

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.12.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE R.PONGIAPPAN

CMA No.105 of 2009

Commissioner of Customs & Central Excise,
6/7, ATD Street,
Race Course Road,
Coimbatore - 641 018. Appellant / Respondent

vs.

1. M/s.Hindustan Construction Company Ltd.,
34, Viran Mansion,
Railway Feeder Road,
Tirupur - 641 601.

2. Customs, Excise and Service Tax
Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan Annexe I Floor,
26, Haddows Road, Chennai - 600 006. Respondents/Applicant

Civil Miscellaneous Appeal filed under Section 35-G of the
Central Excise Act against the order dated 30.04.2008, passed by
the Customs, Excise, and Service Tax Appellate Tribunal, South
Zonal Bench, Chennai made in Final Order No.434/2008.

For Appellant : Mr.A.P.Srinivas

For Respondents : Mr.N.Prasad (for R1)
for Mr.N.Inbarajan

JUDGMENT

(Order of the Court was delivered by S.MANIKUMAR, J)
Instant Civil Miscellaneous Appeal is filed against the
order dated 30.04.2008, passed by the Customs, Excise, and
Service Tax Appellate Tribunal, South Zonal Bench, Chennai in
Final Order No.434/2008.

2. Short facts leading to the filing of the appeal are that
M/s.Hindustan Construction Company Limited [HCCL], the 1st

respondent/assessee herein, is engaged in Engineering Consultancy and had rendered service in that category to M/s.New Tirupur Area Development Corporation Limited [NTADCL]. According to the 1st respondent, as there was doubt about the applicability of the service tax to the construction contract executed on turnkey basis, they had applied for registration and paid the service tax to the tune of Rs.2,84,16,809/- on 8.1.2004. Thereafter, the 1st respondent, obtained advice from the tax practitioners and having understood that self assessment and remittance of service tax was uncalled for, applied for refund of the same.

3. The adjudicating authority in Order in SL.No.151/2004 dated 5.8.2004 held that the 1st respondent has entered into 4 different contracts with NTADCL for implementing Tirupur Water supply project and that the four contracts were independent in nature, for different purposes. Therefore the claim of M/s.HCCL that the contract entered with M/s. NTADCL, as one single turnkey contract, though there were divisions within the contract, is not acceptable.

4. The Adjudicating authority further held that the Engineering Contract entered with M/s.NTADCL, comes within the purview of consulting Engineering service and hence service tax already paid by M/s.HCCL on the amount received from M/s. NTADCL is correct, and accordingly, the claim for refund of Rs.2.84 crores was liable for rejection.

5. Aggrieved by the same, the 1st respondent/assessee filed appeal and the Commissioner of Central Excise (Appeals) vide order No.42/2004/ST dated 07.01.2005 dismissed the same.

6. The 1st respondent/assessee preferred further appeal to CESTAT. Before the CESTAT the 1st respondent/assessee contended that they entered into two contracts with M/s. NTADCL. In one of the contracts, HCCL was to render service of consulting engineering to NTADCL, and as per the other contract, HCCL was to implement water treatment and distribution project (TWP) for NTADCL and on 29.10.2002, the two contracts were merged into one and a turnkey contract called co-ordination agreement came into existence. The 1st respondent/assessee further submitted that as HCCL itself designed and executed the project, there was no question of the respondent's rendering engineering consultancy to any other person. The project was implemented as a works contract. The assessee had registered with Tamil Nadu Sales Tax Department and paid tax for the works contract and relied on the judgment in Daliem Industrial Co. Ltd. Vs. CCE Vadodara reported in 2003 (155) ELT 497 (Tri-Del) upheld by Supreme Court [2004 (170) ELT A.181 (SC)].

7. Before the CESTAT, department contended that as per CBEC circular No.49/11/2002 dated 18.12.2002, even when a person who rendered engineering consultancy as part of a turnkey contract, the said service portion was liable to service tax under the category of consulting Engineer.

