IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 11513 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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MESSRS N J DEVANI BUILDERS PVT. LTD
Versus
UNION OF INDIA

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Appearance:
AMAL PARESH DAVE(8961) for the Petitioner(s) No. 1,2
MR PARESH M DAVE(260) for the Petitioner(s) No. 1,2
DS AFF.NOT FILED (N)(11) for the Respondent(s) No. 1
MR. PARTH H BHATT(6381) for the Respondent(s) No. 2
NOTICE SERVED BY DS(5) for the Respondent(s) No. 3

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 12/03/2020

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Rule, returnable forthwith. Learned Standing Counsel Mr. Parth Bhatt waives service of notice of Rule on behalf of the respondents.

2. By this petition, under Articles 226 and 227 of the Constitution of India, the petitioners prayed for the following reliefs:

"(A) That Your Lordships may be pleased to issue a Writ of Certiorari or any other appropriate writ, order or direction quashing and setting aside final order No..A/10973/2019 dated 3.6.2019 ***(Annexure-"N")*** *made by the Appellate Tribunal, Ahmedabad on Service Tax Appeal No.107/2009;*

(B) Your Lordships may be pleased to issue a Writ of Prohibition or a Writ in the nature of Prohibition, or any other appropriate writ, order or direction, completely and permanently prohibiting the respondents, their servants and agents from taking any action against the Petitioner pursuant to Show Cause Notice F.No. STC/ 452/O&A/ SCN/ NJD/ 2006 dated 12.3.2007 and for the subject matter involved in this show cause notice;

(C) That Your Lordships may be pleased to issue a Writ of Mandamus or any other appropriate writ, direction or order directing the 3rd Respondent Commissioner of Service Tax, Ahmedabad to return Rs.2 lakhs pre-deposited by the Petitioner along with interest @6% per annum from the date of deposit till the actual payment to the petitioner;

(D) *That Your Lordships may be pleased to issue a Writ of Mandamus or any other appropriate writ, direction or order holding and declaring that the Petitioner was not liable to pay any service tax on the services involved in the present case and no action whatsoever by the Respondents is permissible against the Petitioner for the works contract service involved in the present case involving the period from October, 2005 to March, 2006;*

(E) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to stay recovery of any amount(s) from the Petitioner pursuant to final order No. A/10973/2019 dated 3.6.2019, and be further please to stay implementation and execution of this final order No. A/10973/2019 dated 3.6.2019 made by the Appellate Tribunal, Ahmedabad.

(F) An ex-parte ad-interim relief in terms of Para-23(E) above may be kindly be granted:

(G) Any other further relief as may be deemed fit in the facts and circumstances of the case may also please be granted."

3. The facts giving rise to the present petition may be summarized as under:

3.1. The petition is filed by the Private Limited Company incorporated under the provisions of the Companies Act, 1956 through its Director petitioner no.2. The petitioner company is engaged in the business of construction of buildings and

civil structures for last several decades.

3.2. It is the case of the petitioner that, petitioner was under bona-fide belief that petitioner was liable to pay service tax, as the business of the petitioner is covered under the provision of Section 65(105)(zzq) inserted w.e.f. 15.06.2005 by the Finance Act, 2005 r/w. Section 65(25b) of the Finance Act, 1994 (for short 'the Act, 1994'), wherein, the service 'commercial and industrial construction service' is defined as one of the services liable for service tax. The petitioners therefore applied for, and obtained service tax registration for 'commercial or industrial construction service' and started paying appropriate amount of service tax on the value of construction services rendered to its client. The petitioner followed the procedure laid down under the Act, 1994, the Service Tax Rules framed there-under including furnishing statutory return in Form ST-3 on periodical basis.

3.3. According to the petitioner, w.e.f. 01.06.2007, a new category of taxable services, viz. 'Works Contract Service' was brought under the levy of service tax by

inserting Section 65(105)(zzzza) in the Act, 1994.

3.4. It is the case of the petitioner that, services rendered by the petitioner were actually in the nature of 'Works Contract' because petitioner entered into a contract with its client, wherein, transfer of property in goods involved in execution of such contract was leviable to tax as sale of goods and such contract was for the purpose of carrying out construction of a new building or a civil structure and not any commercial or industrial construction. According to the petitioner, when it realized that the services rendered by it was actually taxable under 'Works Contract Service' category, the petitioner applied for a registration for works contract service, which was granted by the respondent authorities in January, 2008.

3.5. The petitioner has thereafter paid service tax for the construction activities carried out by him under works contract service at an appropriate rate leviable for such taxable service and returns were filed by the petitioner under works contract service which were accepted and assessed by the respondent authorities.

3.6. It is the case of the petitioner that, during the period from October, 2005 to March, 2006, the petitioner paid service tax under the head 'commercial or industrial construction service', though no service tax was leviable at all, on the business activity of the petitioner at that time though the petitioner rendered the 'works contract service' which was liable for levy of such service tax w.e.f. 01.06.2007.

