CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

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Appearance
Shri V. Sridharan & Shri G. Prahlad, Advocates for the Appellant.
Shri P.R.V. Ramanan, Special Consultant for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 11/09/2018
Date of Decision: 07/01/2019

FINAL ORDER No. A/30023-30027/2019

[Order per: M.V. Ravindran]

This appeal is directed against Order-in-Original No. 06/2009 (ST) dated 20.01.2009.

2. The relevant facts that arise for consideration, after filtering out unnecessary details are appellants herein were awarded the contract by M/s Reliance Industries Ltd., (hereinafter referred as

RIL) for construction of Onshore Terminal (hereinafter referred as OT) for the purpose of receiving, processing/purification and transportation of natural gas extracted from the Godavari Basin; the gas would be brought through the pipelines to the site i.e., the OT at Gadimoga for necessary processing and onward transmission and transportation to the customers. The agreement entered by appellant with RIL on 18.10.2006 narrates the reasons for entering into such agreement and the scope of work to be undertaken by the appellants was under:

1. Construction of onshore Terminal & Infrastructure work

2. Construction of Civil works for comprehensive Protected Water Supply Scheme (CPWS) Scheme at Gadimoga village.

3. Haul Road work.

4. Access Bridge to Workman Colony

5. Flyover Bridge

6. Road widening work

7. Other Common and infrastructure facilities

The appellants were required to execute the above work and RIL was to provide with all the machinery and equipments. Appellant had registered themselves as service tax payer but did not pay the tax under an impression that OT which is developed for receiving and transportation of gas for further distribution and hence it would be exempted from payment of tax. After investigation, lower authorities issued a show cause dated 31.07.2008 directing the appellant show cause as to why the service tax be not demanded for consideration received under the category of commercial or industrial construction services or works contract services or erection commissioning and installation services and finally demanded tax liability under the category of commercial or industrial construction services by applying provisions of Section 65 (A)(2B) of the Finance Act, 1994. Appellant had filed a detailed reply inter-alia contesting the classification on the ground that it is works contract service and the OT is a transport terminal and not liable for tax. Adjudicating Authority after following due process of law, confirmed the demands raised along with interest and also imposed penalties.

3. Learned Counsel submits as under:

EXTENDED PERIOD IS NOT INVOKABLE

A.1 In para 29 and 30 (Page 396 of the Part-II of the Paper Book) of the Order-in-Original the invocation of extended period has been confirmed on the following counts:

1. *The appellants mi-declared taxable services under the head 'exempted Services' in ST-3 Returns.*
2. *The appellants have not disclosed the exemption notification for availing such exemption.*
3. *The appellants have knowingly camouflaged the value received from OT project along with host of other projects for which they have claimed exemption.*
4. *The appellants have not sought any opinion from the department on the taxability of the present transaction.*
5. *The appellants did not disclose the activity undertaken by them at the OT in reply to letter dated 21.2.2007.*
6. *The audit conducted in October 2007 was a routine affair.*

A.2 In this regard, the appellants submit as follows:

'Bonafide Belief' that the said service does not come under the purview of 'Commercial or Industrial Construction' service

A.3 Firstly, the extended period is not invokable as there was no suppression of facts with intent to evade payment of service tax. The appellants were under a bonafide belief that the said service does not come under the purview of 'Commercial or Industrial Construction' service. This belief is strengthened by the decision of the Commissioner (Appeals II), Hyderabad in the case of ***IVRCL Infrastructure Projects Limited, Hyderabad vide Order-in-Appeal No. 38&39/2009 (H-II) ST dated 20.07.2009*** *wherein it was stated that the activities undertaken for the same project by IVRCL would be exempt from service tax being 'transport terminal'.*

A.4 Contractually, RIL is liable to pay service tax, hence there cannot be intention to evade.

Department was aware of the transaction in 21.2.2007.

A.5 Secondly, the department was already aware about the said activities at Onshore Terminal as the appellants vide their letter dated 5.3.2007, in reply to the department letter dated 21.2.2007, submitted list of various contractors undertaking the aforesaid activity and the amounts paid to them.

A.6 Simultaneously, investigation was also started by Visakhapatnam Commissionerate in 2007 itself.

A.7 Further, AG Audit was also undertaken during the month of October 2007, wherein contract and other related documents were sought by the department. The appellants duly submitted the contract along with other relevant documents. Even though all the relevant documents were available with department, DGCEI erroneously delayed the issuance of show cause notice and eventually issued the present show cause notice on 31.7.2008 by invoking extended period.

Deficiency in the prescribed format of return form will not amount to non-disclosure on the part of the appellants

A.8 In absence of any column in ST-3 Returns for declaring amount in relation to non-taxable services, the appellants bonafidely declared the services provided to RIL under the category of "Commercial or Industrial Construction Service" under the head "Exempted Service'' in the ST-3 returns. Therefore, deficiency in the prescribed format of form will not amount to non-disclosure on the part of the appellants. Please refer:

a) Muthiah Chettiar Vs CIT, Madras, [1969 (1) SCC 675] (Page 20-25 of the Compilation)

b) Apex Electricals Pvt. Ltd., Vs UOI, [1992 (61) ELT 413 (Guj.)] (page 15-19 of the Compilation)

Exemption claimed in return-No suppression

*A.9 When the appellants have claimed exemption under the ST-3 Returns, the department cannot allege suppression of fact. Reliance is placed upon **CCE Vs. Polycab Wires Pvt. Ltd., [2018 (360) ELT 391 (Bom.)]** (page 26-27 of the Compilation):-*

> *"**4.** Upon perusal of the appeal paper book and particularly the order under appeal, we are unable to agree. The Tribunal must perform its duty as a last fact finding authority is indeed an unassailable legal proposition. However, it has performed it or otherwise would depend on the facts and circumstances of each case and we must find out whether in this case the Tribunal has failed in its duty expected from it to be performed in law. It is not fair to read only one paragraph of the order under appeal or by picking out some sentences therefrom. To read the order in appeal in such a manner and consider the finding in isolation would be unjust and unfair. The Commissioner (Appeals) in this case held that the assessee was expected to perform certain duty and that is of full disclosure of facts. In the present case, the assessee was visited with a show cause notice of 9th December, 2005. That followed a show cause notice of 9th September, 2003, which was issued in the normal period of one year and duly adjudicated by an order dated 27th February, 2004. The second show cause notice, invoking the larger period (December, 2002 to March, 2003) alleged suppression and misdeclaration by the assessee, which was also the allegation in the earlier show cause notice and duly adjudicated. In such a factual backdrop, the Commissioner (Appeals) determined as to*

whether there was any suppression of facts by the assessee. ***He disagreed with the adjudicating authority and after referring to all the materials on record, including the RT 12 returns, he held that the department could not have alleged suppression, when all the facts were disclosed in the returns and the assessee specifically claimed that it was not liable to pay any duty. There are figures on record from which appropriate inference could have been drawn by the Revenue. It is, therefore, the department's obligation to investigate and for that purpose, it possessed the requisite powers. If the department fails in that duty, it could not turn around and blame the assessee.***

5. *That is how the Commissioner (Appeals) approached the matter. The Tribunal endorsed this approach because it found that the same was not vitiated by any error of law apparent on the face of the record. The Tribunal referred to the judgment in the case of Northern Plastic Ltd. v. Collector of Customs and Central Excise –[1998 (101) E.L.T. 549 (S.C.)]. The Tribunal relied upon it because the principle enshrined therein had application to the case at hand. Meaning thereby, it did not blindly follow this principle.* ***The principle is, when all the facts necessary to be disclosed by the assessee have been disclosed and there cannot be any allegation of suppression, then, the extended period of limitation cannot be invoked****. On facts, it found no suppression in this case. That is what the Commissioner (Appeals) also found. It is, therefore, the endorsement of the Commissioner's finding and conclusion.*

...Emphasis Supplied.

A.10 Reliance is also placed upon the following decisions:

1. *Cement Marketing Co. of India Ltd., Vs ACST, [1980 (6) ELT 295 (SC)] (page 28-29 of the compilation)*
2. *Pahwa Chemicals Pvt. Ltd., Vs CCE, [2005 (189) ELT 257 (SC)] (page 30 of the Compilation)*
3. *Commissioner Vs Meghmani Dyes, [2013 (288) ELT 514 (Guj.)] (page 31-37 of the compilation)*

There is no legal opinion taken by the appellants

A.11 Though there is no allegation or finding on the fact that the appellants have followed the opinion provided by their provider of service. The said legal opinion was provide to M/s Simplex Industries by their charter. Further, the said opinion also accepts the fact that it is 'transport terminal' however, they applied the principle of noscitur a sociis to held that infrastructure alone will be covered. Firstly, it is not an opinion obtained by the appellants. RIL had obtained opinion from their consultants. In any case, the opinion obtained from charter accountant was in contradiction with the Circular issued in 2005, which provided that roads constructed in private complex were also exempt from service tax.

