CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No: 88296 of 2014

[Arising out of Order-in-Original No: 199-201/MAK(199-201) COMMR/RGD/ 2013-14 dated 31st March 2014 passed by the Commissioner of Central Excise, Customs & Service Tax), Raigad.]

APM Terminals India Pvt Ltd … ***Appellant***
(Equipment, Maintenance and Repair Division)
Sangurli Phata, Shirdhon, Mumbai-Goa Highway,
Panvel, Raigad – 410 222

versus

Commissioner of Central Excise …***Respondent***
Raigad
4th Floor, Utpad Shuilk Bhawan, Plot No.1, Sector – 17
Khandeshwar, Navi Mumbai – 410 206

APPEARANCE:

Shri Vipin Kumar Jain with Shri Ramnath Prabhu, Advocates for the appellant

Shri KM Mondal, Special Counsel for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/87503 / 2019

DATE OF HEARING: 04/06/2019
DATE OF DECISION: 29/11/2019

PER: C J MATHEW

It is not unusual that an order impugned before us may, owing to the elapse of time since filing of appeal, involve arguments from the appellant and Revenue that are on different planes; often enough, judicial enlightenment in the *interregnum* places the respondent in a situation of having to defend, in the changed circumstances, findings of the lower authorities in the absence of legal support relied upon therein. The present proceedings, in our view, is one such that requires us to delve, at length, into the impugned order.

2. The appellant herein, M/s APM Terminals India Pvt Ltd, carries on various business activities of which we are concerned with 'maintenance, management or repair services' undertaken by their Equipment, Maintenance and Repair Division for the shipping line of the AP Moller-Maersk Group whose containers may undergo damage while being handled or during voyages. They are contracted examine each container and, on the basis of survey of damages, submit an estimate of the cost of materials and of labour which, upon approval, is converted into a purchase order and, subsequently, into separate invoices for both. Normally, steel sheets, wood, steel articles, compressors and similar parts of refrigerated containers are utilised for effecting repairs. It is common ground that liability, as provider of 'management, maintenance or repair' service, taxable under section 65(105)(zzg) of Finance Act, 1994, is discharged on the labour component of the contracted activity. The appellant was proceeded against in three show cause notices dated 12th October 2010 for the period from 2005-06 to 2009-10, dated 14th October 2011 for 2010-11

and dated 9th October 2012 for 2011-12 to recover amounts collected towards materials utilised in rendering the service. All three were adjudicated in a single order-in-original no. 199-201/MAK (199-201)/COMMR/RGD/2013-14 dated 31st March 2014 by Commissioner of Central Excise, Customs & Service Tax, Raigad confirming demand of ₹ 13,75,68,767 under section 73 of Finance Act, 1994, along with applicable interest under section 75 of Finance Act, 1994, besides imposing penalties under section 78 and section 76 of Finance Act, 1994.

3. The submissions made by Learned Counsel for appellant are, save for the decisions handed down since then, not much different than that pleaded before the adjudicating authority and, it would appear that, aggrieved by the discarding of these, quashing of the impugned order is being sought. For the sake of record, it behoves us to recall the contours of the defence put forth then and the counters adopted by the adjudicating authority to negate the contentions. We would, thereafter, adjudge the applicability of the decisions cited by Learned Counsel to the findings arrived at in the impugned order.

4. The primary claim of the appellant was that the activity undertaken falls within the purview of ‘works contract’, which having been constitutionally earmarked as ‘deemed sale’, is beyond the pale of taxation under List I of the Seventh Schedule of the Constitution of India. According to Learned Counsel, this circumstance, even in the

context of non-levy of tax on sale owing exclusion of export, does not detract from the constitutional constraint of taxing the consideration thereof. A further submission was that notification no. 12/2003-ST dated 20th June 2003, providing for abatement of materials supplied along with services subject to specified conditions, had been complied with to render the proceedings untenable.

5. From a perusal of the impugned order, we gather that the adjudicating authority has not clearly appreciated the substantive difference between the claim of having undertaken 'works contract' and the finding that the impugned activity was not covered by the definition of 'works contract service' taxable under section 65(105)(zzzza) of Finance Act, 1994. From that negation to the conforming of the activity, both by having discharged liability on a portion of the consideration and by testing against the definition in section 65 (64) of Finance Act, 1994, was but, in the view of the adjudicating authority, the next logical step. And on the invoking of section 67 of Finance Act, 1994 for adding the material cost to the '*gross amount charged' by the service provider for the service provided* hangs a tale.

