IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

S.T.Appeal No.282/09

(Arising out of Order-in-Original No.21/Commr./ST/Kol/2009-10 dt.14.09.2009 passed by Commissioner of Service Tax, Kolkata)

M/s S.K.Samanta & Co. (P) Ltd.

Applicant (s)/Appellant (s)

Vs.

Commr. of Service Tax, Kolkata

Respondent (s)

Appearance:

Dr.Samir Chakraborty, Sr.Advocate and Shri Abhijit Biswas, Adv. for the Appellant (s)
Shri S. D.Halder, Asstt.Commr. (AR) for the Revenue (s)

S.T.Appeal No.294/09

(Arising out of Order-in-Original No.21/Commr./ST/Kol/2009-10 dt.14.09.2009 passed by Commissioner of Service Tax, Kolkata)

Commr. of Service Tax, Kolkata

Applicant (s)/Appellant (s)

Vs.

M/s S.K.Samanta & Co. (P) Ltd.

Respondent (s)

Appearance:

Shri S. D.Halder, Asstt.Commr. (AR) for the Revenue (s)
Dr.Samir Chakraborty, Sr.Advocate and Shri Abhijit Biswas, Adv. for the Appellant (s)

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI BIJAY KUMAR, TECHNICAL MEMBER

Date of Hearing : 07.06.2018
Date of Pronouncement : 17.07.2018

ORDER NO.FO/76440-76441/2018

***S.T.Appeal Nos.* 282 & 294/09**

Per Shri Bijay Kumar :

The present appeals have been filed against the Order-in-Original No.21/Commr./ST/Kol/2009-10 dt.14.09.2009 passed by Commissioner of Service Tax, Kolkata. Against this order, both the appellant and Revenue are in appeal. The appellant-assessee is in appeal against the service tax demand of Rs.7,21,52,207/- including Education Cess and SHE Cess under Section 73 of the Finance Act, 1994 along with penalty of equal amount under Section 78 of the Act and Rs.5,000/- under Section 77 of the Act. The appellant-assessee is also contesting the interest imposed under Section 75 of the Act for non-quantified amount. The Respondent-Revenue is in appeal against portion of order-in-original for non-imposition of penalty under Section 76 of the Act and non-quantification of interest under Section 75 of the Act.

2.1 Briefly stated the facts of the case are that the appellant-assessee, consequent to award of the job/project as per tenders, had entered into agreements with their clients, namely, M/s Northern Coalfields Ltd., M/s Southern Coalfields Ltd., M/s Heavy Engineering Corporation Ltd. for supply of equipments and accessories and forworks and services. The Chart of equipments, accessories and construction materials supplied under the contract (s) is as under :

Chart of equipments, accessories and construction materials supplied under the Contract(s)

- TOTAL CONTRACT
  - SUPPLY PART
    - Equipment & Accessories
      - Belt Conveyors
      - Beltings
      - Sampling Equipment
      - Load Out Equipment
      - Vibratory Feeder
      - Dust Suppression Fans
      - Ducting for Dust Suppression
      - Fire Fighting Pumps & Piping
      - Chutes & Liner
      - Electric Hoist
      - Manual Winch
      - Lifting Tackles
      - EOT Crane
      - Service Lifts
      - Belt Handling Equipment
      - Sub Station Equipment
      - Cables & Accessories
      - Pressurisation & Air Conditioning
      - Condition Monitoring Equipment
      - Drinking Water Pumps & Piping
      - Air Compressors
      - Compressed Air Piping
      - Tools & Tackles
      - Spares
  - WORKS & SERVICES
    - Construction Material
      - Structural Steel
      - Reinforcement Steel
      - Binding wires
      - CGI Sheets
      - Stainless Steel
      - Cement
      - Sand
      - Chips
      - Bricks
      - Morrum
      - Boulder
      - Ballast
      - Floor Tiles
      - False Ceiling
      - Inserts, bolts, nuts
      - GI Sheeting
      - Tanks & Pumps
      - Cables Wires
      - Paint
      - Bitumen
      - Ironite
      - Concertinal Coil
      - Factory Gates
      - Doors & Windows
      - Consumables
      - Elec & Sanitary Fittings
    - Service
      - Survey
      - Soil Investigation
      - Design Engineering Drawing
      - Civil Work Construction
      - Structural Fabrication
      - Transportation
      - Erection of mech Equipment
      - Erection of Elec Equipment
      - Trial Run & Commissioning
      - Training of Personnel