WITHOUT PREJUDICE TO ANY OF THE ABOVE SUBMISSIONS, THE APPELLANTS ARE ENTITLED TO THE BENEFIT OF NOTIFICATION NO. 1/2006-ST DATED 1.3.2006

B.1 Without prejudice to the above submission, in case the demand is confirmed then the benefit of abatement Notification 1/2006-ST dated 1.3.2006 must be extended to the appellants.

B.2 Relevant part of the Notification No. 1/2006-ST dated 1.3.2006 is reproduced as under:
"Effective rate of service tax for specified services- Percentage of abatements
In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service of the description specified in column (3) of the Table below and specified in the relevant sub-clauses of clause (105) of section 65 of the Finance Act, specified in the corresponding entry in column (2) of the said Table, from so much of the service tax leviable thereon under section 66 of the said Finance Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (5) of the said Table, of the gross amount charged by such service provider for providing the said taxable service, subject to the relevant conditions specified in the corresponding entry in column (4) of the Table aforesaid:

Table

Sl. No.	***Sub-Clause of clause (105) of Section 65***	***Description of taxable service***	***Conditions***	***Percentage***
(1)	*(2)*	*(3)*	*(4)*	*(5)*
7.	*(zzq)*	*Commercial or industrial construction service.*	*This exemption shall not apply in such cases where the taxable services provided are only completion and finishing services in relation to building or civil structure, referred to in sub-clause (c) of clause (25b) of section 65 of the Finance Act. Explanation.- The gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of the construction service for providing such service.*	*33*

Provided that this notification shall not apply in cases where, -
(i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service, has been taken under the provisions of the CENVAT Credit Rules, 2004; or
(ii) the service provide r has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2003-Service Tax, dated the 20th June, 2003[G.S.R. 503 (E), dated the 20th June, 2003].
......"

B. 3 The appellants have fulfilled all the conditions of the Notification No. 1/2006-ST dated 1.3.2006. The same are explained in the ensuing paras.

i)The services provided by the appellants are classified as 'Commercial or Industrial Construction Service' by department themselves.
ii) The services provided by the appellants are not merely completion and finishing services.

iii) From 1.4.2006, the appellants are maintaining separate books of account and have not availed or utilized any CENVAT so far used in 'Commercial or Industrial Construction Service'. There is no dispute *from department on the fact that the appellants are not entitled for the benefit of above Notification 1/2006.*

iv) As per the contract, it is a cost-plus contract, whatever cost is incurred by the appellants, the invoice is raised by them on RIL along with mark-up. The contract is service contract, however many of the items such helmet, staging materials, electricity, water, etc. which are used in rendition of output service is being provided by the appellants as well.

v) The appellants have not taken any CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing construction of transport terminal. The same is evident from ST-3 returns of the period in dispute itself.

vi) Further, the appellants had also not availed the benefit of Notification No. 12/2003-ST dated 20.06.2003.

B.4 After introduction of Notification 1/2006, the appellants are maintaining separate books of account and have not availed or utilized any CENVAT so far used in 'Commercial or Industrial Construction Service". Some credit taken in relation to 'Erection, Installation or Commissioning Service'. However, it has been clarified by Hon'ble CESTAT that the bar of exemption shall not apply in relation to such cases if separate books of account or contract has been maintained.

B.5 Reliance is placed upon ***Bharat Heavy Electricals Ltd., Vs. CCE, 2014 (34) STR 430 (T)*** *(page 65-68 of the compilation) wherein it was held that even if there are more than one contract, abatement under the said Notification can be claimed for any one of the contract.*

*"**4.2** A plain reading of the Notifications clearly shows that the condition relating to non-availment of CENVAT credit on inputs/input services applies to "case" where CENVAT credit is taken either on the 'input' or 'input service', then the abatement under the aforesaid Notifications would not be available. In a "case" where the CENVAT credit on input/input service is not taken then the benefit of abatement would be available. The Notification uses the expression "in cases where". In other words, the Notification does not stipulate that in all cases, the condition of non-availment of CENVAT credit should be satisfied uniformly without exception. Therefore, in respect of a contract where the assessee has not taken input credit prior to 1-3-2006 and input/input service tax credit on or after 1-3-2006, the assessee would be rightly entitled for the benefit under the Notification No. 15/2004-S.T. as replaced by Notification No. 1/2006, dated 1-3-2006. In a case where the assessee avails CENVAT credit, then in such cases the assessee is not entitled for abatement and the service tax liability will have to be discharged on the full value of the contract. There is nothing in these Notifications which prevents an assessee from not availing CENVAT credit and paying service tax on 100% of the contract value in respect of one particular contract and availing abatement and not availing CENVAT credit in respect of another contract. In other words, there is no stipulation in the Notification that the option to avail/non-avail CENVAT credit has to be exercised uniformly in respect of all the contracts executed by the assessee. It is for the assessee to choose which formulation he wants to follow in a given contract."*

B.6 There is no condition in the Notification No. 1/2006 ST dated 1.3.2006 which remotely even suggests that the benefit of the Notification shall be applied only in the cases wherein the contract in question is a composite contract of supply of material as well as the supply of services. In fact, this was the argument by the department *before Hon'ble Supreme Court in* ***CST Vs. Bhayana Builders (P) Ltd., [2018-TIOL-66-SC-ST],*** *that the abatement is given to utilize the cost of material used in such transactions and the free supply of material is also liable to be included. Negating the contention of the revenue, the Hon'ble Apex Court held that the above argument of the department is not supported by any material.*

B.7 Accordingly, the value of free material supplied by the service receiver is not included in value of taxable service for the purpose of claiming abatement under Notification No. 1/2006-ST 1.3.2006 in view of decision of the larger bench of the tribunal in case of ***M/s Bhayana Builders Pvt. Ltd., Vs. CST[2013-TIOL-1331-CESTAT-DEL-LB]*** *(page 42-57 of the compilation) affirmed by* ***CST Vs. Bhayana Builders (P) Ltd., [2018-TIOL-66-SC-ST]*** *(page 58-64 of the compilation).*
Relevant portion is reproduced as under:

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

18. *In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the Learned Counsel for the Revenue as it says '33% of the gross amount 'charged' from any person by such commercial concern for providing the said taxable service'. According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient. Obviously, no amount is charged (and it could not be) by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of 'taxable service'. Thirdly, even when the explanation was added vide notification dated March 1, 2005, it only explained that the gross amount charged shall include the value of goods* *and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged'.*

19.*Matter can be looked into from another angle as well. In the case of Commissioner, Central Excise and Customs, Kerala v. M/s. Larsen & Toubro Ltd. - (2016) 1 SCC 170 = 2015 (39) STR 913 (S.C.). This Court was concerned with exemption notifications which were issued in respect of 'taxable services' covered by sub-clause (zzq) of clause (105) read with clause (25b) and sub-clause (zzzh) of clause (105) read with clause (30a) and (91a) of Section 65 of Chapter V of the Act. This Court in the aforesaid judgment in respect of five 'taxable services' [viz. Section 65(105)(g), (zzd), (zzh), (zzq) and (zzzh)] has held as under :*

> *"23. A close look at the Finance Act, 1994would show that the fixed taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines 'taxable service' as 'any service provided".*

Further, while referring to exemption notifications, it observed:

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

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

B.8 The abatement is not only given in the cases wherein the composite contract is involved but also to take care of situation wherein there could be a possibility of distortion of the CENVAT credit scheme.

B.9 One example of the above situation is abatement in case of goods transport agency services. In case of goods transport agency services, the very same notification allows the abatement of 75% of the gross amount charged. The basic purpose of granting the abatement in case of goods transport agency is to take care of the proper functioning of the credit scheme. The legislature is aware that goods transport agency sector is an unorganized sector and many of the people do not follow proper invoicing method or maintain proper records etc. In such a case, there is an obvious possibility that the credit chain might snap. Hence, the legislation had prescribed a straight jacket formula that in such cases the service provider shall pay service tax on the amount of 25% of the value subject to the condition that no CENVAT credit is taken.