6. According to Learned Special Counsel for Revenue, the claim of alternate classification as 'works contract service' had been properly discarded by the adjudicating authority leaving no option but to subject the entire activity to tax as 'management, maintenance or repair' and the consideration thereof to encompass cost of every input and input

service deployed for the purpose. Drawing attention to master circular no. 96/7/2007 dated 23 August 2007 of Central Board of Excise & Customs, he endorsed the determination of tax liability ordered by the adjudicating authority. Supporting the finding that abatement of material cost attendant upon such taxable service is not an entitlement owing to absence of evidence of discharge of the liability on sale of such material, he pointed out that breach of this essential condition in notification no. 12/2003-ST dated 20th June 2003 sufficed for confirmation of demand in full. The purportedly logical and legally sound disposal of the claim preferred the appellant herein for exclusion from taxation of the material component of the impugned activity was elaborately dwelt upon by Learned Special Counsel. In his summation, the finding that the contract was entirely for service, that the goods utilised lost their identity with the rendering of services and that the dominant intention of the contract was ‘maintenance and repair’ sufficed to proceed with examination of acceptability of claim for abatement as well as bar of limitation. We have already noted *supra* that the claim of the appellant in proceedings before the original authority was not for coverage under ‘works contract service’ tax but that the transaction constituted ‘deemed sale’ and, hence, beyond the ambit of Finance Act, 1994.

7. Learned Counsel for the appellant relied substantially on the decision of the Hon’ble Supreme Court in *Commissioner of Central*

Excise & Customs, Kerala v. Larsen & Toubro Ltd [2015 (39) STR 913 (SC)] which, according to him, was not concerned only with the aspect of taxability of contracts, amenable to vivisection as service and goods, under Finance Act, 1994 prior to 1st June 2007 as held by a Larger Bench of the Tribunal but also with the division of power to tax between the Centre and the federating states. Setting the background for resolution of the dispute before the Hon'ble Supreme Court, the observation that

> *'3. The Law Commission of India in its 61st Report elaborately examined the law laid down in Gannon Dunkerley's case and suggested that the relevant entry contained in the 7th Schedule to List II to the Constitution of India - Entry 54 - could either be amended; or a fresh entry in the State List could be added; or Article 366 which is a definition clause could be amended so as to widen the definition of "sale", and include therein indivisible composite works contracts. Having regard to the said recommendation of the Law Commission, the Constitution (46th Amendment) Act was passed in 1983 by which Parliament accepted the 3rd alternative of the Law Commission, and amended Article 366 by adding sub-clause (29A). We are concerned with sub-clause (b) of Article 366(29A) which reads as follows :-*
>
> > *366 (29A) "tax on the sale or purchase of goods" includes -*
> >
> > *(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;*
> >
> > *and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;*

4. The Constitutional amendment so passed was the subject matter of a challenge in Builders' Assn. of India v. Union of India, (1989) 2 SCC 645. This challenge was ultimately repelled and this Court stated :-

"... After the 46th Amendment, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above." (at para 36)'

and, tracing the origin of disputed overlap prior to incorporation of concept of 'works contracts' in the scheme of Finance Act, 1994, it was stated that

'6. Service tax was introduced by the Finance Act, 1994 and various services were set out in Section 65 thereof as being amenable to tax. The legislative competence of such tax is to be found in Article 248 read with Entry 97 of List I of the 7th Schedule to the Constitution of India. All the present cases are cases which arise before the 2007 amendment was made, which introduced the concept of "works contract" as being a separate subject matter of taxation. Various amendments were made in the sections of the Finance Act by which "works contracts" which were indivisible and composite were split so that only the labour and service element of such contracts would be taxed under the heading "Service Tax"'.