2.2 The appellant-assessee divided the job-project by entering into two separate agreements with each of the said client, one for supply of plant, machinery, equipments and the second agreement for works & services, namely, erection, installation and commissioning services. The appellant-assessee discharged service tax w.e.f. 01.04.2006 on the second set of agreements relating to erection, installation, and commissioning services by availing benefit of Notification No.19/2003-ST dated 21.08.2003 and Notification No.1/2006-ST dt.01.03.2006. Revenue issued show-cause notice denying the abatement availed under the said Notifications and demanded service tax on the entire taxable value of erection, installation and commissioning services w.e.f. 01.07.2003 to 30.09.2007.

3.1 The ld.Sr.Advocate appearing on behalf of the appellant-assessee, has advanced two-fold argument. At the first instance, he has submitted that in response to the tenders floated by their clients, and on being qualified to undertake the turnkey project as per the tenders, they had executed two separate contracts with each of their clients on the terms and conditions stipulated in the respective contracts. In the first set of contract, it was agreed upon to supply the plants, machinery and equipments and in the second set of contract it was agreed to provide services of erection and commissioning of the said plants and equipments. He has submitted that it has been specifically incorporated in each of the said agreement that the award of separate contracts shall not in any way dilute the responsibility for the successful completion of works as per the contract document. Both contracts contained cross-fall- breach clause specifying that breach of one contract would also constitute breach of the other contract. It is his submission that even though there were two separate contracts, all these projects agreed to be completed by the applicant/appellant were turnkey projects and covered under the definition of 'works contract' inserted in the Finance Act w.e.f 01.07.2007. The Ld. Advocate placed reliance on the judgement of the Tribunal in the case of ABB Ltd. Vs. Commissioner of Service Tax, Bangalore – 2010 (20) S.T.R. 610 (Tri. Bang.) in support of his submission that even though turnkey projects for erection, commissioning and installation had been split into supply of materials as well as provision for service, the same would fall under the works contract service. Hence, if at all, any Service Tax is payable on the said turnkey projects being works contracts then it would be payable for the period 01.07.2007 to 30.09.2007 and not for the earlier period as confirmed by the adjudicating authority in the impugned order. Advancing his second leg of submission, he has submitted that they have correctly determined and discharged Service Tax liability after availing the benefit of Notification No. 19/2003-ST & 1/2006 w.e.f. 01.04.2006 in relation to works and services contract under the head erection & Commissioning Service. He has submitted that pursuant to the said works & Service agreements not only the work of erection and Commissioning are executed, but also along with the said work, the Applicant/Appellant had supplied structural steel for erection and Commissioning of the plant and machinery. The supply of structural steel for erection & Commissioning work are clearly evident from the approved billing schedule between applicant and their clients. Also, applicable VAT has been paid on these structural steel indicating that these are sold and supplied to the clients during the course of erection and commissioning. Consequently, the allegation that the Works & Service agreements are pure service contracts and do not involve supply of materials is incorrect. It is his submission that as supply of goods and services are involved in the works and service agreements, consequently, they are entitled to abatement of 67% of the value of the services as on a simple reading of the said Notifications No. 19/2003 ST & 01/2006 ST it is clear that the said Notifications refers to "a contract for supplying the plant, machinery or equipment and commissioning or installation of the said plant, machinery or equipment". Further, he has pleaded that the demand is barred by limitation as all the facts are within the knowledge of the department and there is no suppression or mis-declaration on the part of the Appellant.

3.2 The ld.Sr.Advocate also submitted that during the material period, the appellant entered into EPC Contracts/Turnkey Contract with their clients as mentioned above. He contested the impugned order rejecting the appellant's contention that from the respective contract agreements, it is evident that each set of agreement, one for supply of equipments and other for erection and commissioning of entire plant by using the equipment were entirely depended and effectively constituted one contract and was a works contract within the meaning thereof in the Act, the Commissioner has held that the contracts for supply of equipments is not the subject matter of the instant appeal, but the demand was only on contracts pertaining to works and service contracts. Therefore, denial of benefit of exemption Notification No.19/2003-ST (supra) is improper. In his support, he has relied upon the following decisions :

(i) ABB Ltd. Vs. CST : 2010 (20) STR 610 (T) ;

(ii) Om Metals Infra Projects Ltd. Vs. CCE : 2011 (24) STR 583 (T) ;

(iii) Indian National Shipowners' Association Vs. Union of India : 2009 (14) STR 2829 (Bom.).

