

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

RESERVED ON: 30.11.2022
DELIVERED ON:06.12.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

MAT 1668 OF 2016

WITH

IA NO. CAN 1 OF 2016

(OLD CAN NO. 10675 OF 2016)

M/S. LARSEN & TOUBRO LIMITED

VERSUS

**ASSISTANT COMMISSIONER, SERVICE TAX COMMISSIONERATE,
DIVISION-III, KOLKATA & OTHERS**

Appearance:-

**Mr. G. Dhara Maduri, Advocate
Mr. P. Purushottam, Advocate.
Mr. Avra Mazumder, Advocate.
Mr. T. Shanmugam, Advocate.
Mr. Binayak Gupta, Advocate.
Mr. Suman Bhowmick, Advocate.**

.....For the Appellant

**Mr. K.K. Maiti, Advocate
Mr Tapan Bhanja, Advocate**

.....For the CGST Authorities

Mr. Prithu Dudhoria, Advocate.

.....For the Union of India

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This intra court appeal filed by the writ petitioner is directed against the order dated July 01, 2016 in WP No. 23547 (W) of 2014 (2016 SCC Online Calcutta 3865). The said writ petition was filed by the appellant for issuance of a writ of declaration to declare the Notification No. 7 of 2008 dated 01.09.2008 enhancing the rate of service tax from 2% to 4% as illegal, ultravires the Finance Act, 1994 and the Constitution of India, and bad in law in so far as it seeks to levy additional burden of service tax upon the contracts for which the option under Notification No. 32 of 2007, dated 22nd May, 2007 as already been exercised by the appellant; for a declaration that notification No. 10 of 2012 dated 17.03.2012 effective from 01.04.2012 enhancing the rate of service tax from 4% to 4.8% as illegal, ultravires the Finance Act, 1994 and the Constitution of India, and bad in law in so far as it seeks to levy additional burden of service tax upon the contracts for which option under notification No. 32 of 2007 dated 22.05.2007 as already been exercised; for issuance a writ of declaration that the amendment vide Notification vide No. 7 of 2008, dated 01.03.2008 to works contracts (Composition Scheme for Payment of Service Tax) Rules 2007 would apply to the contracts only in respect of which option is exercised after 01.03.2008 and/or only after the expiry of the previous contracts for which option under notification No. 32 of 2007, dated 22.05.2007 has been exercised; for a declaration that the amendment vide

Notification No. 10 of 2012 dated 17.03.2012 to the works contracts (Composition Scheme for Payment of Service Tax) Rules, 2007 would apply to contracts only in respect of which option is exercised after 01.04.2012 and/or only after expiry of the previous contracts for which the option under Notification No. 32 of 2007, dated 22.05.2007 has been exercised and for issuance of writ of mandamus to direct the respondent to apply the amendment to the Works Contract, Composition Scheme for Payment of Service Tax Rules 2007, vide Notification No. 7 of 2008 dated 01.03.2008 only to the contracts entered and option is exercised after 01.03.2008 and/or only after expiry of the previous contract for which the option under Notification No. 32/2007, dated 22.05.2007 has been exercised. The facts leading to the filing of the writ petition could be precisely set out as herein under.

2. The appellant entered into several works contract during the year 2006-2007 on turnkey basis. After coming into the force of the Works Contract (Composition Scheme) for Payment of Service Tax Rules, 2007 (Composition Scheme), the appellant exercised option under the scheme and paid service tax at 2%. The appellant had submitted their returns in form ST-3 for the period from March 2008 to 2011-2012 showing the payment of service tax at 2% in respect of the works contract. By Notification No. 7 of 2008, dated 01.03.2008 the rate of service tax under the composition scheme was enhanced from 2% to 4% with effect from the date of notification. The respondent department issued show cause notice dated 17.04.2013 alleging short payment of service tax on the ground that the appellant having exercised the option to go under the composition

