IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.1

Service Tax Miscellaneous Application No.75481 of 2023
(Additional Evidence)
(On behalf of Appellant)
And
Service Tax Appeal No.250 of 2009

(Arising out of Order-in-Original No.10/ST/Commr./2009 dated 30.06.2009 passed by Commissioner, Central Excise & Service Tax, Ranchi.)

M/s. Gainwell Commosales Private Limited
(Formerly M/s. TIL Limited)
(1, Taratolla Road, Garden Reach, Kolkata-700024.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Ranchi
.....Respondent
(Central Revenue Building, 5A, Main Road, Ranchi-831001.)

WITH

Service Tax Miscellaneous Application No.75482 of 2023
(Additional Evidence)
(On behalf of Appellant)
And
Service Tax Appeal No.76003 of 2016

(Arising out of Order-in-Original No.20-21/S.Tax/Commr/2016 dated 29.02.2016 passed by Commissioner, Central Excise & Service Tax, Ranchi.)

M/s. Gainwell Commosales Private Limited
(Formerly M/s. TIL Limited)
(Central Maintenance Complex, West Bokaro Collieries, Ghatotand, Ramgarh-825314, Jharkhand.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Ranchi
.....Respondent
(Central Revenue Building, 5A, Main Road, Ranchi-831001.)

<u>APPEARANCE</u>

Shri B.L.Narshimanh, Shri Rahul Tangri & Ms.Udita Saraf, all Advocates for the Appellant (s)
Shri K.Chowdhury, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

MISCELLANEOUS ORDER NO. 75260-75261/2023
FINAL ORDER NO. 75758-75759/2023

DATE OF HEARING : 14 June 2023
DATE OF DECISION : 14 June 2023

Per : ASHOK JINDAL :

The Appellant has filed Applications for bringing additional grounds on record as after filing the Appeals there were judicial pronouncements which are very necessary to decide the issue in hand. Heard the Ld.Counsel for the Appellant, considered the fact that additional ground raised by the Appellant on the basis of judicial pronouncements passed by various courts after filing the appeals, which are legal in nature therefore, the same are taken on record and applications filed by the appellant are allowed.

2. The Appellant has filed these appeals and having a common issue therefore both the appeals are taken together for disposal.

3. The facts of the case are that the appellant is engaged in maintenance and repair services of Heavy Earth Moving Machinery which also entail supply of spare part in respect of such repair. For the purpose of said activity, the appellant entered into long term comprehensive maintenance and repair contracts with Tata Iron & Steel Company in relation to the heavy earth moving machineries like Rear Dump Truck, Dozers etc. procured by TISCO from M/s. Caterpillar India Ltd. and M/s. Caterpillar Singalore.

4. As per the agreement the appellant were charging repair and maintenance fees for supply of spare parts. Ground Engaging Tools fees for supply of ground engaging spare parts replaced during repairs and maintenance, manpower fees for supply of labour charges and on site supports fees towards logistics charges. For the initial years of the contract as the equipment is new, therefore, consideration for spare parts was more than actual value of spare parts supplied. The appellant

was discharging VAT on actual value of the spare parts to TSL therefore for the period January 2004 to August 2007, the Revenue sought the demand of Service Tax on differential value of consideration on which the VAT was not paid by the Appellant. W.e.f. 1.07.2008, the appellant took a conservative approach and started discharging Service Tax on excess consideration received for supply of spares in the initial years of the equipment, but for subsequent period i.e. October 2007 to March 2014, the Revenue took a position contrary to what was taken earlier confirming the demands against the appellant. From October 2008 to March 2012, the demand is confirmed under maintenance and repair service holding that the benefit of Notification No.12/2003-ST the reduction of value of goods supplied on payment of VAT is not available to the appellant as there is no supply of spares. Therefore, the Service Tax is computed on the entire consideration amount for supply of spares without reducing the consideration on which VAT has already been discharged by the appellant. For the period July 2012 to March 2014, the demand is confirmed holding that the services as works contract, but demand is computed by disregarding the actual value of goods and VAT payment made by the appellant holding that Rule 2A(i) of the Service Tax Valuation Rules is not applicable to the present case, therefore, the appellant is liable to pay Service Tax by applying Rule 2A(ii) of the Service Tax Valuation Rules i.e. 70% of the gross consideration received by the appellant. Aggrieved from the said orders, the appellant is before us.