8. After hearing the perspectives of the dispute, as laid out on behalf of Revenue and assessees, the Hon'ble Supreme Court did find it necessary to articulate that

'14. Crucial to the understanding and determination of the issue at hand is the second Gannon Dunkerley judgment which

is reported in (1993) 1 SCC 364. By the aforesaid judgment, the modalities of taxing composite indivisible works contracts was gone into. This Court said :-

> *"On behalf of the contractors, it has been urged that under a law imposing a tax on the transfer of property in goods involved in the execution of a works contract under Entry 54 of the State List read with Article 366(29-A)(b), the tax is imposed on the goods which are involved in the execution of a works contract and the measure for levying such a tax can only be the value of the goods so involved and the value of the works contract cannot be made the measure for levying the tax. The submission is further that the value of such goods would be the cost of acquisition of the goods by the contractor and, therefore, the measure for levy of tax can only be the cost at which the goods involved in the execution of a works contract were obtained by the contractor. On behalf of the States, it has been submitted that since the property in goods which are involved in the execution of a works contract passes only when the goods are incorporated in the works, the measure for the levy of the tax would be the value of the goods at the time of their incorporation in the works as well as the cost of incorporation of the goods in the works. We are in agreement with the submission that measure for the levy of the tax contemplated by Article 366(29-A)(b) is the value of the goods involved in the execution of a works contract. In Builders' Association case [(1989) 2 SCC 645 : 1989 SCC (Tax) 317 : (1989) 2 SCR 320] it has been pointed out that in Article 366(29-A)(b), "[t]he emphasis is on the transfer of property in goods (whether as goods or in some other form)". (SCC p. 669, para 32: SCR p. 347). This indicates that though the tax is imposed on the transfer of property in goods involved in the execution of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of a works contract. We are, however, unable to agree with the contention urged on behalf of the contractors that the value of such goods for levying the tax can be assessed only on the basis of the cost of acquisition of the goods by the contractor. Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, 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 the works and not the cost of acquisition of the goods by the contractor. We are also unable to accept the contention urged on behalf of the States that in addition to the value of the goods involved in the execution of the works contract the cost of incorporation of the goods in the works can be included in the measure for levy of tax. Incorporation of the goods in the works forms part of the contract relating to work and labour which is*

distinct from the contract for transfer of property in goods and, therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by Article 366(29-A)(b).

Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. This would mean that labour charges for execution of works, [item No. (i)], amounts paid to a sub-contractor for labour and services [item No. (ii)], charges for planning, designing and architect's fees [item No. (iii)], charges for obtaining on hire or otherwise machinery and tools used in the execution of a works contract [item No. (iv)], and the cost of consumables such as water, electricity, fuel, etc. which are consumed in the process of execution of a works contract [item No. (v)] and other similar expenses for labour and services will have to be excluded as charges for supply of labour and services. The charges mentioned in item No. (vi) cannot, however, be excluded. The position of a contractor in relation to a transfer of property in goods in the execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax, the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. The charges mentioned in item No. (vii) relate to the various expenses which form part of the cost of establishment of the contractor. Ordinarily the cost of establishment is included in the sale price charged by a dealer from the customer for the goods sold. Since a composite works contract involves supply of materials as well as supply of labour and services, the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services. The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods. Similar apportionment will have to be made in respect of item No. (viii) relating to profits. The profits which are relatable to the supply of materials can be included in the value of the goods and the profits which are relatable to supply of labour and services will have to be excluded. This *means that in respect of charges mentioned in item Nos. (vii) and (viii), the cost of establishment of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be excluded. The amount so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover —*

(a) Labour charges for execution of the works;

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

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

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

(e) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and

(f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

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

(h) profit earned by the contractor to the extent it is relatable to supply of labour and services.

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find

> *merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts." (at paras 45, 47 and 49)*

15. A reading of this judgment, on which counsel for the assessees heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting therefrom charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub-paras (f), (g) and (h). Under each of these paras, a bifurcation has to be made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor's accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire *works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost, expenses and profit as would be attributable in the works contract to the transfer of property in goods in such contract. This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts.'*

before going on to render the finding that

'18. Similarly, in Kone Elevator India (P) Ltd. v. State of T.N. - *(2014) 7 SCC 1 = 2014 (34) STR 641 (S.C.) = 2014 (304) ELT 3 (S.C.), this Court held:* -

"Coming to the stand and stance of the State of Haryana, as put forth by Mr. Mishra, the same suffers from two basic fallacies, first, the supply and installation of lift treating it as a contract for sale on the basis of the overwhelming component test, because there is a stipulation in the contract that the customer is obliged to undertake the work of civil construction and the bulk of the material used in construction belongs to the manufacturer, is not correct, as the subsequent discussion would show; and second, the

