

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7890 OF 2015

M/s. D. P. Jain and Company }
Infrastructure Pvt. Ltd. }
A company incorporated }
under the Companies Act, }
1956 having its office at }
U/G Himalaya Accord, }
Opp. Law College, Amravati }
Road, Nagpur 440 010 } Petitioner

versus

1. Union of India }
through the Secretary, }
Ministry of Finance, }
Department of Revenue, }
North Block, }
New Delhi - 110 001 }
}
2. The Commissioner of }
Central Excise, Customs and }
Service Tax, Nagpur, }
Kendriya Utpad Shulka }
Bhavan, Post Box No. 81, }
Telangkhedi Road, }
Civil Lines, }
Nagpur - 440 001 } Respondents

WITH
CENTRAL EXCISE APPEAL NO. 51 OF 2014
(ORIGINAL SIDE)

M/s. D. P. Jain and Company }
Infrastructure Pvt. Ltd. }
A company incorporated }
under the Companies Act, }
1956 having its office at }
U/G Himalaya Accord, }
Opp. Law College, Amravati }
Road, Nagpur 440 010 } Appellant

versus

The Commissioner of	}	
Central Excise and Customs	}	
Nagpur, having his office at	}	
Kendriya Utpad Shulk	}	
Bhavan, Post Box No. 81,	}	
Telangkhedi Road,	}	
Civil Lines,	}	
Nagpur - 40 001	}	Respondent

Mr. V. Sridharan - Senior Advocate with
Mr. Prakash Shah and Mr. Jas Sanghavi
i/b. M/s. PDS Legal for the petitioner.

Mr. Pradeep S. Jetly with Mr. Jitendra B
Mishra for the respondents.

**CORAM :- S. C. DHARMADHIKARI &
G. S. KULKARNI, JJ.**

**Reserved on 29th March, 2016
Pronounced on 18th July, 2016**

JUDGMENT:- (Per S. C. Dharmadhikari, J.)

1. On the above writ petition, we had granted Rule on 22nd February, 2016 and directed that it be heard along with Central Excise Appeal No. 21 of 2015.

2. Rule on interim relief in the writ petition was made returnable on 21st March, 2016 and after both sides consented, we indicted to them that the writ petition itself will be disposed of finally at the stage of interim relief. Hence, by consent of both sides, we heard the matters and are disposing them of finally by this judgment.

3. The writ petition is directed against the order-in-original dated 28th November, 2014 passed by respondent no. 2.

4. The petitioner is a company incorporated under the Indian Companies Act, 1956, having registered office at the address mentioned in the cause title. The first respondent is Union of India and the second respondent is the Commissioner of Central Excise, Customs and Service Tax, Nagpur. The petitioner is holding Service Tax Registration No. AACCD1376KST001 under the categories of "Transportation of Goods by Roads" and "Site Formation and Clearance, Excavation and Earth Moving and Demolition Service"

5. The petitioner is inter alia engaged in the business of:-

(i) Construction of roads for NHAI (National Highway Authority of India), CPWD (Central Public Works Department) and NMC (Nagpur Municipal Corporation).

(ii) Construction of runways for Airport Authority of India Ltd.

(iii) Strengthening renewal of roads.

(iv) Improving and surfacing of runways.

(v) Site preparation, excavation for further construction of roads either on its own behalf or for the clients having contracts for construction of roads.

6. The present dispute pertains to (i) repair and maintenance of roads; (ii) repair and maintenance of airport runways; (iii) site formation activity undertaken at roads. The dispute in the present case pertains to period from 2005-06 to 2009-10.

7. In the month of July, 2010, investigations were conducted by the officers of Service Tax Cell of Central Excise Headquarters, Nagpur, in connection with the alleged non-payment of service tax on the services rendered by the petitioners.

8. Following correspondences were exchanged between the department and the petitioners:-

(i) The Superintendent, Service Tax, Headquarters, Nagpur, by his letter dated 9th July, 2010 called upon the petitioner to submit the details of work done and the receipts for the same, during the period 2004-05 to 2009-12.

(ii) The petitioner, vide letter dated 19th August, 2010, filed the documents as directed by the Superintendent in the aforesaid letter.

9. Based on the scrutiny of the records of the services rendered during the financial years 2005-06 to 2009-10, a show cause notice dated 14th October, 2010 was issued to the petitioner, calling upon it to show cause as to why service rendered by it should not be classified under the categories of (a) Management, Maintenance or Repair; (b) Commercial and Industrial Construction Service and (c) site formation and excavation clearance service.

10. Further, the petitioner had to show cause as to why service tax amounting to Rs.10,25,72,125/- should not be demanded from it under the provisions of section 73(1) of the Finance Act, 1994. Interest under section 75 was proposed to be recovered and penalties under sections 76, 77 and 78 of the said Act were proposed to be imposed on the petitioner.

11. The petitioner filed an elaborate reply dated 1st August, 2011 to the show cause notice *inter alia* raising the following contentions:-

(i) The activities of repair, alteration, renovation or restoration or similar services were covered by the definition of pre-existing category “commercial or industrial construction service” as defined in clause (25b) of section 65 of the Act and such services when rendered in respect of

roads and airports were excluded from the levy of service tax and therefore, the same could not be levied under the category of “management, maintenance and repair” service.

(ii) Amongst the various activities covered by the show cause notice were services of excavation and earth work carried out in respect of roads, which were totally exempt from service tax by Notification No. 17 of 2005-Service Tax, dated 7th June, 2005.

(iii) Service tax was demanded on the gross receipts without allowing the cum-tax benefit in terms of section 67(2) of the Act.

(iv) The Board's circular was prospective in effect and based on such circular, demand of service tax could not be raised for the past period.

(v) The Board's circular dated 24th February, 2009 being an oppressive circular, had only prospective effect.

(vi) The extended period of limitation under proviso to section 73(1) of the Act could not be invoked because the Department itself was in doubt about the taxability of the various activities in relation to road as was apparent from the Board's circular which was issued on a representation made by the Nasik Commissionerate and because the details of receipts made in respect of the services provided were reflected in the balance sheet of the petitioner's company which was a public document.

(vii) Penalties under sections 76 and 78 of the Act could not be simultaneously imposed for the period in dispute.

12. However, without appreciating the submissions made by the petitioners, respondent no. 2 passed the order-in-original dated 28th October, 2011 confirming the demand of service tax of Rs.10,25,72,125/- along with interest under section 75 of the Act. The respondent has also imposed penalties of Rs.200/- per day or 2% per month of service tax amount whichever is higher under section 76, of Rs.5,000/- under section 77 and of Rs.10,25,72,125/- under section 78 of the Act.

13. While denying the benefit of exemption under Notification No. 17/2005-Service Tax on the services, excavation and earth work, respondent no. 2 observed that the exemption was applicable only to site formation performed during the course of construction of road and not to the service rendered at a very far of place for quarrying metal, etc. He further observes that the exemption is applicable only if the activity was undertaken in the course of construction of road and not for maintenance of road.

14. On the point of limitation, respondent no. 2 records a finding that since the petitioner was also engaged in construction of roads, its activities of maintenance or repairs of road got

camouflaged in the balance sheet and that it was after calling for the records from the petitioner that the Department came to know about the correct nature of the activities carried out.

15. Being aggrieved with the order-in-original dated 28th October, 2011, the petitioner filed Appeal No. ST/26/2012 (along with Stay Application No. ST/Stay/125/2012) before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) on several grounds.

16. Meanwhile, Finance Act, 2012 was enacted and, thereby, sections 97 and 98 have been inserted. Section 97 provide for retrospective exemption to activity of management, maintenance or repair of road with effect from 16th June, 2005. Similarly section 98 provides for retrospective exemption to activity of management, maintenance or repair of non-commercial Government building with effect from 16th June, 2005.

