

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.**

Appeal No. ST/85124/2015

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-079-14-15 dated 26.09.2014 passed by Commissioner of Central Excise (Appeals), Pune)

Laxmi Associates

Appellant

S.No. 19/1, Laxmitara Market,
Tathwade Road, Dange Chowk,
Thergaon, Pune 411 033.

Vs.

Commissioner of Central Excise, Pune-I Respondent

ICE House, 41-A Sasson Road,
Opp. Wadia College,
Pune 411 001.

WITH

Appeal No. ST/85364/2015

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-088-14-15 dated 10.10.2014 passed by Commissioner of Central Excise (Appeals), Pune)

L.R. Associates

Appellant

S.No. 10/11, Laxmitara Market,
Tathwade Road, Dange Chowk,
Thergaon, Pune 411 033.

Vs.

Commissioner of Central Excise, Pune-I Respondent

ICE House, 41-A Sasson Road,
Opp. Wadia College,
Pune 411 001.

Appearance:

Shri Sagar Shah, C.A. for the Appellant

Shri O.M. Shivalikar, Authorised Representative for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. A/ **86183-86184/2019**

Date of Hearing: 09.01.2019

Date of Decision: 28.06.2019

PER: SANJIV SRIVASTAVA

These appeals as detailed below are directed against two different order in appeal of Commissioner Central Excise (Appeal) Pune 1. By both the orders Commissioner (Appeal) has upheld the order in original of the adjudicating authority. Since the issues involved in both the appeal are common and identical they have been taken up for consideration together. The details of appeals are as follows:

Appeal No	Appellant	Order in Appeal No and date
ST/85124/15	Laxmi Associates	PUN-EXCUS-001-APP-079-14-15 dtd 26.09.2014
ST/85364/15	L R Associates	PUN-EXCUS-001-APP-088-14-15 dtd 10.10.2014

2.1 The Appellants in both the appeals are engaged in providing taxable services falling under the category of “Construction of Complex Services” as defined by Section 65(105)(zzzh) of the Finance Act, 1994. Though providing taxable services at the material time they did not took registration and paid service tax. When enquiry was initiated against them they paid some amounts of service tax as is discussed in para 2.2 and 2.3.

2.2 M/s Laxmi Associates (Appellant 1) were providing the taxable services under said category from 01.07.2010. They were required to pay service along with the education and secondary and higher education cess as detailed below:

Quarter	Advance Received	Taxable Amount	Service Tax and Cesses Payable	Due Date
July-Sept 10	0	0	0	0
Oct-Dec 10	1000000	250000	25750	5.1.11
Jan-Mar 11	11185216	2796304	288019	31.3.11
Apr-June 11	13454876	3363719	346463	5.7.11

July-Sept 11	27439632	6859908	706571	5.10.11
Oct-Dec 11	31118723	7779681	801307	5.1.12
Jan-Mar 12	16734805	4183701	430921	31.3.12
Apr-June 12	22674691	5668673	700648	5.7.12
	12,36,07,943	3,09,01,986	32,99,679	

Against the above amount payable they deposited the tax along with interest as detailed below:

Challan No	Date	Service Tax	Edu Cess	SHE Cess	Interest	Total
100	9.1.12	1000000	0	0	0	1000000
11	19.1.12	424731	0	0	0	424731
279	25.4.12	145676	2914	1457	1480	151527
281	25.4.12	51144	1023	511	2857	55535
277	3.4.12	62733	0	0	0	62733
279	3.4.12	36336	0	0	0	36336
281	3.4.12	11029	0	0	0	11029
283	3.4.12	2383	0	0	0	2383
		17,34,032	3,937	1,968	4,337	17,44,274

2.3 M/s L R Associates (Appellant 1) were providing the taxable services under said category from 01.07.2010. They were required to pay service along with the education and secondary and higher education cess as detailed below:

Quarter	Advance Received	Taxable Amount	Service Tax and Cesses Payable	Due Date
July-Sept 10	0	0	0	0
Oct-Dec 10	0	0	0	5.1.11
Jan-Mar 11	0	0	0	31.3.11
Apr-June 11	275000	68750	7081	5.7.11
July-Sept 11	2315601	578900	59627	5.10.11
Oct-Dec 11	32844284	8211071	845740	5.1.12
Jan-Mar 12	51996916	12999229	1338921	31.3.12
Apr-June 12	43064276	10766069	1330686	5.7.12
July-Sept 12	9150603	2287651	282754	5.10.12
	13,96,46,680	3,49,11,670	38,64,809	

There seem to be calculation error in the Annexure A to show cause notice in Column marked CESS. Education

Cess has been computed @ 20% of Service Tax amount instead of @ 2%.

Against the above amount payable they deposited the tax along with interest as detailed below:

Chall an No	Date	Service Tax	Edu Cess	SHE Cess	Intere st	Total
9	13.1.12	500000	0	0	0	500000
267	3.4.12	1117	0	0	0	1117
266	3.4.12	5733	0	0	0	5733
		5,06,850	0	0	0	5,06,850

2.4 Accordingly a show cause notice dated 18.12.2012 was issued by Additional Commissioner to the Appellant 1 and dated 11.12.2012 to Appellant 2, demanding the tax payable under Section 73 along with interest under Section 75 and penalties under Section 76, 77 and 78 of Finance Act, 1994. Show cause notice also proposed to appropriate the tax and interest already paid against the amount of tax and interest to be confirmed.

2.5 The matters were adjudicated by the vide his order in original dated 30.09.2013 (Appellant 1) and 29.11.2013 (Appellant 2). By his order Additional Commissioner confirmed the demand of tax made against the appellants along with interest he also imposed penalties under Section 77(2) and Section 78 of the Finance Act, 1994 on the Appellants.

2.6 Aggrieved by the order of Additional Commissioner, Appellant 1 and Appellant 2 filed the appeal before Commissioner (Appeal) which were decided by the Commissioner(Appeal) vide his orders referred in para 1, supra, upholding the order of Additional Commissioner.

2.7 Aggrieved by the orders of Commissioner (Appeal) both Appellants have preferred these appeals before the tribunal.

3.1 In the appeals filed, appellants have challenged the order of Commissioner (Appeal) stating that-

i. No service tax is leviable on the part of the construction of complex constructed prior to entering into the agreement to sale with the flat buyers/ customers. They have deposited the service tax on the value of construction services provided by them after entering into sale agreement with the buyer, as any activity rendered by them in respect of the construction of complex prior to entering into agreement of sale with the buyer was the service to self.

ii. Construction of buildings/ apartments as undertaken by them is a works contract. The work contract is an indivisible contract involving supply of goods and labour. Hon'ble Supreme Court has in case of L & T Vs State Of Karnataka [303) ELT 3 (SC)] held that the activities of sale of under construction flats etc by way of entering into agreement of sale is indeed a work contract subject to VAT.

iii. Hon'ble Apex Court has also stated that such activity of builder/ developer would be classifiable as work contract only and only from the date from which the agreement to sale is entered. Prior to this date it would not be work contract. Thus in way prior to that the such an agreement it would be sale to self and not to anybody else.

iv. Tribunal has in case Precot Mills Ltd {2006 (2) STR 495 (T-Bang)} held that services provided by one unit of company to another unit of the same company is service to self and not taxable. Similar view has been expressed by the tribunal in following cases:

- ✓ L & T Ltd [2013 (32) STR 113 (T-Ahd)]
- ✓ R K B K Automobiles (P) Ltd [2013 (30) STR 502 (T-Del)]
- ✓ Chemplast Sanmar Ltd [2010 (19) STR 424 (T-Chennai)]

v. Since they entered into the agreement to sale only after completion of the part of the construction of the

project, hence in terms of the above decision of the Hon'ble Apex Court in case of L & T, the said activity cannot be made liable to service tax, for the portion of work carried out prior to the date of entering into agreement to sale.

vi. Further, in terms of Section 65 (105)(zzh), the service is a taxable service only and only if it is provided by one person to another person. Hence in terms of the definition of taxable service, if any activity of the construction is carried out prior to having any customer, then that activity cannot be said to be provided by the appellant to the customer and as such cannot be classified as taxable service.

vii. In terms of explanation inserted in the above referred section with effect from 1st July 2010, following conditions need to be cumulatively satisfied for the purpose of levy of service tax.