8. After considering the above submissions, the tribunal vide Final Order No.434 of 2008 dated 30.04.2008 held that the 1st respondent prepared engineering designs required for executing the project, and simultaneously carried out the execution of construction work, involved in the execution of the project.

9. CESTAT, Madras, accepted the submissions of the 1st respondent/assessee and held that the agreement which involved HCCL, undertaking the work of engineering design as well as construction of TWP and HCCL is a composite contract and therefore service tax is not payable. Against such finding, instant Civil Miscellaneous Appeal is filed by the revenue, on the following substantial questions of law.

(i) Whether the Hon'ble Tribunal is correct to hold that M/s.HCCL did not render engineering consultancy to NTDCL after finding that the agreement involved HCCL undertaking work of engineering design as well as construction of TWP;

(ii) Whether the tribunal is correct in holding that all the 3 contracts entered in to between the parties on the same date constitute a single turnkey contract and hence service tax is not leviable which view is against the definition of "Consulting Engineering Service" under Section 65(31) of the Finance Act, 1994 and the Notification No.CB 43/5/97-TRW dated 2.7.97 and circular No.49/11/2002-SR dated 18.12.2002.

(iii) When the case laws relied on by the Tribunal deals with "Turnkey Project", is it correct on the part of the Tribunal to apply the ration of the above decision when there exists two different contracts one for Engineering and another for Construction in the present case against them."

10. Seeking reversal of the order, Mr.A.P.Srinivas, learned counsel for the appellant, made submissions.

11. Mr.N.Prasad, learned counsel appearing for 1st respondent/assessee made submissions to sustain the order of the tribunal.

12. Heard the learned counsel for the parties and perused the materials available on record.

13. Upon appreciation of evidence, the tribunal has come to the conclusion that there is an indivisible contract and paragraph Nos.3 and 4 of the order made in F.No.434 of 2008 dated 30.04.2008 is extracted hereunder.

"3. We have carefully considered case records and the submissions made by both sides. It is seen from the contract that the appellants prepared engineering designs required for executing the project simultaneously with carrying out the construction work involved in the execution of the project. We find that in the Daelim Industrial Company Ltd. (supra) cited by the appellants, the Apex Court had upheld the decision of the Tribunal. The Tribunal had held that a turnkey contract could not be vivisected and the service portion separately taxed. This decision was followed by this Bench in CMS (supra). Other case law cited laid down the same ratio.

3.1 We find that the clauses 2.1 and 2.2 of the co-ordination agreement laid down as follows:

"2.1 The parties recognize and accept that though the scope of the Works under each of the Contracts is separate and exclusive. HCCL, being the Contractor under the Engineering Contract as well as the Contractor under Construction Contract, the separate obligation under the Contracts shall constitute a single obligation of HCC. Notwithstanding anything contained in the Contracts, HCC agrees that it shall be liable under the Contracts to the same extent as if the Engineering Contract and the Construction Contract were a single combined Contract. HCC shall perform its obligations under each of the Contracts without recourse to the owners insofar as such performance does not involve the owner.

2.2 Notwithstanding anything contained in the Contracts, HCC shall carry out and complete all works necessary to establish a fully operational and complete Facility free from defects as detailed in the Contracts and HCC acknowledges from the Contracts shall together constitute a single turnkey contract that provide for

the design, engineering. Construction, testing, commissioning and completion of the works (as defined in both the contracts)"

In the letter dated 20 January 2004 from New Tirupur Area Development Corporation Ltd., to M/s.Hindustan Construction Company Ltd., appellant was informed as follows:

"Therefore, NTADCL reiterates that both the Engineering Contract and Construction Contract, though executed separately are in fact a single contract and that the liability of HCC is to execute its portion on a turnkey basis taking both the contracts together.

In view of the above, it is our opinion that the opinion of the Consultant that service tax is payable by HCC on the engineering services is not based on facts and contract and consequently NTADCL, rejects HCC's claim of service tax from the company."