scheme on 26.03.2008, ought to have paid service tax at 4% and payment at the rate of 2% amounts to evasion of tax. The extended period of limitation was invoked on the alleged ground that the appellant had suppressed the date of exercise of option and continued to pay tax at the old rate that is 2%. Another show cause notice dated 21.10.2013 was issued alleging short payment of service tax at the enhanced rate of 4.8% as notified in Notification dated 17.03.2012 from 01.04.2012. The appellant by their response contended that the composition scheme which came into effect from 01.06.2007 gives an option to the service tax provider under the works contract to pay service tax in relation thereto by paying an amount equivalent to 2% of the gross amount charged for the works contract. It was further stated that once the service provider exercises such option under the composition scheme the rates of service tax at the time of option would continue for the entire works contract period and the service provider cannot recede from the said scheme until the completion of the said works contract and therefore any change in the rate of tax on the basis of subsequent notification is impermissible and hit by the Doctrine of Promissory Estoppel. The reply submitted by the appellant was rejected by the department on the ground that the appellant had exercised option only on 26.03.2008 when the rate of service tax was enhanced from 2% to 4%. For such reason, the proposal made in the show cause notice was confirmed, interest was demanded and penalty was also imposed.

3. The learned Writ Court framed four issues for consideration:- Firstly, whether the notifications dated 01.03.2008 and 17.03.2012 can be given retrospective effect after an option is exercised and whether it is repugnant

or contrary to the composition scheme violating Section 94 of the Finance Act, 1994. The second issue being as to whether the notifications have rendered the composite scheme as unworkable offending Article 14, 19(1)(g) and 265 of the Constitution. Thirdly as to whether enhancing the rate of tax by subsequent notification after parties are allowed to alter the position is hit by principle of Promissory Estoppel and fourthly as to whether the show cause notices were barred by limitation as no ground exists for invoking the extended period of limitation.

4. The learned Writ Court found that the competent authority had jurisdiction to amend the rate of tax but such amendment would be applicable prospectively and shall not affect the pending works contract. While taking note of the issue as to whether the appellant had exercised option under the said scheme, the Court noted sub rule (3) of Rule 3 of the Composition Scheme which provides that option should be exercised in respect of works contract prior to the payment of service tax and such option shall remain applicable for the entire works contract and shall not be permitted to be withdrawn until the completion thereon. Further the learned Writ Court holds that there is no prescribed mode for exercising such option. Further the Court holds that the appellant had paid service tax at 2% and the same was duly received by the department prior to 01.03.2008. However the Court proceeded to hold that the expression “opts to pay service tax under this rules” cannot be construed and mean the filing of the return and the payment would sufficiently constitute the exercise of the option under the composition scheme. The department had referred to the various clauses as contained in the contract entered into by

the appellant with *M/s. Godrej Water Site Properties Private Limited and Others* and contended that the appellant was conscious that the rate of tax may vary in course of the works contract and therefore they have incorporated the clause that any change in the existing rate of taxes or new tax being levied during the currency of the contract, the same would be paid by the appellant. The argument of the department was rejected by the learned Writ Court holding that the department for the purpose of construction of the composition scheme cannot rely upon the conditions in the contract entered into between the appellant and private parties. It further held there is freedom of contract between two individuals unless it is against public policies. Finally, the Court proceeded to hold that the appellant having exercised the option for the first time only on 26.03.2008, the rate of tax shall be 4%. Aggrieved by such findings, the appellants are before us by way of this appeal.

5. When the appeal was heard, the Division Bench by order dated 11.04.2017 directed the appellant to file a comprehensive statement disclosing therein the particulars of vouchers through which the appellant claims that they had paid service tax at the rate of 2% under the composition scheme prior to 01.03.2008. This has been complied with by the appellant and a supplementary affidavit along with necessary documents have been filed and taken on record.

6. We have heard Mr. G. Dhara Maduri, learned advocate appearing for the appellant assisted by Mr. P. Purushottam and Mr. Avra Majumdar, learned advocates for the appellants and Mr. K.K. Maiti, learned senior standing counsel assisted by Mr. Tapan Bhanja, learned advocate for the

respondent.