- a) There should be a residential complex.
- b) Construction is being done for an intended sale.
- c) Sale could be of whole/ part of complex.
- d) Intended sale could be made by the builder/ developer or his authorized person.
- e) Intention of sale could be either before construction, during or after construction. Such sale should be to the buyer.
- f) Any such sale consideration is received after receipt of the completion certificate would not be covered by the present explanation.

viii. When a construction activity is carried out by the builder/ developer not for any identified buyer, such construction activity would also fall outside the ambit of the said explanation.

ix. To the extent they had carried out the construction activity prior to having an identified customer it would be out of service tax.

x. In CBEC Circular No 108/02/2009-ST dated 29.01.2009 it has been clarified that any construction activity carried out by the builder/ developer prior to entering into the agreement to sale is a service to self. The principle outlined in the said circular shall apply in their case too.

xi. The reliance placed on circular Nop 151/2/2012-ST dated 10.02.2012 is totally uncalled for.

xii. No penalty could be imposed in the present case as the legal history makes it fairly evident that till recently there was dispute about the fact whether the builder/ developers are undertaking works contract or not. Hence whether builder/ developer is liable to VAT and Service Tax was till recently a matter of great confusion. The issue being that of legal interpretation penalty not justified as held in following cases:

- a) Color Times [2006 (3) STR 741 (T-Bang)]
- b) J P Transformers [2014 (36) STR 471 (T-Del)]
- c) Fibre Foils Ltd [2005 (190) ELT 352 (T-Mum)]
- d) R B Knit Exports [2013 (310) STR 625 (T-Del)]
- e) Gujral Distributors [2012 (28) STR 475 (T-Kol)]
- f) P Jani & Co [2010 (20) STR 701 (T-Ahmd)]

xiii. They were under a bonafide belief that service tax was not leviable on the activity carried out by them. Since they were under bonafide belief penalty should not be imposed on them as has been held in the following cases:

- a) Hindustan Steel Ltd [1978 (2) ELT (J159)(SC)]
- b) Abharan Motors Pvt Ltd [2011 (23) STR 72 (T-Bang)]
- c) Kalsis Kitchenette [2010 (20) STR 772 (T-Mum)]

xiv. All the transactions were recorded in books of account and hence they are not liable for penalty. Also there was no guilty mind or mensrea on the part of appellant and hence penalty cannot be justified as held by the Apex Court in case of Rajasthan Spinning & Weaving Mills [2009 (238) ELT 3 (SC)].

xv In any case benefit of Section 80 should have been extended as held in following decisions:

- a) Gamma Consultancy Pvt Ltd [2006 (4) STR 591 (T-Mum)]
- b) ETA Engineering Ltd [2006 (3) STR 429 (T-LB)]
- c) Vinayaka Travels [2011 (23) STR 5 (Kar)]

xvi Extended period of limitation is not available in the present case in view of following decisions:

- a) Vineet Electrical Industries Pvt Ltd [2001 (136) ELT 784 9T-Kol)] maintained in [2002 (144) ELT A292 (SC)]
- b) Janta Rubber Distributors [2000 (125) ELT 671 (T-Kol)]

xvii. The proceedings initiated by the Show Cause Notices are void ab initio as they have paid the service tax due along with interest prior to issue of show cause notice and the proceedings should have been concluded in terms of Section 73(3) and CBEC Circular No 137/167/2006-CX.4 dated 03.10.2007. Reliance is also placed on the following decisions:

- a) Neev Sai Developer [2010-TIOL-2197-CESTAT-MUM]
- b) Gupta Coal Field & Washeries [2013 (29) STR 166 (T-Mum)]
- c) Krishna Security and Detective Services [2011 (24) STR 574 (T-Ahd)]
- d) Hajarilal Jangid [2011(24) STR 510 (T-Mum)]
- e) Nischint Engineering Consultants Pvt Ltd [2010 (19) STR 276 9T-Ahd)]
- f) Addecco Flexione Workforce Solutions Ltd [2012 (26) STR 3 (Kar)]
- g) Metro Automobiles [2013-TIOL-886-CESTAT-MUM]

xviii. Demand need to re-quantified by granting the cum tax benefit, in view of decisions in case of-

- a) Srichakra Tyres Limited [1999 (108) ELT 361 (T-LB)] affirmed at {2002 (142) ELT A279 (SC)]

b) Maruti Udyog Limited [2002 (141) ELT 3 (SC)]

xix They are not required to pay any interest over and above what has been paid by them.

4.1 We have heard Shri Sagar Shah, Chartered Accountant for both the Appellants and Shri O M Shivdikar, Assistant Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the appellants learned Chartered Accountant submitted-

a) Construction of residential Complex prior to date of agreement to sale is Service to self and hence cannot be levied to service tax. {Reliance on K Raheja Development Corporation [2006 (3) STR 337 (SC)], Larsen and Toubro Limited [303 ELT 3 (SC)], Precot Mills Limited [2006 (2) STR 495 (T-Bang)], Larsen and Toubro Limited {2013 (32) STR 113 (T-Ahd)], DGST Circular issued vide F No V/DGST/22/Audit/Misc/1/2004 dated 16.02.2008, CBEC Circular No 108/02/2009-ST dated 29.01.2009, Commissioner (Appeal) Pune order OIA-PUN-EXCUS-001-APP-0157-15-16 dated 30th November 2015]

b) Service tax cannot be imposed on the portion of construction undertaken prior to 01.07.2010 in view of decision of Apex Court in case of Vazir Sultan Co Ltd [1996 (83) ELT 3 (SC)]

c) Cum tax benefit should be extended to them

d) In case of Suresh Kumar Bansal [2016 (43) STR 2 (Del)], Hon'ble Delhi High Court had stuck down the levy of service tax on composite contract of construction of residential complex service on the ground that neither section 67 of the Finance Act, 1994, which deals with valuation of services nor the Service Tax (Determination of value) Rules, 2006 provide for any machinery to ascertain the value of

services involved in relation to construction of complex, building or civil structure or part thereof.

- e) In order to provide a mechanism for valuation of works contract service where value of land is involved in the gross amount charged for services provided Rule 2A of Service Tax Valuation Rules, 2006 was amended, vide Finance Act, 2017, retrospectively to be effective from 1/7/2010 deducting the value of land to determine the value of service involved in the works contract.
- f) Services of construction of complex, building or civil structure or part thereof cannot be valued as per Rule 2A of valuation Rules, 2006 which specifically deals with the valuation of Work Contract Service, and in absence of valuation provisions to ascertain the value of services involved “construction of complex service” demand to levy Service Tax under this category cannot be upheld.
- g) Notification No 26/2012-ST dated 20.06.2012 which provides for an abatement to the value of land with respect to services in relation to construction of complex, indirectly implies that there was tax applicable on the same. However Tax on land is a subject covered under entry 49 of List II of the Constitution of India and falls under exclusive domain of state legislature, therefore it falls outside the legislative competence of the Parliament as far as levy of service tax on land is concerned. Therefore the said delegated legislation clearly traverse beyond the legislative competence of the Act. Thus the notification is per se arbitrary and has been issued without there being sufficient cause. Thus the notification under challenge does not confirm to the statute under which it is made.[reliance placed on the decision of Hon'ble Apex Court in case of Indian Express Newspapers & Others [(1985) 1 SCC 641= 1999 (110) ELT 3 (SC)]

- h) Entire dispute of invocation of extended period, penalty and interest should be settled in their favour. {SP Associates [CESTAT Order No A/90026/16/SMB dated 23.08.2016]}

