

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Service Tax Appeal No. 86241 of 2016

(Arising out of Order-in-Original No. 24/ST-VII/RK/2015-16 dated 31.12.2015 passed by the Commissioner of Service Tax-VII, Mumbai)

M/s. Sankalpan Infrastructure Pvt. Ltd.

Appellant

304, Sentinel, Hiranandani Business Park,
Powai, Mumbai 400 706.

Vs.

Commissioner of Service Tax-VII, Mumbai

Respondent

115, New Central Excise Building,
M.K. Road, Churchgate, Mumbai 400 020.

Appearance:

Shri Bharat Raichandani, Advocate, for the Appellant

Shri Nitin M. Tagade, Joint Commissioner, Authorised Representative
for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 20.10.2022

Date of Decision: 20.10.2022

FINAL ORDER NO. A/86066/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Original No. 24/ST-VII/RK/2015-16 dated 31.12.2015 of the Commissioner of Service Tax-VII, Mumbai. By the impugned order following has been held:

"ORDER

20.1. I confirm Service Tax demand of Rs. 7,22,68,684/- (Rupees Seven Crores Twenty Two Lakhs Sixty Eight Thousand Six Hundred Eighty Four only) and determine the same as Service Tax payable on Commercial or Industrial Construction services and Erection, Commissioning or Installation services provided by M/s. Sankalpan Infrastructure Pvt. Ltd., Mumbai, for the period 01.03.2006 to 31.05.2007, under the provisions of Section 73(2) of the Finance Act, 1994;

20.2. I confirm Service Tax demand of Rs. 3,10,33,081/- (Rupees Three Crores Ten Lakhs Thirty Three Thousand Eighty One only) and determine the same as Service Tax payable on Works Contract services provided by M/s. Sankalpan Infrastructure Pvt. Ltd., Mumbai, for the period 0.0022047 to 30.06.2010, under the provisions of Section 73(2) of the Finance Act, 1994;

20.3. I confirm Service Tax demand of Rs. 13,78,709/- (Rupees Thirteen Lakhs Seventy Eight thousand Five Hundred Nine only) and determine the same as Service Tax payable on Renting of Immovable Property services provided by M/s. Sankalpan Infrastructure Pvt. Ltd., Mumbai, for the period June 2007 to September 2009, under the provisions of Section 73(2) of the Finance Act,

30.4. I confirm Service Tax demand of Rs. 14,24,939/- (Rupees Fourteen Lakhs Twenty Four Thousand Nine Hundred Thirty Nine only) and determine the same as Service Tax payable on 1 Business Support services provided by M/s. Sankalpan Infrastructure Pvt. Ltd., Mumbai, for the period October 2006 to September 2009, under the provisions of Section 73(2) of the Finance Act, 1994;

20.5. I order appropriation of Rs. 2,42,57,514/- paid by M/s. Sankalpan Infrastructure Pvt. Ltd. against the Service Tax liability confirmed in para 20.1, 20.2, 20.3 and 20.4;

20.6. I order recovery of interest at appropriate rate on the amount of Service Tax demands confirmed at para 20.1, 20.2, 20.3 and 20.4 above, from M/s. Sankalpan Infrastructure Pvt. Ltd., Mumbai, under the provisions of Section 75 of the Finance Act, 1994;

20.7. I impose penalty of Rs. 10,61,05,413/- (Rupees Ten Crores Sixty One Lakhs Five Thousand Four Hundred Thirteen only) on M/s. Sankalpan Infrastructure Pvt. Ltd., Mumbai, under the provisions of Section 78 of the Finance Act, 1994;

20.8. I impose penalty of Rs. 10,000/- (Rupees Ten Thousand only) on M/s. Sankalpan Infrastructure Pvt. Ltd., Mumbai, under the provisions of Section 77 of the Finance Act, 1994."

1.2 The miscellaneous application filed by the appellant in terms Section 35B(7) of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and under Rule 10 and 41 of CESTAT (Procedure) Rules, 1982 for urging additional ground was disposed vide order No. M/85549-85550/2021 dated 22.11.2021.

2.1 The appellant registered with the Service tax department, provides works contract services. Works contract service, inter alia, includes demolition of existing brickwork, RCC wall and granite counter, making opening in wall, electrical work, façade work including glazing, cladding, installation of safety security system.