7. The short issue which falls for consideration is as to in what manner an option has to be exercised by the assessee to avail the benefit of the composition scheme. Does the scheme contemplate a mode of exercising option and what would be the correct meaning that has to be assigned to the words “shall exercise option in respect of the works contract prior to payment of service tax”.
8. Notification No. 32 of 2007, dated 22.05.2007 was issued framing the rules for the composition scheme which came into force with effect from 1st day of June 2007. The said scheme is as follows:

**NOTIFICATION NO. 32/2007 –
SERVICE TAX, DATED 22-05-2007**

*[TO BE PUBLISHED IN THE GAZETTE OF INDIA,
EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (i)]*

GOVERNMENT OF INDIA

MINISTRY OF FINANCE

(Department of Revenue)

**Works Contract (Composition Scheme for Payment of
Service Tax) Rules, 2007 New Delhi, the Date: 22nd May,
2007**

1 Jyaistha, 1929 (Saka)

Notification No. 32/2007-Service Tax

G.S.R. (E). In exercise of the powers conferred by sections 93 and 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules, namely:-

1. *Short title and commencement.- (1) These rules may be called the Works Contract (Composition Scheme for Payment*

of Service Tax) Rules, 2007.

(2) They shall come into force with effect from the 1st day of June, 2007.

2. Definitions.- In these rules, unless the context otherwise requires,-

(a) "Act" means the Finance Act, 1994 (32 of 1994);

(b) "section" means the section of the Act;

(c) "works contract service" means services provided in relation to the execution of a works contract referred to in sub-clause (zzzza) of clause (105) of section 65 of the Act;

(d) words and expressions used in these rules and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

3. (1) Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to two per cent. of the gross amount charged for the works contract.

Explanation.- For the purposes of this rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid on transfer of property in goods involved in the execution of the said works contract.

(2) 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.

(3) The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.

[F. No. B1/7/2007-TRU]

(G.G. Pai)

Under Secretary to the Government of India

9. By notification No. 07 of 2008, dated 01.03.2008, the rate of service was substituted as 4% instead of 2% and this notification came into effect on 01.03.2008. Subsequently, by notification No. 10 of 2012, dated 17.03.2012 the rate of tax was substituted at 4.8% with effect from 01.04.2012. From the above notification more particularly, Rule 3(1), it is seen that it commences with non-obstante clause taken and states that notwithstanding anything contained in Section 67 of the Finance Act, 1994 and Rule 2A of the Service Tax (determination of value) Rules 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his services tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in Section 66 of the Act, by paying an amount equivalent to 2% of the gross amount charged for the works contract.

10. Thus, Rule 3(1) of the scheme gives an option to the person liable to pay service tax to discharge his service tax liability in terms of the scheme by paying an amount equivalent to 2% of the gross amount charged for the works contract. Sub rule (3) of Rule 3 states that a person who opts to pay service tax under the composition scheme shall exercise such option prior to payment of service tax and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract. The argument of the department is that the option to pay service tax under the composition scheme shall be exercised prior to the payment of service tax and the appellant having not exercised

the option prior to 26.03.2008 is required to pay service tax at the rate of 4% and not 2%. The department further proceeds to state that this short payment is intentional to evade payment of duty and therefore extended period of limitation can be invoked. The cardinal principle of interpretation has taught us to read the rule in its entirety to ascertain the true meaning and intention of the legislation. If that be so sub rule (3) of Rule 3 of the scheme cannot be read in isolation. It is required to be read in conjunction with sub rule (1) of Rule 3.