B.10 Similarly, in the construction industry also work is done through various subcontractors, and the construction industry is also unorganized and subcontractors also do not maintain proper records. In such a case, the service tax paid by the sub-contractor forms part of the cost of the subcontractor which results in distortion of the credit

scheme. To take care of such a situation Notification No. 1/2006 ST dated 1.3.2006 had been issued extending the abatement scheme to construction service provider. Payment on the 33% of the total value under Notification No. 1/2006 ST dated 1.3.2006 is coupled with the condition of non-availment of CENVAT credit. After introduction of Notification 1/2006, the appellants are maintaining separate books of account and have not availed or utilized any CENVAT so far used in 'Commercial or Industrial Construction Service'. Some credit taken in relation to 'Erection, Installation or Commissioning Service'.
B.11 Hence, the benefit of Notification No. 1/2006-ST has to be extended to the appellants.

CONSTRUCTION SERVICE IS NOT THE PREDOMINANT ACTIVITY UNDERTAKEN BY THE APPELLANTS IN THE PRESENT TRANSACTION. HENCE, THE ACTIVITY CANNOT BE CLASSIFIED UNDER 'COMMERCIAL OR INDUSTRIAL CONSTRUCTION SERVICES'. SECTION 65A(2)(b) OF THE FINANCE ACT, 1994 IS ONLY APPLICABLE ON TWO OR MORE TAXABLE SERVICE AND NOT IN CASE WHERE IN NON-TAXABLE SERVICES ARE ALSO INVOLVED.

C.1 Section 65A(2)(b) of the Finance Act, 1994 reads as under:

Section 65A. ***Classification of taxable services. –***

(1) For the purposes of this chapter, classification of taxable services shall be determined according to the terms of the sub-clauses (105) of section 65;

(2) When for any reason , a taxable service is prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-

(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;
(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;
(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merits consideration;]

(3) The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.

C.2 In para 10 of the show cause notice dated 31.7.2008, the department has analyzed whether the activity undertaken by the appellants can be covered under 'Works Contract Service', 'Erection, Commissioning or Installation Services' or 'Commercial or Industrial Construction service' and then came to conclusion that it is covered under 'Commercial or Industrial Construction service' by applying Section 65A(2)(b) of the Finance Act, 1994 on the assumption that construction is the predominant activity in the present matter. Accordingly to the department, the present activity is not a 'works contract' as it does not involve any transfer of property in goods, it is not 'Erection, Commissioning or Installation Services' as it has not been rendered by a commissioning and installation agency.

C.3 The activity undertaken by the appellants in the present matter is a turnkey contract comprising of engineering, erection, installation, commissioning, electrical, mechanical, instrumental, construction, etc. There is no justification or allegation as to how the department has reached a conclusion that the construction is the predominant activity in the transaction.

*C.4 Otherwise also, from the wording of Section 65A (b) of the Finance Act, 1994, it can be inferred that it is applicable only in the cases wherein two or more **taxable services** are involved. Reliance is placed upon **Cox & Kings India Ltd., Vs. CST, 2014 (35) STR 817 (T)** (page 91-103 of the compilation). The relevant portion is reproduced as under:*

*"(iii) In our considered view, the provisions of Section 65A have no direct application. **This provision provides a guide to the classification of taxable services, where in any circumstances, a taxable service is, prima facie classifiable under two or more sub-clauses of Section 65(105)**. The provision clarifies that in any such situation, the sub-clause of Section 65(105) which provides the most specific description (of the service provided) must be preferred to another which provides a more general description. Sub-clause (b) states that a composite service, consisting of a combination of different services, which cannot be classified in the manner provided in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable.*

(iv) As the activity of planning and scheduling on the one hand and of organising and arranging (tour) on the other, are not distinct and separate taxable services enumerated in different sub-clauses of Section 65(105), the instrument of instructions/clarifications in Section 65A would be of no direct relevance. In any event, organising or arranging of tours is indisputably a service provided to tourists and not a service provided by the assessees to themselves."

C.5 In the present case, the transaction many of the items involve non-taxable services such as

1. *fabrication work,*
2. *construction of roads,*
3. *residential complex,*
4. *guest house for personal use,*
5. *water supply facility,*
6. *bridges, etc.*

C.6 Construction of guest house or residential complex for personal use is not taxable-reliance is placed upon-

1. P.B. Rathod Vs. CCE, [2015 (39) STR 650 (T) (Residential Quarters)] (page 104-106 of the Compilation)
2. Mittal Construction Vs CCE, [2018 (11) GSTL 334 (T) (Guest House)] (page 107 of the Compilation)

C.7 Therefore, the present transaction shall not be governed by Section 65A (b) of the Finance Act, 1994.

THE ACTIVITY UNDERTAKEN BY THE APPELLANTS IS NOT A CONSTRCUTION OF A 'NEW BUILDING' OR 'CIVIL STRUCTURE' OR 'PIPELINE' OR 'CONDUCIT', IN ANY CASE, THERE IS NO ALLEGATION IN THE SHOW CAUSE NOTICE TO THAT EFFECT

D.1 Section 65(25b) of the Finance Act, 1994, as amended, defines the term "Commercial or Industrial Construction service" as under:

> *"commercial or industrial construction service"] means –*
> *(a) construction of a new **building** or a **civil structure** or a part thereof; or*

*(b) construction of **pipeline or conduit**; or*

(c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit,

which is –

(i) used, or to be used, primarily for; or

(ii) occupied, or to be occupied, primarily with; or

(iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;]

[Emphasis supplied]

D.2 Section 65(25b) of the Finance Act, includes only those construction services that are rendered for construction of a 'new building', civil structure', 'pipeline' or 'conduit'.

D.3 The present activity undertaken by the appellants is not construction of a 'building'.

D.4 The word 'building' is defined in various dictionaries as follows:

1. As per New Oxford Dictionary means 'a structure with roof and walls such as house, school, or factory'.
2. As per Webster's Ninth New Collegiate Dictionary means 'a usually roofed and walled structure built for permanent usage.'
3. As per Black's Law Dictionary means 'a structure designed for habitation, shelter, storage, trade, manufacture, religion, business, education and the like. A structure or edifice enclosing a space within its walls and usually, but not necessarily covered with a roof.'

D.5 In view of the above dictionary meanings, a 'terminal' cannot be said to be a 'building' as it is not a structure with roof and walls. In any case, the terminal constructed by the appellants may include some building like structures. However, these buildings form a very small portion of the terminal as the said terminal comprises of numerous other structures such as pipes, equipments, machineries, etc. In any case, majority of the work is fabrication of the pipes. Hence, the terminal as a whole cannot be considered as a 'building'.

D.6 Further, the terminal constructed by the appellants is not a 'Civil Structure'. The term 'Civil Structure' in common parlance refers to a structure wherein cements and bricks are used. Whereas the 'terminal' in the present case, is an 'engineering structure' or a 'non-civil structure' comprising of pipes, equipment, machineries, roads, etc. Therefore, the said activity is not on civil structure.

D.7 Also, the activity in the present case is not construction of a 'pipeline' or 'conduit'. As admittedly, the appellants has constructed the *terminal as a whole and is not concerned with the laying of pipeline from the terminal to the end users and the said activity is not forming part of the present dispute. It is the terminal that has been constructed and therefore there is no construction of 'pipeline' or 'conduit' per se.*

D.8 There is no averment in the show cause notice that the activity undertaken in the present case is with respect to any of these items namely 'new building', 'civil structure'. 'pipeline' or 'conduit'. Accordingly to the department, the activity is one of construction of plant. The legislative scheme itself makes a distinction between what is covered under the scope of 'Commercial or Industrial Construction service' and 'Erection, Installation and Commissioning Service'. Activity in relation to Plant is covered under the category of 'Erection, Installation and Commissioning Service' and not under 'Commercial or Industrial Construction services'. Hence, the activity undertaken by the appellants does not fall within the definition of 'Commercial or Industrial Construction services'.

THE PRESENT ACTIVITY IN DISPUTE IS A COMPOSITE CONTRACT COMPRISING OF ENGINEERING ERECTION, INSTALLATION AND COMMISSIONING, MECHANICAL, INSTRUMENTAL, CONSTRUCTION, ETC. UNLIKE WORKS CONTRACT SERVICE, WHERE TRUNKEY PROJECTS INVOLVING ENGINEERING, PROCUREMENT AND CONSTRUCTION OR COMMISSIONING IS ENUMERATED AS A TAXABLE SERVICE, IN ANY OF THE OTHER HEAD SUCH COMPOSITE ACTIVITY IS NOT SOUGHT TO BE TAXED. FURTHER, VIVISECTION OF THE CONSTRUCTION ACTIVITY IS ALSO NOT POSSIBLE IN ABSENCE OF ANY MACHINERY PROVISION.