17. Relevant portion of both the sections are reproduced herewith for ready reference:-

“SECTION 97. Special provision for exemption in certain cases relating to management, etc. of roads. - (1) Notwithstanding anything contained in section 66, no service tax shall be levied or collected in respect of management, maintenance or repair of

roads, during the period on and from the 16th day of June, 2005 to the 26th day of July, 2009 (both days inclusive)

“SECTION 98. Special provision for exemption in certain cases relating to management, etc., of non-commercial Government buildings. - (1) Notwithstanding anything contained in section 66, no service tax shall be levied or collected in respect of management, maintenance or repair of non-commercial Government buildings, during the period on and from the 16th day of June, 2005 till the date on which section 66B comes into force”

18. The aforesaid stay application came up for hearing before the appellate tribunal on 30th July, 2012. The petitioner appeared for hearing and submitted that it is not liable to pay service tax.

19. However, after hearing both sides, the appellate tribunal, vide Stay Order No. S/1059/12/CSTB/C-II dated 30th July, 2012 directed the petitioners to deposit a sum of Rs.3 crores.

20. Being aggrieved and dissatisfied by Order No.S/1059/12/CSTB/C-I dated 30th July, 2012 in Appeal No.ST/26/12 passed by the Appellate Tribunal, the petitioner filed an appeal before this court. This court, vide order dated 29th November, 2012 quashed and set aside the stay order and directed the appellate tribunal to hear the appeal on its own merits without any requirement of pre-deposit.

21. Thereafter, the appellate tribunal heard the appeal on merits and passed Final Order No. A/1264/13/CSTB/C-I dated 29th May, 2013. In this order, the appellate tribunal held that section 97 and section 98 of the finance Act, 1994, which provides retrospective exemption to the services, namely, “repairs and maintenance of roads” and “repairs and maintenance of non-commercial Governmental buildings” were not there in the statute book when respondent no. 2 passed the order as these sections were subsequently introduced.

22. Accordingly, the appellate tribunal remanded the matter to the original adjudicating authority, namely, respondent no. 2 to grant the exemption provided under both these sections of the Finance Act, 2012. The appellate tribunal noted that maintenance or repair of roads was retrospectively exempted from the levy of service tax from 16th June, 2005 onwards and hence the petitioners are rightly eligible for exemption from service tax on the repair and maintenance of roads undertaken by them during the period from 16th June, 2005 to March, 2010.

23. However, the appellate tribunal held that runways cannot be said to be covered under the term “road” and hence the exemption extended to repair or maintenance of roads is not

available with respect to the activity of repair/maintenance of runways carried out by the petitioner during the disputed period.

24. The appellate tribunal also noted that even though services of repair, alteration, renovation, restoration or similar services with respect to roads and airports are excluded from the levy of service tax under “commercial or industrial construction” service, the same are still taxable under the taxable head of “management, maintenance or repair service” defined in section 65(64) of the Finance Act.

25. Aggrieved by that part of the order dated 29th May, 2013 passed by the appellate tribunal, as explained in paragraphs 23 and 24 above, the petitioners preferred an appeal, namely, central Excise Appeal No. 51 of 2014 before this court.

26. The aforesaid appeal came up for admission before this court on 13th February, 2015 and this court admitted the appeal on the following substantial questions of law:-

- (a) Whether in the facts and circumstances of the present case, the impugned order passed by the appellate tribunal holding that the activities pertaining to “runway” will not be entitled for exemption in terms of section 97 and 98 of the Finance Act is sustainable in law?

- (b) Whether in the facts and circumstances of the case, the activity of repair and maintenance of runway undertaken by the petitioners will be taxable under “management, maintenance or repair service, even when it is specifically excluded from the scope of “commercial or industrial construction service”?

27. A memorandum vide F. No. IV (16) 30-192/ST/Adj./ 2010/ 6195-6196 dated 2nd May, 2014 was issued by the Superintendent to the petitioner to submit written submissions and appear for personal hearing. The petitioner, vide letter dated 20th May, 2014, informed respondent no. 2 that the appeal filed by the petitioner against the appellate tribunal’s order dated 29th May, 2013 is pending before this court and therefore, requested to await the order of this court.

28. However, respondent no. 2, without even awaiting for the decision of this court, passed the impugned order dated 28th November, 2014 upholding the demand for Rs.5,34,70,601/-. Respondent no. 2, however, granted the following reliefs to the petitioner:-

- (a) Benefit of section 97 given to the petitioner on grounds that retrospective exemption is expressly granted to management, maintenance and repair of roads from 16th June, 2005.

Therefore, to that extent the demand was dropped.

- (b) Further, cum-duty tax benefit was allowed to the petitioner for they did not collect such service tax from recipients.

29. The aforesaid order-on-remand dated 28th November, 2014 passed by respondent no. 2 though appealable order and an appeal against the same can be filed before the appellate tribunal, but as the earlier order of the appellate tribunal is already against the petitioner and is binding on it. Hence, the remedy by way of appeal is not efficacious and effective.

30. In the light of the above facts, it is submitted that Central Excise Appeal No. 51 of 2014 is already admitted by this court on the above reproduced substantial questions of law. No useful purpose will be served by filing an appeal against the impugned order dated 28th November, 2014 to the tribunal. In any event, the tribunal has already taken a particular view of the matter. It is in these circumstances that the writ petition is filed. We having admitted it and directed that it will be heard along with the appeal that the rival contentions now need to be noted.

31. It is submitted that the impugned order is *ex-facie*

erroneous and wholly perverse. It is also submitted that it is incorrect on facts as well as on law. It is a non speaking order. The second respondent has not rendered findings on the submissions canvassed by the petitioner before him.

32. Mr. Sridharan learned Senior Counsel appearing for the petitioner, in support of the writ petition and the appeal submitted that the show cause notice as well as the order-in-original fail to classify the activity to be undertaken by the petitioner. The demand was made in respect of the work undertaken by the petitioner in three different categories without providing breakup thereof. Once the petitioner was unable to explain its case in the absence of such a breakup, then, the impugned order is *ex-facie* perverse.

33. Elaborating this argument further, Mr. Sridharan would submit that the show cause notice does not indicate as to how the activity undertaken by the petitioner and which is sought to be taxed by the Department falls under the definition of “management, maintenance and repair service”, “construction of commercial complex service” and “site formation and excavation service” as defined under the Finance Act, 1994. The service provided by the service provider, which is sought to be taxed is

the core of any show cause notice. The petitioner submits that the activity undertaken by the petitioner does not fall under taxable head of “management, maintenance and repair service”, “construction of commercial complex service” and “site formation and excavation service” as defined under the Finance Act, 1994. The show cause notice was, therefore, liable to be dropped. Mr.Sridharan submits that it is well settled that the assessee must be put to notice as to the exact nature of the contravention for which he is liable. Mr. Sridharan submits that once the show cause notice does not provide detailed breakup on which the demand is based, then, even the impugned order, which fails to indicate the broad parameters of the demand and the details thereof, must stand vitiated in law. The entire proceedings, therefore, deserve to be quashed and set aside.

34. Mr. Sridharan submits that the second respondent has excluded the portion, which pertains to repair and maintenance of roads and confirmed the rest of the demand. Under which category he has confirmed the demand is also not clear. Therefore, the findings are vague and are unsustainable. They deserve to be quashed and set aside.

35. Mr. Sridharan submits that the petitioner/appellant is *inter*

alia engaged in the business of construction of roads for National Highway Authority of India, Central Public Works Department and Nagpur Municipal Corporation. It is also engaged in the business of construction of runways for Airport Authority of India Limited. The petitioner also undertakes works of repair and maintenance of road like strengthening and renewal of road. Similarly, it undertakes repair and maintenance like improving and surfacing of runways, taxiways/apron ways.