4.3 Arguing for the revenue learned Authorized Representative submitted that-

- a) From the Agreement for Sale dated 26.05.2011 registered on 03.06.2011, it is evident that appellant is a builder and had constructed the complex on their own land with a intention to sale to the buyer. As such, the services provided by them are appropriately classifiable as "Construction of Complex Services" under the category 65(105)(zzzh) and not under 'Works Contract Service" in absence of any specific contract between a person who engages a builder to construct a unit for him and lack of transfer of property in goods (supply of material).
- b) The decision of Delhi High Court in case of Suresh Kumar Bansal is clearly distinguishable, because the value of land is ascertainable from the sale deed executed between the appellant and the land owners and the issue regarding valuation of the undivided share of land acquired by buyer of dwelling unit as discussed in Delhi High Court decision.
- c) Appellants have in these cases started the construction activity from Mar 2010 and had received the consideration in form of advance payment against purchase of residential units from their customers only from December 2010, i.e. after 1.07.2010.
- d) J S (TRU), DOF No 334/3/2010-TRU dated 1.07.2010 has vide para 2, clarified that any amount received after 1.07.2010 by the service provider/person liable to pay tax would be subjected to tax.
- e) CBEC has vide Circular No 151/2/2012-ST dated 10.02.2012 issued vide F No 332/13/2011-TRU

clarified that for the purpose of valuation, provisions of Section 67 of the Finance Act, 1994 will apply.

5.1 We have considered the impugned order along with submissions made in appeal, during the course of arguments and in the written submissions filed.

5.2 Appellants are providing taxable service under the category of 'Construction of Complex Services' as defined by Section 65(105) (zzzh). The services provided by them in respect of residential complexes have been brought in the taxable category with effect from 01.07.2010 by insertion of explanation to Clause (zzzh) of sub section 105 to Section 65. The relevant clauses of Section 65 are reproduced below:

"Section 65 In this Chapter, unless the context otherwise requires,

(30a) "construction of complex" means-

- (a) construction of a new residential complex or a part thereof; or*
- (b) completion and finishing services in relation to residential complex 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; or*
- (c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;*

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

- (i) a building or buildings, having more than twelve residential units;*
- (ii) a common area; and*
- (iii) any one or more of facilities or services such as park, lift, parking space, community hall,*

common water supply or effluent treatment system,

located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

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

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

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

(105) "taxable service" means any service provided, -

(zzzh) to any person, by any other person, in relation to construction of complex;

Explanation:.—For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;"

Appellants do not dispute the classification of the services provided by them under this taxable category. However in their appeal memo and during the course of argument they have contended that, the service provided by them is one of work contract, and have relied upon series of case laws to argue that in case of work contracts the VAT was

leviable. Reliance placed upon the decisions in case of K Raheja Development Corporation [2006 (3) STR 337 (SC)] and subsequent decision in case of Larsen And Toubro Limited [2014 (303) STR 3 (SC)]. On the basis of the above decisions appellants have argued that service tax could be imposed only when there are two parties to the contract, the service provider and service receiver. Hence their cannot be any liability to service tax in respect of the activities undertaken by them prior to entering into agreement of sale with the buyer.

5.3 The decisions of the Hon'ble Apex Court are in relation to VAT, relatable to the sale of goods. Further the issue under consideration is not of classification of services, whether as work contract or under the category of construction of complex services. At the material time both work contract services and construction of complex services were leviable to service tax. Since the services provided by the appellants are more specific to construction of complex services they get classified under that category which is more specific. The dispute in the present case is in relation to valuation of taxable services. Appellants have contended that in view of the above referred decisions the service tax cannot be levied in respect of activities undertaken by them prior to entering into agreement of sale with the buyer of flats.

5.4 The value for the purpose determination of the service tax payable has to be done in terms of Section 67 of the Finance Act, 1994 read with the relevant Valuation Rules, 2006. For ease of reference section 67 and relevant rules are reproduced below:

“67. (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.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation.—For the purposes of this section,—

(a) “consideration” includes any amount that is payable for the taxable services provided or to be provided;

(b) “money” includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;

(c) “gross amount charged” includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called “Suspense account” or by any other name, in the books of account of

a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.”

5.5 In terms of Notification No 1/2006-ST dated 1.03.2006 as amended by Notification No 29/2010-ST dated 22nd June 2010, the value of taxable service for the calculation of the tax payable has been prescribed at 25% of the gross receipts. The relevant portion of Notification is reproduced below:

S. No	Subclause of clause (105) of Section 65	Description of taxable service	Conditions	Percentage
10	(zzzh)	Construction of complex.	<i>This exemption shall not apply in cases where the taxable services provided are only completion and finishing services in relation to residential complex, referred to in sub-clause (b) of clause (30a) of section 65 of the Finance Act.</i> <i>Explanation.- The gross amount charged shall include the value of goods and materials supplied or provided or used for providing the taxable service by the service provider.</i>	33
10(a)	(zzzh)	Construction of Complex	<i>This exemption shall not apply in cases where the taxable services provided are only completion and finishing services in relation to residential complex, referred to in sub-clause (b) of clause (30a) of section 65 of the Finance Act.</i> <i>Explanation.- The gross amount charged shall include the value of goods and materials supplied or provided or used for providing the taxable service by the service provider.</i> <i>This exemption shall not apply in cases where the</i>	25

			<i>cost of land has been separately recovered from the buyer by the builder or his representative.</i>	
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5.6 The impact of Section 67 and the Notification No 1/2006-ST dated 1.03.2006 as amended by Notification No 29/2010-ST dated 22nd June 2010 has been explained by J S TRU vide his DOF No 334/3/2010-TRU dated 01.07.2010 in respect of these services as follows:

“6. Construction services:

6.1 In the Finance Act, changes have been made in the construction services, both commercial construction and construction of residential complex, using 'completion certificate' issued by 'competent authority'. Before the issuance of completion certificate if agreement is entered into or any payment is made for sale of complex or apartment in residential complex, service tax will be leviable on such transaction since the builder provides the construction service. Completion certificate issued by a Government authority was prescribed as demarcation by introducing an Explanation in the Finance Act. During the post budget discussions, it was pointed that practice regarding issuance of completion certificates varies from state to state. Considering the practical difficulties, the scope of the phrase 'authority competent' to issue completion certificate has been widened by issuing an order for removal of difficulty (Refer M.F.(D.R) Order No.1/2010 dated 22nd June 2010). Completion certificate issued by an architect or chartered engineer or licensed surveyor can be now taken to determine the service tax liability.

6.2 After the Budget was introduced views were expressed that the tax liability on construction sector has been tightened at a time when the sector was recovering after recession. After considering the issue, abatement available for construction of industrial or commercial complex and also residential complex has been prescribed as seventy

five per cent. This means now tax incidence will be the rate of service tax applied on twenty five per cent of gross value of commercial or residential complex or unit, broadly representing the service component in the construction, subject to conditions (Refer Notification 29/2010-Service Tax, dated 22nd June 2010). Importantly seventy five percent abatement will be applicable only if the gross value of commercial or residential complex or unit includes cost of land. Otherwise the existing rate of abatement of 67% would continue to apply.”

In our view from the above clarification there seem to be no iota of doubt with regards to the value to be taken for determination of the tax payable in respect of the services rendered by the appellants. Appellants have contended that certain portion of the works have been completed by them prior to entering into contract/ agreement of sale of the flats with the buyer. Hence no service tax can be demanded in respect of the works undertaken prior to entering into such agreement of sale. We are not in agreement with the contentions raised because the value of taxable service is not vis a vis the activity done prior to entering into contract/ agreement for sale, but is on the basis of gross amount (Consideration) received for providing the such construction of complex services. The gross consideration received cannot be vivisected into the on the basis of work done prior to and after entering into agreement for sale. If the argument advanced by the appellant was to be accepted then the taxable value for every flat sold in the same complex constructed by the appellant will vary depending on the date of agreement, though the gross amount charged for the same flat from the customer remains the same.