E.1 As per the averments made in the show cause notice, there is no doubt as to the fact that the present activity undertaken by the appellants is a composite service contract. The activity undertaken by the appellants in the present matter is a turnkey contract comprising of engineering, erection, installation, commissioning, electrical, mechanical, instrumental, construction, etc.

E.2 In this regard, reference can be made to the definition of 'works contract service' under Section 65 (105) (zzzza) of the Finance Act, 1994 which expressly provides for inclusion of 'turnkey projects' under its ambit. The relevant portion is reproduced as under:

> *(zzzza) "Taxable service" means - any service provided or to be provided 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 leviable 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 airconditioning 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".

...Emphasis supplied.

E.3 Unlike works contract, the other taxable category will not include a composite activity of engineering, procurement and construction or commissioning, in absence of any specific inclusion, 'turnkey contracts' cannot be taxed under the category of 'Commercial or Industrial Construction Services.'

*E.4 In any case, present contract is a composite contract wherein vivisection is not possible in absence of any machinery provision and accordingly, the demand under 'Commercial or Industrial Construction Services' is not sustainable. Reference can be made to **CCE, Kerala Vs. Larsen & Toubro Ltd., 2015 (39) STR 913 (SC)** (page 69-88 of the compilation).*

*"**35.** The aforesaid finding is in fact contrary to a long line of decisions which have held that where there is no machinery for assessment, the law being vague, it would [not] be open to the assessing authority to arbitrarily assess to tax the subject. Various judgments of this Court have been referred to in the following passages from Heinz India (P) Ltd. v. State of U.P., (2012) 5 SCC 443."*

THE APPELLANTS ARE NOT LIABLE BE SERVICE TAX UNDER 'COMMERCIAL OR INDUSTRIAL CONSTRUCTION' SERVICE AS THE ONSHORE TERMINAL IS NOTHING BUT A TRANSPORT TERMINAL FOR TRANSPORTATION OF GAS THROUGH PIPELINES.

F.2 Section 65(25b) of the Finance Act, as referred supra.

F.3 Section 65(105)(zzq) defines the taxable service in relation to 'commercial or industrial construction service' as under:

"to any person, by a commercial concern, in relation to commercial or industrial construction service".

F.4 Section 65(25b) of the Finance Act, 1994 excludes services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams from the ambit of 'Commercial or Industrial Construction Service'. The services provided by the appellants to the customer viz. M/s Reliance Industries Limited are in the course of development of a 'transport terminal'. Hence, the same are excluded from the levy of service tax.

The services provided by the appellants are in relation to of construction of 'transport terminal'.

F.5 Since the term and expression 'transport terminal' has not been defined under the Finance Act, 1994 the same has to be understood in their ordinary or commercial parlance.

F.6 The meaning of the term 'terminal' as defined in the following dictionaries:

*a) **Chambers 21st Century Dictionary***
an installation at the end of a pipeline or at a port where oil is stored and from where it is distributed.

ETYMOLOGY: 19c in adj sense 1; 15c in obsolete heraldic sense: from Latin terminals, from terminus boundary."

*b) **Illustrated Oxford Dictionary***
6. an installation where oil is stored at the end of a pipeline or at a port.

*c) **The American Heritage Dictionary of English Language***
a terminus either end of a railroad or other transportation line, a boundary or border

*d) **Cambridge International Dictionary of English***
the area or building at a station, airport or port which is used by passengers leaving or arriving by train, aircraft or ship.

*e) Under the **Integrated Planning Act, 1997** (a statute passed under the laws of Australia), transport terminal has been defined to mean as under:*
"Premises" used for the transport of goods and people, including the loading, unloading and temporary storage of goods. The term also includes the garaging and routine servicing of vehicles engaged in the transport of such goods and people.

F.7 The term 'terminal' as defined in the Transport Geography Glossary compiled by Dr. Jean Paul Rodrigue, Dept. of Economics & Geography, Hofstra University is as under:

***Terminal.** Any location where freight and passengers either originates, terminals, or is handled n the transportation process. Terminals are central and intermediate locations in the movements of passengers and freight. **They often require specific facilities to accommodate the traffic they handle** {emphasis supplied}.*

*F.8 The Supreme Court in the case of **Central India Spinning, Weaving & Manufacturing Co. Ltd., Vs. Municipal Committee, Wardha Air 1958 SC 341**(page 144-154 of the compilation) has observed the meaning of terminal in page 347 as under:*

"The word 'terminal' could refer either to the terminal of the goods or the termini of the Municipality. It is clear that the word 'terminal' refers not to the destination or origin of the goods but to the terminal of the Municipal limits. "Terminal" means end, boundary; situated at or forming the end or extremity of something; situated at the end of a line of railways; forming or belonging to a railway terminus."

*F.9 The Supreme Court in the case of **Man Mohan Tuli Vs. Municipal Corporation of Delhi (1981) 2 SCC 467** (page 133-143 of the compilation) has held that "Terminal" in connection with transportation means inter alia the fixed beginning or ending point of a given run".*

F.10 Thus, the term 'transport terminal' is associated with a storage unit or junction on a transportation line where raw materials are store for example, similar to the present case, a transport terminal on an oil or gas transportation line.

Transportation through pipeline is a well-known mode of transportation of goods

F.11 The term 'Transport terminal' may not only be associated with transportation by road, rail or air. Transportation through pipeline is a well-known mode of transportation of goods in the form of liquid or gas. Section 65(105) (zzz) of Finance Act, 1994, as amended with effect from 16.6.2005 specifically introduced taxable service under head of 'transport of goods other than water through pipeline or other conduit'. The onshore terminal is nothing but a transport terminal for transportation of gas through pipelines.

F.12 In the present case, the major facilities at the onshore terminal of M/s Reliance Industries Limited at Gadimoga, near Kakinada and its purpose in brief are as under:

Description of the facility	**Purpose of the facility**
Slug catchers	Removal of bulk water
Production separator	Separating water and MEG
Inlet gas heater	To heat the gas
Gas dehydration package	Removal of water
MEG Regeneration	Recirculation of MEG

F.13 The above facilities enable the terminal to carry out processing of natural gas; such processing being activities undertaken to make the said gas transportable. Using the above facilities, the terminal receives gas from the offshore facilities, dehydrates (removal of moisture, free water and MEG) the gas to make it suitable for onward transportation (meeting sales specifications) and feeding the gas into the cross-country transportation pipeline.

F.14 All gas transport terminals receiving gas from deepwater offshore wells and transported to customer through cross country pipelines would have same or similar facilities and it is the presence of these facilities that goes to establish that the main activity of the said terminal is transportation.

F.15 Taking into consideration the industry practices, it is beyond any doubt that the said onshore terminal of RIL at Gadimoga is a 'transport terminal' which receives natural gas from offshore deepwater fields, removes the impurities and transports dry gas through cross country pipelines and the services of construction of a peripheral-cum-reclamation bund in order to prevent the onshore terminal from flooding are services provided in the course of construction of a 'transport terminal'.

On-shore Terminal is not Processing Centre

F.16 The said onshore terminal is meant for transportation of gas through cross country pipelines. The gas when extracted from the offshore wells would be treated with MEG (Methanol) so as to avoid formation of ice when transported from the terminal through underwater pipelines. Water and unwanted particles, if any present in the gas, would be removed with the help of appropriate facilities installed at the onshore terminal. At present, there are no facilities at the offshore or onshore terminal for removal of Sulphur, Hydrogen Sulphide & other impurities from the offshore gas. Since the offshore gas is about 99% pure, such a requirement is not envisaged. Hence, the gas is found in its purest form and does not require any treatment or storage at the Onshore terminal.

F.17 Assuming whilst denying that the onshore terminal is considered as a gas processing plant, there is not dispute about the fact that the said facility would be used for transportation of gas through long distance pipelines after processing. Once this is the admitted *position, merely because gas is being processed at the said onshore terminal, the same would not take the onshore terminal out of the purview of the definition of a 'transport terminal'.*

F.18 If the goods are packed, repacked etc. at the freight container stations for onward transportation of the goods to the customers in containers by road, would the same render the container stations as 'industrial plants' and accordingly, would not qualify for the exclusion granted to 'transport terminals'. The answer to the above question is clearly in the negative.

The decision of the Hon'ble CESTAT in Afcons Infrastructure Ltd., Vs. CST, Mumbai, 2015 (37) STR 850 (T) is distinguishable from the matter in dispute in the present case.