36. Mr. Sridharan submits that the present dispute pertains to (i) repair and maintenance of roads and (ii) repair and maintenance of airport runways/taxiways/apron ways. The period in question is 16th June, 2005 to 27th July, 2009. 16th June, 2005 is the starting point of demand, since from that date only management, maintenance or repair service included immovable property. That is also the date from which the construction service became taxable. However, the demand could be raised only up to 27th July, 2009 since on that date, Notification No. 24/2009-ST was issued exempting management, maintenance or repair service relating to road. Thus, after 27th July, 2009, show cause notice itself did not demand service tax except in case of two invoices wherein the demand had been made perhaps due to oversight. No show cause notice could have been

issued for any subsequent period though the activity has remained the same. Mr. Sridharan submits that all contracts entered into with the customer involved the supply of material as well as the supply of services. In other words, none of the contracts entered into with the customer are pure labour or pure service contracts. They are in the nature of works contract. The petitioner/appellant has duly paid sales tax on all the contracts involved in the present case treating the same as works contract. The same is also duly reflected in the sales tax returns filed by the petitioner/appellant.

37. Mr. Sridharan submits that the specification for construction/repair of road is prescribed by Indian Road Congress (IRC). The same specification is followed for construction/repair of runways as well. The activity of repair and maintenance of runways referred to in the present case involves the runways, which means the strip, where the aircraft lands or takes off. Taxiways are road on which the buses or any other vehicle ply within the airport premises. Apron roads are roads wherein the aircraft moves to the parking area after landing/take off. The method of construction/specification in terms of thickness of the layers and other parameters for all the three portions, namely, runway, taxiway and apron road are the same. Mr. Sridharan

submits that upon the show cause dated 14th October, 2010, the initial order-in-original dated 28th October, 2011 was passed confirming the demand. That order was challenged before the CESTAT, Mumbai. During the pendency of the appeal before the CESTAT, Finance Act, 2012 was enacted. By this enactment, sections 97 and 98 have been inserted in Chapter V of the Finance Act, 1994. Section 97 of the Finance Act, 1994 provided for retrospective exemption to activity of management, maintenance and repairs of road with effect from 16th June, 2005. Similarly, section 98 of the Finance Act, 1994 provided for retrospective exemption to activity of management, maintenance and repairs of non-commercial Government buildings with effect from 16th June, 2005.

38. In the initial order dated 29th May, 2013, the CESTAT remanded the matter back to the adjudicating authority for considering the plea for grant of exemption under sections 97 and 98 of the Finance Act, 1994. The adjudicating authority was directed to consider the plea of the petitioner for exclusion of the value of the material and also the plea that majority demand of tax is barred by limitation.

39. Mr. Sridharan submits that in the remand order dated 29th

May, 2013, the CESTAT held against the appellant on two counts, namely the runways cannot be said to be covered under the term “roads” and hence the exemption extended to repair or maintenance of roads under section 97 of the Finance Act, 1994 is not available with respect to the activity of repair/maintenance of runways carried out by the petitioner. Secondly, though services of repair, alteration, renovation, restoration or similar services with respect to roads and airports are excluded from the levy of service tax under “commercial or industrial construction service” vide clause 65(25b) read with section 65(105)(zzq), the same are still taxable under “management, maintenance or repair service” as defined in section 65(64) of the Finance Act, 1994 read with section 65(105) thereof.

40. Mr. Sridharan would submit that commercial or industrial construction service was introduced as taxable service under the head “construction service” with effect from 10th September, 2004. The service was renamed as “commercial or industrial construction service” with effect from 16th June, 2005. Inviting our attention to the definition of the term “commercial or industrial construction service” as appearing in the Finance Act, 1994, Mr. Sridharan would submit that if these definitions are read together with the definition of the term “repair” as

appearing in the Finance Act, 1994 and as appearing in section 2(b) of the Airport Authority of India Act, 1994, it would be apparent that repairs of road and airport is specifically excluded from the definition of commercial and industrial construction. Once it is so excluded, the same cannot be taxed under any general category of management, maintenance or repair service. Mr. Sridharan submits that specific exclusion from one taxable clause will prevail over general description in another taxable clause. Mr. Sridharan submits that clause 65(25b) of the Finance Act, 1994 *inter alia* relating to maintenance or management of immovable property is demonstrative of the fact that repair/maintenance is mentioned in both clauses. Thus, rate of tax is otherwise the same for both clauses. Determination of value and all other provisions of Chapter V of the Finance Act, 1994 is identical to both these clauses. If specific exclusion has been granted to the activity of repair and maintenance of roads and airport from the definition of commercial or industrial construction service under section 65(25b) of the Finance Act, 1994, it would be illogical to suggest that it is still covered under taxable head “maintenance or repair service”. This would render the exclusion granted to the activity of repair and maintenance of roads under taxable head of “commercial or industrial construction service” redundant.

41. Mr. Sridharan submits that it could never be the intention of the legislature to grant exclusion under one head and to tax the same activity under different head. The legislature never intends to give or confer by one hand and take the same away by the other. Once any interpretation which creates redundancy is to be avoided, then, applying the principle in the judgment of the Hon'ble Supreme Court of India in the case of *Tahsildar Singh vs. State of Uttar Pradesh*¹, in the submission of Mr. Sridharan, we must hold that the tribunal's and that of respondent no. 2 views in their order are wholly unsustainable and they deserve to be quashed and set aside.

42. Mr. Sridharan, after relying on another principle laid down in several decisions of the High Courts and the Hon'ble Supreme Court of India submitted that the reasons assigned by the CESTAT are erroneous and unsustainable. Mr. Sridharan submits that the tribunal's order is based on an assumption that if repair and maintenance of roads and airport is held as not falling under "commercial and industrial construction service", then, there would be no need to retrospectively exempt the same activity by interpretation of section 97 of the Finance Act, 1994. The repair and maintenance of the road/airport was taxable earlier under

¹ 1959 (Supp.) (2) SCR 875

the category of repair and maintenance service and in order to grant exemption to such activity, retrospective amendment has been made. This is an erroneous assumption on which the tribunal proceeds. Mr. Sridharan submits that this assumption runs counter the intent of the legislature. The intent of the legislature is to grant exemption as an abundant caution. The legislature acted in public interest. Mr. Sridharan submits that when legislature acts in this manner, the legislation cannot be defeated and frustrated. The tribunal has precisely done that according to Mr. Sridharan.

43. Mr. Sridharan's second contention is that "road" is a genus of which runway is the species. The repair services rendered qua runway will also be exempt in terms of section 97 of the Finance Act, 1994. Mr. Sridharan submits that the term "road" is a broad term and "runway" is species of the road and therefore, the retrospective exemption given to road under section 97 of the Finance Act indeed applies to runway as well. Mr. Sridharan has relied upon the meaning of the term "road" as provided in the Chambers Dictionary, 1993 at page 1487. He also relies upon the meaning of term "runway" as provided in the dictionary and according to him, they refer to nothing but a 'track' suitable for certain types of wheeled vehicles, namely, motor car, bus, aircraft

etc. In these circumstances, runway cannot be left out or excluded from this broad concept of road. Mr. Sridharan has relied upon a judgment of a Division Bench of this court in the case of *Union of India vs. Authority under the Minimum Wages Act*².