3.7. According to the petitioner, petitioner was receiving services of goods transport operators for bringing construction and other materials at its work site in relation to its business activity. Goods transport agency service was made taxable service w.e.f. 01.01.2005, but the Central Government has shifted the liability to pay the service tax on Goods Transport Agency (GTA) service to the person paying freight, by virtue of reverse charge mechanism. The petitioner was also, therefore, liable to pay service tax under reverse charge mechanism as recipients of goods transport agency service from January, 2005. As the petitioner was not aware about such reverse charge mechanism made applicable for recipients of goods transport agency

services, the petitioner had initially not paid service tax on such services received and used by it.

3.8. By letter dated 08.03.2006, the Superintendent of Service Tax informed the petitioner about its liability to pay the service tax on Goods Transport Agency (for short 'GTA') services under reverse charge mechanism w.e.f. 01.01.2005. The petitioner therefore applied for and obtained a registration for GTA services in March, 2006 and paid service tax for the period from 01.01.2005 to 28.02.2006 and informed the Range Superintendent by letter dated 27.03.2006 about payment of service tax aggregating to Rs.1,24,799/- on GTA services for the period from January, 2005 to February, 2006.

3.9. It is the case of the petitioner that, under the Cenvat Credit Rules, a recipient of taxable service is allowed to take credit of service tax paid on any input service used in or in relation to providing taxable output service. Since, GTA service was one of the input services for the petitioner, credit of Rs.1,24,799/- paid by the petitioner as service tax on GTA service for the period from January, 2005

to February, 2006 was taken as Cenvat input tax credit by the petitioner in March, 2006 which was reflected in the Cenvat register as well as the return filed by the petitioner. The petitioner utilized Cenvat credit of GTA service for paying service tax for the month of March, 2006, as reflected in the return filed in Form ST-3.

3.10. The petitioner thereafter received a show cause notice dated 12.03.2007 issued by the Joint Commissioner of Service Tax proposing to recover Rs.8,67,144/- as service tax for the taxable services provided by the petitioner during October, 2005 to March, 2006 on the ground that the petitioner had paid service tax on commercial or industrial construction service during the period on abated value by availing abatement allowed under Notification No. 1/2006-ST dated 01.03.2006, but abatement in value under this notification was wrongly availed by the petitioner, as the condition for abatement under the notification was that the service provider should not have taken credit of duty paid on input services used for providing such taxable service. Since the petitioner had availed Cenvat credit of service tax paid on GTA service in March, 2006, objection

was raised and the differential service tax denying the benefit of the notification dated 01.03.2006 was raised under the head 'commercial or industrial construction service' was supposed to be recovered with interest and penalty from the petitioner.

3.11. The petitioner thereafter submitted a reply dated 26.03.2007 to the show cause notice and explained that there was no violation of condition of the Notification in not taking Cenvat credit of service tax paid on input services because the Cenvat credit taken in the month of March, 2006 was actually in respect of service tax paid for input services availed and utilized from January, 2005 to February, 2006 but credit was taken in March, 2006 only, because the petitioner had paid service tax for past period in March, 2006. It was further submitted by the petitioner that Cenvat credit taken and utilized in March, 2006 was not in respect of input services used for providing taxable services on which service tax was being paid by the petitioner, as there was no condition in the notification allowing abatement in value that benefit of the notification would be inadmissible even if Cenvat credit of service tax on any other input services,

i.e. input services not used for providing the taxable services under assessment was taken. However, the Joint Commissioner of Service Tax who was also the adjudicating authority did not accept the explanation tendered by the petitioner and confirmed the service tax liability on the differential value for the month of March, 2006 by passing Order In Original (for short 'OIO') dated 15.01.2008 and denied the exemption as per the notification dated 01.03.2006 and raised the demand of service tax of Rs.8,67,144/- together with penalty and interest liability upon the petitioner.

3.12. The petitioner being aggrieved and dissatisfied with the OIO, preferred an appeal before the Commissioner (Appeals) raising the fundamental contention that there was no liability to pay service tax by the petitioner prior to 01.06.2007, because the services rendered by the petitioner were appropriately classifiable as 'Works Contract', and not as 'commercial or industrial construction service'. The petitioner also raised contention in the appeal that service tax on works contract had been imposed only w.e.f. 01.06.2007, and therefore, it was submitted that the service tax could not be demanded from the

petitioner on the works contract service prior to 01.06.2007 under any other category. The petitioner therefore submitted that the liability for payment of service tax is fastened upon the petitioner was without jurisdiction.

3.13. The Commissioner (Appeals) rejected the appeal vide an order dated 26.02.2009 holding that it would be fallacious to presume that with coming into force of a specific entry for works contract service, all other entries, pertaining to the construction activities or activities relating to commissioning and installation, would be redundant.