4. Following the ratio of the judicial authorities cited, we find ourselves in agreement with the plea taken by the appellants. HCCL implemented the coordination agreement and implemented the TWP. The agreement involved HCCL undertaking work of engineering design as well as construction of TWP. HCCL did not render engineering consultancy to NTADCL. Therefore, the impugned amount of service tax HCCL paid as Consulting Engineer was not due to be paid. The appeal is allowed."

14. In Daelim Industrial Co. Ltd. Vs. Commissioner of C.Ex., Vadodara, reported in 2003 (155) ELT 457 (Tri.-Del), upon perusal of the clauses in the Contract and material on record at paragraph No.6, the tribunal held as follows:

"6. Thus, a perusal of the clauses of the contract leaves no doubt that the appellant contract with IOC was a work contract on turnkey basis and not a consultancy contract. It is well settled that a work contract cannot be vivisected and part of it subjected to tax. The impugned orders have proceeded to do precisely that. Therefore, they are required to be set aside."

Said judgment has been affirmed by the Hon'ble Supreme Court in 2004 (170) ELT A181 (SC).

15. On the aspect as to whether Service Tax can be levied in respect of composite contract or indivisible contract, the Hon'ble Supreme Court in Commissioner of Central Excise &

Customs, Kerala Vs. Larsen & Toubro Limited, reported in 2015 (39) STR 913 (SC), at paragraph Nos.10 to 26, 29 and 43, held as follows:

"10.Section 65. Definitions. In this Chapter, unless the context otherwise requires, ----

(105) taxable service means any service provided-

(g) to a client, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering [but not in the discipline of computer hardware engineering or computer software engineering;

(zzd) to a customer, by a commissioning and installation agency in relation to erection, commissioning or installation;

(zzh) to any person, by a technical testing and analysis agency, in relation to technical testing and analysis;

(zzq) to any person, by a commercial concern, in relation to construction service;

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

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

Section 66. Charge of service tax

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of ten per cent. Of the value of the taxable services referred to in sub-clauses (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zd), (ze), (zf), (zg), (zh), (zi), (zj), (zk), (zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzj), (zzk), (ztl), (zzm), (ztn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), and (zzy) of clause (105) of section 65 and collected in such manner as may be prescribed.

Section 67. Valuation of taxable services for charging service tax.- For the purposes of this Chapter, the value of any taxable service shall be the gross amount charged by the service provider for such service

rendered by him.

Explanation.1- For the removal of doubts, it is hereby declared that the value of a taxable service, as the case may be, includes,-

a) the aggregate of commission or brokerage charged by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker;

b) the adjustments made by the telegraph authority from any deposits made by the subscriber at the time of application for telephone connection or pager or facsimile or telegraph or telex or for leased circuit;

c) the amount of premium charged by the insurer from the policy holder;

d) the commission received by the air travel agent from the airline;

e) the commission received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;

f) the reimbursement received by the authorized service station from manufacturer for carrying out any service of any automobile manufactured by such manufacturer; and

g) the commission or any amount received by the rail travel agent from the Railways or the customer, but does not include, -

(i) initial deposit made by the subscriber at the time of application for telephone connection or pager or facsimile (FAX) or telegraph or telex or for leased circuit;

(ii) the cost of unexposed photography film, unrecorded magnetic tape or such other storage devices, if any, sold to the client during the course of providing the service;

(iii) the cost of parts or accessories, or consumables such as lubricants and coolants, if any, sold to the customer during the course of service or repair of motor cars, light motor vehicle or two wheeled motor vehicles;

(iv) the airfare collected by air travel agent in respect of service provided by him;

(v) the rail fare collected by rail travel agent in respect of service provided by him;

(vi) the cost of parts or other material, if any, sold to the customer during the course of providing maintenance or repair service;

(vii) the cost of parts or other material, if any, sold to the customer during the course of providing erection, commissioning or installation service; and

(viii) interest on loans.