> *Notification dated 17-5-2010 issued by the Government of Haryana, Excise and Taxation Department, whereby certain rules of the Haryana Value Added Tax Rules, 2003 have been amended and a table has been annexed providing for "Percentages for Works Contract and Job Works" under the heading "Labour, service and other like charges as percentage of total value of the contract" specifying 15% for fabrication and installation of elevators (lifts) and escalators, is self-contradictory, for once it is treated as a composite contract invoking labour and service, as a natural corollary, it would be works contract and not a contract for sale. To elaborate, the submission that the element of labour and service can be deducted from the total contract value without treating the composite contract as a works contract is absolutely fallacious. In fact, it is an innovative subterfuge. We are inclined to think so as it would be frustrating the constitutional provision and, accordingly, we unhesitatingly repel the same." (at para 60)*

19. In Larsen & Toubro Ltd. v. State of Karnataka, (2014) 1 SCC 708 = 2014 (34) STR 481 (S.C.) = 2014 (303) ELT 3 (S.C.), this Court stated: -

> *"In our opinion, the term "works contract" in Article 366(29-A)(b) is amply wide and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of contract. Parliament had such wide meaning of "works contract" in its view at the time of the Forty-sixth Amendment. The object of insertion of clause (29-A) in Article 366 was to enlarge the scope of the expression "tax on sale or purchase of goods" and overcome Gannon Dunkerley (1) [State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd., AIR 1958 SC 560 : 1959 SCR 379]. Seen thus, even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract. The additional obligations in the contract would not alter the nature of contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of works contract are satisfied in a contract then irrespective of additional obligations, such contract would be covered by the term "works contract". Nothing in Article 366(29-A)(b) limits the term "works contract" to contract for labour and service only. The learned Advocate General for Maharashtra was right in his submission that the term "works contract" cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into existence some "works". We are also in agreement with the submission of Mr. K.N. Bhat that the term "works contract" in Article 366(29-A)(b) takes within*

> *its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Parliament had all genre of works contract in view when clause (29-A) was inserted in Article 366." (at para 72)'*

9. Referring to the decision of the Hon'ble High Court of Delhi in *GD Builders v. Union of India [2013 (32) STR 673 (Del)]* which was summed up as

> *'31. In the aforesaid judgment, it was held that the levy of service tax in Section 65(105)(g), (zzd), (zzh), (zzq) and (zzzh) is good enough to tax indivisible composite works contracts. Various judgments were referred to which have no direct bearing on the point at issue. In paragraph 23 of this judgment, the second Gannon Dunkerley judgment is referred to in passing without noticing any of the key paragraphs set out hereinabove in our judgment. Also, we find that the judgment in G.D. Builders (supra) went on to quote from the judgment in Mahim Patram Private Ltd. v. Union of India, 2007 (3) SCC 668 = 2007 (7) STR 110 (S.C.), to arrive at the proposition that even when rules are not framed for computation of tax, tax would be leviable.'*

and, after considering various decisions of the Hon'ble Supreme Court as well as of several High Courts, it was held that

> *'41. We are afraid that there are several errors in this paragraph. The High Court first correctly holds that in the case of composite works contracts, the service elements should be bifurcated, ascertained and then taxed. The finding that this has, in fact, been done by the Finance Act, 1994 Act is wholly incorrect as it ignores the second Gannon Dunkerley decision of this Court. Further, the finding that Section 67 of the Finance Act, which speaks of "gross amount charged", only*

speaks of the "gross amount charged" for service provided and not the gross amount of the works contract as a whole from which various deductions have to be made to arrive at the service element in the said contract. We find therefore that this judgment is wholly incorrect in its conclusion that the Finance Act, 1994 contains both the charge and machinery for levy and assessment of service tax on indivisible works contracts.'

10. Analysis of this exposition and, in particular, from

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

it emerges that 'works contracts' extends beyond the limited scheme of taxation of such contracts by Finance Act, 1994 and, while service tax authorities are empowered to levy tax on the service component of the few that are enumerated in section 65 (105)(zzzza) of Finance Act, 1994, the exclusion of others of similar ilk, comprising transfer of goods along with the rendering of service, cannot be intruded into beyond the finding of the Hon'ble Supreme Court that

'16. At this stage, it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy

is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm. This position is well reflected in Bharat Sanchar Nigam Limited v. Union of India, (2006) 3 SCC 1 = 2006 (2) STR 161 (S.C.), as follows:-

> *"No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in Larsen & Toubro v. Union of India [(1993) 1 SCC 364]: (SCC p. 395, para 47): -*
>
> > *"The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods."*
>
> *For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. As was held by us in Gujarat Ambuja Cements Ltd. v. Union of India [(2005) 4 SCC 214], SCC at p. 228, para 23: -*
>
> > *"This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the*