3.14. Being aggrieved by the order passed by the Commissioner, the petitioner went into appeal before the Appellate Tribunal. The petitioner raised again fundamental ground that there was no liability to pay service tax prior to 01.06.2007 because it was for the first time that the business activities of the petitioner, which were in the nature of works contract, had been brought under the levy of service tax w.e.f. 01.06.2007 by introducing a new service tax category.

3.15. The Appellate Tribunal by an order dated

22.06.2009 granted stay against the recovery on condition of deposit of Rs.2,00,000/- by the petitioner.

3.16. The petitioner deposited Rs.2,00,000/-. Thereafter, the question about propriety for levy of service tax on works contract for prior period came up before the Supreme Court in case of Larsen & Tourbo Ltd. and the Supreme Court in decision in the case of ***Commissioner of Central Excise and Customs, Kerala v. Larsen & Tourbo Ltd.*** reported in ***2015 (39) STR 913 (SC)*** held that, 'works contract service' was made liable to service tax only w.e.f. 01.06.2007, and therefore, service tax was not leviable on works contract for the period prior thereto. Following the decision of the Supreme Court, various other High Courts and Tribunals have applied this ratio. Therefore, when the appeal filed by the petitioner came up for hearing on 11.02.2019, the petitioner submitted before the Appellate Tribunal, Ahmedabad to follow the decision of the Supreme Court and High Courts and Tribunal including the Ahmedabad Tribunal. The Appellate Tribunal after concluding the hearing on 11.02.2019 in Appeal No. E./107/2009 and reserved the order.

3.17. It is the case of the petitioner that in one more appeal filed by the petitioner being Appeal No. ST/379/2009 involving the same issue as to whether the service tax was recoverable from the petitioner prior to 01.06.2007 or not was also pending before the Appellate Tribunal, Ahmedabad. When the said appeal came up for hearing on 02.04.2019 by the bench comprising of two Hon'ble visiting members, the appeal was allowed by pronouncing the order in the open court, with a clarification that detailed order would follow.

3.18. It is the case of the petitioner that, leaned advocate of the petitioner submitted a letter dated 03.04.2019 bringing to the notice of the regular bench of the Appellate Tribunal, Ahmedabad about the development of hearing of the matter on 02.04.2019 to defer passing of the final order in Appeal No. ST/107/2009, which was heard on 11.02.2019, so that a copy of the final decision of the another bench of the Appellate Tribunal that allowed the appeal on 02.04.2019 could be submitted on the record of the case pending for passing final order.

3.19. However, the Appellate Tribunal, Ahmedabad passed a final order dated 03.06.2019 in Appeal No.ST/107/2009 rejecting the submission of the petitioner that no service tax was leviable or recoverable from it for the period prior to 01.06.2007 on the ground that the petitioner never contested their classification of services before the authorities and applied for registration for works contract service only in January, 2008 and therefore, the services would remain classified under 'commercial or industrial construction services' prior to such period. The Tribunal also did not accept the request of the petitioner to defer passing of the final order in the other appeal of the petitioner being Appeal No. ST/379/2009.

3.20. The Tribunal, however, noted that the order allowing the appeal No. ST/379/2019 pronounced in open Court on 02.04.2019 was a case decided by the Mumbai Tribunal because the Hon'ble Members who heard and allowed the appeal of the petitioner on 02.04.2019 came from Mumbai, and such order was brushed aside by observing that the order of the Mumbai Tribunal had no bearing on the issue before the Appellate Tribunal

because the petitioner has separate registration at Mumbai. However, it is the case of the petitioner that the petitioner has only one place of business i.e. at Ahmedabad and only registration that the petitioner held was at Ahmedabad.

3.21. The petitioner has therefore, being aggrieved by such order passed by the Tribunal, which is contrary to the binding precedent of the judgment of the Supreme Court as well as order passed by the Appellate Tribunal in the case of the petitioner itself and other similar cases, has filed this petition, as the Tribunal ultimately remanded the matter back for verifying that whether the Cenvat credit of GTA services was reversed or not to the adjudicating authority.

4.1. Learned advocate Mr. Paresh M. Dave appearing for the petitioners submitted that the facts of the case are glaring as the Tribunal could not have decided the Appeal No. ST/107/2009 contrary to the decision of the Supreme Court and the Appellate Tribunal in the case of the petitioner itself, and therefore, the impugned order passed by the Tribunal in Appeal No. ST/107/2009 is illegal and

without jurisdiction and is also in violation of the principles of natural justice.