Explanation 2. - Where the gross amount charged by a service provider is inclusive of service tax payable,

the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged.

11. By the Finance Act, 2007, for the first time, Section 65 (105) (zzzza) set out to tax the following:-

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

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

i) Transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

ii) Such contract is for the purposes of carrying out,-

a) Erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

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

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

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

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

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

Valuation of taxable services for charging Service tax
(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,

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

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money,

be such amount in money, with the addition of service tax charged, is equivalent to the consideration;
(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

13. Pursuant to the aforesaid, the Service Tax (Determination of Value) Rules, 2006 were made, Rule 2A of which reads as under:-

2A. Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

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

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

(i) labour charges for execution of the works;

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

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

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

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

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

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

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

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

value of service portion in the execution of works contract under this clause.

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

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

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy per cent of the total amount charged for the works contract;

(C) in case of other works contracts, not covered under sub- clauses (A) and (B) including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property, service tax shall be payable on sixty per cent of the total amount charged for the works contract.

Explanation I.-For the purposes of this rule,-

(a) "original works" means- (i) all new constructions;

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

(d) "total amount" means the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(i) the amount charged for such goods or services, if any; and (ii) the value added tax or sales tax, if any, levied thereon: Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

Explanation 2.-For the removal of doubts, it is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.[2]

14. Crucial to the understanding and determination of the issue at hand is the second Gannon Dunkerley judgment which is reported in (1993) 1 SCC 364. By the aforesaid judgment, the modalities of taxing composite indivisible works contracts was gone into. This Court said:-

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

the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. We are also unable to accept the contention urged on behalf of the States that in addition to the value of the goods involved in the execution of the works contract the cost of incorporation of the goods in the works can be included in the measure for levy of tax. Incorporation of the goods in the works forms part of the contract relating to work and labour which is distinct from the contract for transfer of property in goods and, therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by Article 366(29-A) (b).

Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. This would mean that labour charges for execution of works, [item No. (i)], amounts paid to a sub-contractor for labour and services [item No. (ii)], charges for planning, designing and architect's fees [item No. (iii)], charges for obtaining on hire or otherwise machinery and tools used in the execution of a works contract [item No. (iv)], and the cost of consumables such as water, electricity, fuel, etc. which are consumed in the process of execution of a works contract [item No. (v)] and other similar expenses for labour and services will have to be excluded as charges for supply of labour and services. The charges mentioned in item No. (vi) cannot, however, be excluded. The position of a contractor in relation to a transfer of property in goods in the execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax, the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. The charges mentioned in item No. (vii) relate to the various expenses which form part of the cost of establishment of the contractor. Ordinarily the cost of

establishment is included in the sale price charged by a dealer from the customer for the goods sold. Since a composite works contract involves supply of materials as well as supply of labour and services, the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services. The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods. Similar apportionment will have to be made in respect of item No. (viii) relating to profits. The profits which are relatable to the supply of materials can be included in the value of the goods and the profits which are relatable to supply of labour and services will have to be excluded. This means that in respect of charges mentioned in item Nos. (vii) and (viii), the cost of establishment of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be excluded. The amount so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover

- (a) Labour charges for execution of the works;
- (b) amount paid to a sub-contractor for labour and services;
- (c) charges for planning, designing and architect's fees;
- (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
- (e) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and
- (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;
- (g) other similar expenses relatable to supply of labour and services;
- (h) profit earned by the contractor to the extent it is relatable to supply of labour and services.

The amounts deductible under these heads will have to be

determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts. (at paras 45, 47 and 49)

15. A reading of this judgment, on which counsel for the assessee heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting therefrom charges towards labour and

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

16. At this stage, it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of

taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm. This position is well reflected in *Bharat Sanchar Nigam Limited v. Union of India*, (2006) 3 SCC 1, as follows:-

"No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in *Larsen & Toubro v. Union of India* [(1993) 1 SCC 364] : (SCC p. 395, para 47) :-

The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods.

