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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 10226/2009**

Reserved on: 23rd July, 2013

% **Date of Decision: November, 2013**

RAJ FURNITURE ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI .. Respondent
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

W.P.(C) 4127/2008

CLARION PROPERTIES LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

Versus

UOI AND ORS. .... Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

W.P.(C) 4658/2008

VIPUL LIMITED ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.

Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

W.P.(C) 5046/2008

UNITECH LIMITED ..... Petitioners
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

W.P.(C) 6924/2008

ANS CONSTRUCTIONS LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

W.P.(C) 401/2009

SIMPLEX INFRASTRUCTURE LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

W.P.(C) 4057/2010 & CM 8074/2010

SIMPLEX INFRASTRUCTURE LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

W.P.(C) 6658/2010 & CM 13173/2010

SIMPLEX INFRASTRUCTURE LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for Resp-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.
Mr. Ruchir Mishra & Mukesh Kr. Tiwari
For UOI.

W.P.(C) 4187/2008 & CM 8168/2008

VISTAR CONSTRUCTIONS (P) LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

W.P.(C) 5646/2010 & CM 11101/2010

VISTAR CONSTRUCTIONS (P) LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.
Mr. Ruchir Mishra & Mukesh Kr. Tiwari
For UOI.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.

For detailed order see Writ Petition (Civil) No. 4107/2008 titled *G.D.Builders versus Union of India and Another*, pronounced today.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

November , 2013
VKR

25

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ Writ Petition (Civil) No. 4107/2008

Reserved on: 23rd July, 2013

% Date of Decision: 13th November, 2013

G.D. BUILDERS ..... Petitioner

Through Mr. J.K. Mittal, Mr. Varun Prabhakar & Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents

Through Mr.Rajeeve Mehra, Addl. Solicitor General with Mr. Mukesh Anand and Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel for respondent No. 2.

\+ W.P.(C) 10226/2009

RAJ FURNITURE ..... Petitioner

Through Mr. J.K. Mittal, Mr. Varun Prabhakar & Mr. Varun Gaba, Advocates.

versus

UOI ... Respondent

Through Mr.Rajeeve Mehra, Addl. Solicitor General with Mr. Mukesh Anand and Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel for respondent No. 2.

\+ W.P.(C) 4127/2008

CLARION PROPERTIES LTD. ..... Petitioner

Through Mr. J.K. Mittal, Mr. Varun Prabhakar & Mr. Varun Gaba, Advocates.

Versus

26

UOI AND ORS. .... Respondents

Through Mr.Rajeeve Mehra, Addl. Solicitor General with Mr. Mukesh Anand and Mr. Ashish Virmani for UOI/R-1. Ms. Sonia Sharma, Sr. Standing Counsel for respondent No. 2.

+ **W.P.(C) 4658/2008**

VIPUL LIMITED ..... Petitioner

Through Mr. J.K. Mittal, Mr. Varun Prabhakar & Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents

Through Mr.Rajeeve Mehra, Addl. Solicitor General with Mr. Mukesh Anand and Mr. Ashish Virmani for UOI/R-1. Ms. Sonia Sharma, Sr. Standing Counsel for respondent No. 2.

+ **W.P.(C) 5046/2008**

UNITECH LIMITED ..... Petitioners

Through Mr. J.K. Mittal, Mr. Varun Prabhakar & Mr. Varun Gaba, Advocates.

versus.

UOI AND ANR. .. Respondents

Through Mr.Rajeeve Mehra, Addl. Solicitor General with Mr. Mukesh Anand and Mr. Ashish Virmani for UOI/R-1. Ms. Sonia Sharma, Sr. Standing Counsel for respondent No. 2.

+ **W.P.(C) 6924/2008**

ANS CONSTRUCTIONS LTD. ..... Petitioner

Through Mr. J.K. Mittal, Mr. Varun Prabhakar & Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents

Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

\+ **W.P.(C) 401/2009**

SIMPLEX INFRASTRUCTURE LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

\+ **W.P.(C) 4057/2010 & CM 8074/2010**

SIMPLEX INFRASTRUCTURE LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

\+ **W.P.(C) 6658/2010 & CM 13173/2010**

SIMPLEX INFRASTRUCTURE LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. .. Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor

28

Mr. Ashish Virmani for Resp-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.
Mr. Ruchir Mishra & Mukesh Kr. Tiwari
For UOI.

+ **W.P.(C) 4187/2008 & CM 8168/2008**

VISTAR CONSTRUCTIONS (P) LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. ..... Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.

+ **W.P.(C) 5646/2010 & CM 11101/2010**

VISTAR CONSTRUCTIONS (P) LTD. ..... Petitioner
Through Mr. J.K. Mittal, Mr. Varun Prabhakar &
Mr. Varun Gaba, Advocates.

versus

UOI AND ANR. ..... Respondents
Through Mr.Rajeeve Mehra, Addl. Solicitor
General with Mr. Mukesh Anand and
Mr. Ashish Virmani for UOI/R-1.
Ms. Sonia Sharma, Sr. Standing Counsel
for respondent No. 2.
Mr. Ruchir Mishra & Mukesh Kr. Tiwari
For UOI.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.

This common judgment will dispose of the aforementioned 11 writ petitions in which identical and similar issues arise for consideration. The petitioners herein have challenged and prayed for quashing of Explanation to Notification No. 15/2004-ST dated 10th September, 2004 and Notification No. 18/2005-ST dated 7th June, 2005 and in Notification No. 1/2006-ST dated 1st March, 2006, the challenge is with respect to column 4 entries at S. No. 5, 7 and 10. In some writ petitions, assessment orders have been passed and appellate proceedings have been initiated. However, in Writ Petition No. 4107/2008 by G.D. Builders, Writ Petition No. 5046/08 by Unitech Limited, Writ Petition Nos. 401/2009, 4057/2010 & 6658/2010 by Simplex Infrastructure Ltd. and Writ Petition Nos. 4187/2008 and 5646/2010 filed by Vistar Construction Pvt. Ltd., show cause notices have been issued and the proceedings are still pending before the original authority. In Writ Petition No. 4127/2008 filed by Clarion Properties Ltd. and Writ Petition No. 4658/2008 filed by Vipul Limited, notice for appearance of furnishing of documents/reply has been given and even show cause notice has not been issued.

Contentions of the Petitioners

2. Contentions of the petitioners can be crystallized as under:-

(i) Service tax levied from time to time by Finance Act, 1994 and subsequent amendments is in exercise of power under residual entry 97 of List I of the Seventh Schedule of the

Constitution of India. It is levied on taxable service as defined in Section 65(105) read with definition clauses.

(ii) Service tax is applicable only in respect of service element and the Central Government does not have any power under the residual entry to impose tax on entries under List II of the Seventh Schedule of the Constitution.

(iii) The Parliament cannot impose service tax on material or goods used in execution of works/composite contract. Central Sales Tax is payable and levied on material used in "works contract" with effect from 11th May, 2002 after amendment of the Central Sales Tax Act, 1956 vide Finance Act, 2002.