5. The Ld.Counsel appearing on behalf of the appellant submits that the Service Tax is not leviable as composite contract for maintenance and repairs of equipment which entails supply of goods and services for the period up to 01.07.2012. To support this contention he relied on the decision in the case of CCE, Delhi v. Xerox India Ltd. [2019 (20) G.S.T.L. 96(Tri.-Chan.) and in the case of SEW Infracture Ltd. v. CCE, Raipur [Final Order No.50640/2023 dated 02.05.2023].

6. In alternate he submits that value of materials supplied during repairs and maintenance service is deductible from the total contract value to arrive at assessable value liable for levy of Service Tax.

7. He further submitted that for the period w.e.f. 01.07.2012, the service portion of the work contract service computable under Rule 2A(i) of the Valuation Rules. It is his contention that the appellant had arrived at the value of service portion in execution of work contract by excluding entire value of goods in relation to works contract on which VAT has been paid. As the value of goods supplied is ascertainable and VAT has been paid by them, therefore, Rule 2A(i)(c) of the Valuation Rules is applicable to the facts of the present case, therefore, the provision of Rule 2A(ii) of the Valuation Rules adopted by the Revenue is not applicable to the facts of the present case. He further submitted that VAT and Service Tax are mutually exclusive and Service Tax cannot be levied on goods. Finally, he submitted that extended period of limitation is not invocable.

8. On the other hand, the Ld.Authorized Representative for the department reiterated the finding of the impugned orders and supported the same.

9. Heard the parties and considered the submissions.

10. On consideration of the arguments advanced before us the following issues emerge:-

(a) Whether the appellant is liable to pay Service Tax on the differential amount of consideration and actual value of spare parts for the period prior to 01.07.2012 or not?

(b) Whether the appellant is liable to pay Service Tax on the value as per Rule 2A(i) (c) of the Service Tax Valuation Rules, 2006 or Rule 2A(ii) of the Rules?

(c) Whether in the facts and circumstances of the case extended period of limitation is invocable or not?

(d) Whether penalty can be imposed on the appellant or not?

(a) Whether the appellant is liable to pay Service Tax on the differential amount of consideration and actual value of spare parts for the period prior to 01.07.2012 or not?

11. We find that it is a fact on record that maintenance and repair contracts were entered between appellant and TISCO is the composite contracts involving supply of goods as well as providing the service. In that circumstances, when there is a contract of supply of goods as well as services, the same was termed as 'works contract' and the same was taxable w.e.f. 01.06.2007 under the category of works contract services as held by the Hon'ble Apex Court in the case of Commissioner v. Larsen & Toubro Ltd. [2015 (39) S.T.R. 913 (S.C.)]. Therefore, prior to 01.06.2007 the nature of activity undertaken by the appellant is correctly classifiable under works contract services and for the period prior to 01.06.2007 covered by the decision of Larsen & Toubro Ltd. (supra) and not liable to pay Service Tax at all. W.e.f. 01.06.2007, we find that similar issue has come up before this Tribunal in the case of Xerox India Ltd. (supra), wherein this Tribunal has held that if service has been provided along with material and the value of material supplied cannot be vivisected, in that circumstances, appropriate classification of the service shall be works contract service and same is not taxable prior to 01.06.2007. Further it was held by this Tribunal that for the period post 01.06.2007, the maintenance and repairs and XGS services are classifiable under works contract service. Whether services under works contract service is taxable or not this Tribunal has observed has under:-

> *"We find that for the first time Section 65(105)(zzzza) set-out to tax the service as Works Contract service for levy of service tax on the works executed along with the material and the said condition is enumerated hereunder :-*
>
> > *"11. By the Finance Act, 2007, for the first time, Section 65(105)(zzzza) set out to tax the following :-*

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

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

(i) Transfer of property in goods involved in the execution of such contract is 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 air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

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

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

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

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

12. Section 67 of the Finance Act, 1994 was amended to read as follows :-

*"**Valuation of taxable services for charging Service Tax. -***

(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall, -

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner."