4.2. Mr. Dave submitted that the services rendered by the petitioner no.1 company are admittedly that of 'works contract' and when the Apex Court in the case of L & T (supra) has conclusively held that service tax on works contract was leviable only from 01.06.2007, the Appellate Tribunal did not have jurisdiction to decide otherwise to the law laid down by the Supreme Court and uphold the demand of service tax on works contract service rendered by the petitioner for the period up to March, 2006. It was further submitted that, another Bench of the Appellate Tribunal in the case of the petitioner no.1 itself on the basis of the judgment of the Supreme Court in case of L & T Ltd. (supra) has held that the petitioner is not liable to service tax prior to 01.06.2007. Learned advocate referred to the decision of the Tribunal dated 02.04.2019 in Service Tax Appeal No. 379/2009, in the case of the petitioner itself, which read thus:

"6. We find that the fact regarding supply of goods for execution of the construction activity was nor in disputed in the case in

hand inasmuch as such fact has also been acknowledged at paragraph 35 in the impugned order dated 31.08.2009. Thus, the construction activity undertaken by the appellant was a. composite one, involving both supply/sale of goods and for execution of the assigned task of accomplishing the purpose of the contract. Since by nature, it was a composite contract, the appropriate head of classification of taxable service would be Works Contract service, leviable to service tax w.e.f. 01.06.2007. The Hon'ble Supreme Court in the case of Larsen & Toubro Ltd (supra) have ruled that irrespective of the classification of service, if any service involves both provision of service and for supply of goods, then the same should be considered as composite service and will be eligible to service tax under the taxable category of Works Contract Service and not otherwise. Further, by placing reliance on the said judgment of the Apex Court; this Tribunal in the case of Vistar Construction Pvt. Ltd (Supra) has allowed the appeal in favour of appellant under identical set of facts.

7. In view of the well settled position of law that the composite contract, involving

both execution of the job and for supply of material for achieving such object, should appropriately be classifiable under Works Contract Service and not under any of the other defined category of service, we do not find any merits in the impugned order for endorsing the views expressed therein."

4.3. Learned advocate therefore submitted that the Tribunal has erred in law in deferring with the decision of Coordinate bench holding that it was the decision of the Mumbai Tribunal.

4.4. Learned advocate for the petitioner further invited attention to the synopsis of dates, events and proposition filed before the Tribunal, which was not at all considered by the Tribunal while passing the impugned order, which read thus:

> *5. Heard both the sides and perused the records. Admittedly the Appellant were registered under the category of construction service and no dispute was raised by them regarding classification of service. Even though the category of "Works Contract" came into effect from 01.06.2007, they applied for said category only in January, 2008. They never contested their classification of services before authorities. They had paid service tax on GTA Services under reverse charge mechanism and also availed credit of same. The Appellant's*

first contention that the credit was of service tax on GTA pertained to the period till Feb'2006 and the service tax was paid on "construction Services" in March'2006 hence both are not reliable is not correct. Whatever services of GTA were availed by them was in respect of Construction service and the exemption on value which is in excess of 33% was availed by them continuously. Obviously the tax on construction services paid by them was in respect of continuous service of Construction activity. The construction activity was not initiated and completed in March'2006, therefore the GTA services before March'06 has clear linkage for the service tax paid on construction service in March '06. We also find that the Appellant did not contest the levy of service tax on construction services, but classified their services into "Works Contract" Service only w.e.f. Jan' 2008. Hence prior to such period the services would remain classified under "Construction Services". The order of Mumbai Tribunal in Appellant's case will have no bearing on the present issue as the Appellant has separate registration at Mumbai and is not related to present controversy. However we are in agreement with the Appellant's contention that in case of reversal of the credit utilized by them they are eligible for benefit of exemption Notification.

6. We thus, remand back the matter to the adjudicating authority to ensure that the credit is reversed along with interest within four weeks of the passing of this order subject to which the Appellant shall be eligible for the benefit of impugned subject notification. The appeal is allowed by

way of remand to the adjudicating authority."

4.5. Referring to the aforesaid findings of the Tribunal, it was submitted that, there is no order of Mumbai Tribunal in the case of the petitioner and petitioner has neither business activities at Mumbai nor has any service tax registration at Mumbai. It was therefore submitted that, the petitioner is unable to understand that as to what is the basis of the observations and reasons given by the Tribunal for not following the binding precedents while deciding the appeal of the petitioner.

4.6. It was submitted that, therefore, there are two contradictory decisions in the case of the petitioner, one in Service Tax Appeal No. 379/2009 and another in Service Tax Appeal No. 107/2009. The decision in Service Tax Appeal No. 379/2009 is based upon the decision of the Supreme Court, whereas, the Tribunal while passing the impugned order in Service Tax Appeal No. 107/2009 did not assign any reason for not following the settled legal position which is gross violation of the principles of natural justice, as held by this Court in case of ***Vadilal Gases Ltd.*** reported in

2016 (332) ELT 625 (Guj.) and ***Manek Chemicals Pvt. Ltd.*** reported in ***2016 (334) ELT 302 (Guj.)***.

4.7. Learned advocate Mr. Dave therefore submitted that, the petitioners are in such circumstances constrained to invoke the extraordinary jurisdiction of this Court under Article 226 /227 of the Constitution of India for correcting such jurisdictional error, and also the redressal of grievance for gross violation of principles of natural justice that has resulted in ex-facie illegal order against the petitioner instead of filing appeal before this Hon'ble Court under the provisions of Central Excises Act.