2.2 Based on the scrutiny of the records and investigations undertaken, the revenue was of the view that-

- i) although the Noticee had obtained Service Tax registration on 23-02-2005 under Commercial or Industrial Construction services and subsequently included other services in the registration, they had failed to pay Service Tax on the value of a) Commercial or Industrial Construction services/ Erection, Commissioning or Installation service, b) Works Contract service. c) Renting of Immovable Property service and d) Business Support services received during the period 01.03.2006 to 30.06.2010, and also failed to file ST-3 returns for the said period.
- ii) although they had billed and collected Service Tax amount of Rs. 11,35,463/- for providing Renting of Immovable Property service and Rs. 11,35,463/- for providing Business Support service from M/s Adventity BPO, they had failed to deposit the said amount in the government account. Further it was also revealed that they had billed Service Tax @2%, @4% to the clients and collected the said tax from them but failed to deposit the said amount also in the government treasury,
- iii) the said failure amounted not only suppression of fact about the taxable services having been rendered and taxable value having been collected but also amounted

to violation of provisions of sections 66, 67, 68, 69.70 and 73A /FA, 1994, read with rules 4,6 and 7 of STR, 1994;

- iv) The appellant vide letter dated 10.02.2011 informed that they had deposited an amount of Rs. 2,42,57,514 - (Rs. 2,40,42,308/- + Rs. 1,95.7891- + Rs. 19,4177-) towards their Service Tax liability and produced the copies of TR-6 challans.

2.3 Accordingly revenue opined that appellant contravened the provisions of Sections 66, 67, 68, 69, 70 and 73A of the FA, 1994 and Rules 6, 7 of the STR, 1994 in as much as they-

- (i) failed to include the Business Support services in the Service tax registration as required under Section 69 of FA, 1994, read with Rule 4 of STR. 1994;
- (ii) failed to pay service tax amounting to Rs 19,85,98,590/- in terms of Section 68 of FA, 1994 read with Rule 6 of STR, 1994, on the value of taxable services received by them against (a) Construction services in respect of Commercial or Industrial buildings and civil structures Erection, Commissioning and Installation service. (b) Works Contract service, : kenting of Immovable Property service and (d) Business Support services provided by them during the period;
- (iii) failed to declare the value of aforesaid services provided by them, as required under section 67 of FA, 1994 with a deliberate intent to evade Service Tax;
- (iv) failed to file half yearly returns in form ST -3 for the aforesaid services as required under Section 70 of FA, 1994, read with Rule 7 of STR, 1994, for the period from April 2006 to June 2010;
- (v) failed to deposit Service Tax amount billed and collected/recovered from the clients from 01.03.2006 onwards on account of aforesaid services in the Government account, as required under Section 73 A of FA, 1994.

- (vi) It appeared that the failure was intentional with a view to evade payment of Service Tax due from them. Therefore, it appeared that the extended period of limitation of time, as provided under the proviso to Section 73(1)/F A, 1994 is invokable for recovery of Service Tax amount of Rs. 19,85.98,590/- during the period 01.03.2006 to 30.06.2010. They appeared liable to pay interest at applicable rates under Section 75 ibid on the said Service Tax and also appeared liable to penalty under Sections 76, 77 and 78/F A. 1994.

2.4 Based on above a show cause notice dated 21.04.2011 was issued to the appellant asking them to show cause as to why:

- a. Service Tax amounting to Rs. 7,22,68,684 - (Rupees Seven Crore Twenty Two Lakhs Sixty Eight Thousand Six Hundred Eighty Four only) payable on Commercial or Industrial buildings and civil structures services and Erection, Commissioning and Installation service during the period 01.03.2006 to 31.05.2007, should not be demanded and recovered from them under proviso to Section 73(1)/F A, 1994;
- b. Service Tax amounting to Rs. 12.35,26.258/- (Rupees Twelve crore thirty five lakhs twenty six thousand two hundred fifty eight only) payable on Works Contract services during the period 01.06.2007 to 30.06.2010 should not be demanded and recovered from them under proviso to Section 73(1)/F A, 1994;
- c. Service Tax amounting to Rs. 13,78,709/- (Rupees Thirteen lakhs seventy eight thousand seven hundred and nine only) payable on Renting of Immovable Property services during the period 01.06.2007 to 30.09.2009 should not be demanded and recovered from them under proviso to Section 73(1)/F A. 1994;
- d. Service Tax amounting to Rs. 14.24,9397- (Rupees Fourteen lakhs twenty four thousand nine hundred thirty nine only) payable on Business Support service during 16.10.2006 to 30.09.2009 should not be demanded and

recovered from them under section 73(1)/F A, 1994, read with the proviso thereto;

- e. The amount of Rs. 2,42,57,514/- deposited by the Noticee under various challans should not be appropriated at the Service Tax payable;
- f. Interest at applicable rates should not be charged and recovered from them under Section 75 of the Finance Act, 1994;
- g. Penalty should not be imposed on them under the provisions of Section 76 and 78 of the Finance Act, 1994; and
- h. Penalty should not be imposed on them under Rule 7C of Service Tax Rules, 1994 and Section 77 of the Finance Act, 1994.