44. It is then contended by Mr. Sridharan that runway is part of airport only. The benefit of section 98, which provides retrospective exemption to repair/maintenance services provided to non-commercial Government buildings, has to be extended to runways of airports as well. Mr. Sridharan would submit that runways, taxiways and apron ways/apron taxi tracks are all parts of building of airport. The building includes not only the land appurtenant thereto but the civil structures built on such appurtenant land. Therefore, what applies to repair and maintenance of a non-commercial government building equally applies to the activity carried out for preserving the structures. Mr. Sridharan submits that airports do not carry on any commercial activity. In any case, later part of the demand pertains to defence airports at Yelakhana and Bidar which are exclusively used for defence operations. In such circumstances, when the definition of the term “airport” appearing in section

² AIR 1969 Bom. 380

2(b) of the Airports Authority of India Act, 1994 can be safely utilised and it includes the runways, then, it would be absurd to suggest that maintenance and repairs done to a road/open parking lot in a society building would not be considered a part of the building. In the circumstances, retrospective exemption provided to non-commercial Government buildings under section 98 of the Finance Act, 1994 equally applies to runways as well being part of the airport building.

45. Lastly, it is submitted that the service in question is a works contract or repairs and maintenance. The works contract pertaining to roads and airport are excluded from the ambit of works contract service. The same cannot be covered under the category of repair and maintenance service as the said taxable head will cover only service simplicitor and not works contract. Mr. Sridharan submits that 60% of the value of the total contract is attributable to material supply. In these circumstances, even on this ground, this court should allow the writ petition and grant all the reliefs. Mr. Sridharan has relied upon the definition of the term “works contract” under the Finance Act, 1994. He submits that upon a plain reading of this definition, it would be evident that works contract with respect to road, airport have been excluded from the levy of service tax. The transaction involved

in the present case is composite. If it is composite contract of repairs and maintenance of roads and airport runways and excluded from the definition of the word “works contract” itself, then, they are not taxable under the works contract service. Then, repairing of roads/airport are not taxable under the works contract service.

46. Then, it is submitted that the order of the Commissioner demanding tax of Rs.37,79,784/- is incorrect. This is under category of site formation, excavation services. The commissioner held that the activity was performed at a place very far off from the site of construction and was undertaken for excavating the material which was required for road making situated away from the actual place where the road was to be laid. That is why the Commissioner held that the activity in question was done far away from road and does not qualify as exemption under Notification No.17/2005-ST. If that activity was away from the road and did not qualify for exemption, then, it is evident that it will not fall under the category of site formation, excavation service site formation. Even if the activity is recorded as site formation, it is not taxable under Notification No. 17/2005-ST. Mr. Sridharan submits that the Commissioner has not excluded the value of material. The tax is on service. The value of the

material is not liable to service tax and should have been excluded. It is incorrect to hold that no evidence is produced. Mr. Sridharan submits that at least for this purpose, the matter should be remanded back to the commissioner.

47. Mr. Sridharan submits that the demand is barred by limitation. The issue in the present case involves interpretation of law. The petitioner/appellant was of the bonafide view that they are not liable to pay service tax. The customers are also Government. The service tax being an indirect tax and eventually the liability is of the customers, then, all the more penalty was not leviable. For all these reasons, Mr. Sridharan would submit that the penalties deserve to be waived.

48. In support of the above contentions, Mr. Sridharan has relied upon the following decisions:-

(i) Dr. Lal Path Lab Pvt. Ltd. vs. Commissioner of C. Ex., Ludhiana, **2006 (4) STR 527 (Tri. Del.)**

(ii) Commissioner of C. Ex. Ludhiana vs. Dr. Lal Path Lab (P) Ltd., **2007(8) STR 337 (P & H)**

(iii) Commissioner of Customs, Central Excise vs. Federal Bank Limited, **2013 (29) STR 554 (Ker.)**

(iv) Commissioner of Central Excise and Customs, Kerala vs. M/s. Larsen and Toubro Ltd., **2015 TIOL 187 SC-ST**

(v) **Tahsildar Singh and Anr. vs. State of U. P., 1959
Supp (2) SCR 875**

49. Mr. Jetly appearing for the respondents fully supports the impugned order. Mr. Jetly submits that the petition is devoid of merits and deserves to be dismissed. Mr. Jetly submits that the demand was rightly raised. It should be sustained for the petitioner/appellant is indulging in hairsplitting. It is aware of the fact that it has rendered taxable services. It is aware of the fact that service tax is demanded by the Department/Revenue on the basis of clear provisions of law. When such a demand is raised, it is resisted only to avoid making payment to the Government. The assessee has resorted to trickery and partially succeeded in defeating the demand. The delay in adjudication and repeated remands defeats justice. Once the view taken by the authorities is possible and permissible in law, then, this court should not, in its extraordinary and equitable jurisdiction under Article 226 of the Constitution of India, interfere with pure finding of fact. The view taken is neither perverse nor vitiated by error of law apparent on the face of the record. Hence, the writ petition be dismissed.

50. Mr. Jetly has relied upon the following judgments.

(i) M. C. Mehta vs. Union of India, **AIR 1999 SC 2367**

(ii) Roshan Lal and Ors. vs. International Airport Authority of India and Ors., **AIR 1981 SC 597**

51. For properly appreciating the rival contentions, a brief reference to the allegations in the show cause notice is necessary. The show cause notice was issued on the basis of the intelligence gathered. That revealed that the petitioner/appellant is engaged in providing management or repair of goods, equipments or properties service, commercial and industrial construction service and site formation and clearance, excavation and earthmoving and demolition service to various agencies like Airport Authority of India, Municipal Corporation of the City of Nagpur and CPWD etc. The intelligence also revealed that the petitioner is providing services such as repairs and strengthening of roads, improvement and resurfacing of runways, periodical renewal of National Highways etc. and construction of toll plazas to said agencies and receiving crores of rupees for this purpose.

52. After referring to the definition of the above services, as appearing in the Finance Act, 1994, it was alleged that the records of the petitioner for the years 2005-06 to 2009-10 were called for by letters and which were replied by the petitioner/assessee. On scrutiny of all the materials produced, including the statements of the authorised signatory, it is alleged

that the activity of strengthening, repairs and black topping of roads is undertaken on the already existing road. It also appears that the activity of strengthening of road is altogether distinct from that of building or construction of a new road. Further, it appears from the definition of the “management, maintenance or repair service” that the work of strengthening or repairs of road amounts to providing of service in relation to management, maintenance or repair of properties. The notifications exempting the services of maintenance or repairs of roads from whole of the service tax leviable thereon with effect from 27th July, 2009 has been specifically referred in the show cause notice. It is, therefore, alleged that for the subject period, the petitioner/appellant had undertaken the work of providing taxable service of management, maintenance, repair of immovable property, commercial construction, site formation and excavation service. In these circumstances, the taxable service being rendered, the service tax, inclusive of education cess should have been deposited in the Government Treasury. The service tax liability to the extent of Rs.10,25,72,125/- was thus determined and the amount demanded.

53. The response of the petitioner/appellant has been that the definitions under the Finance Act, 1994 and the exemption

notifications based thereon would reveal that the excavation and earth work has been carried out for construction of roads. Notification No. 17/2005-ST dated 7th June, 2005 grants total exemption from service tax on site formation and excavation services, when rendered in the course of construction of roads. As such, out of the total value of taxable services attributable to the site formation, construction of roads is liable to be excluded and the service tax demand cannot be confirmed accordingly.

54. In relation to the other demand under the category of commercial and industrial construction, that as well is not justified and the explanation for the same has been provided in para 8 of the reply to the show cause notice at page 108 of the paper book.