4.1 The ld.D.R. appearing on behalf of the Revenue, stated that the appellant has divided whole contracts into two components at their own violation, one being that of supply of plant, equipments and machineries and other being the works and service contract, which fall under erection, installation and commissioning services classifiable under Chapter Heading 65(105)(zzd) of Finance Act,1994. As far as the supply of plant, equipment and machineries are concerned, the Department has not imposed any service tax considering it this is sale. However, the second contract was only for erection, installation and commissioning of this importer, which involved the supply of the same material as incidentally to the main contract and therefore, the exemption benefit of Notification No.19/2003-ST dated 21.08.2003 and Notification No.1/2006-ST dt.01.03.2006, is not applicable in this case.

4.2 As regards the Revenue's Appeal (STAppeal No.294/09), he has submitted that there was an error on the part of the Adjudicating Authority while imposing penalty under Section 76 of the Finance Act, 1994 in view of the fact that the penalties under Sections 76 & 78 of the Act, are independed of each other, even though the transaction is one. For his submission, he relied upon the decision of the Hon'ble Kelara High Court in the case of Assistant Commissioner of Central Excise Vs. Krishna Poduval reported in 2006 (1) STR 185 (Ker.).

5. We have both sides and perused the appeal records.

6.1 The issue involved in these appeals is regarding leviability of service tax on the services rendered by their clients, which was obtained as EPC contracts and as per LOI between the appellant and their clients. We have perused the LOI with the agreement entered upon by the appellant. The total contract as per LOI has been devided into two parts which is as under :

<u>TOTAL CONTRACT</u>

SUPPLY PART WORKS & SERVICES

Equipment & Accessories	Construction Material	Service	
Belt Conveyors Beltings Sampling Equipment	Structural Steel Reinforcement Steel	Survey Soil Investigation	

Load Out Equipment Vibratory Feeder Dust Suppression Fans Ducting for Dust Suppression Fir Fighting Pumps & Piping Chutes & Liner Electric Hoist Manual Winch Lifting Tackles EOT Crane Service Lifts Belt Handling Equipment Sub Station Equipment Cables & Accessories Pressurisation & Air Conditioning Condition Monitoring Equipment Drinking Water Pumps & Piping Water Cleaning Pumps & Piping Air Compressors Compressed Air Piping Tools & Tackles Spares	Binding wires CGI Sheets 'Stainless Steel Cement Sand Chips Bricks Morrum Boulder Ballast Floor Tiles False Ceiling Inserts,bolts,nuts GI Sheeting Tanks & Pumps Cables wires Paint Bitumen Ironite Concertinal Cpol Factory Gates Doors & Windows Consumables Electric & Sanitary Fittings	Design Engineering Drawing Civil work Construction Structural Fabrication Transportation Erection of Mech. Equipment Erection of Elec. Equipment Trial Run & Commissioning Training of Personnel	

As is evident from the various contracts, that the appellant has divided the job/project by entering into two separate agreements with their clients ; one for the supply of plant and machinery/equipments and other for work and services viz. erection, installation and commissioning service. The appellant has been disallowed service tax w.e.f. 01.04.2006 on the second set of agreements relating to erection, installation and commissioning service by availing the benefit under Notification No.19/2003-ST dated 21.08.2003 and Notification No.1/2006-ST dt.01.03.2006.

6.2 The Respondent-Revenue has issued a show-cause notice No.DGCEI/AZU/36-17/2008-09/6184 dated 10.07.2008 denying the abatement availed under the aforesaid Notification. It is also evident from the contract that even though the works and service contracts, which the Department to intend classification as erection, installation and commissioning service, are the components of supply of construction materials as referred above, which, as per ld.Sr.Advocate, constituted substantial portion of the total cost of the second agreement. In respect of exemption to value of goods and materials sold by service provider, the Notification No.12/2003-ST, dated 20.06.2003, reads as under :