2.4 The show cause notice was adjudicated as per the impugned order referred in para 1 above. Aggrieved appellants have filed this appeal.

3.1 We have heard Shri Bharat Raichandani, Advocate for the appellant and Shri Nitin M Tagade, Joint Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits:

- Issue involved in respect of Commercial or industrial construction services for the period upto 1st July is squarely covered by the decision of the Hon'ble Supreme Court in the case of L & T, wherein Hon'ble Apex Court has held that when these services are provided along with the transfer of material then these services are more appropriately classifiable as Work Contract Services and could not have been taxed under these category. However as this decision of the Hon'ble Apex Court was rendered by the Hon'ble Apex Court after adjudication of this case this argument was not before the adjudicating authority. However being the legal submission on the basis of the decision rendered by the Hon'ble Apex Court, this argument should be allowed to be taken for which they have filed the Miscellaneous Application.
- Issue wise submission against each part of the demand is per the table below:

Nature of Service	Period	Amount (Rs.)
Commercial or industrial construction services	March 2006 to May 2007	7,22,68,684/-
At Para 11.4 of the impugned order it is stated that the Appellant in ST-3 return filed for the period of October, 2006 to March 2006 has taken cenvat till February, 2006 and an amount of Rs. 58,945/- has been shown as utilized. At Para 11.7 of the impugned order it is stated that appellant has not satisfied the condition of non-availment of cenvat credit as stipulated under in notification 1/2006, hence the appellant is not entitled to take the benefit of abatement. At Para 11.8 of the impugned order it is stated that the appellant has attempted to disown their own submissions		
In this regards, the appellants as submitted earlier states that they, have never availed or utilized any credit cenvat credit while discharging the service tax liability for the above referred period. The Appellants have never availed nor utilized any cenvat credit during this period, in fact they have not accounted cenvat credit even in their books of accounts also for the relevant financial years. It is further submitted that submission of Cenvat credit register is for the subsequent period i.e., where they have discharged service tax under Works Contract Composition Scheme and not by taking abatement under notification 1/2006. Hence, the cenvat credit availed for the subsequent period which is not the subject matter of dispute for extending benefit of abatement notification 1/2006 during the period March, 2006 to May, 2007 is totally ignored by the Ld. Commissioner. The appellants submit that if the cenvat credit was actually availed and utilized, then it would have been reflected in their books of accounts, but since they have not availed any cenvat credit they have not accounted for in books The appellants has discharged entire service tax liability for March, 2006 in		

		cash only and there was no availment/ utilization of cenvat credit during March, 2006. The appellants have relied upon judgment of Hon'ble Supreme court in the case of M/s Chandarpur Magnet Wires Pvt. Ltd. Vs. CCE, Nagpur (1996) 81 ELT 3. The appellants have also relied upon the judgment of Hon'ble Ahmadabad CESTAT in the case of CCE, Vadodara Vs Ram Krishna Travels Pvt. Ltd. 2010 (17) STR 487 wherein it was held that the benefit of notification no. 01/2006-ST dated 01.03.2006 cannot be denied if the CENVAT is reversed together with interest.
Works contract services	June, 2007 to June, 2010	3,10,33,081/-
At Para 12.10 of the impugned order, it is stated that the appellant is eligible for the payment of Service Tax under Works Contract Composition Scheme, as it is evident from the material available on records that they have charged service tax at the rate prescribed under the said scheme. Hence, the said contention of the appellant is acceptable and service tax demanded at full rate in the impugned SCN is not correct the proposition of the Ld. CEO. At Para 12.14 of impugned order, the Ld. Commissioner has stated that however, the amount of service tax payable on the Works Contract services for the above period has to be computed on the basis of the value certified by the		The Ld. Commissioner erred in considering the value of taxable services as per the finance statements for determining the service tax liability under works contract composition scheme, Appellants have already submitted statement computing. service tax liability vide letter dated the 8.10.2015 under works contract scheme. The appellant relies upon section 68 read with Rule 6 of the service tax rules, 1994. According to the said section the appellants

Chartered Accountant submitted on 02.11.2015 as the same are based on the sales register and financial statements of appellant.		have the discharged service tax liability on the amount received towards the service charges during the impugned period in view of Rule 6 of the Service Tax Rules, 1944. Appellants have relied upon the judgment of M/s Tempest Advertising (P) Ltd. Vs. CCE, Hyderabad (2007) 9 STR 312 in which it is held that amount due from customers not to be included in taxable value for levy & demand of service tax. Appellants have relied upon the judgment of M/s Alpa Management consultants Pvt. Ltd. Vs. CST, Bangalore (2007) 6 STR 181 in which it was held that tax cannot be recovered based on returns shown in Income Tax Returns.	
Renting of immovable property services	January 2009 to September 2009	13,78,709/-	
At Para 13.4 of the impugned order, the Ld. Commissioner has stated that the amount forfeited towards the interest free security deposit of Rs. 60 Lacs on vacating the premises by the Licensee, is to be treated as consideration towards the	The appellants humbly submit that they had entered into an agreement dated 16.10.2006 with M/s Adventity BPO Pvt Ltd. for letting out their premises along with furniture and fixtures vide two separate agreements. The said rent income received by the appellant is liable for service tax under "Renting of Immovable		