(iv) The "composite or works contracts" are excluded from the ambit of levy of service tax under Section 65(105)(zzq) and (zzzh).

(v) Section 65(105)(zzq) and (zzzh) apply only to "service contracts" and not to "composite or works contract", therefore, exemption under notification to the extent of 67% to set off value of the goods involved in execution of "composite contract" is contrary to the charging provision and a nullity, as it amounts to enlarging and widening of charging section and would have the effect of including or imposing service tax even on goods or material used in a "composite/works contract". It is well settled that a notification cannot

expand or enlarge the charging section or even amend the statutory provisions or the main enactment.

(vi) The exemption notifications by which 67% of the contract value in a "composite contract" is abated has the effect of imposing service tax on "composite or works contract" which is not covered by the main statutory provision. Thus, what is not covered and cannot be covered by the principal enactment, have been covered and brought under the service tax ambit by the explanations appended to the notifications. Thus, abatement granted in the notifications is invalid and contrary to main enactment. The said argument is equally applicable to column 4 of serial numbers 5, 7 and 10 of the 2006 notification.

(vii) As per Section 93 of the Finance Act, 1994, the Central Government is empowered to grant exemption from levy of service tax either wholly or in part but as "composite contracts" and "works contracts" are not covered under Section 65(105)(zzq) or (zzzh) Central Government cannot grant exemption by way of notification.

(viii) Service tax has been imposed on services involved in execution of "composite/works contract" only with effect from 1st June, 2007 under Section 65(105)(zzzza). Rule 2A of Service Tax (Determination of Value) Rules, 2006 determines value of services involved in "works/composite contracts" and it is levied @ 2%,

enhanced to 4% with effect from 1st March, 2008. The said levy is not applicable to "services" covered under Section 65(105)(zzq) and (zzzh).

(ix) There is a conflict between Section 65(105)(zzzza), (zzq) and (zzzh) and what is covered by Section 65(105)(zzzza) cannot be covered by Section 65(105)(zzq) and (zzzh). The two sets of provisions cannot co-exist. Subsequent legislation shows that the earlier legislation will not cover "composite or works contract".

(x) Section 66 is the charging section and provisions of Section 67 are the valuation provisions. Value of taxable services under Section 67 is the gross amount charged by the service provider for such "services provided or to be provided". Service tax can be charged only for the specified "taxable services" as defined in sub-clauses of Section 65(105). Tax can be only on the value of services and not beyond. There is no provision for a notional value or to enable the authorities to reduce or subtract value of material or goods. The gross amount charged or the value of service cannot include value of goods and material supplied/used.

(xi) Vagueness or uncertainty makes a levy invalid and illegal.

Legislative History

3. Section 65(105)(zzq) imposed service tax with effect from 10th September, 2004 on any service provided by a commercial concern in

relation to construction service. The term 'construction service' was defined in Section 65 clause (30a) as under Finance Act (No. 2) of 2004 as:-

> "construction service" means,-
>
> (a)Construction of new building or civil structure or a part thereof; or
>
> (b) repair, alternation or restoration of, or similar services in relation to, building or civil structure, which is-
>
> (i) used, or to be used, primarily for; or
>
> (ii) occupied, or to be occupied, primarily with; or
> (iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, but does not include road, airport, railway, transport terminal, bridge, tunnel, long distance pipeline and dam;"

4. By Finance Act 2005 service tax was imposed under Section 65(105)(zzq) on any service provided or to be provided, to any person by a commercial concern in relation to "commercial or industrial construction service". The expression "commercial or industrial construction service" was separately defined in Section 65(25b) as under:-

> "commercial or industrial construction service" means-
> (a) Construction of a new building or a civil structure or a part thereof; or
> (b) construction of pipeline or conduit; or
> (c) completion and finishing service such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of

swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

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

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

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

(iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;"

5. Finance Act 2005 also saw introduction or service tax on construction of complexes (residential complexes) under section 65(105)(zzzh) with effect from 16th June, 2005. The term "construction of complexes" was defined in Section 65(30a) as under:-

"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 journey and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

(c) repair, alternation, renovation or restoration of, or similar services in relation to, residential complex;"

The expression "residential complex" was defined in Section 65(91a) but we need not refer to the said definition as it is not relevant.

6. Section 65(105)(zzzza) introduced service tax in respect of works contract service with effect from 1st June, 2007 by Finance Act, 2007 and reads as under:-

> "Taxable service" means any services provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.
>
> **Explanation.**—For the purposes of this sub-clause, "works contract" means a contract wherein,—
> (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
> (ii) such contract is for the purposes of carrying out,—
> (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
>
> (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
> (c) construction of a new residential complex or a part thereof; or
> (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
> (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects."

Notifications

7. Notification No.15/04-ST dated 10th September, 2004, reads as under:-

"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided by a commercial concern to any person, in relation to commercial or industrial construction service, from so much of the service tax leviable thereon under section 66 of the said Act, as is in excess of the service tax calculated on a value which is equivalent to thirty-three per cent of the gross amount charged from any person by such commercial concern for providing the said taxable service:

Provided that this exemption shall not apply in such cases where –

(i) the credit of duty paid on inputs or capital goods has been taken under the provisions of the Cenvat Credit Rules, 2004; or

(ii) the commercial concern has availed the benefit under the notification of the Government of India, in the Ministry of Finance, (Department of Revenue) No.12/2003-Service Tax, dated the 20th June, 2003 [G.S.R. 503 (E), dated the 20th June, 2003]; or

(iii) the taxable services provided are only completion and finishing services in relation to building or civil structure, referred to in sub-clause (c) of clause (25b) of section 65 of the Finance Act, 1994.

Explanation.- For the purposes of this notification, the "gross amount charged" shall include the value of goods and material supplied or provided or used by the provider of the

commercial or industrial construction service for providing such service."

8. For the purpose of clarity, we record that clauses (ii) and (iii) of the proviso were added by way of amendment notification No.19/2005-ST dated 7th June, 2005. What is subject matter of challenge before us are two pronged; the explanation and clause (iii) of the proviso. The effect of clause (iii) to the proviso was/is that benefit of the said notification would not be available in case the service provider was providing "completion and finishing services" in relation to building or civil structure referred to in sub-clause (c) of clause (25b) of Section 65 of the Act. The second challenge before us is to the *explanation*.

9. Notification No.18/2005-ST dated 7th June, 2005 was issued in respect of Section 65(105)(zzzh) which reads as follows:-

> "In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided to any person by any other person, in relation to construction of complex, referred to in sub-clause (zzzh) of clause (105) of section 65 of the Finance Act, from so much of the service tax leviable thereon under section 66 of the said Finance Act, as is in excess of the service tax calculated on a value which is equivalent to thirty-three per cent. of the gross amount charged from any person by such service provider for providing the said taxable service:
>
> Provided that this exemption shall not apply in such cases where –

(i) the credit of duty paid on inputs or capital goods used for providing such taxable service has been taken under the provisions of the CENVAT Credit Rules, 2004; or

(ii) the service provider has availed the benefit under the notification of the Government of India, in the Ministry of Finance, (Department of Revenue) No. 12/2003-Service Tax, dated the 20th June, 2003 [G.S.R. 503 (E), dated the 20th June, 2003]; or

(iii) 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.