55. As far as the dispute with regard to services falling under the category of management, maintenance and repairs, the attention of the Revenue was invited to Board Circular No.110/04/2009-ST dated 23rd February, 2009 with regard to levy of service tax on maintenance and repairs of road. Para 3 of the circular has been relied upon and it has been submitted that activity of extension/resurfacing, strengthening rendered in connection with runways within the area of airport cannot be

equated with a road by relying on this circular. This response of the petitioner is to be found in para 9 of the reply to the show cause notice at page 109 of the paper book. Thereafter, the reply sets out in details as to how service tax could not have been levied in relation to the services rendered and covered by the show cause notice. We need not advert to this reply any further for the simple reason that the contentions raised therein based on some judgments of courts of law have already been referred by us hereinabove. In the order passed on 28th October, 2011, the adjudicating authority reproduced the allegations in the show cause notice and the reply thereto in para 14 of the order and held that the main issues to be decided are whether the activities of the petitioner are classifiable and taxable under the category of site formation, maintenance or repair of property and construction of complex and whether the demand is hit by limitation. Finally, whether the petitioner is liable for payment of interest under section 75 of the Finance Act, 1994.

56. The order refers to the wording in Notification No. 17 of 2005 dated 16th June, 2005, which exempts the site formation and clearance, excavation and earthmoving and demolition, any such other and similar activities referred to in sub clause (zzza) of clause (105) of section 65 of the Finance Act, 1994 provided to

any person by any other person in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, ports or other ports. Thus, if the activity of site formation, excavation to be exempted must be rendered in the course of construction of roads, airports and runways etc., that does not apply to the activity of site formation which was performed at a place very far off and not on the actual site of road making and was undertaken for excavating the material which was required for road making, namely quarrying of metal, murrum etc. from a place situated away from the actual place where the road was to be laid. Thus, it was on the petitioners to establish that they were entitled to the exemption and mere averment that the said activity was done for road making would not enable them to claim exemption. The view taken was that the notification would be applicable to those cases where the activity of site formation was undertaken at the site of road making and not otherwise, namely, the place from where rubble etc. would be excavated and brought at the site of road making. This notification also would not be helpful when the activity undertaken by them pertained to maintenance of road. The distinction, thus, was made between an activity styled as construction of road and which is termed as distinct from maintenance of road. It was held that the petitioners did not submit any documentary evidence to indicate

that the said activity was undertaken by them for construction of road and not for maintenance of road. That is why the petitioner's submissions were rejected.

57. As far as other aspect is concerned, namely, maintenance, management and repair service, the findings are as under:-

“.....

iii. It is noteworthy to mention that it has not been disputed by the noticee that they had undertaken the activity of repairs and maintenance in so far as the same relate to the runway and road. On the contrary in the statement of Mrs. Vandana Gupte, Additional General manager, (Fin.) recorded under section 14 of the Central Excise Act, 1944 on 24.09.2010 she has inter alia stated that the term ST BT appearing in the contract mean Strengthening and Black Topping of roads. That they had undertaken the work of Resurfacing of Runway, Apron Taxiways and Strengthening of Apron Taxiways and also the work of BT Renewal of certain roads which required relaying the Black topping to the roads e.g. in the case of Sonegaon Bela Sirsi Road. That the work of Short Term Improvement and routine maintenance undertaken by us during the year 2008-09 and 2009-10 for Nagpur-Hyderabad section was a composite contract involving execution of reconstruction of part of damaged road and other ancillary activities to maintain smooth flow of traffic. That the contract for periodical renewal involved a wide scope of work including repairs, renewal, making good damages caused to the road. That they had undertaken the work of repairs of runway at Air Force Station at Bidar and also of strengthening and resurfacing of taxi tracks at Air force Station at Yelahanka.

iv. Thus even STBT (Strengthening and Black Topping) was an activity including strengthening of road which clearly falls under the category A (III) of the circular no. 110/4/2009-S.T., dated 23-2-2009 as

taxable being maintenance. The circular is very vivid and is binding on the officers of revenue. In view of the same I find that the submissions of the noticee as regards to taxability are not at all tenable and rejected.

15.1. In view of the above findings, I hold that the demand of Rs.102572125/- raised under show cause notice F. No. IV(16)30-192/ST/ADJ/2010/24872, dated 14-10-2010 is recoverable from the notice.

15.2. The show cause notice issued by Additional Director General, DGCEI, Zonal Unit Mumbai vide F. No. DGCEI/MZU/I&IS"D"/30-16/10/1076, dated 18-02-2011 answerable to the Commissioner Central Excise Nagpur pertains to the period June, 2008 to July, 2009. The show cause notice proposed recovery of service tax of Rs.85,64,006/- under the service category of "Management, Maintenance or Repair Service". The period, amount and service of this show cause notice have been covered in show cause notice dtd 14.10.2010 issued by the Commissioner of Central Excise, Nagpur, for an amount of Rs.102572125/-. Accordingly, both the show cause notices are disposed off with this Order in Original."

58. On the point of limitation, the initial order passed in 2011 held that the demand in the case has been prepared after calling for copies of the contracts, studying the nature of work undertaken, which was not forthcoming from the balance-sheet, but after scrutiny of the various documents. The case of the petitioner was that since it has registered itself for varied services under the Finance Act, 1994, there cannot be any suppression. The order observes that merely because registration has been obtained does not mean that the petitioner has declared all its activities to the Department. The balance-

sheet is not the document which would display on its face all the activities particularly the bifurcation between construction and maintenance or repair activities. They were camouflaged in the balance-sheet. Hence, till the details were submitted by the petitioner, it was not clear as to whether it was engaged in any activity of maintenance or otherwise. Further, the petitioner was working under self assessment. It was not for the Department to inform the petitioner as to how it should compute their tax liability. Thus, it was its bounden duty to have correctly assessed the service tax duty. The value of taxable service escaped assessment of service tax on account of the failure to disclose the relevant information to the Central Excise Department. That is how a conclusion was reached that the petitioner had suppressed facts to evade payment of service tax. Therefore, invocation of the extended period of five years is justifiable. The initial order of 2011 placed reliance upon several judgments of the tribunal, in which such a view has been taken.

59. Even on the aspect of interest and penalty, the initial order did not uphold the claim and the contentions of the petitioner.

60. This order was challenged in appeal before the CESTAT, West Zonal Bench, Mumbai. Application for stay was also made

and from the record, it appears that an order was passed on the stay application on 30th July, 2012 directing deposit of Rs.3 crores. That was on the prima facie view as reflected from that order.

61. This order on the stay application was challenged before this court in Central Excise Appeal (L) No. 137 of 2012 and on 29th November, 2012, this appeal was allowed and the interim order of the tribunal was set aside.

62. Thereafter, Appeal No. ST/26/2012, which challenged the order passed by the Commissioner of Central Excise, Nagpur on 28th October, 2011 was heard finally. The tribunal noted the rival contentions and in para 5.1 held that the petitioner/appellant has undertaken maintenance/repair of roads in addition to repair/maintenance of runways. Wide Notification No. 24/2009, maintenance/repair of roads was exempted from the levy of service tax and such exemption was given retrospective effect vide section 75 of the Finance Act, 2012 for the period starting from 16th June, 2005 onwards.

63. This part of the tribunal's order having already been complied with by the Commissioner, as is apparent from para

11.1 of the impugned order at page 81 of the paper book, we need not dwell on the same any further.

64. The tribunal's finding and which is mainly impugned before us is contained in para 5.2. There, it is held that in the absence of a specific exemption in respect of maintenance or repairs of runways, the benefit of service tax exemption available in respect of roads cannot be extended to runways.

65. The appellant/petitioner relied before the tribunal on Notification No. 24/2009-ST dated 27th July, 2009, which granted exemption to services provided in relation to management, maintenance or repair of roads. That notification reads as under:-

“Notification: 24/2009-S. T. dated 27-Jul-2009

Roads - Exemption from Service Tax to management, maintenance or repair of roads

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, referred to in sub-clause (zzg) of clause (105) of section 65 of the Finance Act, 1994, provided to any person by any other person in relation to management, maintenance or repair of roads, from the whole of the service tax leviable thereon under section 66 of the said Finance Act.”