5.7 Hon'ble Supreme Court has in case of Larsen And Toubro [2014 (303) ELT 3 (SC)] laid down the law as follows:

101.*In light of the above discussion, we may summarise the legal position, as follows :*

(i) For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled : (one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the property in those goods must be transferred to a third party either as goods or in some other form.

(ii) For the purposes of Article 366(29A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks, etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

(iii) Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term “works contract” in Article 366(29A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29A)(b) limits the term “works contract”.

(iv) Building contracts are species of the works contract.

(v) A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

(vi) The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in

Article 366(29A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

(vii) A transfer of property in goods under clause (29A)(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

(viii) Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.

(ix) The expression "tax on the sale or purchase of goods" in Entry 54 in List II of Seventh Schedule when read with the definition clause (29A) of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

(x) Article 366(29A)(b) serves to bring transactions where essential ingredients of 'sale' defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is

deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

(xi) Taxing the sale of goods element in a works contract under Article 366(29A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods.

115.*It may, however, be clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government.*

116.*The reasons stated in the referral order for reconsideration of Raheja Development (supra) do not make out any good ground for taking a view different from what has been taken by this Court in Raheja Development (supra). We are in agreement with the submission of Mr. K.N. Bhat that since Raheja Development (supra) in May, 2005 almost all States have modified their laws in line with Raheja Development (supra) and there is no justification for change in the position settled after the decision of this Court in Raheja Development (supra).*

117.*The submission of Mr. K.N. Bhat that the view in Raheja Development (supra) that when a completed building is sold, there is no work contract and, therefore, no liability to tax is not correct statement of law, does not appeal to us. If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the*

goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser. That the building is intended for sale ultimately after construction does not make any difference.”

This decision of the Apex Court do not advance the case of the appellant any further. Hon'ble Supreme Court in case referred to by appellant as is evident that from the above decision was concerned with levy of the VAT on those goods which have been used for construction of a building. When the building was sold it was immovable property, the value of goods that had gone into construction of building could only be subject matter of VAT in view of the deeming fiction created by the Article 366(29A) of the Constitution of India. Supreme Court has held vis a vis the taxability of the goods that have changed the form, from what they were to the point of sale. Hon'ble Supreme Court has not stated that the gross amount received gets varied on this account.

5.8 In any taxing statute the measure of levy is to be determined according to the provisions of taxing statute. The measure of levy can be on the basis of actual computations of the taxable value or on the basis of proxy prescribed by the legislature after taking into consideration all the relevant facts. Hon'ble Supreme Court has in case of Bombay Tyre International [1983 (14) ELT 1896 (SC)] has dealt with the issue in great length and has concluded as follows:

“15.*As we have said, it was open to the Legislature to specify the measure for assessing the levy. The Legislature has done so. In both the old Section 4 and the new Section 4, the price charged by the manufacturer on a sale by him represents the measure. Price and sale are related concepts, and price has a definite connotation. The “value” of the excisable article has to be computed with reference to the price charged by the manufacturer, the computation being made in accordance with the terms of Section 4.*

16. *A contention was raised for some of the assesseees, that the measure was to be found by reading Section 3 with Section 4, thus drawing the ingredients of Section 3 into the exercise. We are unable to agree. We are concerned with Section 3(1), and we find nothing there which clothes the provision with a dual character, a charging provision as well as a provision defining the measure of the charge.*

17. *At this stage, it would be advantageous to refer to certain decisions which have some bearing on the proper construction of clause (a) and clause (b) of the old Section 4.*

18. *In Vacuum Oil Company v. Secretary of State for India in Council - LR 59 IA 258 = 1978 E.L.T. (J 260), the Privy Council had to construe the scope of Section 30 of the Sea Customs Act, 1878 which contained clauses (a) and (b) substantially comparable with the two clauses of the old Section 4 of the Central Excises and Salt Act. The appellants in this case manufactured different grades of lubricating oil in the United States. Large quantities of lubricating oil of particular manufacture and mark were imported into India through the port of Bombay and sold by the appellants directly to consumers. A dispute arose as to the provisions under which duty under the Sea Customs Act was attracted. Section 30 of that Act provided that for the purposes of the duty the real value should be deemed to be “(a) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold or are capable of being sold, at the time and place of importation..... or (b) where such price is not ascertainable, the cost at which goods of the like and quality could be delivered at such place,.....” The Government contended that the real value of the appellants’ oil was its “wholesale cash price” referred to in Section 30(a) a price ascertainable, without difficulty. The appellants replied that in view of the unique character of*

their oil and of the invariable course of business pursued by them in relation to its sale, a “wholesale cash price” for that oil had never existed and was not ascertainable and that therefore its real value must be determined in accordance with Section 30(b) of the Act. The Privy Council observed that there was no other oil in Bombay which could be said to be “of the like kind and quality” as the oil imported by the appellants and therefore the relevant “wholesale cash price” for the appellants, if there be such price, was to be found in the actual sales of those oils in Bombay by the appellants themselves provided that such sales had taken place. It was noted that large stocks of oil were imported at Bombay and all contracts for sale were made with reference to stocks. The oils were disposed of directly to consumers and never to dealers. The appellants themselves discharged all the functions of retailers of their oil as so sold. Besides, the selling price to consumers was about 70 per cent above the entry price, the difference representing the appellant’s retailing profit and the expenses incurred by them in respect of matters subsequent to importation. The quantities of oil purchased by individual consumers were in some cases very large indeed. The Privy Council took the view that in no sense could the price charged to consumers for the oils imported by the appellants be regarded as “a wholesale cash price”, and that therefore the case did not fall within Section 30(a) but must be regarded as attracting Section 30(b).

19.*On the other side of the line is Ford Motor Company of India Ltd. v. Secretary of State for India in Council - L.R. 65 I.A. 32 = 1978 E.L.T. (J 265), in which the Privy Council had to consider the scope of Section 30 of the Indian Sea Customs Act again. The appellants imported Ford motor vehicles into India from Canada and sold them to authorised dealers or distributors. They possessed a monopoly in India as regards the supply of such vehicles. The appellants issued from time to time a price list and the*

terms of business were that the retail price to be charged by the distributors to the public was that stated in the price list current at the time of arrival of the vehicles in India, and the price payable by the distributors to the appellants was the same price less a discount of 20 per cent. The Collector of Customs assessed customs duty on a consignment of 256 Ford motor cars under Section 30(a). The appellants contended that for the motor cars in question no wholesale cash price was ascertainable and the duty should have been assessed under Section 30(b). The Privy Council approached the case from the stand point that if a wholesale price satisfying the description contained in Section 30(a) was ascertainable, the goods could not be dealt with under Section 30(b), and in this connection they referred to the expression "ascertainable" as importing more than should be satisfied by the result of a mere estimate. The Privy council held that the appellant's price to the distributors was a wholesale price within the meaning of Section 30(a) because it was a cash price, and only discount had been deducted, and the sum payable by the distributor had been reduced to a price referable to a car in the condition in which it arrived in Bombay. It was contended for the appellants that "goods of the like kind and quality" in clause (a) was a phrase which suggested other goods than that under assessment and therefore, the price fetched by the goods themselves must be disregarded or should be considered only to see what price other similar goods would have realised. It was urged that since that test was not satisfied clause (a) could not be invoked. The Privy Council rejected the contention, observing that the application of clause (a) did not depend upon any hypothesis to the effect that at the time and place of importation an indefinite amount of further goods added to the available supply had had effect upon the wholesale price. And what is important, the Privy Council further observed : "But if there is an actual price for the goods themselves at the time and place of importation,

and if it is a "wholesale cash price, less trade discount" the clause is not inapplicable for want of sales of other goods. The clause can be applied distributively to each of the motor cars in this consignment, and even if they are regarded collectively the clause is not defeated. A particular car may be sold at a price which, having regard to other transactions in such cars, or to other circumstances, is too high or too low. In that sense, the actual price in a particular instance does not necessarily or finally establish a wholesale price to satisfy clause (a), whether the particular car or cars sold be part of the shipment in question or not. But the goods under assessment may under clause (a) be considered as members of their own class even though at the time and place of importation there are no other members. The price obtained for them may correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation."