Explanation.- For the purposes of this notification, the "gross amount charged" shall include the value of goods and materials supplied or provided or used for providing the said taxable service by the said service provider.

2. This notification shall come into force on the 16th day of June, 2005."

The challenge is to the *explanation* to the said notification and clause (iii) of the proviso.

10. Notification No.15/2004-ST as amended and Notification No.18/2005-ST were subsequently replaced by Notification No.1/2006-ST dated 1st March, 2006 and the relevant portions of the said notification read as under:-

"Notification No. 1/2006-ST[F.No.334/3/2006-TRU], dated 1-3-2006

G.S.R. (E). In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the

Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service of the description specified in column (3) of the Table below and specified in the relevant sub-clauses of clause (105) of section 65 of the Finance Act, specified in the corresponding entry in column (2) of the said Table, from so much of the service tax leviable thereon under section 66 of the said Finance Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (5) of the said Table, of the gross amount charged by such service provider for providing the said taxable service, subject to the relevant conditions specified in the corresponding entry in column (4) of the Table aforesaid:

Table

S.No.	Sub-clause of clause (105) of Section 65	Description of taxable service	Conditions	Percentage
(1)	(2)	(3)	(4)	(5)
5.	(zzd)	Erection, commissioning or installation, under a contract for supplying a plant, machinery, equipment or structures and erection, commissioning or installation of such plant, machinery, equipment or structures.	This exemption is optional to the commissioning and installation agency. *Explanation.*- The gross amount charged from the customer shall include the value of the plant, machinery, equipment, structures parts and any other material sold by the commissioning and installation agency, during the course of providing erection, commissioning or installation service.	33
7.	(zzq)	Commercial or	This exemption shall	33

		industrial construction service	not apply in such cases where the taxable services provided are only completion and finishing services in relation to building or civil structure, referred to in sub-clause (c) of clause (25b) of section 65 of the Finance Act. *Explanation.*- The gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of the construction service for providing such service.	
10.	(zzzh)	Construction of complex	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. *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.	

Provided that this notification shall not apply in cases where, -

(i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service, has been taken under the provisions of the CENVAT Credit Rules, 2004; or

(ii) the service provider has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.12/2003-Service Tax, dated the 20th June, 2003[G.S.R. 503 (E), dated the 20th June, 2003].

Explanation.- For the purposes of this notification, the expression "food" means a substantial and satisfying meal and the expression "catering service" shall be construed accordingly."

11. The challenge, as noticed above, is to the stipulations in column 4.

Service Tax and Computation

12. Service tax is a value added tax which was/is imposed and levied by the Parliament by way of Finance Act, 1994. It was imposed in phases and presently it is imposed on all taxable services as defined, except for the negative list.

13. Section 65A states that classification of taxable services shall be determined in accordance with the said-clauses of clause (105) of section 65 and where for any reason, a taxable service is prima facie,

classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-

(i) Specific description shall be preferred to more general description;

(ii) Composite services consisting of a combination of different services which cannot be classified as per clause (i), shall be classified as if they consist of a service which gives them their essential character, in so far as this criteria is applicable;

(iii) Where a service cannot be classified as specified in clauses (i) and (ii) above, it shall be classified under the sub-clause which occurs first among the sub-clauses which merit equal consideration.

14. Section 67 stipulates that the value of any taxable service shall be the gross amount charged by service provider for such services provided or to be provided by him. Thus, it sets out the manner of valuation of taxable services for charging service tax. Section 67 is not the charging section as elucidated and relates to manner of computation or value which can be subjected to service tax. By Finance Act, 2001 with effect from 16th July, 2001, Section 67 was substituted by a new comprehensive section. The said section has undergone further amendments from time to time and prior to its re-enactment with effect from 18th April, 2006 vide Finance Act 2006. As on 17th April, 2006, explanation 1 of Section 67 for the purpose of removal of doubt, was deemed to include the aggregate amounts as specified in clauses (a) to (g) but did not include the amounts/deposits specified in (i) to (viii). Explanation 3 for removal of doubt declared that the gross amount charged for taxable service shall include the amount received before, during or after provision of such services.

15. Section 67 as amended with effect from 18th April, 2006 reads as under:-

"***SECTION 67. Valuation of taxable services for charging service tax.*** —

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such 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 as, 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, travelers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value* **(Omitted by Finance Act 2012 w.e.f. 1st July 2012)**

(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."

With effect from 19th April, 2006, Service Tax (Determination of Value) Rules, 2006 have become applicable.

Discussion

16. Before be delve further into the questions, we would like to reproduce the statements made by the counsel as recorded in the order dated 1st July, 2013:-

> "Learned counsel appearing for the petitioner accepts and states that "service component" in composite contracts can be taxed, but not as works contract per se. Learned counsel for the petitioner further states that the respondents are also competent to bifurcate and tax the service component alone. He submits that the notifications dated 07.06.2005 and 01.03.2006 are bad in law because they have been issued under Section 93(1) of the Finance Act, as if the respondents have granted exemption to the extent of 67% of a composite contract. This is contrary to Sections 65, 66 and 67 of the Finance Act, as the service component alone is taxable and not the entire consideration payable under the composite contract which includes payment towards goods or moveable properties.

During the course of hearing, the learned Additional Solicitor General appearing for the respondents has submitted that the two notifications dated 07.06.2005 and 01.03.2006 are optional and it is open and an assessee need not take benefit of the said notifications, if he so desires. However, service tax is to be levied and is payable on the service component of the composite contract, which can be computed.

It is submitted that an assessee cannot bifurcate two notifications dated 07.06.2005 and 01.03.2006 and take benefit of the notifications, yet claim that the explanation to the said notifications should not be applied. Explanation stipulates that the gross amount for the purpose of computation includes the entire value of the goods used in the construction.

Learned Additional Solicitor General states that he would like to take written instructions before the said statement is taken on record and the court proceeds further."

17. It was accepted and stated on instructions by the respondents that the notifications in question (or rather partly in question) are optional and an assessee need not take benefit of the said notifications, if he so desires, but the service tax is to be levied and is payable on the service component of a composite contract, which can be computed. The notifications also specifically stipulate, when they apply and the preconditions which must be satisfied before they can be applied.