*F.19 The decision of the Hon'ble CESTAT in **Afcons Infrastructure Ltd., Vs. CST, Mumbai, 2015 (37) STR 850 (T)** (page 300-307 of the compilation) is distinguishable on the following counts:*

*1. The Article "The Geography of Transport Systems by Dr. Jean Paul Rodrigue and Dr. Brian Slack" relied upon by the Bench, itself says that a 'Terminal' is any location where freight and passengers either **originates, terminates, or is handled** in the transportation process. Thus, it can be a place where either the transportation of goods/passengers 'originates', or where the transportation of goods/passengers 'terminates' or a place where goods/passengers are handled. Unidirectional movement of goods/passengers will not make any difference.*

*2. Further, nowhere in the said Article, it has been mentioned that there has to be arrival of passengers or freight from different destinations and dispersal to different destinations. Such inference has been wrongly derived from the said article as the terms used in 'originates', 'terminates', **or** 'handled' and not 'originates', 'terminates', **and** 'handled'. The term 'or' cannot be used as 'and' for the purposes of interpretation.*

3. Concept of 'transport terminal' is exhaustive, it cannot be limited to Airports, railways, bus terminals, etc. There are number of articles including that of Dr. Jean Paul Rodrigue and Dr. Brian Slack that specifically state that 'transportation through pipelines' is a worldwide phenomenon. Some of such articles are as under:

a. 'Transportation Modes: An Overview' by Brian Slack, Dr. Jean-Paul Rodrigue and Dr. Theo Notteboom (page 43-50 of the Volume-I of the Compilation)

b. Illustrated Glossary for Transportation Statistics – 4th Edition (page 66 of the Volume-I of the Compilation)

c. Chapter 2:Transporting oil and gas in Northwest Russia http:/ftp2.bentley.com/dist/collateral/docs/press/terminal-pums-natural-gas-through-longest-subsea-pipelkine_dew-journal.pdf (page 79 of the Volume-I of the Compilation)

4. Water Treatment Plant analogy is incorrect. Unlike in the Water Treatment Plant, wherein treatment of the water is done, no such treatment is done on oil/gas at the 'Onshore Terminal'. In any case, the statement that a Water Treatment Plant is not a 'terminal' is based on assumptions.

F.20 In view of the above, the rational given in the said decision is not goods in law.

THE EXCLUSION IN NO MANNER SPECIFIES THAT IT WOULD APPLY ONLY TO GOVERNMENTAL OR PUBLIC WORKS

G.1 The "means" clause covers only 'commercial' constructions and hence the exclusion of roads, airports, railways, transport terminals, bridges, tunnels and dams should necessarily be 'commercial roads', 'commercial airports', 'commercial railways', 'commercial transport terminals', 'commercial bridges', 'commercial tunnels' and 'commercial dams', because the exclusion is of the items which were included by the "means" clause.
G.2 Even assuming that the transport terminal constructed by the appellant is not for 'public use or benefit', the exclusion in no manner specifies that it would apply only to 'Governmental or public works'. Even assuming the appellant's activities are not for the purpose of 'public utility' they would still be eligible to the benefit of the exclusion under Section 65(25b) of the Finance Act, 1994.

*G.3 In **Afcons Infrastructure Ltd., Vs. CSE, 2015 (38) STR 194 (T)** (page 286-290 of the compilation), construction of viaduct and stations of Delhi Metro Railway Project for Delhi Metro Corporation (DMRC) under turnkey contracts was held to be exempted from 'Commercial or Industrial Construction Services' under the head 'railways' even if it is not part of 'Indian Railways.'*

*G.4 Similarly, while deciding exemption under Exemption Notification No. 25/2007-S.T shall be given to 'public port' only or 'private ports' can also claim such exemption, CESTAT in **Punj Lloyd Ltd.** vs. **CCE, 2015 (40) STR 1028 (T)** (Page 291-294 of the Compilation) held that the Notification nowhere implies that CICS in relation to construction of public port only eligible for exemption. Service (CICS) rendered in relation to construction of other port and eligible for benefit of full exemption under Notification No. 25/2007-S.T.*

*G.5 The Appellant places reliance on the decision of the Hon'ble Tribunal in **CST, Ahmedabad v. Shilpa Constructions Pvt. Ltd. reported at 2010 (19) STR 830 (Tri. Ahmd.)** (page 308-310 of the Compilation) wherein the respondents constructed a driveway in a petrol pump and paid service tax on the same. Subsequently, they filed an application for refund on the grounds that they had paid it wrongly for the construction of road which is exclude from the category of "Commercial and Industrial Construction" as defined under clause (25b) of the Section 65 of the Finance Act, 1994. While allowing the said exclusion to them, the Hon'ble CESTAT observed as follows:*

*"**7.** After carefully considering the submissions made by both the sides we find that it is an admitted fact by both the sides that the construction of road does not require payment of service tax. **The Revenue's only appeal is that construction of driveway cannot be equated with the construction of road in as much as such driveway was not for public utility purpose but the same was in connection with the petrol pump owned by the owner.***

*In this connection we find that the Board's Circular No. B1/6/2005-TRU dated 27-7-05 is to the effect that - "if the contract for construction of commercial complex is a single contract and the construction of road is not recognized as a separate activity as per the contract, then the service tax would be leviable on the gross amount charged for construction including the value of construction of road". **As such it becomes clear that the value of construction of road is to be included in the value of the service only when there is no segregation between the construction of commercial complex and construction of the road. If the contract recognizes the two activities as separate activities, even though the construction of the road is***

<u>in connection with the commercial complex, the benefit has to be allowed. As such the fact whether the road is being constructed for public utility purpose or as a part of a commercial complex is not relevant, in terms of the Board's Circular above.</u> *Accordingly we do not find any infirmity in the view adopted by Commissioner (Appeals), in as much as the contract in the present appeal is admittedly for construction of road only."*

…Emphasis Supplied.

*G.6 Reference is also made on **Board's Circular No. B1/6/2005-TRU dated 27.7.2005** (Page 311-314 of the Compilation).*

<u>THE EXCLUSION FROM LEVY OF SERVICE TAX IS AVAILABLE TO 'TRANSPORT TERMINAL' BECAUSE IT IS AN 'INFRASTRUCTURE PROJECT' AND NOT BECAUSE IT IS A 'PUBLIC UTITLITY'. THE PRINCIPLE OF 'NOSCITUR A SOCIIS' AS WELL AS THE 'EJUSDEM GENERIS' IS NOT APPLICABLE IN THE PRESENT CASE.</u>

H.1 The principle of 'Noscitur a sociis' is not applicable because the said principle is applicable when two or more words which are susceptible of analogous meaning are coupled together; in such a case the two or more words are understood to be used in their cognate sense. They take colour from each other, that is, the more general is restricted a sense analogous to the less general. In the current case, the words used in the definition of 'Commercial or Industrial Construction' are "roads, airports, railways, transport terminals, bridges, tunnels, dams, ports or other ports". There are no two words in the above group of words, which are susceptible to analogous meaning. Each of the words have a different meaning.

H.2 The rule of 'ejusdem generis' is also not applicable to the words covered by the notification because 'ejusdem generis' is a specific application of the broader principle of 'Noscitur a sociis' ; none of the nine words contained in the notification are specific words which originate from a particular genus; each word is an independent term having a defined scope.

*H.3 In the instant case, the only underlying thread between the terms covered in the definition of 'Commercial or Industrial Construction Service' referred supra is that all these are **'infrastructure projects'** and the intention of legislature to provide for the exclusion from levy was because these are infrastructure projects and not because these are 'public utility projects'.*

H.4 The exclusion from levy was provided by the legislature because these were infrastructure projects, the Appellants rely on Para 6.4.1 of TRU letter DOF No. 334/1/2007-TRU dt 28.02.2007, extracted below:

> *"Works contract in respect of specified **infrastructure projects** namely roads, airports, railways, transport terminals, bridges, tunnels and dams are specifically excluded from the scope of levy".*

H.5 it is clear from the above circular of the Board, that the Board and the Department itself has understood/ visualized these only as infrastructure projects.

H.6 The above Para issued in the context of the 'Works contract service' would apply in all fours to their case. This is because both under the definition of 'Commercial or Industrial Construction service' *as well as 'works contract service', exclusion is available to roads, airports, railways, transport terminals, bridges, tunnels and dams.*

H.7 In view above, the onshore terminal being constructed by RIL being an infrastructure project, the services rendered by the Appellant is not liable to tax.

THE INFRASTRUCTURAL FACILITIES ARE ANCILLARY AND IN RELATION TO THE ONSHORE TERMINAL

I.1 Apart from construction of the onshore gas terminal, the Appellants are also required to undertake certain civil works/construction for Rural Water Supply (RWS) Scheme at Gadimoga Village.