> *"In exercise of the powers conferred by Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under Section 66 of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials :*
>
> *[Provided that the said exemption shall apply only in such cases where –*
>
> *(a) no credit of duty paid on such goods and materials sold, has been taken under the provisions of the Cenvat Crdit Rules, 2004 ; or*
>
> *(b) where such credit has been taken by the service provider on such goods and material, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials.]*
>
> *2. This Notification shall come into force on the 1st day of July, 2003."*

From the perusal of the above Notification, it is clear that the credit can be denied only on the non-fulfilment of conditions (a) & (b), which is not the case in the present appeal. Therefore, the appellant is entitled for abatement as contained in the Notification No.12/2003-ST, dated 20.06.2003. This substantiated from the fact that the appellant has paid the VAT on the portion of the materials sold and used in the erection and commissioning of the plant and machinery under Local Taxes Act.

6.3 Considering the nature of the contract entered by the appellants and the services rendered to their clients, it is beyond doubt that they are engaged in providing EPC contracts, which falls under the category of Works Contract Acts. The exclusion of two separate agreements by the appellants with their clients, will not alter the fact that this is part of one contrat and also for the cross fall breach condition, which makes both the contracts related as per condition of the contract, the failure in one, will lead the cancellation of the other appellant. The levy of service tax on the works contract, has been the subject matter of the appeal before the Hon'ble Supreme Court in the case of Commr. of Central Excise & Customs, Kerala Vs. Larsen & Toubro Ltd. reported in 2015 (39) STR 913 (S.C.). In the said judgement, it has been held that leviability of service tax prior to 1st June, 2007, whereafter Finance Act, 2007, expressly made such contracts liable to service tax is not as per the Scheme of Finance Act,

1994. For better appreciation, the relevant Paras are reproduced below :

> ***15.*** *A reading of this judgment, on which counsel for the assessees heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting therefrom charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub-paras (f), (g) and (h). Under each of these paras, a bifurcation has to be made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor's accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost,*

expenses and profit as would be attributable in the works contract to the transfer of property in goods in such contract. This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts.

20. *We also find that the assessees' argument that there is no charge to tax of works contracts in the Finance Act, 1994 is correct in view of what has been stated above.*

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.*

34. *In the aforesaid judgment it was found that Section 9(2) of the Central Sales Tax Act conferred powers on officers of the various States to utilize the machinery provisions of the States' sales tax statutes for purposes of levy and assessment of central sales tax under the Central Act. It was also noticed that the State Government itself had been given power to make rules to carry out the purposes of the Central Act so long as the said rules were not inconsistent with the provisions of the Central Act. It was found that, in fact, the State of Uttar Pradesh had framed such rules in exercise of powers under Section 13(3) of the Central Act as a result of which the necessary machinery for the assessment of central sales tax was found to be there. The Delhi High Court judgment unfortunately misread the aforesaid judgment of this Court to arrive at the conclusion that it was an authority for the proposition that a tax is leviable even if no rules are framed for assessment of such tax, which is wholly incorrect. The extracted passage from Mahim Patram's case only referred to rules not being framed under the Central Act and not to rules not being framed at all. The conclusion therefore in paragraph 36(2) of the Delhi High Court judgment is wholly incorrect. Para 36(2) reads as follows :-*

"(2) Service tax can be levied on the service component of any contract involving service with sale of goods etc. Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for

computation, it does not follow that no tax is leviable." [at para 36]

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. This Court said :-*

"This Court has in a long line of decisions rendered from time to time, emphasised the importance of machinery provisions for assessment of taxes and fees recoverable under a taxing statute. In one of the earlier decisions on the subject a Constitution Bench of this Court in K.T. Moopil Nair v. State of Kerala [AIR 1961 SC 552] examined the constitutional validity of the Travancore-Cochin Land Tax Act (15 of 1955). While recognising what is now well-settled principle of law that a taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Article 14, this Court found that the enactment in question was violative of Article 14 of the Constitution for inequality was writ large on the Act and inherent in the very provisions under the taxing section thereof. Having said so, this Court also noticed that the Act was silent as to the machinery and the procedure to be followed in making the assessment. It was left to the executive to evolve the requisite machinery and procedure thereby making the whole thing, from beginning to end, purely administrative in character completely ignoring the legal position that the assessment of a tax on person or property is a quasi judicial exercise."