66. A perusal of this notification reveals that the Central Government, on being satisfied that it is necessary in the public interest so to do, exempts the taxable service referred to in sub clause (zzg) of clause (105) of section 65 of the finance Act, 1994, provided to any person by any other person in relation to management, maintenance or repair of roads. Section 65 is contained in Chapter V of the Finance Act, 1994. Section 65 contains several definitions and we are concerned with clause (105), which defines “taxable service” to mean any service provided or to be provided to any person by any person in relation to management, maintenance or repair. Then, reliance is placed upon the definition of the term “airport” as appearing in the Finance Act, 1994. That definition is to be found in section 65 clause (3c). That reads as under:-

“65(3c) “airport” has the meaning assigned to it in clause (b) of section 2 of the Airports Authority of India Act, 1994 (55 of 1994).”

67. Then, reliance is placed upon the definition of the “airport” as appearing in section 2(b) of the Airports Authority of India Act, 1994. that definition reads as under:-

“2(b) “airport” means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome as defined in clause (2) of section 2 of the Aircraft Act, 1934 (22 of 1934).”

68. The argument is that the charging section applies both the clauses, namely section 65(64) and section 65(105) uniformly. Mr. Sridharan submits that repairs of road and airport is specifically excluded from the definition of industrial construction. Hence, the same cannot be taxed under another general category, namely, “management, maintenance or repair service”. Specific exclusion from main taxable clause will prevail over a general description in another taxable clause. In that regard, Mr. Sridharan has relied upon section 65(25b) of the finance Act, 1994. The same reads as under:-

“65(25b) “commercial or industrial construction” 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 services 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.”

69. His argument is that commercial or industrial construction service was introduced as taxable service under the head “construction service” with effect from 10th September, 2004. The same service was renamed as “commercial or industrial construction service” with effect from 16th June, 2005. Though it refers to repair, alteration, renovation etc., but that does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels or dams. If that is excluded from commercial or industrial construction, then, the same cannot be taxed under another general category of management, maintenance or repair service.

70. We are unable to accept this contention and for more than one reason. We are not concerned here with the wisdom of the legislature in taxing services and of varied categories. Merely

because repair of road and airports is specifically excluded from the definition of commercial or industrial construction does not mean that it cannot form part of other taxable service. That apart, if one carefully analyses section 65(25b) of the Finance Act, 1994, it would be apparent that it defines the words or expression “commercial or industrial construction”. It inter alia means, repair, alteration, renovation, restoration of or similar services in relation to building or civil structure, pipe line or conduit, but that ought to be used or to be used primarily for or occupied or to be occupied primarily with or engaged or to be engaged primarily in commerce or industry, or work intended for commerce or industry. From that service, the legislature excluded services provided in respect of roads, airports, transport terminals etc. The reason is obvious because the section contains a definition. The service provided could be for maintenance of utilities. Such maintenance may also include repairs. Therefore, the legislature thought it fit to bring it within maintenance or repair service under section 65(64) and while doing so, it firstly defined “management, maintenance or repair service” to mean any service provided by any person under a contract or an agreement for a manufacturer or any person authorised by him in relation to management of properties, whether immovable or not, maintenance or repair of properties,

whether immovable or not or maintenance or repair including reconditioning on restoration, or servicing of any goods, excluding a motor vehicle and also substituted it by the Finance Act, 2006 with effect from 1st May, 2006. It also substituted the *Explanation* below section 65(64) with effect from 15th May, 2008 to state that for the purpose of section 65(64) “goods” includes computer software and “properties” includes information technology software. However, when the legislature brought in the concept of “taxable service” by section 65(105) and defined it to mean any service provided or to be provided to person by any person in relation to management, maintenance or repair, its aim was specific and clear. Therefore, for the purpose of Finance Act, 1994 and while bringing in service tax, the definitions were to guide as to what could be a taxable service as defined under section 65(105) and when a particular category of service was contemplated by sub clauses thereof that was specified. The definitions contained in section 65 and by prior clauses would act as and provide a guideline. We do not see how it is possible to accept the argument of Mr. Sridharan based on the wording of section 65(25b) and section 65(64). As we have already held above, the definitions are for the purpose of understanding the taxable service provided or to be provided by a stock-broker, to a policy holder by an insurer, by an advertising

agency, by a courier agency etc. and when it came to service in relation to management, maintenance or repair, the legislature was free to tax it. Merely because repairs of roads and airports is specifically excluded from the definition of “commercial or industrial construction” it could still be brought in under the category of “management, maintenance or repair service”. Ultimately, management, maintenance or repair is defined to mean any service provided by any person under a contract or an agreement for a manufacturer or any person authorised by him in relation to management of properties, whether immovable or not, maintenance or repair of properties, whether immovable or not or maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle. Mr. Sridharan does not urge that roads and airports are not properties. It is the management of properties as also their maintenance or repairs, irrespective of whether they are immovable or not, which is a management, maintenance or repair service. Once it is taxable, then, whether it is in relation to road or airport is hardly relevant and material for us. It is not for us to sit in judgment over the wisdom of the legislature. We are not concerned with that in this matter. In matters of taxing provisions, the legislature enjoys a very wide latitude and discretion. It need not tax everything to tax something. It is not

for the court to probe this part of the legislative action even if it finds that some other way or measure could have been thought of. Mr. Sridharan was unable to point out any legal prohibition either. In such circumstances, we do not think that the submission has any merit. The whole argument proceeds on the logic of the legislature in excluding from one definition the aspect of maintenance or repair and including it in some other definition. In that regard, we find that commercial or industrial construction service is defined in section 65(25b) and in its wisdom, the legislature thought the services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dam would not be necessarily commercial or industrial construction and in any event repair, alteration, renovation, restoration of such utility should be excluded from the purview of the definition of the term "commercial or Industrial construction service". By this, there is no prohibition for bringing it in another category. We do not think that the definitions as carved out would make any provision of the Act redundant. Once management, maintenance or repair is a service and, in it, provision of such service in relation to any property immovable or otherwise could be brought, then, we do not think that we should uphold the argument of Mr. Sridharan. It is clear that in matter of taxation, when the language of the section or provision is clear and

unambiguous, then, the court must give effect to it. There is no question of then interpreting the provision and by finding out the supposed intention of the legislature. It is only when the language is not clear but ambiguous or obscure, then, there is scope for interpretation. In the present case, we do not think that the principles of interpretation can be pressed into service. More so when we do not find any redundancy or absurdity. Eventually, in inserting and incorporating definitions so as to understand taxable service if management, maintenance or repair is taken to be a distinct service and that aspect is excluded from the definition of the term “commercial or industrial construction service”, then, it is not a case of redundancy or rendering any provision nugatory, but being specific and clear. Once the matter is understood in this manner, then, the submission of Mr. Sridharan, based on the judgment of the Hon'ble Supreme Court of India in the case of *Tahsildar Singh* (supra) cannot be accepted.

71. In the case of *Tahsildar Singh* (supra), the Hon'ble Supreme Court of India was concerned with construction of section 162 of the Code of Criminal Procedure, 1898. The argument before the Hon'ble Supreme Court was that section 162 of Cr. P. C. by its own operation attracts the provisions of section 145 of the Indian Evidence Act and under the later section, the whole vista of cross-

examination on the basis of the previous statement in writing made by the witness before the police is open to the accused and a question can be posed to him with a view to elicit response and equally by contradicting him by putting to him an earlier statement which does not contain the statement made during the course of trial. The second argument was that the word 'contradiction' is of such wide connotation that it takes in all material omissions and the court can decide whether one such omission has to amount to contradiction only after the question is put, answered and relevant portion or part of it is marked and therefore, no attempt should be made to evolve an arguable principle but the question must be decided at large by the Judge concerned on facts of each case.