11. Sub rule (1) of Rule 3 is substantive portion of the rule which provides for an option to be exercised by the person liable to pay service tax. By virtue of the said rule, the person liable to pay service tax has an option to discharge the liability by paying the amount equivalent to 2% of the gross amount charged for the works contract instead of paying service tax at the rate specified in Section 66 of the Act. On a reading of sub rule (1) of Rule 3 shows that the option exercisable by this person liable to pay service tax is exercised by paying service tax at the 2% instead of rates specified in Section 66. Sub rule (3) of Rule 3 states that the provider of the taxable service who opts to pay service tax under the composition scheme shall exercise such option prior to the payment of service tax. If rule 3(1) and (3) and read in conjunction and harmoniously, the intention of the scheme is to give an option to the provider of taxable service to discharge his service tax liability by paying an amount equivalent to 2%. This being the substantive part of the scheme, sub rule (3) which is a machinery provision has to give life to the substantive part of the rule namely Rule 3(1) and that would mean that the option shall be exercised by paying the

amount equivalent to 2% of the gross amount charged for the works contract. It is the submission of the learned senior standing counsel that the crucial words in sub rule (3) of Rule 3 is “opts” and “prior to payment of service tax”. Thus, the department would contend that the option has to be exercised by the provider of taxable service prior to the payment of service tax. If that be so the rule should provide in what manner the provider of taxable service has to exercise such option. Admittedly no procedure has been laid down under the rule and there is no statutory form for exercise of such option. This has been held so by learned Single Bench, against which the revenue are not on appeal. In the absence of statutory format can the department be heard to say that the option should be exercised in a particular fashion and cannot be by conduct, that is by paying the service tax equivalent to 2% of the gross amount charged for the works contract.

12. Before we go into legal aspect as to how the courts have interpreted similar provision, we shall touch upon the certain facts which would be relevant. The return in Form ST3 for the relevant year have been filed before us and by way of illustration, we have taken up form ST3 for the period October 2007 to March 2008. Under the column works contract services, there are several questions which have been asked and information has been called for. In para A2, the question is whether the assessee is liable to pay service tax on his taxable service as a service provider or a service receiver. The appellant has indicated that they are liable to pay service tax as a service provider. Para C1 requires the assessee to mention as to whether they have availed benefit of any exemption notification, the answer should be either yes or no. If answer to Para C1 is

yes in Para C2, the assessee is required to furnish the notification number. The assessee has indicated that they availed the benefit of notification no. 32 of 2007 which is the composition scheme, referred above. Para (F) of the return deals with the value of taxable service, service tax payable and gross amount charged. Under the said column, the appellant has given the service tax rate wise breakup details and indicated in respect of services the tax had been paid at 2% under composition scheme. The proof of payment of tax along with the challan numbers. have also been given in the return. Admittedly, the assessing officer has accepted the return submitted by the assessee and has not raised any objection of any short payment of service tax in respect of such contracts where the appellant availed the option to discharge the service tax liability under the composition scheme. Thus, it can never be the case of the respondent department that the appellant failed to disclose their availment of the benefit under the composition scheme. Having steered clear of this factual issue, we will consider as to in what manner similar provisions have been dealt with by other High Courts in statutes which are *pari materia*.

13. In ***T. Azhakesan Versus State Tax Officer and Others***¹, the Division Bench of the High Court of Madras considered a similar issue, but, arising under the provision of the Tamil Nadu Value Added Tax Act, 2006. The said Act also contained a similar provision stating that the option should be exercised by the dealer prior to payment of tax. Similarly, under the said Act, there was no prescribed form for exercising such option. This issue was considered and the same was decided in favour of the dealer

¹ 2021 SCC Online Mad 10505

therein. The relevant portion of the judgment is herein below:

The appellant's case is that when they filed their return under the provisions of the TNVAT Act in Form-L, they have exercised such an option and they have paid tax at 2% being lumpsum payment in terms of Section 6(1) of the TNVAT Act. The Assessing Officer did not raised query and the returns were accepted along with the proof of payment of tax. It is much after when the Enforcement Wing inspected the business premises of the appellant, they pointed out several effects, one of which, which is the subject matter in these appeals is with regard to the absence of an option letter for payment of tax under Compounding Scheme in terms of Section 6(2) of the TNVAT Act. The moot question would be whether the option letter may be in writing or can it be inferred that the dealer having paid lumpsum tax at 2% while filing his return, is deemed to have been exercised option in terms of Section 6(1) of the TNVAT Act.