4.8. Mr. Dave on merits submitted that, the services rendered by the petitioner are admittedly that of 'works contract', and there is absolutely no dispute on the nature of service because the petitioner has been given a registration for the works contract service in January, 2008 for the same activities / services rendered by the petitioner.

4.9. It was also submitted that, neither the Commissioner (Appeals) nor the Appellate

Tribunal raised any dispute about the correct classification of the services rendered by the petitioner. Moreover, it was pointed out that, as per the decision of the case in L & T Ltd. (supra) no service tax was leviable or recoverable on works contract services prior to 01.06.2007 under any other category of taxable service. It was therefore submitted that the Tribunal has no jurisdiction to uphold demand of service tax on the business activities / services of the petitioner for the period prior to 01.06.2007 when the business activities of the petitioner were undisputedly that of 'works contract'.

4.10. The learned advocate relied upon the following findings of the Supreme Court in the case of ***Larsen & Tourbo Ltd. (supra)***, which read thus:

"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

"The cost of establishment of the contractor which is relatable to supply of

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

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

"This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field." (at paras 88 and 89)

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

"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 assessees' 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 Court's 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.

27. In fact, the speech made by the Hon'ble Finance Minister in moving the Bill to tax Composite Indivisible Works Contracts specifically stated:-

"State Governments levy a tax on the transfer of property in goods involved in the execution of a works contract. The value of services in a works contract should attract service tax. Hence, I propose to levy service tax on services involved in the execution of a works contract. However, I also propose an optional composition scheme under which service tax will be levied at only 2 per cent of the total value of the works contract."

28. Pursuant to the aforesaid speech, not only was the statute amended and rules framed, but a Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 was also notified in which service

providers could opt to pay service tax at percentages ranging from 2 to 4 of the gross value of the works contract.

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."

4.11. Reliance was placed on the decision of the Kerala High Court in case of ***Wexco Homes Pvt. Ltd. v. Union of India*** reported in ***2017 (48) S.T.R. 457 (Ker.)***, wherein, the Court has held thus:

> *"4. On a consideration of the facts and circumstances of the case and*

the submissions made across the Bar, I find that the show cause notices issued to the petitioners, which are impugned in these writ petitions, cover the period from January, 2006 to June, 2010. During the said period, there were amendments to the Finance Act, 1994 with regard to the levy of service tax and, apart from the heads of 'commercial and industrial construction services'/'construction of residential complex services' that were recognised for the purposes levy of service tax, there was a new head of tax namely, 'works contract service', which was introduced in the statute with effect from 1-6-2007. The issue of classification of composite services for the purposes of levy of service tax has been clarified by the Supreme Court in the decision referred to above, and the Supreme Court has made it clear that for period prior to 1-6-2007, in the case of composite works contract services, there was no enabling provision in the Finance Act, 1994, which enabled the authorities administrating the levy of service tax under the Act, to artificially split up the components in a composite contract into such portions as would merit classification under the heads of 'commercial and industrial construction services'/'construction of residential complex services', for the purposes of levying a tax on those portions alone. The said decision is significant in the matter of classification of composite services because, one would have to now ascertain the

nature of the service in question and then proceed to determine whether it is a composite service or not. If it is a composite service, then the question of classification of the service would also have to be gone into. It would be incumbent upon the adjudicating authorities under the Act to consider these aspects before confirming any demand based on the proposals communicated to the petitioners. Inasmuch as the show cause notices themselves have been challenged in these writ petitions, I am of the view that the interests of justice would be served by relegating the petitioners to the remedy of filing replies to the show cause notices, so as to get an adjudication of the dispute done by the authorities under the Finance Act, 1994. In the said adjudication proceedings, it would be open to the petitioners to produce all relevant materials to substantiate their contention with regard to the services rendered by them meriting classification under any particular head of tax. It would also be open to them to establish whether they come within the ambit of the specific circulars issued by the Central Board of Excise and Customs in the matter of classification of services. The adjudicating authorities would also have to consider the impact of the decision of the Supreme Court in Commissioner, Central Excise & Customs, Kerala v. Larsen & Toubro Ltd., 2015 84 VST 403 (SC)]. Thus, without prejudice to the rights of the petitioners to approach the adjudicating authorities under the

Finance Act, 1994 for an adjudication of the disputes, I dismiss the writ petitions, in their challenge against the impugned show cause notices.;

5. In the case of W.P.(C). No. 60502009, I find that the challenge against Ext.P4 order of the adjudicating authority is one that has to be legally sustained. In Ext.P4 order, the adjudicating authority does not give any finding with regard to the correct classification of the service rendered by the petitioner therein. The only reason cited in Ext.P4 order for confirming the demand in the show cause notice issued to the petitioner is that the petitioner could not contend for an alternate classification having already declared his service under the head of ***'commercial and industrial construction services'*** */'construction of residential complex services'. In my view, the said reasoning of the adjudicating authority is erroneous, more so, in the light of the decision of the Supreme Court referred to above. I therefore quash Ext.P4 order, and direct the adjudicating authority to reconsider the matter in the light of the observations in this judgment. Needless to say that the petitioners shall be afforded an opportunity of hearing before the adjudicating authorities pass fresh orders, as directed."*