18. Service tax in the facts in question has been imposed in three stages. In the first stage, service tax was imposed on construction of industrial and commercial complexes. In the second stage, service tax was imposed on residential complexes of 12 or more residential units and in the third stage, service tax was imposed on works contracts of

any nature except for the exclusion in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. Each provision or levy has its own scope and ambit, while the first two provisions were primarily specific and targeted, the third inclusion i.e. works contract is very broad and wide term and will include within its ambit and scope construction of industrial and commercial complex or construction of residential complexes as specified. Introduction and imposition of service tax on works contract by Finance Act, 2007 does not mean that we have to read down, the scope and ambit of the provisions enacted levy tax on contracts relating to "commercial and industrial construction" service or "construction of (residential) complexes" services as specified by Finance Act 2004 and Finance Act 2005 respectively. The new levy imposed by Finance Act 2007 does not indicate or show that works contract relating to "construction of industrial and commercial complexes" or "construction of (residential) complexes" as specified, would be only applicable when the contractor was providing labour or service and was paid for the same and not to composite contracts when the contractor was providing labour/services as well as goods used for construction of industrial and commercial complexes or residential complexes as specified. It would cover any and every contract, when the contractor was only supplying labour or undertaking construction services, whether with or without supply of material, i.e. composite contract. The levy is valid when the provisions of Section 65(105)(zzh) and 65 (105)(zzq) of the Act are satisfied. The only condition and requirement is that the service tax should be levied and imposed on the "service" element and not levied and charged on

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material or goods used, as the power to levy sales tax or value added tax on the sales of goods is with the State Governments.

19. The said legal principle is no longer res-integra, as the principle and concept underlining service tax was highlighted and stands elucidated by Full Bench of this court in ***Home Solutions Retail (India) Ltd. vs. UOI & Anr.*** 182 (2011) DLT 548 (FB), wherein after referring to several judgments, following propositions were set out:-

> "52. From the aforesaid pronouncements in the field, the following principles regarding service tax can be fruitfully culled out:
>
> (i) The measure of taxation does not affect the nature of taxation and, therefore, the manner of quantification of the levy of service tax has no bearing on the factum of legislative competence.
>
> (ii) Taxable services can include providing of premises on a temporary basis for organizing any official, social or business function but also other facilities supplied in relation thereto.
>
> (iii) Levy of service tax on a particular kind of service cannot be struck down on the ground that it does not conform to a common understanding of the word „service" as long as it does not transgress any specific restriction embodied in the Constitution.
>
> (iv) Service tax is a levy on the event of service.
>
> (v) The concept of service tax is an economic concept.
>
> (vi) "Consumption of service" as in case of "consumption of goods" satisfies human needs.
>
> (vii) Service tax is a value added tax which, in turn, is a general tax applicable to all commercial activities involving provision of service.

(viii) Value added tax is a general tax as well as destination based consumption tax leviable on services provided within the country.

(ix) The principle of equivalence is in-built into the concept of service tax.

(x) The activity undertaken in a transaction can have two components, namely; activity undertaken by a person pertaining to his performance and skill and, secondly the person who avails the benefit of the said performance and skill. In the said context, the two concepts, namely, activity and the service provider and service recipient gain significance."

20. In ***Tamil Nadu Kalyana Mandapam Asscn. vs. UOI and Ors.*** (2004) 267 ITR 9 (SC), challenge was made and rejected by the Supreme Court on imposition of service tax on Kalyan Mandapam or Mandap keepers who provided furniture, fixtures, floor coverage etc for organizing social or business functions. The tax on "service" was defined as any service provided to a client by a mandap keeper in relation to use of mandap in any manner, including facilities provided to the client in relation to such use and also the service, if rendered, as a caterer. The Supreme Court made reference to the 46th amendment i.e. Article 366 (29A) of the Constitution and referred to the fact that as per the formula prescribed in the Finance Act 1994, service tax was levied on 40% of the gross amount charged by the mandap keepers from the client where mandap keepers were providing catering services. Thus, in the case of mandap keepers, service tax was payable on composite contract where the mandap keepers were to also provide food, furniture, electrical fittings, tents etc. The contention that the service tax imposed on mandap keepers was tax on land or tax on sale or purchase of goods was rejected. It was observed that Article

366(29A) (f) does not include supply of services, within supply of goods. The two were separate aspects. Concept of catering includes concept of rendering service, though sale of goods is involved. Parliament is competent to levy service tax on the service aspect. Reference was made to sub-clause (f) to Article 366(29A) but in the present case clause (b) to Article 366(29A) would be appropriate and applicable. Clause (b) uses the term "works contract" as the said expression or term had gained acceptability in light of the earlier judgments of the Supreme Court, where contracts for construction of building along with labour and material were described as "works contract" in contradiction or as antitheses to contracts for supply of material, without labour or construction services. The said term is also used in the Central Sales Tax Act, 1956. The said clause enabled the legislature to bifurcate the works contract into separate parts i.e. sale of goods or materials involved in the construction and supply of labour and service and attribute values to the two parts/aspects. There is no standard formula to distinguish a contract for sale of goods from the works contracts and it largely depends upon the facts and circumstances of each case. Sale of goods involves transfer of movable property and delivery of possession of movable property but in case of contract for works, there is work and labour alone. Works contract are composite and have elements of both service and sale/consideration for use of goods.

21. In *K. Raheja Development Corpn. Vs. State of Karnataka* (2005) 5 SCC 162, the Supreme Court examined the term 'works contract' as defined in Karnataka Sales Tax Act, 1957 to include any

agreement for carrying out for valuable consideration etc. building construction, fabrication, erection, installation, fitting out, improvement, modification of any moveable or immovable property. It was observed that the definition was not restricted to works contract as commonly understood i.e. contract to do work on behalf of somebody else. It was further observed that the definition makes no distinction between contract for residential flat or commercial unit and would, therefore, include construction of commercial units. As long as the agreement was entered into before the construction was "complete", it would be a works contract (we are not required to interpret and construe the expression "complete" in the present case). Thus the definition clauses in the Act for applying section 65(105)(zzq) and (zzzh) have to be given full effect.

22. Affirming the judgment in the case of ***Raheja Development*** (supra), the Supreme Court in its recent decision ***Larsen & Toubro Limited versus State of Karnataka***, Civil Appeal No.8672/2013 elucidated the effect of Article 366 (29A) as conferring power on the States to tax "works contract" by taxing transfer of property in goods whether as goods, or in the form of goods involved in the execution of "works contracts". The expression "works contract" is very wide and encompasses several types of contract and should not be given a restrictive meaning. The earlier test, i.e., "dominant purpose test" is no longer valid. Referring to the aspect theory, it has been observed as under:-

> "**100.** We have no doubt that the State legislatures lack legislative power to levy tax on the transfer of immovable property under Entry 54 of List II of the

Seventh Schedule. However, the States do have competence to levy sales tax on the sale of goods in an agreement of sale of flat which also has a component of a deemed sale of goods. Aspects theory though does not allow the State legislature to entrench upon the Union List and tax services by including the cost of such service in the value of goods but that does not detract the State to tax the sale of goods element involved in the execution of works contract in a composite contract like contract for construction of building and sale of a flat therein. In para 88 of *Bharat Sanchar5*, the Court stated: "the aspects theory 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". Having said that, the Court also stated that the States were not competent to include the cost of service in the value of the goods sold (i.e. the sim card) nor the Parliament could include the value of the sim card in the cost of services. But the statement in para 92(C) of the Report is clear that it is upto the States to tax the sale of goods element in a composite contract of sale and service. *Bharat Sanchar5* thus supports the view that taxation of different aspects of the same transaction as separate taxable events is permissible."