For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. As was held by us in *Gujarat Ambuja Cements Ltd. v. Union of India* [(2005) 4 SCC 214] , SCC at p. 228, para 23:-

This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of

the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field. (at paras 88 and 89)

17. We find that the assesseees are correct in their submission that a works contract is a separate species of contract distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In *Gannon Dunkerley*, 1959 SCR 379, this Court recognized works contracts as a separate species of contract as follows:

To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in *Hudson on Building Contracts*, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment. (at page 427)

18. Similarly, in *Kone Elevator India (P) Ltd. v. State of T.N.*, (2014) 7 SCC 1, this Court held:-

Coming to the stand and stance of the State of Haryana, as put forth by Mr Mishra, the same suffers from two basic fallacies, first, the supply and installation of lift treating it as a contract for sale on the basis of the overwhelming component test, because there is a stipulation in the contract that the customer is obliged to undertake the work of civil construction and the bulk of the material used in construction belongs to the manufacturer, is not correct, as the subsequent discussion would show; and second, the Notification dated 17-5-2010 issued by the Government of Haryana, Excise and Taxation Department, whereby certain rules of the Haryana Value Added Tax Rules, 2003 have been amended and a table has been annexed providing for Percentages for Works Contract and Job Works under the heading Labour, service and other like charges as

percentage of total value of the contract specifying 15% for fabrication and installation of elevators (lifts) and escalators, is self-contradictory, for once it is treated as a composite contract invoking labour and service, as a natural corollary, it would be works contract and not a contract for sale. To elaborate, the submission that the element of labour and service can be deducted from the total contract value without treating the composite contract as a works contract is absolutely fallacious. In fact, it is an innovative subterfuge. We are inclined to think so as it would be frustrating the constitutional provision and, accordingly, we unhesitatingly repel the same. (at para 60)

19. In *Larsen & Toubro Ltd. v. State of Karnataka*, (2014) 1 SCC 708, this Court stated:-

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

all genre of works contract in view when clause (29-A) was inserted in Article 366. (at para 72)

20. We also find that the assessee's argument that there is no charge to tax of works contracts in the Finance Act, 1994 is correct in view of what has been stated above.

21. This Court in *Mathuram Agrawal v. State of M.P.*, (1999) 8 SCC 667, held:-

Another question that arises for consideration in this connection is whether sub-section (1) of Section 127-A and the proviso to sub-section (2)(b) should be construed together and the annual letting values of all the buildings owned by a person to be taken together for determining the amount to be paid as tax in respect of each building. In our considered view this position cannot be accepted. The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter.

This construction, in our considered view, amounts to supplementing the charging section by including something which the provision does not state. The construction placed on the said provision does not flow from the plain language of the provision. The proviso requires the exempted property to be subjected to tax and for the purpose of valuing that property alone the value of the other properties is to be taken into consideration. But, if in doing so, the said property becomes taxable, the Act does not provide at what rate it would be taxable. One cannot determine the rateable value of the small property by aggregating and adding

the value of other properties, and arrive at a figure which is more than possibly the value of the property itself. Moreover, what rate of tax is to be applied to such a property is also not indicated. (at paras 12 and 16)

22. Equally, this Court in *Govind Saran Ganga Saran v. CST*, 1985 Supp SCC 205, held:-

The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity. (at para 6)

23. To similar effect is this Courts judgment in *CIT v. B.C. Srinivasa Setty*, (1981) 2 SCC 460, held:-

Section 45 charges the profits or gains arising from the transfer of a capital asset to income tax. The asset must be one which falls within the contemplation of the section. It must bear that quality which brings Section 45 into play. To determine whether the goodwill of a new business is such an asset, it is permissible, as we shall presently show, to refer to certain other sections of the head, Capital gains. Section 45 is a charging section. For the purpose of imposing the charge. Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by Section 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by Section 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the Income Tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When

there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head. (at para 10)

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

25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the

provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.