72. It is in that context, the Hon'ble Supreme Court, after reproducing both, section 162 of the Cr. P. C. and section 145 of the Indian Evidence Act held that the object of the legislature throughout has been to include the statement of the witnesses made before police during the investigation for being used at the trial for any purpose and the amendments from time to time were only intended to make clear the object and to dispel cloud cast on such intention. It is in that regard the Hon'ble Supreme Court of India made the observations relied upon by Mr. Sridharan.

Therefore, the Hon'ble Supreme Court of India held in para 14 that unless the words are clear, the court should not so construe the proviso as to attribute the intention of legislature to give with one hand and take away with another. A sincere attempt should be made to reconcile the enacting clause and the proviso and to avoid repugnancy between the two. But, if the words are clear, plain and unambiguous, then, we do not think how this principle can have any application.

73. Then, Mr. Sridharan places reliance on the judgment of the Gujarat High Court in the case of *Darshan Hosiery Works vs. Union of India*³. Reliance by Mr. Sridharan on this judgment also is totally misplaced. The contentions in the petition before the Hon'ble Gujarat High Court centered around the interpretation of Item 22D and Item 68 in the first Schedule of the Central Excise Act, 1944. After reproducing these articles, the Division Bench held that the goods which are specifically referred to in Item 22 having been exempted from tax, they cannot be brought to tax by relying on the residual entry. It is in that context that the Hon'ble Supreme Court relied upon the principle that when there is a law generally dealing with a subject and another dealing with one of the topics comprised therein, then, general law is to be

construed as yielding to the special in respect of matters comprised therein. We do not think this principle in para 8 would be said to be attracted and can be applied to the facts of the present case. Here, we have two definitions which are to be found to understand the whole gamut of services brought to tax. To encompass almost all the services for bringing them in the tax net, their definitions are worded accordingly. We cannot ignore the plain words by applying the above principle.

74. Then, Mr. Sridharan has placed reliance upon the judgment of the High Court of Punjab and Haryana affirming the view of the Tribunal in the case of *Dr. Lal Path Lab Pvt. Ltd. vs. Commissioner of Central Excise, Ludhiana*⁴. That case dealt with a pathological laboratory. A sample collection centre was managed for specialized laboratories. The sample collection centre collected the samples, processed them to the extent required and forwarded them to the test laboratory. The test laboratory and the sample collection centre had a principal agent relationship. After referring to the basic terms and conditions of this agreement, the tribunal proceeded to consider the argument revolving around the dispute as to whether the service rendered by the collection centre is “business auxiliary service” or

4 2007 (8) STR 337 (P&H)

“technical test and analysis service”. The two definitions have been reproduced in para 4 of the tribunal’s order. The argument of the parties and particularly the principal and the collection centre was noted. Thereafter, the argument of the departmental representative also came to be considered. The tribunal held that services rendered by the appellant before it of drawing, processing and forwarding of samples is integral to the testing of those samples. One of the orders impugned before the tribunal also noted that drawing of test sample may form part of test analysis. Therefore, the tribunal held that once they are held to be so integral, then, in the factual situation and the broad scope of the definition brings these services rendered by collection centre within the scope of “technical testing and analysis”. Once there is a specific entry for an item in the tax code, the same cannot be taken out and goods cannot be taxed under any other entry if they are covered by such specific entry. The Revenue, in that case, was seeking to discard the specific entry and to bring the services of the appellant before the tribunal under very general entry only because under the specific entry, no tax was payable. It is this approach which was held to be contrary to the scheme of the legislation. It is in that context that the principle relied upon by Mr. Sridharan has been pressed into service. It is this principle which was relied upon by the Hon’ble High Court of

Punjab and Haryana to dismiss the appeal of the Revenue. Once again, application of this principle must be seen in the backdrop of the peculiar facts and circumstances.

75. The other decision relied upon by Mr. Sridharan is in the case of *Commissioner of Customs and central Excise vs. Federal Bank Limited*⁵. The High Court of Kerala was considering the question as to whether the tribunal was right in holding that the collection of telephone bills by Federal Bank for Bharat Sanchar Nigam Limited, Airtel and other companies is not business auxiliary service attributing liability of service tax falling under section 65(19) of the Finance Act, 1994. The tribunal referred to the facts, the services rendered and concluded that the definition refers to each and every service covered by sub clause (i) and sub clause (vi), which do not specifically cover banking and other financial services. Banking and other financial services are specifically covered by clause (12) of section 65. Federal Bank is rendering banking/financial services. There is no scope for charging tax for this service rendered by bank under any other head. The High Court held that clause (12) of section 65 covers all charging services rendered by bank. It is in these circumstances but for different reasons the tribunal's view was

5 2013 (29) STR 554 (Ker.)

upheld. This judgment also has no application to the facts of the present case.

76. Mr. Sridharan has relied upon some more decisions in the written submissions and on the same principle. We do not think that we should burden this judgment with reference to every such decision relied upon for what we are concerned with is not a situation as indicated above on par with the facts and circumstances in the reported decisions. For the above reasons, we also distinguish the judgments relied upon, namely, *Kerala State Industrial Enterprises Ltd. vs. Commissioner of Central Excise, Customs and Service Tax*⁶ and *Meteor Satellite Limited vs. Income Tax Officer, Companies circle-IX, Ahmedabad*⁷.

77. Then, Mr. Sridharan assailed the reasons which are assigned by CESTAT while interpreting section 97 of the Finance Act, 1994. We do not think that Mr. Sridharan's arguments on this point are well founded. This is not a case of the legislature granting exemption from tax as and by way of abundant caution. The legislature has clearly held that the service falling within the

⁶ 2011(28) STR 574 (Ker.)

⁷ (1980) 121 ITR 311 (Gujarat)

purview of section 97 can be brought to tax. It is, therefore, clear that exemption of those services from tax has been granted by exercising a distinct power vesting in the Central Government. It is that distinct power which has been conferred and envisaged in the Central Government by the enactment. Once we do not think that the principle and the maxim relied upon has any application, for that reason, we need not refer to the Principles of Statutory Interpretation by Justice G. P. Singh, Seventh Edition page 66.

78. The principle of presence of an exemption notification and that covering a composite contract by itself is not indicative that the services or contracts referred therein were taxable, also cannot be relied upon. The levy of service tax was itself found to be nonexistent. Therefore, question of exemption would not arise. In other words, what could be brought to tax alone can be exempted from it or the levy. If that was not taxable at all or from inception, then, there is no question of grant of any exemption therefrom. That is a principle which has been laid down in case of *Commissioner of Income Tax vs. Shaw Wallace and Co.*⁸

8 AIR 1932 SC 138.

79. The second submission of Mr. Sridharan is that the term “road” is a genus of which runways is the species. Hence, repair services rendered qua runways will also be exempted in terms of section 97 of the Finance Act, 1994.