4.12. The reference was also made to the decision of the Principal Bench of Tribunal, New

Delhi in the case of ***B.R. Kohli Construction Pvt. Ltd. v. Commissioner of S.T., New Delhi*** reported in ***2017 (5) G.S.T.L. 182 (Tri.- Del.)***, wherein, the Tribunal has followed the decision of the Supreme Court in case of L & T Ltd., and held as under:

"4. We have heard both the sides and perused the appeal records. Admittedly, the contracts executed by the appellants are composite in nature and are rightly to be classified under tax entry "works contract service". As held by Hon'ble Supreme Court in Larsen & Toubro Limited (supra) there is no liability to service tax in respect of indivisible, composite works contract prior to 1.6.2007. The appellants are not contesting their service tax liability under works contract service after 1.6.2007. The dispute is only relating to their entitlement to pay the said tax in terms of the composition scheme of 2007. The Original Authority held that the appellants switched over from 'construction service' to 'works contract service' without intimating the service tax department and thus contravened the provisions of the said scheme. We note that the activities carried out by the appellants are taxable only w.e.f. 1.6.2007. In such situation, it is clear that their payment of tax in terms of composition scheme should be examined for correctness based on the said provisions only. It is seen that there is no format or prescribed specific procedure for exercising separate option under the scheme. After the introduction of new tax entry when the appellants discharged

service tax in terms of the applicable provisions, it is clear their entitlement cannot be denied. We note that in terms of calculation in Annexure B to the show cause notice, the differential service tax is only relatable to denial of the said composition scheme to the appellant. We find that the denial of composition scheme by the Original Authority is mainly on the ground that the appellant cannot exercise option under the scheme as the contracts were taxable under 'commercial or industrial construction service'/ 'construction of complex service' prior to 1.6.2007 and accordingly after 1.6.2007 they cannot opt for payment of service tax under works contract service under composition scheme. We find that in view of the legal position settled by the Hon'ble Supreme Court in Larsen & Toubro Limited (supra) the appellant is not liable to any service tax in respect of these indivisible, composite works contract prior to 1.6.2007, As such, subject to fulfillment of the conditions, the appellants are eligible to discharge service tax on such works contract, after 1.6.2007, in terms of composition scheme of 2007. The reason for denial of the benefit recorded in the impugned order is not sustainable. We find, considering the facts and circumstances of the case, the imposition of penalties on the appellant is not justified. The tax liability of the composite works contract has been a subject matter of large number of litigations and the final legal position was clarified only after the decision of the Hon'ble Apex Court, as above. In such situation, no penalty can be imposed on the appellant, especially when they have discharged service tax in terms of the provisions, as applicable during the relevant time and as per the understanding

of such provision during the relevant time. As noted above, the appellants only contested this differential duty and penalties. No other issue is pressed during the submission by the appellant. Accordingly, we allow the appeal with reference to this differential service tax and the penalties. The appeal is accordingly disposed of."

4.13. Learned advocate for the petitioner thereafter relied upon the decision of the Delhi Tribunal in case of ***Vistar Construction Pvt. Ltd. v. Commissioner of S.T., New Delhi*** reported in ***2016 (44) S.T.R. 675 (Tri.-Del.)***, wherein the Tribunal has held as under:

"4. We find no favour with the above contention of the learned DR. A reading of the impugned order clearly shows service were being provided by the appellant in terms of the works contract orders. No doubt the dispute relates to the valuation of the said services but the declaration of law by the Hon'ble Supreme Court in the case of CCE & CUS., Kerala v. Larsen & Toubro Ltd. referred (supra) would equally apply to the facts of the present case laying down with works contract was not taxable prior to 1.6.2007. It is well settled law that the law declared by the highest court of

the country has to be interpreted in such a manner as if the same was the law, even prior to declaration of the same by Hon'ble Supreme Court. As such, we find favour with the appellant's stand that whatever duty stands paid by them was also wrongly paid as there was no tax liability on their part in view of the recent decision of the Hon'ble Supreme Court. However, learned Advocate fairly agrees that whatever has been paid stands paid and they are not disputing the payment of the same."

4.14. Relying upon the aforesaid decision of the Delhi Tribunal in the case of Vistar Construction Pvt. Ltd. (supra), the learned advocate for the petitioner submitted that, the petitioners also undertake not to claim any refund of any amount as whatever has been paid and petitioners are not disputing the payment of the same, even if it is held that the petitioners are not liable to pay service tax prior to 01.06.2007.