The following propositions, which are relevant for the present case, have also been enunciated in ***Larsen & Toubro Ltd. (supra)***:-

"(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) XXXXX

(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 (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. Nothing in Article 366(29-A)(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(29-A). 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) XXXXX

(viii) Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(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) XXXXX

(x) XXXXX

(xi) Taxing the sale of goods element in a works contract under Article 366(29-A)(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."

23. ***In Gannon Dunkerley and Co. vs. State of Rajasthan*** (1993) 1 SCC 364 it was observed that the legal fiction introduced by the Forty-Sixth Amendment has to be carried to its logical end and even single indivisible contracts can be bifurcated into contract for sale of goods and other for supply of labour and services at par with the contract containing two separate agreements. The State legislature are competent to impose tax on transfer of property in goods involved in "works contract". The Parliament can enact laws which can specify restrictions and conditions regarding the system of levy, rates or incidence of tax, but this is not a pre-condition. It means that if the Parliament enacts a law, the exercise of legislative power of the State would be subject to a

system of levy, rates or incidence of tax. Most importantly it has been observed that measure of levy of tax contemplated by Article 366 (29-A)(b) is the value of the goods involved in execution of "works contract". Since the taxable event is the transfer of property in goods, the said transfer takes place when the goods are incorporated in the works, the value of goods, which can constitute the measure for the levy has to be the value of goods at the time of incorporation of the goods in the works.

24. Similarly in ***Mahim Patram (P) Ltd. vs. Union of India and Ors.*** (2007) 3 SCC 668, the Supreme Court referred to the decision of ***Gannon Dunkerley and Co. vs. State of Rajasthan (Supra)*** and observed:-

> **"5.** It was, however, held while laying down that in the absence of law by Parliament so providing, it was not permissible for the State Legislatures to impose such a tax; it did not mean that the legislative power of the State could not be exercised till the enactment of a law under sub-clause (*b*) of clause (3) of Article 286 by Parliament, observing: (*Gannon Dunkerley case* [(1993) 1 SCC 364] , SCC pp. 390-91, para 39)
>
> > "It only means that in the event of a law having been made by Parliament under Article 286(3)(*b*) the exercise of the legislative power of the State under Entry 54 in List II to impose a tax of the nature referred to in sub-clauses (*b*), (*c*) and (*d*) of clause (29-A) of Article 366 would be subject to restrictions and conditions in regard to the system of levy rates and

other incidents of tax contained in the said law. The existence of a law enacted under Article 286(3)(*b*) cannot, therefore, be regarded as a condition precedent for the exercise of the taxing power of the State under Entry 54 in List II to impose a tax of the nature referred to in sub-clauses (*b*), (*c*) and (*d*) of clause (29-A) of Article 366. This does not, however, absolve Parliament from enacting a law as envisaged by Article 286(3)(*b*). Keeping in view the grievance of the contractors that there is wide disparity in the sales tax legislation of the various States in the matter of imposition, mode of assessment, rates, etc. of the tax on deemed sales resulting from transfer of property in goods involved in the execution of a works contract referred to in sub-clause (*b*) of clause (29-A) of Article 366, the need for the law envisaged by Article 286(3)(*b*) cannot be minimised."

25. Thereafter in ***Mahim Patram's case*** (Supra), the Supreme Court held:-

"**6.** This Court noticed the matters which are envisaged for imposition of tax on sale or purchase of goods after the Constitution 46th Amendment. It furthermore considered the deductions which were required to be made from the value of the entire contract in order to arrive at the value of the goods involved in the execution of a works contract. It was held: (*Gannon Dunkerley case* [(1993) 1 SCC 364], SCC p. 396, para 47)

> "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."

26. It was further observed that in deference to the aforesaid judgment in ***Gannon Dunkerley and Co. vs. State of Rajasthan (Supra)***, Parliament had made certain amendments but no rule was framed in regard to manner in which the sale price of such transfer could be calculated and it was therefore held:-

"27. We are, however, not oblivious of the decision of this Court wherein the measure or value to which the rate will be applied for computing the tax liability is considered to be one of the components of tax. (See *Govind Saran Ganga Saran v. CST* [1985 Supp SCC 205 : 1985 SCC (Tax) 447] , SCC para 6.) But

then measure or value to which rate would be applied is one thing, but how the turnover would be determined is another. Computation provisions may bear a relationship with the nature of charge and charging section and computation provisions together constitute an integrated code as was held in *CIT* v. *B.C. Srinivasa Setty* [(1981) 2 SCC 460 : 1981 SCC (Tax) 119] (SCC at p. 465); but it is equally well settled that only because rules had not been framed under the Central Act, the same *per se* would not mean that no tax is leviable.

28. In *Sudhir Chandra Nawn* v. *WTO* [AIR 1969 SC 59 : (1969) 1 SCR 108] this Court rejected the contention that Section 7(1) of the Wealth Tax Act was unconstitutional as no Rules had been framed to value the asset for the purpose of the Act, stating: (AIR p. 63, para 10)

> "*10.* The plea that Section 7(1) of the Wealth Tax Act is ultra vires Parliament is also wholly without substance. That clause provides:
>
> 'Subject to any rules made in this behalf, the value of any asset, other than cash, for the purposes of this Act, shall be estimated to be the price which in the opinion of the Wealth Tax Officer it would fetch if sold in the open market on the valuation date.'

It was urged that no rules were framed in respect of the valuation of lands and buildings. But Section 7 only directs that the valuation of any asset other than cash has to be made subject to the rules. It does not contemplate that there shall be rules before an asset can be valued. Failure to make rules for valuation of a type of asset cannot therefore affect the vires of Section 7. It was also said that Section 7(1) which requires that the asset shall be valued at the price which it would fetch if sold in the open market on the valuation date, was expropriatory. This contention was not raised in the petition, and no ground is made out for holding that the rate at which wealth tax is levied is expropriatory."

29. The question which, in our opinion, is required to be posed and answered, is as to whether there exist

> sufficient guidelines for determination of the turnover in the hands of the assessing authority for the purpose of levy of tax. The 1956 Act provides for levy of tax. Works contract has been brought within the purview of sale. Wherever the said words have been used, the new definition, therefore, would be applied, Section 8 provides for rates of tax on sales in the course of inter-State trade or commerce. Section 8-A provides for determination of turnover. Section 9 provides for levy and collection of tax and penalties. The said provision would, thus, be applied in respect of transfer of property in goods involved in the execution of works contract. The 1956 Act provides for grant of exemptions and various provisions e.g. proviso appended to Sections 6(1) and 6(2) of the Act.
>
> (Emphasis Supplied)

27. Thereafter reference was made to the provisions of U.P. Trade Tax Act, 1948 and the Central Sales Tax Act 1956, whether there exist guidelines for determination of the turnover for the purpose of levy of tax, as works contracts had been brought within the purview of sale. It was observed that Central Sales Tax (U.P.) Rules 1957 was applicable. Clause 3 of Art 286 of the Constitution has also been amended to allow the Parliament to specify by law restrictions and conditions with regards to the system of levy of rates and other incidence of tax on transfer of goods involved in the execution of works contract. It has been highlighted in the ***Mahim Patram's case*** (Supra) as follows:-