20. *These two cases illustrate the fundamental distinction between provisions such as the two clauses of Section 4 of the Central Excises and Salt Act.*

21. *Great reliance has been placed by the assessees on two important decisions of this Court in support of the contention that only the manufacturing cost and the manufacturing profit can be taken into account for assessing the "value" of an excisable article. The first case is A.K. Roy v. Voltas Ltd. (supra). The assessee manufactured air conditioners and water coolers and sold those articles from its head office at Bombay and at branch office in different towns in the country directly to consumers at list prices. The sales so effected amounted to about 90% to 95% of its production. It also sold the articles to wholesale dealers on terms which required them to sell the products at list prices, and that the assessee would sell them the articles at the listed price less 22% discount. The assessee contended before the excise*

authorities that the list price minus 22% discount allowed to the wholesale dealers would constitute the “wholesale cash price” for ascertaining the real value of the articles. The contention was accepted by the excise authorities, and assessments were made on that basis. Subsequently, the Superintendent of Central Excise began to assess the duty on the basis of the retail price and not the wholesale cash price. The case was taken by writ petition to the High Court, which held that the duty fell to be assessed under the old Section 4(a) of the Central Excises and Salt Act on the basis of the wholesale cash price payable by the wholesale dealers, and not under Section 4(b) on the basis of the price of retail sales effected directly to the consumers. The case was brought in appeal to this Court. The Court observed that for the purposes of Section 4(a), it was not necessary for a wholesale market to exist in the physical sense of the term where articles of a like kind or quality are or could be sold. A wholesale market, it was observed, could also mean “the potentiality of the articles being sold on a wholesale basis”. What was necessary was that the articles could be sold wholesale to traders. It was observed further that the application of Section 4(a) of the Act did not depend upon any hypothesis to the effect that at the time and place of sale any further articles of the like kind and quality should have been sold. If there was an actual price for the goods themselves at the time and place of sale and if that was a ‘wholesale cash price’, the clause was not inapplicable for want of sale of other goods of a like kind and quality. Later follow the words, which have brought on the present controversy :

“Excise is a tax on the production and manufacture of goods (see Union of India v. Delhi Cloth and General Mills (supra). Section 4 of the Act therefore provides that the real value should be found after deducting the selling cost and selling profit and that the real value can include only the manufacturing cost and the manufacturing profit. The

section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation, namely selling profit.”

Those observations were made when the Court was examining the meaning of the expression “wholesale cash price”. What the Court intended to say was that the entire cost of the article to the manufacturer (which would include various items of expense composing the value of the article) plus his profit on the manufactured article (which would have to take into account the deduction of 22% allowed as discount) would constitute the real value had to be arrived at after off-loading the discount of 22%, which in fact represented the wholesale dealer’s profit. A careful reading of the judgment will show that there was no issue inviting the Court’s decision on the point now raised in these cases by the assesseees.

The other case is Atic Industries Ltd. v. H.H. Dave, Asst. Collector of Central Excise and Ors., - (1975) 3 S.C.R. 563 = 1978 E.L.T. (J 444). The appellant, Atic Industries Ltd., was a manufacturer of dye stuffs. It sold its products to two wholesale buyers, 70% of its total production to one and 30% to the other. The price charged was a uniform price described as the “basic selling price” less a trade discount of 18%. The wholesale dealers in turn resold the dye stuffs to distributors and also directly to large consumers, including textile mills. The large consumers paid the basic selling price, while the distributors paid a higher price but subject to a trade discount. The distributors sold the product to consumers. The question arose as to how the value of the dye stuffs manufactured by the appellants should be determined under Section 4. The appellants contended that the value should be the price at which the appellants sold in wholesale to the two wholesale buyers, less a uniform trade discount of 18%.

The excise authorities took the view that the value should be the price at which the wholesale buyers had sold the dye stuffs to the distributors without taking into account the discount given to the distributors. Before this Court, the excise authorities pressed the same contention, urging that Section 4(a) did not provide that in every case the wholesale price charged by the manufacturer should be taken into consideration and not the wholesale price charted by the wholesale buyers who sold the product also in wholesale to the next buyers. One of us (Bhagwati J.) spoke for the Court in that case, and delivered a closely enunciated and lucid exposition of the true legal position. It was explained :

“The value of the goods for the purpose of excise must take into account only the manufacturing cost and the manufacturing profit and it must not be loaded with post-manufacturing cost or profit arising from post-manufacturing operation. The price charged by the manufacturer for sale of the goods in wholesale would, therefore, represent the real value of the goods for the purpose of assessment of excise duty. If the price charged by the wholesale dealer who purchases the goods from the manufacturer and sells them in wholesale to another dealer were taken as the value of the goods, it would include not only the manufacturing cost and the manufacturing profit of the manufacturer but also the wholesale dealer’s selling cost and selling profit and that would be wholly incompatible with the nature of excise. It may be noted that wholesale market in a particular type of goods may be in several tiers and the goods may reach the consumer after a series of wholesale transactions. In fact the more common and less expensive the goods, there would be greater possibility of more than one tier of wholesale transactions. For instance, in a textile trade, a manufacturer may sell his entire production to a single wholesale dealer and the later may in his turn sell the

goods purchased by him from the manufacturer to different wholesale dealers at state level, and they may in their turn sell the goods to wholesale dealers at the district level and from the wholesale dealers at the district level the goods may pass by sale to wholesale dealers at the city level and then, ultimately from the wholesale dealers at the city level, the goods may reach the consumers. The only relevant price for assessment of value of the goods for the purpose of excise in such a case would be the wholesale cash price which the manufacturer receives from sale to the first wholesale dealer, that is, when the goods first enter the stream of trade. Once the goods have entered the stream of trade and are on their onward journey to the consumer, whether along a short or a long course depending on the nature of the goods and the conditions of the trade, excise is not concerned with what happens subsequently to the goods. It is the first immediate contact between the manufacturer and the trade that is made decisive for determining the wholesale cash price which is to be the measure of the value of the goods for the purpose of excise. The second or subsequent price, even though on wholesale basis, is not material. If excise were levied on the basis of second or subsequent wholesale price, it would load the price with a post-manufacturing element, namely, selling cost and selling profit of the wholesale dealer. That would be plainly contrary to the true nature of excise as explained in the Voltas' case (supra). Secondly, this would also violate the concept of the factory gate sale which is the basis of determination of value of the goods for the purpose of excise.

There can, therefore, be no doubt that where a manufacturer sells the goods manufactured by him in wholesale to a wholesale dealer at arm's length and in the usual course of business, the wholesale cash price charged by him to the wholesale dealer less trade discount would

represent the value of the goods for the purpose of assessment of excise. That would be the wholesale cash price for which the goods are sold at the factory gate within the meaning of Section 4(a). The price received by the wholesale dealer who purchases the goods from the manufacturer and in his turn sells the same in wholesale to other dealers would be irrelevant to the determination of the value and the goods would not be chargeable to excise on that basis."