Speaking for the majority Sinha, C.J. said: (K.T. Moopil case [AIR 1961 SC 552], AIR p. 559, para 9)

"9. ... Ordinarily, a taxing statute lays down a regular machinery for making assessment of the tax proposed to be imposed by the statute. It lays down detailed procedure as to notice to the proposed assessee to make a return in respect of property proposed to be taxed, prescribes the authority and the procedure for hearing any objections to the liability for taxation or as to the extent of the tax proposed to be levied, and finally, as to the right to challenge the regularity of assessment made, by recourse to proceedings in a higher civil court. The Act merely declares the competence of the Government to make a provisional assessment, and by virtue of Section 3 of the Madras Revenue Recovery Act, 1864, the landholders may be liable to pay the tax. The Act being silent as to the machinery and procedure to be followed in making the assessment leaves it to the Executive to evolve the requisite machinery and procedure. The whole thing, from beginning to end, is treated as of a purely administrative character, completely ignoring the legal position that the assessment of a tax on person or property is at least of a quasi judicial character." *(emphasis supplied)*

In Rai Ramkrishna v. State of Bihar [AIR 1963 SC 1667] this Court was examining the constitutional validity of the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961. Reiterating the view taken in K.T. Moopil Nair [AIR 1961 SC 552] this Court held that a statute is not beyond the pale of limitations prescribed by Articles 14 and 19 of the Constitution and that the test of reasonableness prescribed by Article 304(b) is justiciable. However, in cases where the statute was completely discriminatory or provides no *procedural machinery for assessment and levy of tax or where it was confiscatory, the Court would be justified in striking it down as unconstitutional. In such cases the character of the material provisions of the impugned statute may be such as may justify the Court taking the view that in substance the taxing statute is a cloak adopted by the legislature for achieving its confiscatory purpose.*

In Jagannath Baksh Singh v. State of U.P. [AIR 1962 SC 1563] this Court was examining the constitutional validity of the U.P. Large Land Holdings Tax Act (31 of 1957). Dealing with the argument that the Act did not make a specific provision about the machinery for assessment or recovery of tax, this Court held: (AIR pp. 1570-71, para 17)

"17. ... if a taxing statute makes no specific provision about the machinery to recover tax and the procedure to make the assessment of the tax and leaves it entirely to the executive to devise such machinery as it thinks fit and to prescribe such procedure as appears to it to be fair, an occasion may arise for the courts to consider whether the failure to provide for a machinery and to prescribe a procedure does not tend to make the imposition of the tax an unreasonable restriction within the meaning of Article 19(5). An imposition of tax which in the absence of a prescribed machinery and the prescribed procedure would partake of the character of a purely administrative affair can, in a proper sense, be challenged as contravening Article 19(1)(f)."

(emphasis supplied)

In State of A.P. v. Nalla Raja Reddy [AIR 1967 SC 1458] this Court was examining the constitutional validity of the Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision Act, 1962 (22 of 1962) as amended by the Amendment Act (23 of 1962). Noticing the absence of machinery provisions in the impugned enactments this Court observed: (AIR p. 1468, para 22)

"22. ... if Section 6 is put aside, there is absolutely no provision in the Act prescribing the mode of assessment. Sections 3 and 4 are charging sections and they say in effect that a person will have to pay an additional assessment per acre in respect of both dry and wet lands. They do not lay down how the assessment should be levied. No notice has been prescribed, no opportunity is given to the person to question the assessment on his land. There is no procedure for him to agitate the correctness of the classification made by placing his land in a particular class with reference to ayacut, acreage or even taram. The Act does not even nominate the appropriate officer to make the assessment to deal with questions arising in respect of assessments and does not prescribe the procedure for assessment. The whole thing is left in a nebulous form. Briefly stated under the Act there is no procedure for assessment and however grievous the blunder made there is no way for the aggrieved party to get it corrected. This is a typical case where a taxing statute does not provide any machinery of assessment."

(emphasis supplied)

The appeals filed by the State against the judgment of the High Court striking down the enactment were on the above basis dismissed.

Reference may also be made to Vishnu Dayal Mahendra Pal v. State of U.P. [(1974) 2 SCC 306] and D.G. Gose and Co. (Agents) (P) Ltd. v. State of Kerala [(1980) 2 SCC 410] where this Court held that sufficient guidance was available from the Preamble and other provisions of the Act. The members of the committee owe a duty to be conversant with the same and discharge their functions in accordance with the provisions of the Act and the Rules and that in cases where the machinery for determining annual value has been provided in the Act and the rules of the local authority, there is no reason or necessity of providing the same or similar provisions in the other Act or Rules.