> **15.** Clause (3) of Article 286 of the Constitution was also amended to enable Parliament to specify by law restrictions and conditions in regard to the system of levy rates and other incidents of the tax on the transfer of goods involved in the execution of works contract. Pursuant to or in furtherance of the said enabling provision, as noticed hereinbefore, and in deference to observations made in *Gannon Dunkerley* [(1993) 1 SCC 364] , clause (*g*) of Section

2 was substituted by a new clause defining "sale" in the following terms:

"2. (*g*) 'sale', with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration, and includes,—

(*i*) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(*ii*) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(*iii*) a delivery of goods on hire purchase or any system of payment by instalments;

(*iv*) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(*v*) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(*vi*) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

but does not include a mortgage or hypothecation of or charge or pledge on goods;"

28. Coming back to the case of ***Tamil Nadu Kalyana Mandapam's case*** (supra), it was observed :

"In regard to the submission made on Article 366(29-A)(*f*), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise include the supply of services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "*such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods*". In other words, the operative words of the said sub-article are supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods.

The concept of catering, admittedly, includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering. Mr Mohan Parasaran, learned Senior Counsel for the appellant submitted that the High Court before applying the aspect theory laid down by this Court in the case of*Federation of Hotel and Restaurant Assn. of India* v. *Union of India* [(1989) 3 SCC 634 : AIR 1990 SC 1637] ought to have appreciated that in that matter Article 366(29-A)(*f*) of the Constitution was not considered which is of vital importance to the present matter and that the High Court ought to have differentiated the two matters. In reply, our attention was invited to paras 31 and 32 of the judgment of the High Court in which service aspect was distinguished from the supply aspect. In our view, reliance placed by the High Court on *Federation of Hotel and Restaurant* [(1989) 3 SCC 634 : AIR 1990 SC 1637] and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court. In view of this, the contention of the appellant on this aspect is not well founded.

It is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of the gross charges for catering cannot alter or affect the legislative competence of Parliament in the matter."

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A tax on services rendered by mandap-keepers and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire-purchase activities. Section 65 clause (41) sub-clause (*p*) of the Finance Act, 1994, defines taxable service (which is the subject-matter of levy of service tax) as any service provided to a customer by a mandap-keeper in relation to the use of a mandap in any manner including the facilities provided to [a customer] in relation to such use and also the services, if any, rendered as a caterer.

The nature and character of this service tax is evident from the fact that the transaction between a mandap-keeper and his customer is definitely not in the nature of a sale or hire-purchase of goods. It is essentially that of providing a service. In fact, as pointed out earlier, the manner of service provided assumes predominance over the providing of food in such situations which is a definite indicator of the supremacy of the service aspect. The legislature in its wisdom noticed the said supremacy and identified the same as a potential region to collect indirect taxes. Moreover, it has been a well-established judicial principle that so long as the legislation is in substance, on a matter assigned to a legislature enacting that statute, it must be held valid in its entirety even though it may trench upon matters beyond its competence. Incidental encroachment does not invalidate such a statute on the grounds that it is beyond the competence of the legislature (*Prafulla Kumar* v. *Bank of Commerce* [AIR 1947 PC 60 : 74 IA 23]). Article 246(1) of the Constitution specifies that Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution. As per Article 246(3), the State

> Government has exclusive powers to make laws with respect to matters enumerated in List II (State List). In respect of matters enumerated in List III (Concurrent List) both Parliament and State Governments have powers to make laws. The service tax is made by Parliament under the above residuary powers.
>
> The impugned Act was challenged on the ground that it infringed on the State's power to levy tax on luxury vide Entry 62 of the State List."

29. In ***All India Federation of Tax Practioners & Ors. Vs. Union of India Vol.*** 7 (2007) 7 SCC 527, the Supreme Court upheld levy of service tax on Chartered Accountants and Architects. It was observed that there was no distinction of consumption of goods and consumption of service as both satisfy human needs. Service is an economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution by the 86th amendment. Service tax was a value added tax or a general tax which applies to all commercial activities involving production of goods and provision of services. Reference was made to the principles of equivalence and it was observed:

> "35. For each contract, tax is levied under the Finance Acts, 1994 and 1998. Tax cannot be levied under that Act without service being provided whereas a professional tax under Entry 60 is a tax on his status. It is the tax on the status of a cost accountant or a chartered accountant. As long as a person/firm remains in the profession, he/it has to pay professional tax. That tax has nothing to do with the commercial activities which he undertakes for his client. Even if the chartered accountant has no work throughout the accounting year, still he has to pay professional tax. He has to pay the tax till he remains

in the profession. This is the ambit and scope of Entry 60, List II which is a taxing entry. Therefore, Entry 60 contemplates tax on professions, *as such*. Entry 60, List II refers to "tax on employments".

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39. It was further observed that a lawyer has to pay tax to take out a licence irrespective of whether he actually practises or not. That tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the licence chooses to do so. It was held that the impugned tax on entertainment levied by the Cantonment Board was a tax on the act of entertainment resulting in a show and, therefore, the impugned law imposing tax on entertainment fell under Entry 50 of the Provincial List in Schedule VII to the GOI Act, 1935 and not under Entry 46 (similar to Entry 60 of List II). Therefore, it was held that Bombay Legislature had power to enact the law imposing tax on entertainment which had nothing to do with the law imposing tax on the privilege of carrying on any profession, trade or calling under Entry 46 (similar to Entry 60 of List II in the present case). Therefore, this Court has clarified the dichotomy between tax on privilege of carrying on any trade or calling on one hand and the tax on the activity which an entertainer undertakes on each occasion. The tax on privilege to practise the profession, therefore, falls under Entry 60, List II. It is quite different from tax on services. Keeping in mind the aforestated dichotomy, it is clear that tax on service does not fall under Entry 60, List II. Therefore, Parliament has absolute jurisdiction and legislative competence to enact the law imposing tax on services under Entry 97, List I of the Seventh Schedule to the Constitution."