> *State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field." (at paras 88 and 89)*
>
> *17. We find that the assessees are correct in their submission that a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In Gannon Dunkerley, 1959 SCR 379, this Court recognized works contracts as a separate species of contract as follows: -*
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> *"To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment." (at page 427)'*

to deem the portion pertaining to transfer of goods in a 'works contract' within the ambit of Finance Act, 1994. On the contrary, the incorporation of 'works contract service' in Finance Act, 1994 permits the legislation of a mechanism to provide for vivisection of such 'works contracts' and, given this restrictive framework, precludes taxability of that which is clearly beyond the scope of List 1 in the Seventh Schedule of the Constitution of India. Non-discharge of such liability or any exemptions thereto will not alter the segregated jurisdiction.

11. In *Kone Elevator India Pvt Ltd v. State of Tamil Nadu [2014*

(304) ELT 161 (SC)], the Hon'ble Supreme Court has held that

> *'63. Considered on the touchstone of the aforesaid two Constitution Bench decisions, we are of the convinced opinion that the principles stated in Larsen and Toubro (supra) as reproduced by us hereinabove, do correctly enunciate the legal position. Therefore, "the dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable. If the contract is a composite one which falls under the definition of works contracts as engrafted under clause (29A)(b) of Article 366 of the Constitution, the incidental part as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract.'*

12. The reliance placed upon the decisions of the Hon'ble Supreme Court in *Idea Mobile Communication Ltd v. Commissioner of Central Excise & Customs [2011 (23) STR 433 (SC)], Imagic Creative Pvt Ltd v. Commissioner of Commercial Taxes [2008 (9) STR 337 (SC)]* and *Bharat Shah Ltd v. Union of India [2006 (2) STR 161 (SC)]* by Learned Special Counsel for Revenue do not, in our opinion, provide guidance in the direction nudged by him as the issue of scope and extent of taxability of 'works contracts' was taken up only subsequently *in re Larsen & Toubro Ltd.* The decision of the Larger Bench of the Tribunal in *Aggarwal Colour Advance Photo System v. Commissioner of Central Excise, Bhopal [2011 (23) STR 608 (Tri-LB)]* also fails to advance the case of Revenue for the same reason.

13. We also cannot fail to take note that, in similar circumstances, a

coordinate bench of this Tribunal in *Marine Corporation of India v. Commissioner of Customs, Central Excise & Service Tax, Visakhapatnam-I [final order no. A/30171/2019 dated 30th January 2019]* took the view that

> *'7. We have considered arguments on both sides and perused the records. It is not in dispute that the services rendered by them were in the nature of 'maintenance and repair services' and these services also included transfer of materials. Invoices produced by the learned counsel for the appellant also shows that they had paid VAT on the goods used and paid service tax on the service charges only. This also makes it evident that the nature of contracts is composite contract, which, as per the judgment of the Hon'ble Apex Court in the case of L & T Ltd (supra), became chargeable to service tax only from 01.06.2007. We also find force in the argument of the appellant that after 01.06.2007, the definition of works contract did not encompass all services and specifically it did not include maintenance and repair services. Therefore, no service tax was chargeable from the appellant at all. In other words, no service tax can be charged prior to the introduction of negative list of the services on maintenance and repair activity involving both the service and the sale/ deemed transfer of property of the goods/ components. Even otherwise, when their invoices clearly indicated the goods component separately and paid VAT on them deeming them to be sold to their client, service tax cannot be charged on such sums as they do not form part of the consideration for the service.'*

14. While discarding the taxability as provider of 'works contract service', owing to the non-conformity the specific activity enumerated therein, the adjudication order has not been able to establish that the

claim of being 'works contract' is not tenable. On the contrary, the supply of goods that lose their identity in the object worked upon is a foundation that has been accepted. The transaction is, undoubtedly, in pursuance of 'works contract' and though, by lack of jurisdiction, not taxable under Finance Act, 1994 is yet saved from total exclusion owing to voluntary vivisection of the service *simpliciter*. Such discharge of liability is sufficient compliance of levy on taxable services under Finance Act, 1994. There is, thus, no need to ascertain eligibility for abatement of cost of materials and excludability of the demand by the bar of limitation. For this reason, the differential tax sought to be recovered in the impugned order is without authority of law and must be set aside. We do so to allow the appeal.

(Order pronounced in the open court on 29/11/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as*