23.*This case also does not support the case of the assessee. When it refers to post-manufacturing expenses and post-manufacturing profit arising from post-manufacturing operations, it clearly intends to refer not to the expenses and profits pertaining to the sale transactions effected by the manufacturer but to those pertaining to the subsequent sale transactions effected by the wholesale buyers in favour of other dealers.*

24.*Having explained the true scope of Voltas Ltd. (supra) and Atic Ltd. (supra), we may now proceed directly to the consideration of certain aspects of the provisions of the old Section 4. There has been serious argument on the question whether Section 4(a) provides for the value of the assessee's excisable article being determined on the basis of the wholesale cash price charged or chargeable for articles of the like kind and quality sold by manufacturers generally or on the basis of the wholesale cash price for articles of the like and quality sold by the assessee. At first blush, it would seem that the former construction should be accepted, and indeed some support can be derived for that view from the observations of the Privy Council in Vacuum Oil Co. (supra), where the "wholesale cash price" mentioned in Section 30(a) of the Sea Customs Act, 1878, was construed to mean "that price current for staple articles, the amount of which, if not a subject of daily publication in the press, is easily ascertainable in appropriate trade circles". But this general observation can*

be of no help to the assesseees, because since then, the courts have proceeded to make the position amply clear. The problem presented itself again to the Privy Council in Ford Motor Co. of India Ltd. (supra), and while taking note of what it had said in the earlier case, the Privy Council laid down that where the excisable goods constituted a class of their own and it was not possible to say that other manufacturers produced goods of that kind and quality, the goods under assessment could be considered as members of their own class for the purpose of Section 30(a) even though at the time and place of importation there were no other members. The price obtained for them, it was said, would correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation. Then in Voltas Ltd. (supra), this Court observed that the application of Section 4(a) of the Central Excises and Salt Act did not depend upon any hypothesis to the effect that at the time and place of sale, any further articles of like kind and quality should have been sold. If there was an actual price for the goods themselves at the time and place of sale and if that was a "wholesale cash price", the clause was not inapplicable for want of sale of other goods of a like kind and quality. It seems to us that the more practical way of looking at the problem is that there are very few cases indeed where two manufacturers produce an article of the like kind and quality. An instance has been supplied by learned Counsel for the assesseees, and we are referred to the case of a factory which manufactures identical electric bulbs for supply to a number of companies who sell them in the market under their own distinctive trade name. While such examples are possible, we are inclined to accept the statement of the learned Solicitor General that goods manufactured by different manufacturers generally differ in both kind and quality. Further, the manufacturing and other costs would vary from one manufacturer to another, depending on the efficiency of manufacturing techniques

and management methods employed. Other important considerations are certainty and convenience in the administration of the levy from the view-point of both the assessee and the Revenue. There is the further consideration that the wholesale cash price charged by the assessee must be ascertained on the basis that the sale to the wholesale dealer is at arm's length. We are, therefore, of the view that we should prefer the construction suggested by the Revenue, that Section 4(a) applies to the goods manufactured by the assessee himself. We may also point out that this conclusion is in accord with the general intent expressed in the new Section 4(i)(a), and as we shall show presently it is the case of both the assesseees and the Revenue that in enacting the new Section 4 in supersession of the old section, no material departure was intended from the basic scheme for determining the value of the excisable article.

25.*Accordingly, we hold that pursuant to the old Section 4(a) the value of an excisable article for the purpose of the excise levy should be taken to be the price at which the excisable article is sold by the assessee to a buyer at arm's length in the course of wholesale trade at the time and place of removal. Where, however, the excisable article is not sold by the assessee in wholesale trade but, for example, is consumed by the assessee in his own industry the case is one where under the old Section 4(a) the value must be determined as the price at which the excisable article or an article of the like kind and quality is capable of being sold in wholesale trade at the time and place of removal.*

All the contentions raised by the appellant in respect of prescription of measure of levy and the notification issued being in excess of delegated legislation have been considered and rejected by the Hon'ble Supreme court in this decision. In the present case when the measure of levy has been prescribed to be based on 25% of the Gross

Receipts then the same cannot be questioned on the basis of considerations such quantum of completed work before the agreement to sell. We are clear in our mind that as per the measure prescribed the value of taxable service in this category has to be 25% of the gross receipts. Notification 1/2006-ST as amended by the Notification 29/2010-ST very clearly lays down the condition of exemption and provides that if the

- ✓ gross amount includes the cost of land and the cost of land is not determined and charged separately then taxable value shall be 25% of gross receipt; and
- ✓ in case the cost of land is determined separately charged separately, then the taxable value will be 33% of the gross amount.

This is clearly what has been explained by the J S (TRU) in his letter dated 1.07.2010. In case of person claiming taxable value to be 25% of the gross amount, the question of determination of cost of land is irrelevant and the decision of Delhi High Court in case of Sarwan Kumar Bansal relied upon by the appellant will not be applicable. In case of Venus Castings [2000 (117) ELT 273 (SC)], Hon'ble Supreme Court while upholding the Constitutional Validity of similar optional scheme held as follows:

“10. The schemes contained in Section 3A(4) of the Act and Rule 96ZO(3) or Rule 96ZP(3) of the Excise Rules are two alternative procedures to be adopted at the option of the assessee. Thus the two procedures do not clash with each other. If the assessee opts for procedure under Rule 96ZO(1) he may opt out of the procedure under Rule 96ZO(3) for a subsequent period and seek the determination of annual capacity of production. An assessee cannot have a hybrid procedure of combining the procedure under Rule 96ZO(1) to which Section 3A(4) of the Act is attracted. The claim by the respondents is a hybrid procedure of taking advantage of the payment of

lump sum on the basis of total furnace capacity and not on the basis of actual capacity of production. Such a procedure cannot be adopted at all, for the two procedures are alternative schemes of payment of tax.

11. *The learned Counsel for the respondent contended that the Rule 96ZO(3) is contrary to Section 3A(4) of the Act and, therefore, should be held to be ultra vires or read the relevant rules in such a manner as to allow the procedure prescribed under the provisions of Section 3A(4) to be followed. Section 3A of the Act provides for levy and collection of the tax arising under the Act in such manner and at such rate as may be prescribed by the Rules. Section 3A provides special procedure in respect of the power of the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. If such interpretation is not accepted, it is contended, that the levy of tax is in the nature of a licence fee and not on production of goods at all. Schemes of composition are available in several other enactments including the Sales Tax Act and the Entertainment Tax [See : State of Kerala & Anr. v. Builders Association of India & Ors., 1997 (2) SCC 183]. In this context, the learned Counsel for the respondents referred to several decisions. However, in our opinion, all these decisions either arising under the Income Tax Act in relation to special mode of collection of tax or excise duty on timber dealers or other enactments have no relevance. What can be seen is that the charge under the Section is clearly on production of the goods but the measure of tax is dependent on either actual production of goods or on some other basis. The incidence of tax is, therefore, on the production of goods. It cannot be said that collection of tax based on the annual furnace capacity is not relatable to the production of goods and does not carry the purpose of the Act. In holding whether a relevant rule to be ultra vires it becomes necessary to take into consideration the*

purpose of the enactment as a whole, starting from the preamble to the last provision thereto. If the entire enactment is read as a whole indicates the purpose and that purpose is carried out by the rules, the same cannot be stated to be ultra vires of the provisions of the enactment. Therefore, it is made clear that the manufacturers, if they have availed of the procedure under Rule 96ZO(3) at their option, cannot claim the benefit of determination of production capacity under Section 3A(4) of the Act which is specifically excluded. We find that the view taken by the Andhra Pradesh high Court in Sathawahana Steels & Alloys (P) Ltd. v. Government of India (supra) and the similar view expressed by the Division Bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No. 1127 of 1999 M/s. Jalan Castings (P) Ltd. v. Commissioner of Central Excise & Ors. disposed of on February 28, 2000 is reasonable and correct. We overrule the view taken by the Allahabad High Court in Pravesh Castings (P) Ltd., Kanpur Nagar v. Commissioner of Central Excise, Allahabad & Anr. (supra).

12. *On the reasoning adopted by us and bearing in mind that in taxation measures composition schemes are not unknown and when such scheme is availed of by the assessee it is not at all permissible for him to turn around and ask for regular assessment, we think, there is no substance in the contention urged on behalf of the respondents.”*

5.8 Appellants have contested the demand on limitation and have stated that they

- were under a bonafide belief that their activities undertaken by them are not taxable;
- There was dispute in respect of levability to service tax and the constitutional validity was also under challenge.