services to be provided. There is nothing on record that licensee, M/s Adventity BPO, had objected or appealed against the said forfeiture, which indicates that they had honoured their promise to pay towards the services be provided. The same is "consideration" as per the section 2(d) of the Contract Act, which provides that when at the desire of the promisor, the promisee or any other person has done or abstained from doing or promises to do or to abstain from doing something, such an act or abstinence or promise is called as consideration for the promise.		property services" w.e.f. 01.06.2007. Tenure of the agreement was October 2006 to September 2009 The licensee, or terminated the agreement in the month of December, 2008. No service of "Renting of Immovable Property" were rendered by the appellants for the period from 01.01.2009 to 30.09.2009. The amount received from the lessee was on account of breach of contract i.e., violation of lock in period in instant case. Hence, the recovery of amount by adjusting security deposit cannot partake the character of "consideration".	
Business Support Services	October 2006 to June 2007	14,24,939	
The Ld. Commissioner without considering the submissions made by the appellant has confirmed the demand raised in the show cause that monthly hire charges for use of furniture and fixture are liable to service tax.		The appellant submits that as per the agreement with their client they have given the client the right to use furniture and fixtures already installed within the office for a separate consideration in form of fixed monthly hire charges. The appellant relied upon D.O.F. No. 334/4/2006 TRU dated 28.02.2006 in which it has clarified the scope of taxable service. All such services as provided by the business centers by giving	

	assistance/ support in operating the infrastructures in an office are made taxable. The appellants submit that theirs is not a "Business Centre" who provides support service. In fact their principal business activity is construction related activities of fit-out turnkey projects. They do not provide reception with competent personnel. All the equipment as listed in the schedule to the agreement are given on hire basis. In view of the above justifications, the appellants submit that they have merely given the right to use the furniture, fixtures for which we charge fixed monthly hire charges and hence the same is not liable to service tax under infrastructural support services thereby under business support services.
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3.3 Learned Authorized representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

4.2 As per the impugned order the demands against the appellants have been confirmed on four accounts as listed below period wise.

S No	Nature of Service	Period	Amount (Rs.)
1	Commercial or industrial construction services	March 2006 to May 2007	7,22,68,684

2	Works contract services	June 2007 to June 2010	3,10,33,081
3	Renting of immovable property services	January 2009 to September 2009	13,78,709
4	Business Support Services	October 2006 to June 2007	14,24,939

4.3 In respect of the demand made at SI No 1, we are of the view that Commissioner has himself held that the services provided by the appellant under this category of services are along with the transfer of material. In para 11.2 of the impugned order following has been observed:

"11.1 Service tax demand of Rs 7,22,68,684/- on Commercial or Industrial Construction Services and Erection, Commissioning or installation services:

11.2 The Noticee contends that they undertake only Turnkey contracts and supply material required for execution of any job as the same is part of their contract. Thus, there is no dispute on the fact of rendering the impugned services under a contract, which involved rendering of service as well as supply of material required for rendering the impugned service."

4.4 Hon'ble Supreme Court has in the case of Larsen & Toubro Ltd. [2015 (39) STR 913 (SC)] has observed as follows:

"9. We have heard learned counsel for the parties. Before examining the contentions made on the both sides, it will be necessary to set out the Finance Act, 1994 insofar as it pertains to the levy of service tax.

10. Section 64. Extent, commencement and application.

- (1) This Chapter extends to the whole of India except the State of Jammu and Kashmir.*
- (2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.*
- (3) It shall apply to taxable services provided on or after the commencement of this Chapter.*

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

(105) "taxable service" means any service provided -

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

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

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

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

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

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

Section 66. Charge of service tax. -

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

clause (105) of section 65 and collected in such manner as may be prescribed.

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

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

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

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

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

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

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

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

(g) the commission or any amount received by the rail travel agent from the Railways or the customer,

but does not include, -

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

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

- (iii) the cost of parts or accessories, or consumables such as lubricants and coolants, if any, sold to the customer during the course of service or repair of motor cars, light motor vehicle or two wheeled motor vehicles;*
- (iv) the airfare collected by air travel agent in respect of service provided by him;*
- (v) the rail fare collected by rail travel agent in respect of service provided by him;*
- (vi) the cost of parts or other material, if any, sold to the customer during the course of providing maintenance or repair service;*
- (vii) the cost of parts or other material, if any, sold to the customer during the course of providing erection, commissioning or installation service; and*
- (viii) interest on loans.*

Explanation 2. - Where the gross amount charged by a service provider is inclusive of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged."