There is no gainsaying that a total absence of machinery provisions for assessment/recovery of the tax levied under an enactment, which has the effect of making the entire process of assessment and recovery of tax and adjudication of disputes relating thereto administrative in character, is open to challenge before a writ court in appropriate proceedings. Whether or not the enactment levying the tax makes a machinery provision either by itself or in terms of the Rules that may be framed under it is, however, a matter that would have to be examined in each case." (at paras 15-21)

42. *It remains to consider the argument of Shri Radhakrishnan that post 1994 all indivisible works contracts would be contrary to public policy, being hit by Section 23 of the Indian Contract Act, and hit by Mcdowell's case.*

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.*

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

6.4 It was held in this case that it has been also held that the service contract referred in the charging Section 65 (105), refers only to the contracts simpliciter and not to composite works contracts. In this regard, the relevant Para in the above referred case are reproduced here below :

"24. *A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of* *the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract."*

6.5 Considering the above facts, we are of the view that the service tax is not leviable on the appellant prior to 01.06.2007 and therefore, the demand is only left for the period from 01.06.2007 to September, 2007.

6.6 We have also considered the Department's plea that the appellants have themselves registered with the Department w.e.f. 2004 and therefore, they are not entitled for the benefit under the Works Contracts Act in view of the above decision of the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. (supra). In this regard, we find that the decision of the Hon'ble Bombay High Court in the case of Sheth & Sura Engineering Pvt. Ltd. Vs. Union of India reported in 2018 (10) GSTL 239 (Bom.), wherein it has been held that the works contract cannot be vivisected into various components and cannot be taxed under different Act and therefore, erection, commissioning and installation service component of works contract service would not be liable to service tax as deemed was made prior to 01.06.2007. In this case, the appellant-assessee was found to be eligible for the refund. The relevant Paras are reproduced below :

"4.*The Supreme Court, considering the scheme around the "works contract" and or "indivisible works contract" has held as observed in above para (2) that itself, is sufficient to interfere*

> *with the order passed by the CESTAT. The unsustainable impugned order was based upon Larsen & Toubro Ltd. v. Commr. of S. Tax, Delhi [2015 (38) S.T.R. 268 (Tri.-LB.)] and G.D. Builders v. Union of India - 2013 (32) S.T.R. 673 (Del.).*
>
> ***5.****The findings given by the Supreme Court in Larsen & Toubro (supra), that "works contract" cannot be vivisected into various components. It cannot be taxed under different Acts. The works contract service involved in the present case, the Erection, Commissioning and Installation, would not be leviable to service tax as demand was made prior to 1 June, 2007. Hence, the Appeal deserves to be allowed."*

6.7 In view of the above, we are of the view that in the earlier classification of the appellant, the erection, installation and commissioning services, would not preclude them from the benefit under Works Contract Service. Even otherwise, as per the decision of the Hon'ble Supreme Court in the case of Safety Retreading Co.(P) Ltd. Vs. Commissioner of Central Excise, Salem reported in 2017 (48) STR 97 (S.C.), wherein it has been held that the assessee was not liable to pay service tax on the total amount for retreading including value of materials/goods that have been used and sold in execution of contract. In this case, the Department's plea that there is no sale or deemed sale of parts or other materials used in execution of contract of repairs and maintenance, was rejected. The ratio in this decision is squarely applicable in this case that even if it is held that the second agreement is purely as Works and Service agreement, the same has been held in Paras 12, 13 of above referred case, which are as under :

*“**12.** No dispute has been raised with regard to the assessment of the appellant on its turnover under the local/State Act, insofar as payment of Value Added Tax on that component (70%) is concerned. A reading of the show cause notice dated 24th January, 2008 would go to show that the entire thrust of the Department’s case is the alleged liability of the appellant-assessee to pay service tax on the gross value. In the aforesaid show cause notice, the details of the value of the goods, raw materials, parts, etc. and the value of the services rendered have been mentioned and service tax has been sought to be levied at the prescribed rate of ten per cent (10%) on the differential amount. It is now stated before us that the aforesaid figures have been furnished by the assessee himself and, therefore, must be understood not to be authentic. This, indeed, is strange. No dispute has been raised with regard to the correctness of the said figures furnished by the assessee in the show cause notice issued to justify the stand now taken before this Court; at no point of time such a plea had been advanced.*