4.15. Learned advocate thereafter relied upon the various other decisions of the Tribunal to point out that consistently the Tribunal has followed the decision of the Supreme Court in the case of L & T Ltd. (supra) to

hold that no service tax is liable to be recovered on the work contract services prior to 01.06.2007.

4.16. It was therefore prayed that the impugned order passed by the Tribunal is required to be quashed and set aside.

5.1. On the other hand, learned Standing Counsel Mr. Parth Bhatt appearing for the respondents vehemently objected to the maintainability of the petition as statutory appeal is provided under the provisions of Section 83 of the Finance Act, 1994 r/w. Section 35G of the Central Excise Act, 1994 by way of preferring Tax Appeal before this Court. It was therefore submitted by him that the petition is required to be rejected only on this ground. Mr. Bhatt on merits submitted that, it is the case of the petitioner that the petitioner has raised a new ground before the Commissioner (Appeals) for the first time that the petitioner is not liable to pay service tax on works contract services provided by the petitioners prior to 01.06.2007. It was pointed out that the petitioner no.1 itself has registered for the services under the head of 'commercial or industrial construction services', and therefore, the petitioner cannot now say that

the petitioner was not liable to pay service tax.

5.2. The learned advocate Mr. Bhatt submitted that, the issue before the adjudicating authority was the applicability of the notification dated 01.03.2006, as the petitioner availed Cenvat credit in March, 2006 from the GTA services. Therefore, according to the adjudicating authority, the petitioner was not entitled to the benefit of notification dated 01.03.2006 with regard to the abated value on the ground that the petitioner availed the Cenvat credit. In such circumstances, both the Commissioner (Appeals) as well as the Tribunal were justified in holding that the petitioner was not liable to the benefit of the notification dated 01.03.2006. It was submitted that, the petitioner could not have raised a contention of not liable to pay service tax, despite the fact that the petitioner had voluntarily registered under the category of 'commercial / industrial construction services' under the provisions of the Act, from 16.06.2005 and was paying service tax since 2005 under the said head of 'service tax'.

5.3. The learned advocate for the respondents

relied upon the following averments made in the affidavit-in-rely filed on behalf of the respondent nos. 1 and 3:

"8. I say and submit that in respect of para no. 15, 15.1 and 15.2, the contents thereof are denied. I say and submit that the contention of the Petitioner that the business of the Petitioner admittedly did not fall under the heading of CICS is not correct as the Petitioner had itself registered for payment of Service Tax under the category as the Petitioner was engaged in the business which was classified under CICS as specified under clause 25(b) under Section 65 of the Act, whereby the scope of service under the heading of CICS is defined. I say and submit that clause 25(b) as referred to hereinabove is reproduced hereunder:

"Commercial or industrial construction means-

(a) construction of a new building or a civil structure or a part thereof or

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction

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

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

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

I say and submit that as per the definition accorded under the heading of CICS under the Contract, any construction activity of any civil structure, or part thereof or any such ancillary activities associated with construction were made taxable. I say and submit that therefore since the Petitioner was carrying out activities of Civil Construction, which were covered under the scope of CICS as reproduced hereinabove, Service Tax was correctly levied and paid as per the provisions of the Act.

9. I say and submit that in respect of para 16.1, 16.2 and 16.3, the contents thereof are denied. I say and submit that the activities of the Petitioner rightly fell under the category of CICS prior to 01.06.2007, wherein a new category of WC was provided under the provisions of the Act, and the Service Tax has been correctly levied and paid under the provisions of the Act. I say and submit that the Petitioner has taken benefit of Service Tax abatement under the provisions of the Notification no. 15/2004-ST dtd. 10.09.2004 and subsequent notification No. 01 /2006-ST dtd. 01.03.2006. I say and submit that the Petitioner has filed returns in the form ST-3 since its registration from 01.11.2004 under the heading of CICS.

I say and submit that the Petitioner had never disputed this classification, and that the same was opened for the first time in submissions before the Commissioner (Appeals) by way of additional written grounds at the time of hearing on 24.11.2008. I say and submit that the Petitioner had never raised any objections in respect of its services being classified under CICS since it was registered in the year 2004, the contention of the petitioner that the services did not fall

under the heading of CICS is an afterthough, in as much as it was raised for the first time when a dispute was opened with respect to wrongful availment of benefit of abatement under the notifications as referred to hereinabove, as the petitioner had availed both options simultaneously and violated the terms of the Notifications as referred hereinabove and the same may therefore not be considered by this Court."

5.4. Relying upon the above averments, it was submitted that, the Tribunal has therefore rightly came to the conclusion that the petitioner was liable to pay the service tax, as the petitioner did not contest levy of service tax on the construction / industrial services till January, 2008, and therefore, prior to such period i.e. before January, 2008, the services rendered by the petitioner would remain classified under the construction services.