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

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

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

- (i) Transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*
- (ii) Such contract is for the purposes of carrying out, -*
 - (a) Erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct*

work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

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

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

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

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

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

“Valuation of taxable services for charging Service tax. -

(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall, —

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

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.”

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

“2A. Subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to

in clause (h) of section 66E of the Act, shall be determined in the following manner, namely :-

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

Explanation. - For the purposes of this clause, -

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

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

(i) labour charges for execution of the works;

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

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

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

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

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

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

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

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

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the

execution of the works contract shall determine the service tax payable in the following manner, namely :-

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

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

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

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

(a) "original works" means -

(i) all new constructions;

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

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

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

(i) the amount charged for such goods or services, if any; and

(ii) the value added tax or sales tax, if any, levied thereon:

Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

Explanation 2. - For the removal of doubts, it is clarified that the provider of taxable service shall not take Cenvat credit of duties

or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of Cenvat Credit Rules, 2004.”

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

.....

*15. A reading of this judgment, on which counsel for the assessee heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting therefrom charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub-*paras* (f), (g) and (h). Under each of these *paras*, a bifurcation has to be made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor’s accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost, expenses and profit as would be attributable in the works*

contract to the transfer of property in goods in such contract. ***This being the case, we feel that the learned counsel for the assesseees are on firm ground when they state that the service tax charging section itself must lay down with specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts.***

16. At this stage, it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm. This position is well reflected in *Bharat Sanchar Nigam Limited v. Union of India*, (2006) 3 SCC 1 = 2006 (2) S.T.R. 161 (S.C.), as follows :-

"No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a

sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in Larsen & Toubro v. Union of India [(1993) 1 SCC 364] : (SCC p. 395, para 47) :-

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

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

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

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

"To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire

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

18. Similarly, in *Kone Elevator India (P) Ltd. v. State of T.N.* - (2014) 7 SCC 1 = 2014 (34) S.T.R. 641 (S.C.) = 2014 (304) E.L.T. 3 (S.C.), 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 = 2014 (34) S.T.R. 481 (S.C.) = 2014 (303) E.L.T. 3 (S.C.), 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 species of contract to provide for labour and services alone. Parliament had all genre of works contract in view when clause (29-A) was inserted in Article 366.” (at para 72)

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

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

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

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

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

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

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

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

"....." (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.

....

42. *It remains to consider the argument of Shri Radhakrishnan that post 1994 all indivisible works contracts would be contrary to public policy, being hit by Section 23 of the Indian Contract Act, and hit by McDowell's case.*

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

44. We have been informed by counsel for the revenue that several exemption notifications have been granted qua service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of."

4.5 In view of the observations as made by the Commissioner in para 11.2 of the impugned order it is quite evident that demand of service tax has been made in respect of indivisible contracts for turnkey projects, involving supply of services and the material for provision of the said services. Since Hon'ble Supreme Court has concluded that these services could not have been taxed prior to the introduction of "work contract services" by the Finance Act, 2007, we have no hesitation in holding that the demand made in respect of these services, by denying the abatement claimed can survive. However we also put on record that the learned Counsel has undertaken that apart from the amount demanded (Rs 7,22,68,684/-) confirmed by the impugned order no other relief shall be sought by the appellant.

4.6 In respect of the demand made at SI No. 2, in respect of the Work Contract Services post 01.07.2007, Commissioner has in the impugned order in para 12.11 to 12.14 observed as follows:

12.11. Works Contract is an indivisible contract. The conflict whether transfer of goods in a works contract is exigible to the Sales Tax was resolved by the Supreme Court in the case of *State of Madras versus Gannon Dunkerley & Co.* The Hon'ble Supreme Court held in the said judgement that it was not within the competence of the State to impose Sales Tax on the supply of materials used in the execution of Works Contract treating it as a sale. It is pertinent to mention that such agreements are neither a contract to sell the material used in construction, nor does property pass therein as movables. The materials are passed to the owner only as an accretion to the property, A contract for the sale of materials cannot be implied from such an agreement. Thus, where the contract is indivisible, it cannot be split up. The artificial division of the indivisible contract and consequent splitting of value without having any relation or nexus with the real transaction, for the purpose of payment of Service Tax, is completely contrary to the nature and explicit terms of the contract. In view of this position, it has to be held that for determining the taxable value for the purpose of payment of Service Tax, gross value of the contract/agreement, including the material/goods consumed for providing the output service would be the basis for computing the Service Tax payable on the services provided under such contracts/agreements. Service Tax is chargeable on the services rendered. In the case of indivisible works contract where the value of service cannot be identified or determined then Service Tax is chargeable on the whole value including the value of material/goods. However, since Service Tax is not payable on the value of goods, schemes like abatement or composition scheme are in place, which exclude the value of goods on assumptive basis. As per Section 67 of the Finance Act, 1994 the value of taxable service shall be the gross amount charged by the service provider for provision of the service. Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 stipulates that the gross amount charged for works contract shall include the value of all goods used in or in relation to execution of the works contract, whether supplied under any other contract for consideration or otherwise and

value of all the services that are required to be provided for the execution of works contract.