Identical issue came up for consideration in the case of KRamsamy [supra]. In the said case, as that of the appellant before us, the petitioner therein was a registered dealer under the provisions of the Tamil Nadu General Sales Tax Act [TNGST Act]. Two issues arose for consideration in the said writ petition, first of which would be relevant, namely whether the Assessing Officer in the said case was justified in holding that the said petitioner has not opted to pay tax under Section 7-C of the TNGST Act. The dealer in the said case had filed the return and paid the tax at 2% and the return was processed and the nature of work done by the petitioner therein being works contract, the benefit of Section 7-C of the TNGST Act was extended and the rate of tax was fixed at 2% and the returns were accepted. Subsequently the assessment was sought to be revised by invoking the power under Section 55 of the TNGST Act and revised orders were passed, in which the Assessing Officer took a stand that the petitioner therein has not opted to pay tax under Section 7-C of the TNGST Act. Thus, the Court framed the question as to whether the dealer was required to exercise an option to pay tax under Section 7-C of the TNGST Act by means of a separate letter or a petition. It also noted that under the provisions of the

TNGST Act and the rules framed thereunder, there is no prescribed format or procedure as to how the option should be exercised. After taking note of the decision of the Hon'ble Division Bench in the case of Kikani Exports RIM [supra], wherein it was held that in the absence of any separate form provided for under the Rules or a separate method provided for exercising option to pay tax under Section 7-C of the TNGST Act, it can be safely concluded that the assessee by filing a return and paying tax at compounded rate has exercised the option under the said provision and therefore the Assessing Authority committed error in holding that the dealer did not exercised his option and accordingly, the said question was answered in favour of the dealer. The operative portion of the order reads as follows:

In this regard, useful reference can be made to the decision of the Hon'ble Division Bench of this Court in the case of Commissioner of Income Tax Versus Kikani Exports Private Limited, in TCA No. 330 of 2013 etc. batch dated 09.09.2014. The substantial question of law, which arose for consideration before the Hon'ble Division Bench was whether the return of income filed by the assessee under Section 139(1) of the Income Tax Act claiming depreciation can be treated as exercising of option before the due date as prescribed in second proviso to Rule 5 (1A) of the Income Tax Rules. This question was answered in favour of the assessee and against the revenue on the following terms:-

Short of petition, the issue that arise for consideration is for the purpose of claiming depreciation, whether the assessee should exercise an option before the due date in the manner other than by filing return of income in terms of sub section (1) of Section 139 of the Income Tax Act. According to the Revenue, each one of the assessee should file a separate application or a letter indicating their intention to avail depreciation in terms of Section 32 read with Rule 5(1) of the Income Tax Rules and since the assessee in each case has not exercised

such an option before the due date for furnishing the return of income, they will not be entitled to the benefit of Rule 5(1) but depreciation only under Rule 5(1A) Appendix 1A.

It is relevant to note that while filing the return of income, a procedure has been prescribed for claiming depreciation as pointed out above. The assessee has to set out the manner in which depreciation is claimed for the assessment years in question. All the details required for claiming depreciation under various heads are set out thereunder. Rule 5 of the Income Tax Rules is in relation to determination of profits and gains of business or profession and depreciation forms part of such determination. Therefore, there cannot be an option exercised in isolation (i.e) depreciation with regard to determination of profits and gains of business or profession in the manner other than the procedure prescribed under Section 139(1) of the Income Tax Act. The assessee is liable to file the return of income and claim depreciation in accordance with the various provisions and state in exactitude what he claims under different heads of depreciation. Schedules DOA and DEP in Form ITR # 6 contain the break up of various heads under which depreciation can be claimed. All that the second proviso to Rule 5(1A) of the Income Tax Rules states is that the assessee has to exercise the option before the due date for furnishing the return of income. In other words, if the option is exercised after furnishing of the return of income under sub-section (1) of Section 139, it is of no avail. This assumes importance, as no procedure is prescribed for exercising the option. Form ITR-6 gives the methodology on which depreciation can be claimed and therefore, the statute did not provide for any other method to exercise the option except through filing of that an option should be exercised separately would make the returns filed meaningless.”