5.5. It was therefore submitted that in a peculiar facts of the present case, reliance placed on the decision of the L & T Ltd. (supra) would not be applicable. It was pointed out that in the decision of the L & T Ltd., the Supreme Court has only considered the aspect of the applicability of the service tax on the work

contract services prior to 01.06.2007, but in the facts of the present case, when the petitioner no.1 itself has voluntarily registered under the head of 'commercial / industrial construction services', the petitioner now cannot be allowed to take advantage of the decision of the Apex Court in absence of any finding by any authority that prior to January, 2008, the services rendered by the petitioner was of 'work contract' and not that of 'commercial / industrial construction services'. It was therefore prayed that the petition is devoid of any merit and is liable to be dismissed and no interference may be made in the impugned order passed by the Tribunal while exercising the power under Article 226 and 227 of the Constitution of India.

6.1. Having heard the learned advocates appearing for the receptive parties and having gone through the material on record, it emerges on record that the petitioner no.1 was rendering services classifiable as 'works contract'. This fact has neither been disputed by the Commissioner nor by the Tribunal. That only because the petitioner no.1 registered itself for the service tax under the head of 'commercial / industrial construction

services', the petitioner cannot be fasten its liability to pay service tax on the services rendered by it as 'work contract' services.

6.2. The definition of taxable service as per Section 65 (105) (zzq) reads as under:

Definitions.

65. In this Chapter, unless the context otherwise requires,-

xxx

105. "Taxable service" means any service provided or (to be provided),-

(zzq) to any person by, (any other person), in relation to (commercial or industrial) construction service."

6.3. Section 65 (25)(b) of the Finance Act, 1994 defines 'commercial or industrial construction services' as under:

(25b) "Commercial or industrial construction means-

(a) construction of a new building or a civil structure or a part thereof or

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing,plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction

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

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

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

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

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

6.4. W.e.f. 01.06.2007 by entering (zzzza) in sub-section 105 of Section 65 of the Act,1994 was introduced for the first time by the Finance Act, 2007 to cover the person as taxable person in relation to the execution of the works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. Explanation to Clause-zzzza defines work contract as under:

"(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;"

6.5. Considering the aforesaid amendment in the Finance Act, 1994, the Supreme Court in the case of L & T Ltd. (supra), after considering the decision of the Supreme Court in the case of ***Gannon Dunkerley*** reported in ***(1993) 1 SCC 364*** held that the separation of the value of the 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 there from charges towards labour and services. The Apex Court therefore was of the opinion that the service tax charging Section itself must lay down with specificity that the levy of the service tax can only be on works contracts, and the measure of tax 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 the property in goods transferred in the execution of the works contract. In such circumstances, the Apex Court held that when the legislature has introduced the concept of service tax on indivisible works contracts then such contracts were never intended to the subject matter of the service tax, and therefore, such contracts, not being exempt under the Finance Act, 1994, cannot be said to fall within its tentacles, as which was never the intention of Parliament. The Apex Court, therefore, held that the levy of service tax on works contract was non-existent prior to 01.06.2007.

6.6. In view of the above dictum of law, which is followed by all the other High Courts and the Tribunals including the Coordinate Bench of the Appellate Tribunal in the Service Tax

Appeal No. 379/2009 in the case of the petitioner itself, the Tribunal could not have arrived at a contradictory finding in Service Tax Appeal No. 107 of 2009.

7. We are therefore of the opinion that the impugned order passed by the Tribunal in Service Tax Appeal No. 107 of 2009 is without jurisdiction and contrary to the law laid down by the Apex Court in the case of L & T Ltd. (supra). The Tribunal has further erred in brushing aside the decision of the Coordinate Bench by referring it to be the decision of the Mumbai Tribunal which is contrary to the record. The Tribunal is bound to follow the decision of the Coordinate Bench, whether it is situated in the same region or any other region on the similar facts. Thus, the Tribunal has committed a breach of judicial propriety by remanding the matter to the adjudicating authority to verify the applicability of the notification dated 01.03.2006, though, admittedly the petitioner was not liable to pay the service tax prior to 01.06.2007, as the petitioner was rendering services of 'works contract'.

8. The contention raised on behalf of the respondents that as the petitioner had voluntarily registered under the head of

'commercial /industrial construction services', the petitioner is liable to pay service tax, is not tenable as the petitioner cannot be held to be liable to pay service tax prior to 01.06.2007, where, it is not in dispute that the petitioner was rendering 'works contract service'.

9. For the foregoing reasons, the petition succeeds and is hereby allowed. The impugned order dated 03.06.2009 passed by the Tribunal in Service Tax Appeal No. 107 of 2009 is hereby quashed and set aside and consequently *Show Cause Notice F.No. STC/ 452/O&A/ SCN/ NJD/ 2006 dated 12.3.2007 is also quashed and set aside*. In view of the statement made by the learned advocate for the petitioner that, the petitioner would not be entitled to any refund of the service tax already paid by it, pursuant to any order passed prior to the passing of the impugned order by the Tribunal.

8. Rule is made absolute to the aforesaid extent, with no order as to costs.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

Pradhyuman