30. In ***Association of Leasing and Financial Service Companies vs. Union of India*** (2011) 2 SCC 352, the Supreme Court explained the difference between service tax and sales tax and other taxes observing that service tax is a value added tax and destination based consumption tax i.e. levied on commercial activities, but it is not a charge on business, but on a consumer. It is an economic concept on the principle of equivalence in the sense that consumption of goods and consumption of services are similar. Therefore, it is a tax on activity i.e. the value which is added or the value addition which is made by a person providing services. Sometimes, the dividing line between the sale and service may be very thin, especially in cases where value addition is to the goods manufactured, produced or sold, but there is distinction between the two. Service tax is a tax on activity whereas sales tax is a tax on sale of goods or things. Referring to Article 366 (29A), it was observed:

> ***"Scope of Article 366(29-A)***
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> **49.** If one examines Article 366(29-A) carefully, one finds that clause (29-A) provides for an inclusive definition and has two limbs. The first limb says that the tax on sale or purchase of goods includes a tax on transactions specified in sub-clauses (*a*) to (*f*). The second limb provides that such transfer, delivery or supply of goods referred to in the first limb shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made. Now, in *K.L. Johar case* [AIR 1965 SC 1082 : (1965) 2 SCR 112] , this Court held that the States can tax hire-purchase transactions resulting in sale but only to the extent to which tax is levied on the sale price. This led Parliament to say, in the Statement of Objects and

Reasons to the Constitution (Forty-sixth Amendment) Act,

"though practically the purchaser in a hire-purchase transaction gets the goods on the date of entering into the hire-purchase contract, it has been held by the Supreme Court in *K.L. Johar case* [AIR 1965 SC 1082 : (1965) 2 SCR 112] that there is a sale only when the purchaser exercises the option to purchase which is at a later date and therefore only the depreciated value of the goods involved in such transaction at the time the option is exercised becomes assessable to sales tax which position has resulted in avoidance of tax in various ways".

Thus, we find from the Statement of Objects and Reasons that the concept of "deemed sale" is brought in by the Constitution (Forty-sixth Amendment) Act only in the context of imposition of sales tax and that the words "transfer, delivery or supply" of goods is referred to in the second limb of Article 366(29-A) to broaden the tax base and that as indicated in the Report of the Law Commission prior to the judgment of this Court in *Gannon Dunkerley case* [AIR 1958 SC 560 : 1959 SCR 379], works contract was always taxed by the States as part of the word "sale" in Entries 48/54 of List II.

50. The object behind enactment of Article 366(29-A) is to tax the composite price so that the full value of the hire-purchase price is taxed and to avoid the judgment in *K.L. Johar case* [AIR 1965 SC 1082 : (1965) 2 SCR 112] whose implication was to narrow the tax base resulting in seepage of sales tax revenue. It is in that sense "splitting" of the contract needs to be understood. Thus, it cannot be said that Parliament divested itself of the power to levy service tax vide enactment of the Constitution (Forty-sixth Amendment) Act. Even in the Report of the Law Commission, it has been observed that

"if a hire-purchase transaction results in a sale, sales tax is undoubtedly leviable by the States. No doubt, it is difficult to determine the 'sale price' for the purpose of the sales tax law but this has no bearing on the question of legislative competence." (P. 26)

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31. The contention of the petitioners that the impugned notifications override the statutory provisions contained in Section 65(105), which defines the term "taxable service", Section 66, which it is claimed is a charging section, and Section 67, the valuation provisions of the Finance Act, 1994, has to be rejected. We have, as already stated above, rejected the argument of the petitioners on bifurcation/vivisect and held that as per the provisions of Section 65(105)(zzq) and (zzzh), service tax is payable and chargeable on the service element of the contract for construction of industrial and commercial complexes and contract for construction of complexes as specified and in case of a composite contract, the service element should be bifurcated and ascertained and then taxed. The contention that the petitioners are paying sales tax or VAT on material in relation to execution of the contract under composite contracts for construction of industrial/commercial complexes and construction contracts as specified under Section 65(105) (zzq) and (zzzh) therefore fails. The contention that there was/is no valid levy or the charging section is not applicable to composite contracts under clauses (zzq) and (zzzh) of Section 65(105) stands rejected. But the petitioners have rightly submitted that only the service component can be brought to tax as per provisions of Section 67 which stipulates that value of taxable service is the "gross amount charged" by the service provider for such services provided or to be provided by him and not the value of the goods provided by customers of service provider and the service tax cannot be charged on the value of the goods used in the contract.

32. Similarly, the contention that exemption notification could be issued under Section 93 of the Finance Act in respect of any "taxable service" defined in Section 65(105), misses the legal position and has to be rejected. The notifications in questions dated 10th September, 2004, 7th June, 2005 and 1st March, 2006 granting exemption of 67% towards the value of the material used for computing the service tax payable ensure that the service element is taxable. It is an alternative to an otherwise subjective determination in each case, which may be cumbersome and require a detailed examination for ascertainment of the service element. The formula prescribed is not mandatory or compulsory. Further, it will apply at the option of an assesee. It will be applicable only when the required parameters are met and is not illegal and ultra vires the Act, i.e. the Finance Act, 1994. It is also not contrary to the charging section/provisions of the Finance Act imposing levy of service tax. The aim and purpose of the said notifications is to provide a convenient, alternative, optional and hassle free method for payment of service tax, provided the requirements mentioned in the notifications are satisfied. While dealing with a similar situation, the Supreme Court in ***State of Kerala & Another Vs. Builders Association of India and Others***, (1997) 2 SCC 183 has observed:-

> "The main ground upon which the High Court has held sub-sections (7) and (7-A) of Section 7 to be void is that they levy tax at two per cent on the whole amount of the contract [sub-section (7)] or at a particular rate applied to the entire value of contract [sub-section (7-A)] and not merely upon the value of the goods transferred in the course of execution of the works contract as

contemplated by sub-clause (b) of clause (29-A) in Article 366. The Court also noticed that the goods which are transferred in the course of execution of a works contract may be "declared goods"; they may be goods which are liable to be taxed under the Central Sales Tax Act, 1956; the goods so transferred may also be taxable under different Schedules to the Kerala Act which prescribe different rates. In such a situation, it is held, levying tax on the entire value of the contract means levy of tax contrary to the provisions of the Central Sales Tax Act and the Kerala General Sales Tax Act. It also means, the Court held, taking the non-taxable components of works contract, e.g., labour and services etc. For all these reasons, it is held, the said sub-sections are clearly beyond the legislative competence of the State Legislature. With great respect, we are unable to agree. The first feature to be noticed is that the alternate method of taxation provided by sub-section (7) or (7-A) of Section 7 is optional. The sub-sections expressly provide that the method of taxation provided thereunder is applicable only to a contractor who elects to be governed by the said alternate method of taxation. There is no compulsion upon any contractor to opt for the method of taxation provided by sub-section (7) or sub-section (7-A).