The above referred decision can very well be applied to the facts of the present case, as under the TNGST Act or the Rules framed thereunder, there is no separate form provided or any separate method provided for exercising the option to pay tax under Section 7-C of the TNGST Act. Therefore, it can be safely concluded that the assessee by filing a return and paying tax under Section 7-C of the

TNGST Act amounts to exercising option under the said provision. Thus, the respondents committed an error in holding that the petitioner did not exercise his option. Therefore, the first question is answered in favour of the petitioner and against the revenue.

We are informed that the above order has become final as the revenue has not carried the matter on appeal.

The only distinction in the case on hand is that the present assessment is under the provisions of the TNVAT Act and the said Act does not provide for any separate procedure or method of form of application for exercising option under Section 6(1) of the Act. Therefore, it is to be held that the appellant/dealer having filed their return in Form-L had opted to pay lumpsum tax at 2% is deemed to have exercised his option to pay tax at compounded rates in terms of Section 6(1) of the TNVAT Act.

The above decision would squarely apply to the facts and circumstances of the case before us.

14. In ***GE T and N India Limited Versus Commissioner of Central Excise and Service Tax, Large Tax Payer Unit, Chennai in C.M.A. No. 2032 of 2019*** dated 16.12.2019 the High Court of Madras, identical issue was considered and the Division Bench approved the view taken by the tribunal in the case of ***Vaishno Associates Versus CCE & ST, Jaipur***² wherein the court considered the composition scheme and pointed out that no format has been prescribed for making/exercising an option nor has it been specified as to whom the option must be addressed, the fact of the paying service at composition rate in the return filed by the service provider is enough indication to show that they have opted for payment under the works contract composition scheme.

² (2018) VIL 217

15. While on this issue, it will be beneficial to refer to the decision of the Hon'ble Supreme Court in ***Commissioner of Central Excise Versus Hari Chand Shri Gopal and Others***³ in the said decision, the doctrine of substantial compliance was explained. It was held that doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship, in the cases where the party does all that he can reasonably expected of it, but failed or faulted in some minor or in consequence aspect which cannot be described "essence" or the "substance" of the requirements. It was further pointed out that substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute and the court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objective for which it was passed. We are informed that there are several decisions of the tribunal which have held on the above lines and those decisions have attained finality and one such decision being in the case of M/s. ***ABL Infrastructure Private Limited Versus Commissioner of Central Excise, Nashik***⁴. Thus, it can be safely held that the payment of tax under the composition scheme upon notification of the scheme vide a notification no. 32 of 2007 dated 26.05.2007 by filing the return and paying tax at the compounded rate of 2% is sufficient compliance of exercise of option under the scheme and therefore the subject contracts for which tax had been remitted by the appellant at the rate of 2% is

³ (2011) SCC 236

⁴ 2015(2) TMI 801-CESTAT Mumbai

permissible and acceptable under law.

16. The next aspect is whether the extended period of limitation could have been invoked. The disputed period can be divided into two the first of which being from March 2008 to March 2012. For this period, the show cause notice for the periods from March 2008 to March 2011 have all been issued after a long delay as the show cause notices were issued on 17.04.2013. The said show cause notice also covered the period from April 2011 to September 2011 and October 2011 to March 2011 but for such period the show cause notice was within the time permitted. The question would be whether extended period of limitation could have been invoked in the facts and circumstances of this case and courts have held that such extended period of limitation can be invoked only when that there is a deliberate intention to evade payment of tax and it does not empower the department to invoke the extended period on the sole ground of omission. In several decisions, the Hon'ble Supreme Court has pointed out that every non-payment or non-levy of duty does not attract extended period and there must be a deliberate default; mere non-payment of duties is not equivalent to collusion or willful mis statement or suppression of facts. More importantly, if the alleged contravention has been culled out from the records available, the question would be whether the extended period of limitation could be invoked. Admittedly, the assessing officer of the appellant had not pointed out any error and the returns were accepted and the payment of tax was also accepted. It is only the audit department which had raised such a query and such query was raised based on the available records with no new or fresh tangible material. Therefore, the department

