax on the service component of the works contracts is never in doubt. The question is if the service is covered by the charging section of the Act.

18. Section 66 of the Act was the charging section for levy and collection of service tax on taxable services rendered during the

relevant period. The term 'taxable service' is defined in section 65(105) of the Finance Act and its various clauses covered various types of taxable services. Initially, the levy of service tax was levied only on some services which were enlarged over years by adding more clauses in section 65(105) of the Act thereby making more and more services taxable. During the period, whenever taxable services were rendered along with the use of the goods, i.e., as a part of works contracts, abatement towards the value of the goods used was provided through notifications.

19. Later, with effect from 1.6.2007, tax was levied on any service provided in relation to execution of 'works contract service' by inserting clause (zzzza) in section 65 (105) of the Act. It reads as follows:

Section 65 (105) "taxable service" means any service provided or to be provided,-

(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation.—For the purposes of this sub-clause, "works contract" means a contract wherein,-

(i) transfer of property in goods involved in the execution of such contract is liable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out,-

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

20. In **Larsen & Toubro**, the question before the Supreme Court was whether service tax could be levied on contracts involving the supply of goods and rendering of services, i.e., composite works contracts under various heads [other than section 65(105) (zzzza)] after giving abatement as provided in the notifications towards the cost of materials.

21. Supreme Court held that works contracts are a separate species of contracts recognized by the world of commerce different from the contracts for services simpliciter. The term 'works contracts' in article 366 (29A) (b) of the Constitution was amply wide and cannot be confined to a particular understanding of the term or to a particular form. Contracts where the services are rendered along with transfer of materials are 'works contracts' which have been made taxable after the introduction of clause 65(105)(zzzza) of the Act with effect from 1.6.2007. Other clauses of section 65(105) of the Act covered only services simpliciter and service tax could not be levied under those headings if the services were rendered as works contracts. The relevant portion of the judgment is as follows:

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 assessee's 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.

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.

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.

22. The Supreme Court rejected the submission by the Revenue that since notifications were issued giving abatement towards the cost of materials, service tax could be levied under other heads and held that such notifications should be disregarded because there was no levy of service tax at all during the relevant period on works contracts. The relevant portion of the judgment is reproduced below.

44. We have been informed by counsel for the revenue that several exemption notifications have been granted *qua* service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. **Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise.** With these observations, these appeals are disposed of.

45. We, therefore, allow all the appeals of the assessees before us and dismiss all the appeals of the revenue.

24. To sum up:

- a) Service tax can be levied and it has only been levied on the service component (and not on the goods component) of

works contracts by introducing clause 65(105) (zzzza) of the Act. Therefore, the sections of the Act or the Rules made thereunder cannot be read so as to levy service tax also on the value of the goods transferred in the works contracts as has been erroneously done by the Commissioner (Appeals).

- b) Tax under various clauses of section 65(105) of the Act other than clause (zzzza) including clause (zzzh) under which the demand is confirmed in this case, cover only services simpliciter and not services rendered as a part of the works contract as held in **Larsen & Toubro**. Since the appellant had rendered the service of construction of residential complexes as 'works contracts', the demand of service tax under section 65(105)(zzzh) of the Act towards 'construction of residential complexes' cannot be sustained.
- c) The other submissions regarding the personal use or use of employees of the buildings constructed need not be considered because the services rendered by the appellant do not fall under section 65(105) (zzzh) of the Act at all.
- d) Consequently, the demand, interest and penalties on the appellant cannot be sustained and need to be set aside.

25. The appeal is allowed and the impugned order is set aside with consequential relief to the appellant.

[Order pronounced on **29.10.2024**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)