I.2 The activities referred to in clauses (a) to (d) in the above definition of 'commercial or industrial construction' service would be taxable under the said definition only if the said building, civil structure or part thereof is used or is to be used for commerce or industry, occupied or to be occupied primarily with commerce or industry or engaged, or to be engaged, primarily in commerce or industry.

I.3 In the instant case, the said construction activity is undertaken by the Appellants as a social obligation for local people of Gadimoga Village. In other words, the said construction activity would not be use in commerce or industry. The residential complex (workmen colony) has been constructed for personal use. The said colony would be used as residence by the workmen. Therefore, the aforesaid activity undertaken by the Appellants would not be liable to service tax under taxable head of 'commercial or industrial construction' service as defined under the Finance Act, 1994.

I.4 Without prejudice, a major portion of the infrastructure facilities being constructed by the Appellants are:

- *Construction of Civil works for comprehensive Protected Water Supply Scheme (CPWS) Scheme at Gadimoga village,*
- *Haul Road work, Access Bridge to Workman Colony,*
- *Flyover Bridge, Road widening work etc.*

I.5 The said infrastructure projects would independently be excluded from the levy of service tax under excluded categories of "road", "bridge", "dam" etc.

I.6 Without prejudice, the said infrastructure facilities being construed by the Appellants are merely incidental and ancillary to the onshore terminal. It is well settled that incidentals will never determine or decide the classification. In fact, the said incidentals will not influence or alter the classification for the reason that they are not predominant or equally significant to the main activity undertaken by the Appellants i.e. the development of the onshore gas transport terminal.

I.7 The onshore terminal and the related infrastructural facilities are so integrally connected and inter linked that the said infrastructure facilities are ancillary to the transportation of gas. Moreover, the entire plant has to be construed as one whole integrated unit for receiving, processing and transporting gas.

I.8 Therefore, the aforesaid activities undertaken by the Appellants would not be liable to service tax under taxable head of 'commercial or industrial construction' service as defined under the Finance act, 1994.

COMMISSIONER, HYDERABAD-II DID NOT HAVE JURISDICTION TO DEMAND SERVICE TAX ON THE SERICES RENDERED IN KAKINADA

J.1 Rule 3 of Service Tax Rules, 1994 provide that the Central Board of Excise and Customs may appoint such Central Excise Officers as it thinks fir for exercising the powers under Chapter V of the Finance Act within such local limits as it may assign to them as also specify the taxable service in relation to which any such Central Excise Officer shall exercise his powers. Vide CBEC Notification 14/2002-CE(NT), the jurisdiction of Hyderabad II Commissionerate has been specified as within the district of Hyderabad. Therefore, according to the said notification, Hyderabad II Commissionerate has no jurisdiction over Kakinada, a port located on the Godavari river near Bay of Bengal. In this regard, we rely on the following decisions:

1. M.S.Engineeers India Pvt. Ltd., Vs CCE, 2014-TIOL-269-CESTAT-DEL (Page 391-394 of the Compilation)

2. Vihar Aahar Pvt. Ltd., Vs. CST, 2013-TIOL-534-CESTAT-AHM (Page 395-396 of the Compilation)

3. CCE Vs. Integral Construction Company- 2010 (17) STR 380 (Tri.-Bang.) (Page 397-398 of the Compilation)

4. Inox Leisure Limited Vs. CST, 2016 (42) STR 497 (T) affirmed by Supreme Court in 2016 (44) STR J276 (SC) (Page 399-405 of the Compilation)

J.2 Therefore, Commissioner, Hyderabad-II commissionerate did not have jurisdiction to demand service tax on the services rendered in Kakinada which fell outside the jurisdiction of Hyderabad-II Commissionerate.

INTEREST AND PENALITY NOT PAYABLE

K. No interest is payable as the levy is itself unsustainable;

L. No penalty is imposable under Section 76 of the Act as the Appellants were under a bona fide belief that no tax is payable;

M. Secondly, the department was already aware about the said activities at Onshore Terminal as the Appellants vide their letter dated 5.3.2007, in reply to the department letter dated 21.2.2007, submitted list of various contractors undertaking the aforesaid activity and the amounts paid to them. Simultaneously, investigation was also started by Visakhapatnam Commissionerate in 2007 itself. Further, AG Audit was also undertaken during the month of October 2007, wherein contract and other related documents were sought by the department. The Appellants duly submitted the contract along with other relevant documents. Even Though all the relevant documents were available with department, DGCEI erroneously delayed the issuance of show cause notice and eventually issued the present show cause notice on 31.7.2008 by invoking extended period.

*N. No penalty is imposable under Section 78 of the Act as there was no suppression of facts or intention on the part of the Appellants to evade payment of duty; In any case, penalty under both Section 76 & 78 not payable. Reliance is placed upon **CST Vs. Motor World – 2012 (27) STR 225 (Kar.)** (Page 408-422 of the Compilation).*

O. Without prejudice, Appellant is entitled to waiver of penalties under Section 80 of the Act.

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The Assessee is entitled to claim the benefit of cum tax.

P. The Order-in-Original has rightly allowed the benefit of cum tax on the count that the Appellant was not collecting any service tax in all the cases of demand of service tax. The cum-tax benefit should be extended to the Appellant and the taxable value quantified by the *department was correctly treated as being inclusive of service tax for the purpose of modifying the service tax demand. In support of this reliance is placed on the following:*

1. CCE, Patna Vs. Advantage Media Consultant reported at 2008 (10) STR 449 (Tri-Kolkata) maintained by Supreme Court reported at 2009 (14) STR J49 (SC) (Page 406-407 of the Compilation)

2. CCE Vs Maruti Udyog Limited reported in 2002 (49) RLT 1 (SC)

Q. Hence, the appeal of the assessee may kindly be allowed and the appeal of the Revenue be dismissed.

4. Learned Special Counsel for the Revenue submits that the responsible person in the appellant's office had clearly stated that they have not informed the Department and not paying the service tax on the RIL project that figures related to RIL project were shown under the columns in ST-3 returns. He would submits that Hyderabad office which records the account of RIL project at Kakinada and as all records are maintained in Hyderabad hence the jurisdiction of Hyderabad Commissionerate cannot be called in question. He would submit that the argument of the Senior Counsel, OT constructed by L&T is a 'transport terminal' and hence excluded from the purview of commercial or industrial construction services is totally wrong as the OT at Kakinada cannot be characterized as transport terminal as indicated in the exclusion clause of definition of the commercial or industrial construction services and OT is nothing but an industrial plant meant to produce compressed natural gas and hence, the said onshore terminal is nothing but a refinery/plant with various processing facilities whereas the gas is received along with impurities is totally baseless. The natural gas cannot be transported directly from the gas field to the prospective buyer through a pipeline without being treated for impurities. After explaining us the entire process, Learned Counsel requested time for filing written submissions which was permitted and filed which are as under:

1. "The present submissions are pursuant to the hearing held on 11/9/2018 in the matter. At the time of the hearing a synopsis was filed on behalf of L&T and the present submissions are in response to the same and oral submissions made by the Counsel. Revenue also filed written submissions on the said date and the same may also be kindly given due consideration.

2. <u>Point No. 1: Extended period is not invokable.</u>

<u>Submissions:</u> (i) The period of the first demand is 9/06 to 3/08. SCN was issued on 31/7/2008. In the instant case, the last dates for issuing SCN within normal period of one year were 23/10/2008 and 23/4/2009 respectively, for the periods 4/07 to 9/07 and 10/07 to 3/08. Thus, extended period has been invoked only in respect of the assessment period from 9/06 to 3/07. The objection raised is pertinent only for this period.

(ii) Kind attention is invited to Paras 2.5.1 to 2.5.8 of the written submissions filed on 11/9/2018 on behalf of Revenue. The suppression aspect has been clearly brought out in these submissions. In the light of the internal correspondence it is clear that the concerned officials were of the view that L&T was liable to pay the ST for the construction of OT for RIL but were forced to claim waiver from tax as RIL held a contrary view. Hence, L&T cannot claim any bonafide belief that ST was not payable.

(iii) Bid document of May 2006 did not contain any mention about tax 'exemption' for the subject services rendered by L&T. The subject clause was introduced only in the Contract dated 18/10/2006. Legal opinion from Shri K. Vaitheeswaran was obtained on 23/10/2006 i.e. after the signing of the contract.

(iv) Legal opinion of Shri K. Vaitheeswaran dated 23/10/2006 also clearly indicates that he was of the view that activities within the OT were significant and services in relation to the construction of OT could be a matter of dispute. Shri. Purushottam has pointed out this observation and observed that it was not correct to say that the said opinion endorsed RIL's view.