invoking the extended period of limitation, for the period indicated above, is thoroughly flawed and illegal. For the disputed period from April 2011 to March 2013, there is no delay in issuance of show cause notice. The learned advocate appearing for the appellant on instructions submits that the appellant will pay the differential amount of service tax for the said period that is from April 2012 to June 2012, July 2012 to September 2012 and October 2012 to March 2013 at the appropriate rates. Since the service tax had been paid only at the rate of 2 %, the appellant agrees to pay interest thereon. The learned advocate submits that the court may consider the case and direct that the penalty should not be levied under Section 78 of the Act. We are not able to accede such a prayer as it is beyond the scope of the prayer sought for in the writ petition nor such contention appears to have been raised in the writ petition. However, we give liberty to the appellant to raise all contentions both on law and facts in the event there is proposal to levy penalty for the aforementioned period.

17. Mr. Maiti, learned senior standing counsel appearing for the revenue referred to the decision of the Hon'ble Supreme Court in ***Nagarjuna Constructions Company Limited Versus Government of India***⁵ for the proposition that the appellant having failed to exercise the option prior to the payment of tax is not entitled to the benefit of the composition scheme at 2%. On this aspect, we have already interpreted Rule 3(1) and (3) of the composition scheme and given our reasons as to how there has been compliance of the rule and in the absence of any statutory form for exercise of option, the filing of the return, mentioning the relevant notification

⁵ 2012(28) STR 561 (SC)

number. and payment of tax at the compounded rate is sufficient compliance of exercise of option under the scheme. That apart, we note the facts in **Nagarjuna Constructions** to be entirely different. Since the appellant therein had already paid the taxes and did not opt to pay the service tax under the composition scheme but later sought for such a benefit which was negated. Therefore, the said decision is inapplicable to the facts and circumstances of the case on hand.

18. As noticed by us above, the substantial part of the order passed by the learned Single Bench enures in favour of the appellant, the department having accepted such portion of the judgment cannot be heard to argue contrary to what has been held against them. The learned Single Bench has in no uncertain terms recorded that the service tax was paid of 2% and duly received by the department prior to 01.03.2008. Further it has been held that the rates of tax as increased would be prospective and shall not affect the pending contracts. Further it has been held there is no prescribed mode for exercising option. The court had also noted Rule 6 of the service tax rules which provides that the service tax shall be paid on or before 6th of every month, following the months the payment are received for such taxable service; Rule 7 which states that the return shall be filed on half yearly basis on or before 25th day of the month following the particular year. Further the argument made by the department by referring to the contracts entered into by the appellant with third parties was rejected holding that the clauses in the said contract which requires the appellant to accept the enhanced rates of tax if any during the subsistence of contracts cannot help the department for the purpose of considering the

construction of the composition scheme. As the appellant has freedom to enter into contract and in the absence of the contract being contrary to the public policy, it is binding between contracting parties and cannot in any manner assist the department.

19. Thus, for all the above reasons, the appeal is allowed and that portion of the order passed by the learned Single Bench in paragraph 18 is set aside and it is held that the appellant has exercised the option prior to 01.03.2008 and therefore would be entitled to the compounded rate of tax at 2% for the relevant period and this cannot extend to the period from April 2012 to March 2013 which the appellant has conceded to pay tax at the enhanced rate along with the interest. No costs.

(T.S. SIVAGNANAM, J.)

I Agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A- SACHIN)