We do not find much merits in such submission as in our view the provisions in law and clarifications issued by the authorities on the subject were quite elaborate and clear. Disputes cannot be in respect of the levy but can only with reference to some view being taken. The appellants claim that levy itself was being disputed. Levy being disputed implies the challenge to the power of Parliament to levy tax and it in itself admits that tax has been levied. The difference between dispute and contested levy is quite evident.

Further bonafides cannot be in vacuum but have to be based on firm ground. In this case when the issue had been clarified by J S TRU vide his letter dated 1st July 2010 we do not see any reason for entertaining the claim of the appellant that were under bonafide belief. It is now a settled principle that if the bonafide belief etc., is to be claimed by the appellant then it should be on the basis factual understanding. Reliance place by the appellant on various decisions of the tribunal do not help the cause of appellant. In case of Continental Drugs Company [2015 (39) STR 154 (T-Mum)] following has been held:

“5.2 As regards the claim of the appellant that they had not suppressed any facts and therefore, extended period time cannot be invoked, the appellant has not brought on record any evidence to prove their bona fides. Bona fide belief is not blind belief but has to be based on reasonable measures taken to entertain such belief. There is nothing in the records to show that the appellant consulted either the department or obtained any legal opinion as their liability towards service tax. In the absence of any such evidence, it is difficult to accept this contention. Inasmuch as the appellant did not obtain any registration nor did they follow any of the statutory procedures, the appellant had clearly suppressed the facts from the department with an intent to evade service tax. In these circumstances, the confirmation of duty demand

invoking the extended period of time along with interest thereon cannot be faulted. Consequently, the appellant is also liable to penalty under the provisions of the Finance Act, 1994.”

In case of Kala Sagar [2015 (138) STR 1015 (T-Mum)] following has been held:

“14. *I have considered the submissions of both sides as also the orders recorded by my two learned brothers. Extended period of limitation is invoked under the proviso to Section 73(1) of the Finance Act. The said proviso reads as under :-*

“PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of -

- (a) fraud; or*
- (b) collusion; or*
- (c) wilful misstatement; or*
- (d) suppression of facts; or*
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,*

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words “one year”, the words “five years” had been substituted.”

There can be no doubt that for invoking the proviso to Section 73(1), one or more of the five situations enumerated in the said proviso is required to be satisfied in the case. In the present case, the undisputed facts are that the appellant has not taken the service tax registration nor filed any service tax return or paid any service tax. Taking of the registration, filing of the return and payment of service tax are the requirements under the Finance Act, 1994/Service Tax Rules. These documents

only provide the facts, information and other details about the activities of a service provider to the service tax authorities. Therefore, under the circumstances there can be no doubt that there was suppression of facts and also contravention of various provisions of the Service Tax Law. The main contention of the learned Advocate is based upon bona fide belief, interpretation of the statute, knowledge of the department and revenue neutrality. I find that none of these concepts find any mention in the said proviso. The Hon'ble High Court of Gujarat in the case of Neminath Fabrics [2010 (256) E.L.T. 369 (Guj.)] [quoted by learned Member (Technical)] has held as follows :-

“The termini from which the period of “one year” or “five years” has to be computed is the relevant date which has been defined in sub-section (3)(ii) of Section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of Section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.”

The above observation of the Hon'ble High Court is with reference to the knowledge of the department. However, I find the similar thing would be applicable not only to the knowledge to the department but to the bona fide belief or interpretation of statute or to the revenue neutrality. All the four concepts are not mentioned in the proviso to Section 73 and, therefore, as observed by the Hon'ble High Court, import of such concept in proviso to Section 73 of the Act or the proviso thereunder would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any court leave alone the statutory provision. These can at the most have

in some cases impact on determining the five situations enumerated in proviso to Section 73. Even for sake of argument, if it is assumed that these are relevant, even then the appellant's arguments have no merits. The first reason quoted for bona fide belief is that Section 65(25b) is applicable to construction of new building. The word "new" or "old" is not mentioned in the said definition. In fact a plain reading of clauses (c) and (d) would clearly indicate that the said clauses are applicable to the activities being carried out by the appellant. In fact there can be no doubt for this to a layman or persons engaged in the field of such services. Repair or renovation are not carried out in new building. Similarly, repair and renovation are always carried out in part of building. In fact, interpretation suggested will make entries redundant. The other reason quoted is that the appellant was paying VAT on the same amount. It is noted that the appellant was paying VAT as works contract. Works contract by very nature consists of two parts i.e. supply of goods and material and services. While providing the services, the material also gets consumed and both the services and material are handed over to the recipient. The fact that the appellant was paying VAT under works contract would indicate that they were providing some service. Obviously, the appellant should have kept track whether their service would, at any time, become a taxable service. The least that could have been expected was that the appellant start paying service tax after the introduction of works contract service under the Service Tax Law. Even this was not done. The other reason advanced is that there was excise litigation with respect to same activity. The appellant was litigating and not agreeing that their activity amounts to manufacture and, therefore, is not chargeable to excise duty should have made them believe that their activities involve services and would be liable to payment of service tax. In view of this position, I do not find any merit whatsoever in the appellant's contention that they had

bona fide belief. In fact, conduct only indicates wilful intention. As far as their contention relating to interpretation of statute, the first contention is that initially the department raised the demand on the said activity on various assessees under 'interior decorator service' and later on under 'commercial or industrial construction service'. Thus, there was difference of opinion within the department itself. I find that this argument is not correct. 'Interior decorator service' was introduced in 1998 much before the introduction of 'commercial or industrial construction service' (in 2005). There are entities who only provide the advice consultancy relating to interior decoration. There are also entities which not only provide the advice consultancy but also execute such advice consultancy. Therefore, it was natural that the department in the initial phases was also trying to cover both types of entities under the interior decorator service. However, after the introduction of 'commercial or industrial construction service', the executory activity was specifically listed therein and this dispute vanished. The period under dispute is after the introduction of commercial or industrial construction service under which there was no difference of opinion within the department. As far as covering the activity under the Central Excise Act, 1944 is concerned, the very fact that the appellant was disputing that their activity does not amount to manufacturing furniture and hence not liable to excise duty should lead them to believe that the said activity also involves services and would get covered under Service Tax. In view of this position, I do not find any substance in the contention of the learned Advocate that the issue involved is interpretation of statute. From 2005 onwards, after the introduction of 'commercial or industrial construction service', the activities of the appellant are very specifically covered under the said provision and there can be no two opinions about the coverage of the same after 2005 whatever the difference of opinion or

anything can be is for the period prior to 2005. As far as knowledge of the department is concerned, I agree with the learned AR that the Service Tax Law and Excise Law are two different laws and are implemented by two different set of officers having their own jurisdictions and enforcing the respective laws. The appellant has not shown any evidence whatsoever that the jurisdictional Service Tax officials were informed about the activities of the appellant and, therefore, they were fully aware about them. The jurisdictional Central Excise officials may be aware of the ongoing litigation but there is no evidence to indicate that the Service Tax officials were aware of appellant's activities. On the contrary, the appellant would be knowing the same and should have approached the Service Tax official for registration and inform of all the facts relating to their activities. The last contention is relating to revenue neutrality. I do not find any substance whatsoever in the argument of the learned Advocate. If such a theory is accepted, it will lead to a situation wherein the final consumer of goods or services only should be taxed or charged and all other irregularities by various manufacturers or service providers would become non-taxable. It is also noted that service tax authorities issued summons in February 2006 but appellant did not co-operate. Appellant also did not take registration. It was only in 2010, after lot of persistence that details could be obtained. Conduct of the appellant cannot be considered as bona fide."