(v) What is pertinent for raising a ST demand is the relevant date as defined in section 73(6) of Finance Act, 1994 and not acquiring knowledge of activities as laid down in the Judgment in the case of Neminath Fabrics by the Gujarat High Court.

(vi) By its letter dated 21/2/2007 Sudt. C Ex., Kakinada had only sought the details of various sub-contractors. Further, he was not the officer with whom L&T were registered and were filing ST-3 returns.

(vii) It is an admitted fact [vide the statement of Shri K. Udayabhaskar dated 1/4/2008-Answer to Question No. 17] that L&T had not declared to the jurisdictional officer about the OT project and their claiming of duty waiver on the ground that the OT was a 'transport terminal'. The contract was purportedly shown to the Internal audit party in August 2007 and to CAG Audit in October, 2007. This shows that from June 2006 to August 2007, L&T did not even make the Department aware of the Contract. L&T suppressed the fact of non-payment of ST to the Jurisdictional officer from 6/2006 to 8/2007 and this act of deliberate default did not get obliterated by the production of contract. Significantly, this period covers the period for which SCN was issued beyond the normal period. Hence, the demand is not hit by limitation.

3. <u>Point No. 2: L&T is entitled to the benefit of notification no.1/2006.</u>

<u>Submissions:</u> In view of the order of the LB of the Tribunal in the case of M/s Bhayana Builders 'P' Ltd., Vs. CST [2013-TIOL-1331-CESTAT-DEL LB] affirmed by CST Vs. Bhayana Builders 'P' Ltd., [2018-TIOL-66-SC-ST], appellant's submissions have considerable force. However, the quantum of benefit to be allowed should be subject to verification by the department. Claims as to non-availment of benefit under 12/2003 and of CENVAT credit would also require to be verified by the original authority.

4. <u>Point No. 3. Construction service is not the predominant activity in the present transaction. Hence, classification under CICS is not correct.</u>

<u>Submissions:</u> Officials of L&T have themselves averred that the predominant nature of the contract is construction of OT. Statement of Shri Udaybhaskar dated 1/4/2008 refers in this context. Detailed scope of work clearly points to substantial civil construction activity, such as pile foundation, base civil structure for erection of equipment, pipes connecting processing chambers and construction of buildings. It was for this reason, L&T themselves had classified the service of construction of OT under CICS and the same has been accepted by the Department. Hence, classification under CICS correct in terms of section 65A (2) (b).

5. <u>Point No. 4: Section 65A (2)(b) is only applicable on two or more taxable service and not in case where non-taxable services are also involved</u>.

<u>Submissions:</u> (i) Construction of OT is the service rendered by L&T to RIL. The contract in question was a simpliciter service contract since all materials were provided by RIL. It was not a turn-key project for this reason.

(ii) Nevertheless, the service rendered by L&T was in the nature of a composite service comprising more than one service. It was a combination of different services such as, civil construction, laying of pipes, erection, commissioning and installation of equipments.

(iii) Since L&T is essentially an engineering organization and is better placed to judge which of the activities predominate over others, in terms of work content (i.e. man hours spent) as well as cost the department has accepted the view and practice of classification adopted by them. Essential character and predominance have been regarded for this purpose as synonymous with each other.

(iv) There is no authority to say that if certain activity falls in the excluded category provisions of section 65 A(2)(b) is not applicable. Such exclusions do not vitiate the nature of the contract being composite.

6. <u>Point No. 5: Activity undertaken is not construction of a new building or civil structure or pipeline.</u>

<u>Submissions:</u> (i) A perusal of the detailed scope of work indicates that the activity of construction of OT involved construction of several buildings and civil structures including foundations and civil structures required for erection and installation of equipments. Pipes have also been laid connecting various processing chambers. Thus, the requirement of Section 65(25b) are squarely met.

(ii) Besides, these construction activities being predominant activities in the construction of OT, the criterion of lending the essential character is also satisfied. Accordingly, the classification adopted by the department is correct.

(iii) No vivisection of goods and services is involved in the present case.

7. <u>Point No. 6: OT constructed by L&T is a 'transport terminal' and hence excluded from the purview of CICS</u>

<u>Submissions:</u> (i) Kind attention is invited to Paras 2.4.1 to 2.4.9 of written submissions filed on 1/9/2018 on behalf of Revenue. These submissions have dealt with all the points raised by the appellants.

(ii) RIL has obtained licence under the Factories Act and also under the C Ex Act as a manufacturing unit. This is an admission of the fact that what happens in the OT is not mere movement of gas through pipeline. OT is the premises where a complex manufacturing process is carried out.

(iii) The pipelines from the sub-sea facility end at Pig receivers. Thereafter, the well fluids are subject to a complex process of manufacturing gas which have to satisfy stringent quality/specifications and other bye products. The manufactured gas is significantly different from the input, namely, well fluids. No pipeline runs through the OT. Thus, no movement of goods through a running pipeline is incident in the present case.

(iv) The decision of the Mumbai Bench of the Hon'ble Tribunal in the case of Afcons Infrastructure is squarely applicable as far as the issue whether the constructed by L&T for RIL is a transport terminal is concerned. The OT in question is the same as in the present case.

8. <u>Point No. 7: Commissioner Hyderabad II has no jurisdiction to demand ST in the instant case.</u>

<u>Submissions:</u> This point is exhaustively dealt with in paras 2.3.1 to 2.3.10 of written submissions filed on 1/9/2018 on behalf of Revenue. These submissions may kindly be given due consideration.

9. <u>Point No. 8: Penalty/ interest are not attracted.</u>

<u>Submissions:</u> (i) L&T deliberately suppressed the fact of rendering the services in respect of the OT project and did not declare to the officer with whom they were registered that they were not paying duty since the OT was a 'transport terminal'.

(ii) L&T cannot claim bonafide belief as a defence since they were aware that the OT constructed for RIL was in fact a manufacturing facility. They were fully aware of the ST liability for the services rendered to RIL but deliberately did not discharge the liability at the instance of RIL.

(iii) L&T willfully mis-declared the taxable services under the head 'exempted' services in the ST-3 services. By indicating the relevant notification as 1/2006 they misled the department to believe that they were discharging tax on 33% of the value of the total project cost.

(iv) There was deliberate default on the part of L&T; hence, penal provisions are clearly attracted.

(v) Interest liability is similarly attracted as the tax demand is correct and legally justified.

10. <u>Point No. 9: Department's Appeal is liable to be dismissed.</u>
<u>Submissions:</u> (i) In terms of clause 8 A (f) of the contract, ST has been taken to be inapplicable and such tax if found applicable later would be paid by RIL. From this provision it emerges that ST was independent of and over and above the contract amount. Given the above facts the

amount received by L&T under the contract cannot be regarded as a 'cum-tax' amount. Hence, the abatement allowed by the adjudicating authority on account of this ground was not legal, proper and correct.

(ii) Counsel to the appellant also fairly conceded at the time of the hearing that the above stand in department's appeal is just and correct.

(iii) Department's appeal, therefore, merits to be upheld.

11. In view of the above submissions, tax demands confirmed vide other OIOs <u>for subsequent periods,</u> which form the subject of other appeals merit to be upheld along with due interest."

5. We have considered the submissions made at length by both sides and perused the records.

6. As far as the jurisdiction is concerned, we do not find any merits the appellants arguments, as they have themselves applied for and got Centralized Registration with Hyderabad Commissionerate-II, and the Commissionerate has jurisdiction to issue the demand even when the services are provided outside territorial jurisdiction of Hyderabad Commissionerate-II, which comes out clearly from statement of Mr. Udaybhasker, that they have been granted Centralized Registration even for A.P. & Chattisgarh. Further it is not in dispute that all the records and accounts relating to RIL project are maintained by appellant at its Hyderabad office. Thus the jurisdiction of Hyderabad Commissionerate cannot be questioned.

7. On perusal of the contracts, we find that it is undisputed fact that the contract awarded to appellant is a composite one involving construction, erection, commissioning and installation of plant equipment, structure, instrumental, electrical, etc.,; it is nobody's case that services rendered under contract can be bifurcated activity wise for the tax implication; Revenue Authorities as well as the appellants were unanimous in their submissions that the entirety of

the contract is to be taken as a single indivisible contract and taxability thereof or otherwise should be decided. In terms of contract, appellant was to construct a gas processing plant with certain alloyed facilities called as OT.

8. The appellant was also to undertake the construction of certain common and infrastructure facility such as helipad; hanger; ATF refuelling facility; Radio room, portable water treatment system, permanent facilities like canteen building, office building, first aid centre; security control room; swipe and control access system; permanent warehouses; administrative buildings; accommodation buildings; health centre; construction of road; widening of road; construction of flyover as also construction of civil works for comprehensive protected water supply.