The Hon'ble Apex Court further examined which service is liable to be taxed under Section 65(105)(zzzza) of the Act and observed as under:-

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

> *25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.*
>
> *26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax."*

We have gone through the observations made by the Hon'ble Apex Court and the definition of Works Contract Service. The activities undertaken by M/s. Xerox under various contracts in question for Maintenance and Repair and XGS i.e. 'Business Support Service'/'Business Auxiliary Service' do not qualify as taxable service under Works Contract service, under Section 65(105)(zzzza) of Finance Act, 1994, during the period.

As the activities undertaken by M/s. Xerox under various contracts in question, is in nature of Works Contract i.e. the service has been *provided along with material and value of the material cannot be vivisected and therefore, prior to 1-6-2007 M/s. Xerox is not liable to pay service [tax] at all. For the period post 1-6-2007, as M/s. Xerox is providing services in question along with material but the same is not covered under Works Contract as per Section 65(105)(zzzza) of the Finance Act, 1994. Therefore, M/s. Xerox is not liable to pay service tax under the caterory of Maintenance and Repair service/'Business Support Service'/'Business Auxiliary Service'."*

12. Further in the case of SEW Infrastructure Ltd. (supra) this Tribunal has observed as under:-

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

21. Keeping this in mind that it has to be examined whether the work to be performed would actually fall under the category of 'site formation' service. 'Site formation' has been defined in section 65(97a) of the Finance Act in the following manner :

"(97a) site formation and clearance, excavation and earthmoving and demolition‖ includes, —

(i) drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or

(ii) soil stabilization; or

(iii) horizontal drilling for the passage of cables or drain pipes; or

(iv) land reclamation work; or

(v) contaminated top soil stripping work; or

(vi) demolition and wrecking of building, structure or road,

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

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

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

25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.

26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.

> *40. Finally, in para 31, the Delhi High Court holds :- "The contention of the petitioners that the impugned notifications override the statutory provisions contained in Section 65(105), which defines the term —taxable service‖, Section 66, which it is claimed is a charging section, and Section 67, the valuation provisions of the Finance Act, 1994, has to be rejected. We have, as already stated above, rejected the argument of the petitioners on bifurcation/vivisect and held that as per the provisions of Section 65(105)(zzq) and (zzzh), service tax is payable and chargeable on the service element of the contract for construction of industrial and commercial*

> > *complexes and contract for construction of complexes as specified and in case of a composite contract, the service element should be bifurcated and ascertained and then taxed. The contention that the petitioners are paying sales tax or VAT on material in relation to execution of the contract under composite contracts for construction of industrial/commercial complexes and construction contracts as specified under Section 65(105)(zzq) and (zzzh) therefore fails. The contention that there was/is no valid levy or the charging section is not applicable to composite contracts under clauses (zzq) and (zzzh) of Section 65(105) stands rejected. But the petitioners have rightly submitted that only the service component can be brought to tax as per provisions of Section 67 which stipulates that value of taxable service is the —gross amount charged‖ by the service provider for such services provided or to be provided by him and not the value of the goods provided by customers of service provider and the service tax cannot be charged on the value of the goods used in the contract."*
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> *43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services."*

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

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

(i) Section 65 of the Act provides for taxable services;

(ii) Section 66 of the Act provides for the charge of service tax by the person designated as —the person responsible for collecting the service tax" for the Government;

(iii) Section 67 of the Act provides for the value of taxable service which is to be subjected to 5% service tax; and

(iv) Section 68 of the Act provides for the collection and payment mechanism for service tax.