***13.** Besides the above, the affidavit of the learned Commissioner, referred to above, proceeds on the basis that the appellant assessee is also liable to pay service tax on the remaining seventy per cent (70%) towards material costs in addition to the 30% of the retreading charges. This is clear from the following averments made in the said affidavit of the learned Commissioner :*

“The relevant bills showed that the Appellant had paid service tax only on the labour component after deducting 70% towards material cost on the gross tyre Retreading charges billed and received for the period from 16-6-2005. In short, they have paid service tax only on the 30% of the tyre Retreading charges

received from the customers, by conveniently omitting 70% of the consideration received towards Retreading charges to avoid tax burden.

The verification of invoices of the Appellant for the period from Jan.-2007 to March-2007, the officers noticed that the Appellant have shown material cost, patch cost and misc. charges i.e. Labour charges separately in their invoices. However, on the follow-up action the customers of the Appellant revealed that they have neither purchased nor received raw materials intended for Retreading and they had paid only the Retreading charges for carrying out the Retreading activity."

The invoices which the appellant assessee has also brought on record by way of illustration show the break up of the gross value received. There is again no contest to the same. Leaving aside the question that the case now projected, with regard to lack of proof of incurring of expenses on goods and materials which has been transferred to the recipient of the service provided, appears to be an afterthought, even on examination of the same on merits we have found it to be wholly unsustainable."

6.8 We are of the opinion that the availment of sale of the materials is not important in the case of Works Contract Service even miniscule portion of the supply of material will render as Works Contract Service. It is evident from the fact that the second agreement has substantial portion of the same and therefore, the same will be included under the Works Contracts Service in the instant case.

6.9 In view of the above, we are of the view that the service rendered by the appellant will squarely fall under the category of Works Contract Service classifiable under Chapter Heading 65(105)(zzza) of Finance Act,1994 and liable to service tax only w.e.f. 01.06.2007. In this case, we are also guided by the decision of the Hon'ble Bombay High Court in the case of Indian National Shipowners Association Vs. Union of India reported in 2009 (14) STR 289 (Bom.), wherein it has been held that creature of new entry in the Act, makes it clear that the earlier service rendered was not covered under the previous legislative under the Finance Act, 1994, as held in Para 38 of the said judgement, which are as under :

> "***38.*** *If the Department's contention is accepted that would mean that the activities of the members of the 1st petitioner are covered by entry (zzzy) and entry (zzzzj). Such a result is difficult to comprehend because entry (zzzzj) is not a specie of what is covered by entry (zzzy). Introduction of new entry and inclusion of certain services in that entry would presuppose that there was no earlier entry covering the said services. Therefore, prior to introduction of entry (zzzzj), the services rendered by the members of the 1st petitioner were not taxable. Creation of new entry is not by way of amending the earlier entry. It is not a carve out of the earlier entry. Therefore, the services rendered by the members of the 1st petitioner cannot be brought to tax under that entry."*

6.10 As far as the Department's Appeal is concerned, the same is not sustainable in view of the fact that we have upheld the appeal of the appellant.

7. Accordingly, we hold that the contract covered by the second agreement is appropriately classifiable under the Work Contract Service under the Finance Act, 1994 and not under the Erection, Commissioning and Installation Service, and therefore not chargeable to service tax prior to 01.06.2007. However, for the period starting from 01.06.2007 to 30.09.2007, the appellant has paid the service tax under Erection, Commissioning and Installation Service after availing the benefit of Notification Nos.19/2003-ST dated 21.08.2003 and Notification No.1/2006-ST dt.01.03.2006, the same is required to be recomputed and any excess or short payment is required to be adjusted as per extant provisions under the Act/the Rules.

8. In the result, the appeal filed by the Appellant is allowed partially with consequential relief, if any and the appeal filed by the Revenue is dismissed.

(Pronounced in the open Court on 17.07.2018)

Sd/
(P. K. CHOWDHARY)
MEMBER (JUDICIAL)

Sd/
(BIJAY KUMAR)
MEMBER (TECHNICAL)

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