9. At the threshold the appellant has submitted that since some of the activities to be undertaken such as those relating to construction of road, widening of road, construction of flyover as also construction of water supply system are undisputedly non-taxable there was no mechanism prescribed in the law for taxing such a composite contract involving both taxable (assuming construction of Onshore terminal was not a transport terminal) and non-taxable services. It has been submitted that in the absence of there being a mechanism prescribed under the Finance Act for taxing such contracts, involving both taxable and non-taxable services the entirety of the contract could not be exigible to tax. We are unable to agree with this rather novel proposition urged on behalf of the appellant. The

submission of the appellant that the Act does not prescribe a mechanism for taking such composite contracts is not correct as, in our view provisions of Section 65A of the Finance Act, 1994, provides necessary statutory guidelines for determining, not only specific taxable category, but also its classification as taxable or non-taxable services. The submission of the appellant on this point seeks to give the word "classification" an unduly narrow meaning. Thus, we are of the view that conclusion as to non-taxability of a composite service can be arrived at only in a situation where it is established that essential character of composite contract is imparted. The argument of appellant, it seems, that essential character of composite contract is imparted by the CICS activities, which are taxable. As such, the contention that entirety of the service provided by the appellant is to be regarded as non-taxable is rejected.

10. We have to now consider whether demand for tax can be sustained under the category CICS as held by Commissioner. We note paragraph 10 of show cause notice dated 31.07.2008, some analysis was made to as to taxability of the services rendered by appellants with reference to three possible categories namely WCS, ECIS and CICS; after considering all the implications the notice state that the activity of appellants needs to be classified under CICS. In coming to such a conclusion the notice relied upon Section 65A(2)(b) of the Finance Act, 1944, and applied the test of predominant activity undertaken by the appellant. The Notice records the activity of appellant is not a WCS, as there is no transfer of property in goods. The reason for excluding the service from the head "Erection Commissioning or Installation Services", was that the appellant was

not a “Commissioning and Installation Agency”. The allegation in the notice is that activity of appellant is CICS, Strenuously challenged by appellant contending that the essential character of the composite service was that of ECIS services, we need to look in to that before coming to a conclusion.

11. The appellant has contended that applying the essential character test in terms of Section 65A(2)(b), to the contract awarded to it, the service would be aptly classified under the head of ECIS and not under the head of CICS/WCS. It has been contended that in any ECIS contract, construction is imperative for the purchase of commissioning and installing the plant, machinery, equipment. Reliance in this regards has been placed on CBEC clarification issued pursuant to the Finance Bill 2004-05 being introduced explaining the scope and ambit of Erection services which was added to the head of Commissioning and Installation services. The relevant extract of the clarification is reproduced here for ease of reference.

> *14. Extension of service tax on installation and commissioning, to erection services:*
> *Service tax was levied on commissioning and installation of plant, machinery and equipment w.e.f. 1-7-2003. The general practice is that 'erection, commissioning and installation' are contracted as a composite package. There have been a number of doubts and queries regarding the distinction between erection and commissioning/installation. Erection would refer to the civil works to installation /commissioning of a plant or machinery. In this year's budget, the scope of service tax under installation and commissioning is being extended to include erection also. Erection involves civil works, which would otherwise fall under the category of construction services. However, in case of a composite contract for erection, commissioning and installation, the erection charges would be taxed as part of this category of service.*

12. It has to be noted that many a times parties to contract choose to give to describe a contract is not determinative of its true

character, as in the case in hand the contract is titled as one for "Construction of onshore terminal and associate facilities" is not determinative of its essential character. Even, as per CBEC clarification (as is in paragraph 11), even ECIS contract may involve some element of civil construction activity necessary for erecting and installing equipments and machines. To us it is clear that on standalone basis some of the services provided herein, were in the nature of ECIS services, while some others, again on a standalone basis, were either construction services falling under the head CICS or were non-taxable services as noted herein above. Since both sides are unanimous in contending that the contract is a composite contract and indivisible one, not amendable to being broken down in to its separate components attracting different tax classifications, it was necessary for the adjudicating authority to have examined which of the two taxable services i.e. ECIS or CICS imparted the essential character to the contract as a whole. It seems that no such exercise has been conducted by the adjudicating authority.

13. We are unable to come to a definite conclusion on this point as there is shortage of material on record for us to say with any degree of certainty, which of the two taxable services impart the essential character to the contract in question. The submission of the appellant before us that most of the work carried out was in the nature of ECIS services is not supported by any verifiable data or facts and figures. In the course of hearing we were shown a video presentation of the entire facility in which the work was carried out, but we are unable to take cognizance of such a presentation in the absence of facts and figures. Learned Counsel for Revenue has rightly submitted

that in a pure service contract which is based on cost plus model, as is in the instant case, the essential character of the service rendered can be derived from details of the man hours spent for each activity along with the cost of such manpower. In our view this aspect needs consideration except in appeal No. ST/30275/2016, to determine the essential character of the service rendered under the composite contract on the aforesaid basis.

14. Insofar as appeal No. ST/30275/2016 is concerned, the demand has been confirmed under the head WCS. This demand is unsustainable, as admittedly the contract awarded to appellant, is a pure service contract and does not involve any transfer of property in the goods involved in the execution of the contract, which is a pre-requisite for taxing any service under the head WCS. The fact that the contract is a pure service contract not involving any transfer of property in the goods involved in the execution of the contract is evident from para 10.1 of the show cause notice dated 31.07.2008, which states that since the contract awarded by RIL did not involve any transfer of property in the goods involved in the execution of the contract such activities fell outside scope of WCS.

15. The appellant has contended before us that even if the services rendered by it are held to be taxable under the head of CICS, even then no tax would be leviable, since what has been constructed was a transport terminal. The definition of CICS excludes transport terminal from the definition of the taxing entry. The Revenue on the other hand relied upon the judgement of the co-ordinate bench in the case of AFCONS Infrastructure Ltd (supra) to contend that this Tribunal has already held that processing plant of the present type is

not a transport terminal. The appellant has urged various contentions on facts and in law seeking to distinguish the same. We are however not dealing with this issue, as the matter is being remanded. It is only in case, that on remand, if the adjudicating authority arrives at a conclusion, by applying the essential character test, that the services rendered under the contract were taxable under the head of CICS, would the issue as to whether the Onshore terminal is a transport terminal or otherwise arise. We direct that in case the adjudicating authority on remand concludes that the contract is aptly classifiable under the head of CICS and not ECIS, he would also consider whether the Onshore Terminal can be termed as a transport terminal or not. In doing so the adjudicating authority would take into account the ratio laid down by the co-ordinate bench of this tribunal in the case of AFCONS (supra) as also the submissions that the appellant may urge.

16. The assesse has also claimed benefit of exemption in terms of Notification No. 1/2006-ST dated 1.3.2006 and has also cited the judgement of the Apex Court in the case of Bhayana Builders (supra). We agree that in case the adjudicating authority comes to a conclusion that the activity is taxable under the head of CICS and does not fall in the exclusion of being a transport terminal, then tax only on 33% of the value of the services rendered alone would be payable in terms of Notification No. 1/2006-ST dated 1.3.2006. Even the counsel for the Revenue in his written submissions does not seriously dispute the appellant's eligibility to the benefit of this exemption.

17. Insofar as the appellant's plea regarding the extended period of limitation not being invokable is concerned, we are not examining this plea as the same would be relevant only if on remand

the adjudicating authority comes to a conclusion that the services rendered were taxable under the head of CICS. We leave the issue open for determination by the adjudicating authority.

18. Insofar as the appeal filed by the Revenue is concerned, we are not getting into the merits of the same and are merely remanding the same. The adjudicating authority will examine the applicability of cum-duty benefit, if at all any demand is to be confirmed on the ground that services were taxable under the head of CICS.

19. Accordingly all appeals except appeal No. ST/30275/2016 are disposed of by way of remand in terms of the aforesaid findings after following principles of natural justice, with liberty to asessee to file documents in support of their contention. Insofar as appeal No. ST/30275/2016 is concerned the demand and penalties raised in the same are all set aside, as no demand could have been raised under the head of WCS.

20. As regards the Revenue's appeals filed against the orders in respect of appeal Nos. ST/834/2009 and ST/835/2009, we have disposed of these two appeals by separate orders hence these appeals those are not mentioned in these proceedings.

(Order pronounced on 07/01/2019 in open court)

P. VENKATA SUBBA RAO	**M.V. RAVINDRAN**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

Lakshmi….