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

(a) xxxxxxxx xxxxxxxx xxxxxxxx

(b) xxxxxxxx xxxxxxxx xxxxxxxx

(c) xxxxxxxx xxxxxxxx xxxxxxxx

(d) xxxxxxxx xxxxxxxx xxxxxxxx

(e) xxxxxxxx xxxxxxxx xxxxxxxx

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

22. As already noted, the definition of works contract was brought under the service tax net as per Section 65(105)(zzzza) *of the Finance Act, 1994 by the insertion of the said definition. The said introduction was made pursuant to the Finance Act, 2007, which expressly made the service element in such works contract liable to service tax w.e.f. 1st June, 2007. By the said amendment, works contract which were indivisible and composite could be split so that only the labour and service element of such contracts would be taxed under the heading —Service Tax".*

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

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

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

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

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

13. As it has been held that post 01.06.2006 also the activity of maintenance and repairs if provided along with material, in that circumstances the appropriate classification is under works contract service and demand under the category of maintenance and repair service is not sustainable. Therefore, we hold that prior to 01.07.2012, the appellant is not liable to pay Service Tax in question. Accordingly the demand for the period prior to 01.07.2012 confirmed by the impugned orders are set aside. Accordingly, this issue is answered in favour of the Appellant.

(b) Whether the appellant is liable to pay Service Tax on the value as per Rule 2A(i) (c) of the Service Tax Valuation Rules, 2006 or Rule 2A(ii) of the Rules?

14. For better appreciation of the facts Rule 2A of the Service Tax (Determination of Value) Rules, 2006 is incorporated here as under:-

RULE [2A. Determination of value of service portion in the execution of a works contract. —

Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely :-

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods [or in goods and land or undivided share of land, as the case may be] transferred in the execution of the said works contract.

Explanation. - For the purposes of this clause,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, -

(i) labour charges for execution of the works;

(ii) amount paid to a sub-contractor for labour and services;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and

(viii) profit earned by the service provider relatable to supply of labour and services;

(c) where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause;

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely :-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

[Provided that where the amount charged for works contract includes the value of goods as well as land or undivided share of land, the service tax shall be payable on thirty per cent. of the total amount charged for the works contract.]

[(B) in case of works contract, not covered under sub-clause (A), including works contract entered into for, -

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or

(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property,

service tax shall be payable on seventy per cent. of the total amount charged for the works contract.]

15. We find that Rule 2(1)(c) prescribed that where VAT/Sales Tax has been paid or payable on actual value of the property goods transferred in execution of works contract, then the such value adopted for the purpose of payment of Value Added Tax or Sales Tax shall be taken as the value of property goods transferred in execution of the said works contract for determination of the value of the service portion in execution of the contract under the clause which means if the actual value of goods transferred is available on which VAT has been paid, the same shall be excluded from the total value of works contract service and on remaining part of the value, the Service Tax is payable. Admittedly, in the case in hand, the service has been classified under works contract service and the value of goods supplied is ascertainable on which they have paid VAT, therefore, the same has to be excluded from the value of works contract to ascertain the value of taxable service provided by the appellant. Rule 2A(c) of the Valuation Rules only applies in case the value of goods supplied was not determined under the Rule 2A of the Rules. But, in the case in hand, value of material supplied has already been ascertained and VAT has been paid thereon, in that circumstances, we hold that for the period post

01.07.2002, the taxable value is to be determined in terms of Rule 2A(i)(c) of the Valuation Rules, 2006, therefore in view of the above, this issue is also answered in favour of the Appellant.

(c) Whether in the facts and circumstances of the case extended period of limitation is invocable or not?

16. As whole case is interpretation of the provisions of Service Tax (Determination of Value) Rules, 2006 and classification of the services therefore we hold that extended period of limitation is not invocable in the facts of the present case. Accordingly, the said issue is also answered in favour of the appellant.

(d) Whether penalty can be imposed on the appellant or not?

17. In the facts and circumstances of the present case, no penalty is imposable on the appellant. Accordingly, same is answered in favour of the appellant.

In view of the above discussions, we set aside the impugned orders as all the issues have been answered in favour of the appellant, and allow the appeals filed by the appellant.

(Operative part of the order was pronounced in the open Court.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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