12.12. The value of works contract service taken in the Show Cause Notice, supposedly on the basis of the details provided by the representative of the Noticee, is as under -

<i>2007-08 (01.06.2007 to 31.03.2008)</i>	<i>2008-09</i>	<i>2009-10</i>	<i>01.04.2010 to 30.06.2010</i>
<i>45,10, 96,904/-</i>	<i>20,78,09,379/-</i>	<i>35,75,44,543/-</i>	<i>5,10,51,977/-</i>

From the statement dated 22.01.2010 of Shri. Pravin Vyankatesh Sathe, Head Finance & Accounting of the Noticee Company, it is seen that as per the balance sheet the total value sale of contract is as under:

<i>2007-08</i>	<i>2008-09</i>	<i>2009-10 upto December 2009</i>
<i>58,10,90,551/</i>	<i>12,45,64,561/</i>	<i>30,31,02,319/</i>

However, in his statement dated 09.03.2011 Shri. Sathe had given the amount received by the Noticee towards the value of works contract as under

<i>01.06.2007 to 31.03.2008</i>	<i>2008-09</i>	<i>2009-10</i>
<i>45,10,96,904/-</i>	<i>20,78,09,379/-</i>	<i>35,75,44,543/-</i>

Thus, there is inconsistency in the figures of the value given in the statements dated 22.01.2010 and 09.03.2011 of Shri. Sathe. The Show Cause Notice has considered the figures given in statement dated 09.03.2011.

12.13. The Noticee have produced CA Certificate No. 124/2015-16 dated 30.10.2015 issued by N.A. Shah Associates, certifying the Gross amounts of Trading Sales and other than trading sales. They have also produced the copies of VAT Audit Report, Monthly VAT e>Returns and Challans for the period 2007-08 to 2010-11 in support. The value of contracts executed, other than

trading sales as per the Financial Statements, as certified by the said Chartered Accountant, is as under –

(Amt in Rs.)

<i>2007-08</i>	<i>2008-09</i>	<i>2009-10</i>	<i>2010-11</i>
<i>58,10,90,551/-</i>	<i>12,45,64,561/-</i>	<i>35,52,34,869/-</i>	<i>29,54,47,048/-</i>

12.14. As per the details of the Sales Register for the year 2007-08 provided by the Noticee vide their letter dated 02.11.2015, the value of contracts executed, other than trading sales, for the months of April 2007 and May 2007, is Rs. 11,49,34,068/-. The value of contracts executed during the month of March 2008 is Rs. 5,43,37,514/- and that for the period 01.04.2010 to 30.06.2010 is Rs. 1,31,83,665/-. Thus, the value of contracts executed for the period 01.06.2007 to 31.03.2008 is Rs. 46,61,56,483/-. The amount of Service Tax payable on the Works Contract services for the period 01.06.2007 to 31.03.2011 has to be computed on the basis of the value certified by the Chartered Accountant, which is based on the Sales Register and Financial Statements of the Noticee duly certified by the Statutory Auditor, as the same are legally acceptable. Based on the values certified by the Chartered Accountant, as per Sales Register and Financial Statements, the Service Tax computation on Work Contract services is as under -

(Amt. in Rs.)

<i>Period</i>	<i>Total Value</i>	<i>Rate of Service Tax</i>	<i>Amount of Service Tax payable</i>
<i>01.06.2007 to 29.12.2008</i>	<i>41,18,18,969/-</i>	<i>2.06%</i>	<i>84,83,471/-</i>
<i>01.03.2008 to 31.03.2008</i>	<i>5,43,37,514/-</i>	<i>4.12%</i>	<i>22,38,706/-</i>
<i>2008-09</i>	<i>12,45,64,561/-</i>	<i>4.12%</i>	<i>51,32,060/-</i>
<i>2009-10</i>	<i>35,52,34,869/-</i>	<i>4.12%</i>	<i>1,46,35,677/-</i>
<i>01.04.2010 to 30.06.2010</i>	<i>1,31,83,665/-</i>	<i>4.12%</i>	<i>5,43,167/-</i>
		<i>Total</i>	<i>3,10,33,081/-</i>