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

.....

29. It is interesting to note that while introducing the concept of service tax on indivisible works contracts various exclusions are also made such as works contracts in respect of roads, airports, airways transport, bridges, tunnels, and dams. These infrastructure projects have been excluded and continue to be excluded presumably because they are conceived in the national interest. If learned counsel for the revenue were right, each of these excluded works contracts could be taxed under the five sub-heads of Section 65(105) contained in the Finance Act, 1994. For example, a works contract involving the construction of a bridge or dam or tunnel would presumably fall within Section 65(105)(zzd) as a contract which relates to erection, commissioning or installation. It is clear that such contracts were never intended to be the subject matter of service tax. Yet, if learned counsel

for the revenue is right, such contracts, not being exempt under the Finance Act, 1994, would fall within its tentacles, which was never the intention of Parliament.

.....

43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services."

16. Irrationality and perversity, are the main grounds of challenge, in this appeal. On this aspect, we deem it fit to consider few cases.

(i) In *Kuldeep Singh Vs. The Commissioner of Police & Others*, reported in {(1999) 2 SCC 10, the Hon'ble Supreme Court, held as follows:-

"A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

(ii) In *State of NCT of Delhi v. Sanjeev* reported in 2005 (5) SCC 181 = AIR 2005 SC 2080, the Hon'ble Supreme Court observed thus,

".....to characterize a decision of the administrator as 'irrational' the Court has to hold, on material, that it is a decision 'so outrageous' as to be in total defiance of logic or moral standards."

(iii) In *State of A.P., v. Abdul Khuddus* reported in 2007 (15) SCC 261, the Hon'ble Supreme Court, at Paragraph 12, held that,

"we are unable to sustain the order of the High Court, which had set aside the findings of fact arrived at by the Special Court, which, in our view, were arrived at on consideration of the materials on record and which, by any stretch of imagination,

cannot be said to be based on no evidence or surmises or conjectures and therefore, it was not open to the High Court, in the exercise of its writ jurisdiction, to set aside the findings of fact arrived at by the Special Court which were based on sound consideration of the materials on record."

(iv) In *Arulvelu v. State* reported in 2009 (10) SCC 206, the Hon'ble Supreme Court, at Paragraph 29, explained what "perverse" means,

"29. In *Kuldeep Singh v. The Commissioner of Police*, (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under:

"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

30. The meaning of 'perverse' has been examined in *H. B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others* 1992 Supp (2) SCC 312, this Court observed as under:

"7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory

authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

(v). In *The General Manager (P) Punjab & Sind Bank v. Daya Singh* reported in (2010) 11 SCC 233, at Paragraph 24, the Hon'ble Supreme Court, held as follows:

"24. A perverse finding is one which is based on no evidence or one that no reasonable person would arrive at. This has been held by this Court long back in *Triveni Rubber & Plastics v. CCE*, AIR 1994 SC 1341. Unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration the finding cannot be said to be perverse. The legal position in this behalf has been recently reiterated in *Arilvelu v. State*, 2009 (10) SCC 206. The decision of the High Court cannot therefore be sustained."

(vi) In *S.R.Tiwari v. Union of India* reported in 2013 (6) SCC 602, at Paragraph 30, the Hon'ble Supreme Court, held as follows:

"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is against the weight of evidence, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with."

17. We have gone through the entire material on record. Upon consideration of the clauses in the contract, the tribunal has arrived at a categorical finding of fact that there is an indivisible contract. No concrete material, contra, is placed, before us for reversal of such finding.

18. Decisions quoted supra, are applicable to the case on hand. Hence, for the reasons stated supra, Civil Miscellaneous Appeal is dismissed. Substantial questions of law are answered against the revenue. No costs.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1.Customs, Excise and Service Tax
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2.The Commissioner of Customs and Cetral Excise,
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+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.88296

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CMA No.105 of 2009

SJ(CO)

RRK(10/01/2018)

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