Tribunal has in case of Balaji Society [2015 (38) ELT 139 (T-Mum)] held as follows:

"5.9Further, we observe that though the appellant has claimed bona fide belief, no material has been placed before us, either by way of expert opinion or otherwise, as to the basis for entertaining such belief. A belief can be said to be bona fide only when it is formed after all reasonable considerations are taken into account

as held by this Tribunal in the case of Interscape v. Commissioner of Central Excise, Mumbai-I - 2006 (198) E.L.T. 275 (Tri.-Mum.). In Winner Systems - 2005 (191) E.L.T. 1051 (Tri.-Mum.), it was held that blind belief cannot be a substitute for bona fide belief. Therefore, we do not accept the plea of bona fide belief claimed by the appellant. Consequently the demand of Service Tax confirmed in the impugned order is clearly sustainable in law and we hold accordingly. Once the demand for tax is upheld, the demand for interest thereon is automatic and consequential. Accordingly we uphold the demand for interest on the Service Tax demand confirmed."

Further in case of Board of Cricket Control of India [2015 (37) ELT 785 (T-Mum)] tribunal held-

"6.10 *The next issue pertains to the time bar aspect raised by the appellant. This would arise only in the case of the show cause notice, dated 15-10-2009 as the demands in the other notices appear to be within the normal period of limitation. It is not the case of the appellant that the appellant took registration and gave details of the various contracts entered into to the department. The details of the services received from the non-resident service providers and the consideration paid therefore, was never declared to the department in the statutory returns filed by BCCI. In terms of the provisions of Section 66A read with Section 68 of the Finance Act, 1994, the appellant BCCI was the person responsible for paying Service Tax and it was their duty to comply with the statutory requirements which they failed to do. Both in the show cause notices as well as in the impugned orders, the fact of suppression/withholding of information has been examined and discussed at length. Only after the commencement of the investigation by the department, the true nature of the various transactions undertaken by the appellant came to light. Information relating to the transactions were given to the department in August 2009 and thereafter. After*

completion of investigation, the show cause notices were issued without any undue delay. In these circumstances, invocation of extended period of time cannot be faulted at all. There has been no undue delay on the part of the department either in completing the investigation or in issue of the show cause notices. Further, we observe that though the appellant has claimed bona fide belief, no material has been placed before us, either by way of expert opinion or otherwise, as to the basis for entertaining such belief. A belief can be said to be bona fide only when it is formed after all reasonable considerations are taken into account as held by this Tribunal in the case of *Interscape v. Commissioner of Central Excise, Mumbai-I* - 2006 (198) E.L.T. 275 (Tri.-Mum). In *Winner Systems* - 2005 (191) E.L.T. 1051 (Tri.-Mum), it was held that blind belief cannot be a substitute for bona fide belief. Therefore, we do not accept the plea of bona fide belief claimed by the appellant. Consequently the demand of Service Tax confirmed in the impugned order is clearly sustainable in law and we hold accordingly. In the absence of taking a registration and in the absence of filing any returns statutorily prescribed, it is the date of knowledge of the department that is relevant for determination of time limit. In *Commissioner of Central Excise, Visakhapatnam v. M/s. Mehta & Co.* - 2011-TIOL-17-S.C.-CX = 2011 (264) E.L.T. 481 (S.C.), the Hon'ble Apex Court has held as follows :-

"24. The cause of action, i.e., date of knowledge could be attributed to the appellant in the year 1997 when in compliance of the memo issued by the appellant and also the summons issued, the hotel furnished its reply setting out the details of the work done by the appellant amounting to Rs. 991.66 lakhs and at that stage only the department came to know that the work order was to carry out the job for furniture also. A bare perusal of the records shows that the aforesaid reply was sent by the respondent

on receipt of a letter issued by the Commissioner of Central Excise on 27-2-1997. If the period of limitation of five years is computed from the aforesaid date, the show cause notice having been issued on 15-5-2000, the demand made was clearly within the period of limitation as prescribed, which is five years.”

If we apply the ratio of the above decision to the facts of the present case, it is seen that the show cause notices have been issued well within the period of five years from the date of knowledge and, therefore, the contention that the notices are hit by time bar is clearly unsustainable in law and we hold accordingly. The reliance placed by the appellants on the various decisions are of no avail as in the present case there is deliberate withholding of information.”

In view of the above decision and the fact that appellants had failed to take registration, pay taxes due and file the service tax returns in time we do not find any merits in the submissions made by the appellant in respect of invocation of extended period of limitation. It is also pointed out that relevant defined in terms of Section 73 of Finance Act, 1994 is as follows:

“(6) For the purposes of this section, "relevant date" means,-

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid –

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

- (c) *in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;*
- (ii);
- (iii)”

As per the show cause notice appellants have filed the returns on the dates as indicated in below:

Period	Date of Filing the Return	
	Appellant 1	Appellant 2
Oct 10 - Mar 11	01.03.2012	
Apr 11 –Sept 11	29.02.2012	29.02.2012
Oct 11-Mar 12	05.05.2012	05.05.2012
Date of SCN	18.12.2012	11.12.2012

As is evident from the above table show cause notices have been issued within a period of one year from the date of filing the returns, hence even without invoking the extended period of limitation the demand would not be hit by limitation.

5.9 Hence we have no hesitation in upholding the demands of service tax made. However in respect of the Appellant 2, the demand needs to be reworked taking into account our observation made in para 2 in respect of the computation of demand.

5.10 Since we have upheld the demand of Service Tax the demand of interest will follow. In case of P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)] Hon’ble Bombay High Court has stated as follows:

“10. So far as interest u/s. 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central

Government by notification in the Official Gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable u/s. 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest u/s. 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied/short paid/non-levied/unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of sub-section (1) of Section 11, which runs thus :

“Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under sub-section (2) or has paid the duty under sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate”

The terminal part in the quotation above, which is couched with the words “shall” and “be liable” clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional.”

Thus we uphold the demand of interest under Section 75 of the Finance Act, 1994. For upholding the demand of interest we also rely on the following decisions

- i. Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]
- ii. TCP Limited [2006 (1) STR 134 (T-Ahd)]
- iii. Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]

iv. Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)]

5.11 Since service tax has been demanded invoking extended period of limitation under Section 73 of Finance Act, 1994, penalty under Section 78 will follow as has been held by the Hon'ble Apex Court in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)] and Dharmendra Textile Processors [2008 (231) ELT 3 (SC)].

5.12 Penalties under 77 of Finance Act, 1994 are in nature of civil penalties and are imposed in cases where the person who by his act of omission or commission has failed to fulfill the obligations cast on him under the statute. By not furnishing the correct information as required on ST-3, appellants have made themselves liable to penalty under Section 77(2) read with Section 70 of the Act. Hence the penalties imposed upon by the adjudicating authority are upheld.

5.13 We also find no reason to uphold the claim of Appellants for closure of proceedings initiated against them for the reason they had paid certain amounts before issuance of show cause notice when the demand is made invoking the provision of Section 73(4). In his order adjudicating authority had give the appellants as available under Section 78, to pay the amount of tax confirmed along with interest and 25% of the penalty imposed. It was for the appellants to chose whether they wished to avail the said option.

5.13 We do not find any merits in the claim of the appellants for waiver of penalty under Section 80. Section 80 of the Finance Act, 1994 is not the licence to condone the irregularities in the payment of taxes and filing of the returns. It was provided to remove the genuine difficulties that tax payers would have encountered during the initial implementation of tax regime on services. The scheme of taxation of services was introduced in 1994 and the case

under consideration is for period July 2012 to 2014. Thus we do not find any merits in such submissions.

6.1 In view of discussions as above:

(i) Appeal of Appellant 1 is dismissed.

Appeal of Appellant 2 is disposed subject to the consequential modifications in the impugned order, on account of wrong computation of Education Cess in show cause notice. The demand of tax and penalty under section 78 of Finance Act, 1994 stand modified accordingly.

(Order pronounced in the open court on 28.06.2019)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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