4.7 From the observations made in the impugned order there seem to be no dispute in respect of the levy of service tax and admissibility of the Work Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 to the appellant. The dispute is only in respect of the manner of determination of the quantum of tax payable during the particular financial year. Prior to amendments made in 2010, the service tax was payable on the basis of the amount received during the particular period and not on the accrual basis. In case of *Tempest Adverting (P) Ltd* [2007 (9) STR 312 (T)] after considering the relevant provisions following was observed:

5. On a careful consideration and perusal of the Order-in-Original, it is very clear that the Revenue proceeded to levy Service Tax on the basis of gross receipts shown in the Profit and Loss Account and the details shown in the Income-tax Returns. The details filed under Income-tax Returns are different from the returns that have to be filed in terms of the Service Tax. In the case of Service Tax, the tax is required to be calculated on total receipts and not on the amount still due from the customers. This position has been clarified in the cited case of BPL Ltd. The findings recorded in Para 2 is reproduced herein below :

2. We have heard both sides in the matter and have perused the records. T. Velu Pillai & Co., Chartered Accountants have issued certificate based on the verification of books of account of the appellant company, that till date the appellant did not receive payments towards the debit notes raised for various engineering services provided to M/s. B.S. Refrigerators Ltd., and M/s. B.S. Appliance Ltd., Bangalore. The appellants had been filing returns regularly and informing the department about the outstanding debit notes due to them. There is no dispute about this fact about the appellants not having received the services amounts including the tax from their customers and they had reflected these amounts under the heading sundry debtors. Section 68 of the Finance Act, 1994 and Rule 6 of the Service Tax Rules does not permit recovery of the tax unless the payments are received. Both the Section 68 and Rule 6 (1) are reproduced herein below:-

"Section 68 : Payment of service tax - (1) Every person providing taxable service to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the Service Tax in relation to such service."

"RULE 6 (1) Payment of Service Tax. - The service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the calendar month in which the payments are received, towards the value of taxable services:"

The tribunal has granted full stay by Stay Order No. 334/06, dated 24-3-06, in view of the fact that appellants have not received value of taxable services from their customers in terms of Section 68 and Rule 6(1) of Service Tax Rules. The service tax is not liable to be paid as the assessee has not received the payments towards the value of taxable service. The appellants have been filing returns and informing the department about the non-receipt of the value of services rendered by their customers and about the non-payment of the same. The department is aware of these facts as the returns have been filed. Therefore, the issue of show cause notice beyond the period of one year is barred by time. For the reasons stated above, the appeal is thus allowed with consequential relief if any.

4.8 In case of Alpa Management Consultants Pvt Ltd. [2007 (6) STR 181 (T)] tribunal while following the decision in case of Tempest Adverting observed as follows:

"4.1 *In terms of the above order, Service Tax cannot be recovered based on the returns shown in the Income Tax Returns, as the provisions of Income Tax requires declaration of amounts still due from the debtors, while in the case of Service Tax, the same has to be paid when recoveries are made. The*

appellants have been paying the amounts as and when they are recovering the amounts. They have also not taken the credit as alleged by the Commissioner in his written submission before the Tribunal. Furthermore, there is no suppression of facts and demands are also time barred. Therefore, in terms of the above noted judgments, the impugned order is set aside and appeal allowed with consequential relief, if any."

4.9 It is the submission of the appellant that they have discharged the entire service tax due from them Work Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 only on the receipt of the payment from their clients, the revenue is demanding the same on the basis of their book of accounts which are maintained on accrual basis. In our view this is a matter of factual verification to be done by the original authority. If the entire tax liability has been discharged by the appellant in manner as provided under Rule 6 of Service Tax Rules, 1994 there cannot be another confirmation of demand against them on the accrual basis. For the purpose of factual verification of the payment of service tax in respect of these services the matter is remanded to the original authority.

4.10 In respect of the demand made at SI No 3 & 4 Commissioner has in para 13.1 to 13.4 of the impugned order observed as follows:

13.1 RENTING OF IMMOVABLE PROPERTY AND BUSINESS SUPPORT SERVICES: The allegation in the Show Cause Notice is that the Noticee had rented out the premises to M/s. Adventity BPO on Lease Rent and Fit-out Rent for the period 16.10.2006 to 30.09.2009. The Noticee had entered into an agreement dated 16.10.2006 with M/s. Adventity BPO for renting 27774 sq. ft. of the premises along with interior fit-outs (18600 sq.ft. from 16.10.2006 to 31.03.2007 and thereafter additional 9174 sq.ft.) @ Rs. 18/- per sq. ft. The licensee had deposited Rs. 60,00,000/- as Security Deposit, which was forfeited by the Noticee for vacating the premises in December 2008, i.e. before the Agreement period ending 30.09.2009. In the Show Cause Notice the aforesaid amount has been apportioned in the ratio of the amount of monthly lease rent and fit-out rent charged and received by the Noticee, which is worked as Rs. 33,00,000/ and