It is wholly within the choice and pleasure of the contractor. If he thinks it is beneficial for him to so opt, he will opt; otherwise, he will be governed by the normal method of taxation provided by Section 5(1)(iv). Sub-section (8) provides that the option to come under sub-section (7) or (7-A) has to be exercised by the contractor "either by an express provision in the agreement for the contract or by an application to the assessing authority to permit him to pay the tax in accordance with any of the said sub-sections". In these circumstances, it is evident that a contractor who had not opted to this alternate method of taxation cannot complain

against the said sub-sections, for he is in no way affected by them. Nor can the contractor who has opted to the said alternate method of taxation, complain. Having voluntarily, and with the full knowledge of the features of the alternate method of taxation, opted to be governed by it, a contractor cannot be heard to question the validity of the relevant sub-sections or the rules. Sub-sections (8), (11) and (12) of Section 7 are incidental and ancillary to sub-sections (7) and (7-A) and cannot equally be faulted. Secondly, it is true that the goods transferred in the course of execution of the works contract may be chargeable at different rates under different Schedules appended to the Kerala Act; it may also be that some of them may be "declared goods", the levy of tax upon which is subject to certain restrictions specified in Sections 14 and 15 of the Central Sales Tax Act; it may also be that sale of some of the goods may also be subject to Central sales tax. It must yet be remembered that the method of taxation introduced by sub-sections (7) and (7-A) is in the nature of composition of tax payable under Section 5(1)(iv). The impugned sub-sections have evolved a convenient, hassle-free and simple method of assessment just as the system of levy of entertainment tax on the gross collection capacity of the cinema theatres. By opting to this alternate method, the contractor saves himself the botheration of book-keeping, assessment, appeals and all that it means. It is not necessary to enquire and determine the extent or value of goods which have been transferred in the course of execution of a works contract, the rate applicable to them and so on. For example, under sub-section (7), the contractor pays two per cent of the total value of the contract by way of tax and he is done with all the above-mentioned botheration. The rate of two per cent prescribed by sub-section (7) is far lower than the rates in Schedules 1, 2 and 5 referred to in Section 5(1)(iv)(a). In short, sub-sections (7) and (7-A)

> evolve a rough and ready method of assessment of tax and leave it to the contractor either to opt for it or be governed by the normal method."
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> (Emphasis supplied)

33. When the charging provisions are attracted, question of computation or measure to compute tax would arise and value of taxable service has to be determined. There is a well settled distinction between subject matter or object of tax; and the measure or computation of the tax imposed. The distinction between the two has to be kept in mind (see ***Gujarat Ambuja Cements Ltd. vs. Union of India*** AIR 2005 SC 3020).

34. A Division Bench of Andhra Pradesh High Court in *Nagarjuna* ***Construction Company Ltd. Vs. Union of India,*** (2010) 19 STR 321 (AP) had examined the three provisions which are subject matter of the present writ petition including 2007 Rules enacted under Section 94 of the Finance Act. After referring to the composition scheme stipulated in Rule 3 which is optional, it was held that where a person has exercised the option under Rule 3(3) of 2007 Rules, he will have to comply with the conditions stipulated therein. Further, disqualification for exercise of such option where stipulated, is binding and cannot be ignored.

35. The Supreme Court in ***Nagarjuna Construction Co. Ltd. vs. Union of India and Anr.*** (2013) 1 SCC 721, has affirmed the decision of the Andhra Pradesh High Court. It has been observed that Rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was lucid that the assessee who want to avail the

benefit, must opt to pay service tax in respect of the works contract, before payment of service tax in respect of works contract and the option so exercised is to be applied for all or entire works contract of the assessee and further change of option will not be permitted till the said works contract are completed. The Supreme Court rejected the contention of the assessee that they should be allowed to opt for Rule 3(3) of the Rules, even if they had paid service tax on works contracts prior to 1st July, 2007, when the rule was enforced. The contention that the rule was discriminatory was rejected on the ground that the classification based upon those already paying service tax on works contract; and others, was not illegal or contrary to Article 14 of the Constitution. The said decision takes care of the argument and contention that the contractors providing taxable services in nature of "completion and finishing services" are excluded from the notification. Their exclusion can be justified for the reason that "completion and finishing services" sometimes have a substantial element of "service" and only a limited amount/value is paid for/towards material or goods used. Their exclusion does not mean or imply discrimination as such contractors are to be taxed only for the service element in a works contract for "completion and finishing services" and not for the goods or material used.

36. The aforesaid judgments and discussion highlight the following facets/principles:

(1) After 46th Amendment to the Constitution, composite contracts can be bifurcated to compute value of the goods sold/supplied in contracts for construction of buildings with labour and material.

The service portion of the composite contracts can be made subject matter of service tax. Aspect doctrine is applied for bifurcating/vivisect the composite contract

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

(3) The notifications in question are in alternative and optional. An assessee may take advantage or benefit of the notifications, but cannot be compelled to pay service tax on the proportion or value of a composite contract as per the notification. This is because the formula framed by way of delegated legislation is presumptuous and based on assumption.

(4) However, if an assessee wants to take benefit of the notification, he must comply and adhere to the terms and conditions stipulated as per the notification.

(5) An assessee to claim benefit or advantage as per a notification must meet the preconditions or stipulations stated therein. An assessee cannot take benefit or advantage of a part of a notification but claim that the other part of the notification should be ignored and thus not acted upon. Notification has to be applied in entirety.

(6) Notification has to be read as a whole keeping in mind its objective and purpose. Notification may provide a convenient, hassle free and adopt a non-discretionary formula for computing value of the service element in a composite contract. This curtails litigation, ambiguity, ensures clarity and consistency. A notification cannot be declared as invalid or ultra vires for this reason, provided it is optional.

(7) Authorities cannot compel and force an assessee to accept the notifications in question and pay tax accordingly, as seeking coverage under the notification is voluntary. An assessee can state that the service component of a composite contract should be computed in a fair and reasonable manner and accordingly taxed.

(8) The notifications meet the tests laid down under Section 93 and 94 of the Act because they relate to manner and mode of computation of service tax in a composite contract. The object and purpose is not to tax as non-service element or to include non-taxable part of the composite contracts.

(9) It has not been shown and established that the formula or the value prescribed in the notifications is absurd or irrational. The said notifications are not per se an arbitrary exercise and contrary to data or formula for computing service element. In taxation matters, classification should not be struck down as discriminatory unless there are strong and compelling reasons

that show absurdity and, therefore, violation of Article 14 of the Constitution.

37. Learned counsel for the petitioners have relied upon two judgments of this Court in ***Intercontinental Consultants & Technocrats Pvt. Ltd. Vs. Union of India*** 2013 (29) STR 9 (Del.) and ***Delhi Chit Fund Association Vs. Union of India***, 2013 (30) STR 47 (Del.). The said judgments have no application to the facts of the present case. In the case of ***Intercontinental Consultants & Technocrats Pvt. Ltd (supra)*** it was held that the Rule in question was beyond the scope and ambit of the charging section of the main enactment. The quantification of the value of service can never exceed, what can be brought to charge. The said judgment has no application as the notifications are not beyond and do not extend the scope of the charging section. An assessee need not seek and can reject the option available under the notifications and can claim and opt before the authorities that he should not be taxed on the basis of quantification or measure which is mentioned in the notifications, but on the basis of service component which may be calculated/computed. Thus, the notifications do not seek to overwrite and expand its scope and are not beyond the charging section. Similarly, in ***Delhi Chit Fund Association (supra)***, a Division Bench of this Court examined the statutory provision and came to the conclusion that the transaction/service in question was exempt and thus, the notification issued was contrary to the principal enactment as it taxed services beyond the charging section. The notification was accordingly struck down. The said decision has no application.

38. In view of the aforesaid discussion, we do not find any merit in the present writ petitions and the same are dismissed but with the observation and finding recorded above. No costs.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

November 13th, 2013
Kkb/NA/VKR