80. We do not think that this contention also is well founded. We have already noted that there is a difference even in commercial parlance between these two words and terms. These terms being not defined in the Finance Act, 1994, it is conceded that they must take their colour from their common parlance meaning. They must be understood and interpreted as known to the commercial world. Even the plain dictionary meaning does not support the above contention. Concise Oxford Dictionary, 1990 Edition says that “runway” is a specially prepared surface along which a aircraft takes off and land. Thus, it is a path for aircraft to take off from. Whereas, “road” may be a path or way with a specially prepared surface, but it is used by vehicles/pedestrians etc. Mr.Sridharan may have relied upon the meaning of these two words in the Chambers Dictionary, 1993 Edition page 1487, but even those definitions would make it clear that ordinarily road is understood as a passageway, track suitable for wheeled vehicles. That is not how runway is construed and understood. Runway is made or specifically prepared along

which a aircraft takes off and lands. Eventually, it is not how it is made and surfaced, but what it is utilized for which is relevant. We do not think, therefore, that the premise or foundation that road is a genus of which runway is species is correct and proper. Mr. Sridharan submits that road is a wide term and included in it is a runway. Hence, it is no different from a road. We are unable to agree.

81. The reliance placed by Mr. Sridharan on a Division Bench judgment of this court in the case of *Union of India vs. Authority under the Minimum Wages Act*⁹ is entirely misplaced. There, the argument on behalf of Union of India was that the orders passed by the authorities under the Minimum Wages Act, 1948 should be quashed and set aside. The facts have been noted in para 2 of this judgment. The competent authority under the Minimum Wages Act held that the word “road” included a rail road within the meaning of Entry No. 7 in part I of the Schedule to the Minimum Wages Act, 1948 and therefore, he had jurisdiction to entertain and try the application. He directed that the application should proceed on merits.

82. The argument was that respondent no. 2 to 201 before this court were in employment on the construction or maintenance of

9 AIR 1969 Bom. 310

roads. Construction or maintenance of a railway track is not covered by expression “construction or maintenance of roads”. Therefore, the Division Bench was required to construe as to whether the term or word “road” would include maintenance of railway track. One must not forget that the Division Bench was construing and interpreting a legislation like the Minimum Wages Act, 1948. After analyzing the provisions of this Act, in para 4, the Bench proceeded to consider the primary contention. If the road can be defined to mean as line of communication between places for use of foot passengers, riders and vehicles and the expression “road-bed” is described to mean “foundation, structure of a railway”, then, there is no reason why the railway should not mean a road or a line of communication between places for use of vehicles. Once a railway engine or wagon or compartment would undoubtedly fall within the meaning of the word “vehicle” as carriage conveyance of any kind used on land, then, in the opinion of the Division Bench, the maintenance of railway contract would fall within the broad category. That is how it carved out the principle that road is genus and railway is species of road. We cannot forget that in construing a welfare and beneficial piece of legislation and ensuring that its benefits are derived by those for whom it is enacted that such a broad categorization has been made. We are not concerned with such a

piece of legislation. We are interpreting a taxing provision. In that, there is no scope for intendment or some assumption or hidden meaning. It is the plain language and if it is clear and does not lead to any absurdity, it has to be construed and interpreted as it stands. There is no scope then for interpretation. Para 8 of the decision of the Division Bench would clinch the issue, which reads as under:-

8. It is an ordinary rule of interpretation of statutes that the words of a statute when there is a doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature has in view. When dealing with particular business or transactions words are, therefore, presumed to be used with the particular meaning in which they are understood in the particular business in question. If there is no special meaning given to a word in that business, the words are used in the popular dictionary sense. The Minimum Wages Act is part of labour legislation. In absence of any special meaning given to it in any labour legislation which is in pari material with this Act or by a judicial precedent, the literal meaning is to be preferred to any special meaning that the word may bear in any other enactment which has a different subject of enactment and has a different object to be achieved in view. It would, therefore, appear that the construction or maintenance of roads would include "construction and maintenance" of railway, rail-road or railway tracks."

83. Hence, we are not in agreement with Mr. Sridharan that section 97 should be interpreted as suggested by him. We do not think that for the above reasons any assistance can be derived by the judgment of the Hon'ble Supreme Court of India in the case of *Commissioner of Central Excise and Customs, Kerala vs. M/s. Larsen and Toubro Ltd.*¹⁰ decided on 20th August, 2015. There, the issue was whether service tax can be levied on individual works contracts prior to the introduction on 1st June, 2007. The Hon'ble Supreme Court concluded 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 have to be taxed separately. It is in the context of such essential controversy that all observations and conclusions rendered from paras 24 to 29, relied upon by Mr. Sridharan must be seen. Even para 43, relied upon by Mr. Sridharan of this judgment cannot be read out of context and in isolation. If there is no charge or machinery to levy and recover tax on individual or composite works contract, then, none of the arguments of the Revenue noted by the Hon'ble Supreme Court could have been accepted.

84. Mr. Sridharan relied upon some English judgments, but

those carry forward the interpretation placed on the word “rail road” and as a part and parcel of broad category of “road”. If we have distinguished the judgment of the Division Bench of this court, for selfsame reasons, even these judgments are distinguishable. Merely because on some portions and adjacent to a runway, motor vehicles ply or to tow or bring back stranded aircraft specialized recovery vehicles are brought on runway does not mean that runways are roads. We do not think that section 97 can be construed in this manner.

85. Then, the third submission is pertaining to section 98 of the Finance Act, 1994. That grants retrospective exemption to repair/maintenance services provided to non commercial Government buildings. The argument is that the same must be extended to repair of airports as well. It is submitted that management, maintenance or repair of non commercial Government building would mean an airport should be covered therein. Airports do not carry out any commercial activity. In any case, larger part of demands pertain to defence airports which are exclusively used for defence operations. Those airports falls under the scope of non commercial Government buildings. “Airport”, as defined in the Airports Authority of India Act, 1994 includes the runways and therefore, it would be absurd to suggest

that maintenance or repairs done to roads which are part of the building or airport will not fall within this provision. We do not think that such contentions and far fetched as they are can be accepted. Mr. Sridharan forgets that we are not construing as to whether airport is covered by section 98 of the Finance Act, 1994. We are concerned here with appellant's specific case. Some of the services provided included extension, strengthening of runways, taxi ways, apron taxi ways. We are concerned with these services. Whether these services are falling in the category of maintenance and repairs of road is the question before us. We do not think that we are required to find out whether definition of "airport" itself includes runways and even if they are so included, whether those are contemplated by section 98. Section 98 refers to building services relating to management etc. of non commercial Government buildings. We are not construing the ambit and scope of such services. We are concerned with the excision from the definition of this service the maintenance of road, repair to runway etc. That exclusion is clear.

86. Hence, we restrict the arguments made as above.

87. Even the fourth submission and based on the judgment in the case of Commissioner of *Central Excise and Customs, Kerala*

vs. Larsen and Toubro (supra) cannot be accepted for the reason it is distinguishable on facts.

88. We do not think that the fifth, sixth and seventh submissions, as appearing in that order in the written submissions need detain us. These are based on findings of fact. Once they are relatable to the main contentions and in any event the tax demand as far as site formation and excavation services is concerned has been upheld by observing and holding that it was not exempted under Notification No. 17/2005-ST bearing in mind the site or place where the services are rendered but its location. That being at a far of place, on facts, the benefit of this notification was denied. We do not think that the tribunal was in error in upholding the demand.

89. Even on the point of limitation and no penalties are imposable, we are of the view that there was never any doubt about the provisions and the nature of the services. We do not think, therefore, that appellant can assail or challenge the findings on the point of limitation and imposition of penalty.

90. As a result of the above discussion, we do not find any merit in the appeal. Once the order impugned in the writ petition is a

consequential one and follows the tribunal's order under appeal and is delivered and pronounced on remand, then, for the very reasons, which we have assigned for upholding the conclusion of the tribunal would cover the outcome of the writ petition. If the tribunal's order dated 29th May, 2013 is upheld, then, this order also must prevail. Consequently, the writ petition must also fail. Rule is discharged. There would be no order as to costs.

(G. S. KULKARNI, J.)

(S.C.DHARMADHIKARI, J.)