Rs. 27,00,000/- respectively, and has been included in the total amount received towards lease rent and rent for fit-outs for computing the Service Tax liability. The Show Cause Notice alleges that the Noticee had billed and collected Service Tax amount of Rs. 11,35,463/- during the period October 2006 to December 2008 but had failed to deposit the same in the Government account. The total demand of Service Tax made under the category of 'Renting of Immovable Property' is Rs. 13,78,7091- and that under 'Business Support Services' is Rs. 14,24,939/-,

13.2. The Noticee has submitted that during January 2009 to September 2009 no service was provided. The security deposit of Rs. 60,00,000/- was forfeited for Breach of the Agreement and it had no relation to the rent recoverable. It is further stated that there is no provision under "Renting of Immovable Property service and 'Business Support service to treat forfeiture of deposit as value of taxable service.

13.3. The receipt of Rs. 60,00,000/- by the Noticee is not in dispute. The only issue to be examined is whether or not such forfeited amounts can be added into the taxable value for payment of Service Tax. As the facts go, the Noticee had rented the premises along with fit-outs to M/s. Adventity for the period 01.10.2006 to 30.09.2009, as per the agreement entered between the two parties. M/s. Adventity vacated the premises in December 2008, which was considered as breach of the lease agreement and accordingly, the deposit of Rs. 60,00,000/- made by M/s. Adventity was forfeited by the Noticee. These facts are not in dispute.

*13.4 As per Section 67(1) of the Finance Act, 1994, Service Tax is chargeable on taxable service on the consideration which shall be the gross amount charged for the service provided or to be provided. Thus, Service Tax is payable even on the amount charged for the service to be provided. In the instant case, the amount of Rs. 60,00,000/- has been forfeited by the Noticee for vacating the premises in December 2008 much before the agreement period ending on 30.06.2009 so as to compensate the lease rent and rent on fit-outs to be provided to M/s. Adventity during the 01.01.2009 to 30.09.2009. **The***

consideration is towards the services to be provided. As per Section 2(d) of the Contract Act, when, at the desire of the promisor, the promisee or any other also has done or abstained from doing, or does or abstain from doing or promises to do or to abstain from doing something, such an act or abstinence or promise is called as a consideration for the promise. Consideration is an act of forbearance or the promise thereof, which is offered by one party to an agreement and accepted by other, as inducement to the other's act or promise. There is nothing on record to show that M/s. Adventity had objected or appealed against the said forfeiture, which indicates that they had honoured their promise to pay towards the services provided or to be provided. As such, the amount of Rs. 60,00,000/- is a consideration received by the Noticee towards services to be provided under the category of Renting of Immovable Property services and Business Support services (rent on fit-outs) and therefore, the same is part of the taxable value, as envisaged in Section 67(1) of the Finance Act, 1994, on which Service Tax is payable by the Noticee.

4.11 From the impugned order, para 13.4, it is evident that Commissioner has concluded that the amount of Rs 60,00,000/- forfeited by the Appellant, is a consideration on the basis of the definition of term "consideration" as per Section 2 (d) of the Contract Act, 1962. However in the Finance Act, 1994, explanation to section 67, defines the term "consideration". In our view the manner in which the term consideration has been defined by the Finance Act, 1994 is not in pari materia with the definition as contained in Contract Act. In our view impugned order which relies solely on the definition as contained in the Contract Act, for holding that this amount is "consideration", for the services provided or to be provided cannot be upheld in view of the specific definition contained in Finance act, 1994. Commissioner needs to record a finding to the effect that this amount is an consideration as per the Finance Act, 1994 by referring to definition contained therein. For the purpose of examining the issue again vis a vis the definition of "consideration" as per explanation to section 67 of the Finance

Act, 1994 the matter needs to be remanded to the original authority for de-novo determination.

4.11 Thus in nut shell we record our findings in respect of the four demands made by the impugned order in table below:

S N	Nature of Service	Period	Amount (Rs.)	Findings
1	Commercial or industrial construction services	March 2006 to May 2007	7,22,68,684	Demand set aside
2	Works contract services	June 2007 to June 2010	3,10,33,081	Demand Set aside and matter remanded (para 4.9 & 4.11)
3	Renting of immovable property services	January 2009 to September 2009	13,78,709	
4	Business Support Services	October 2006 to June 2007	14,24,939	

5.1 Appeal is partly allowed and the matter is remanded back to the original authority as per para 4.11.

5.2 Since the matter is quite old, original authority to decide the matter in remand proceedings within three months of the receipt of this order after affording opportunity of hearing to the appellant.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)