CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 10.11.14 to 14.11.2014

Date of decision: 19.03. 2015

S. Tax Stay No. 59278 of 2013 in S.T. Appeal No. 58658 of 2013
S. Tax Appeal No. 550 of 2007

M/s Larsen and Toubro Limited — Appellant
M/s Kehems Engg. Pvt. Ltd.

Vs.

CST, Delhi/ CCE&ST, Indore/ CCE/ Rajkot — Respondent

Service Tax Appeal No. 622 of 2007

CCE & ST, Indore — Appellant

Vs.

M/s Kehems Engineering Pvt. Ltd. — Respondent

Appearance:

Shri N. Venkatraman, Learned Sr. Counsel and Shri P. K. Sahu, Shri B. L. Narasimhan, Shri Puneet Agrawal, Learned Advocates for Assessees; and Shri Amresh Jain and Shri Govind Dixit, Learned AR's for Revenue.

Coram: Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, Member (Technical)
Hon'ble Mr. P. R. Chandrasekharan, Member (Technical)
Hon'ble Mr. R. K. Singh, Member (Technical)

Interim Order Nos. 72 – 74/2015

Per: Justice G. Raghuram:

The issues referred for our consideration essentially involve an issue of classification of taxable services i.e., whether components of a composite transaction amounting to supply of labour/rendition of service(s), under a works contract ought to be classified only under Section 65(105)(zzzza) of the Finance Act, 1994 (the Act) - inserted by the Finance Act, 2007, w.e.f 01-06-2007; or are also comprehended within the ambit of existing (as on 01-06-2007) taxable services such as **Commercial or Industrial Construction Service** (**CICS**); **Construction of Complex Service**(**COCS**); or **Erection, Commissioning or Installation Service** (**ECIS**).

2. Integral to our charter is the interpretation of relevant provisions of the Act. CICS; COCS & ECIS are distinct, extant services defined and enumerated to be taxable services, prior to introduction of **Works Contract Service** (**WCS**).

CICS was initially introduced w.e.f 10-09-2004, termed construction service; was amended in 2005, now called CICS amplifying the scope of the service as well and is defined in Section 65(25b) r/w Section 65(105)(zzq). COCS was also introduced in 2005, defined in Sections 65(30a) & 65(91a) r/w Section 65(105)(zzzh). ECIS was enacted to be a taxable service w.e.f 01-07-2003 *qua* Section 65(105)(zzd) and is defined

in Section 65(39a). Definitions and scope of some of these services were amended over time. The evolutionary history of CICS, COCS & ECIS is however not relevant to the scope of our analyses. The legislative/statutory setting, the relevant definitions, the charging and valuation provisions in respect of these services as on 01-06-2007 (the date on which WCS was inserted), would suffice for answering the reference. We extract relevant provisions of the Act, later in the judgment.

3. We have heard learned Senior Advocate Shri N. Venkataraman, for Larsen & Toubro Ltd. (**L&T**), an assessee/appellant; learned Advocates Shri P.K. Sahu, Shri. Puneet Agarwal and Shri B.L. Narasimhan representing other assessees whose appeals are either listed on our board or are pending before the CESTAT; and Shri Amresh Jain and Shri Govind Dixit learned A.R's representing Revenue. We have also heard Shri J. K. Mittal who asserted to be representing the local Bar association. On 10-11-2007, at commencement of the hearing, Shri Mittal objected to our hearing the reference, contending that the order of reference itself (dated. 09-09-2013) was incompetent and as a consequence, the special Bench *coram non judice.* We orally and peremptorily rejected this contention, particularly as invitation for intervention to non-appellants was to assist in answering the reference and did not extend to contesting the correctness of the reference. Revenue had already challenged and unsuccessfully the order dated 09-09-2013 and its further litigative campaign before the Hon'ble

Delhi High Court failed. Shri Mittal however did not turn up later, to address us on merits of the reference.

Now to the meat of the matter;

4. <u>Prefatory observations</u>:

The legislative fields authorizing levy and collection of taxes on services; and on sale or purchase of goods are distinct, mutually exclusive; not concurrent or overlapping and are plenary assignments within allocated fields, to the appropriate legislature, under our federal constitutional architecture. It is the established principle under our Constitution that allocation of legislative fields which are generic and those authorizing taxation are distinctly enumerated; that taxation is not an ancillary power to be deduced from the general regulatory power; that taxing power may be exerted only *qua* an Entry in the appropriate legislative List which specifies such power; that generic legislative fields do not inhere or accommodate taxing powers; and that taxing powers are distinctly specified and only in Lists I and II (the Union and State Lists); and not in List III (the concurrent List) of the Seventh Schedule of the Constitution, *vide* - ***M.P.V. Sundararamier and Co. vs. State of A.P.***[1]; ***A. Venkata Subba Rao vs. State of A.P***[2]; ***Hoechst Pharmaceuticals Ltd vs. State of Bihar***[3];

[1] AIR 1958 SC 468
[2] AIR 1965 SC 1773
[3] AIR 1983 SC 1983

Synthetics & Chemicals Ltd vs. State of U.P[4]; and ***Godfrey Phillips India Ltd. vs. State of U.P***[5].

the Union and State Lists – constitutional boundaries:

From the scheme of distribution of legislative powers between the Union and States *qua* the mutually exclusive Lists (I&II), it is clear that powers to make laws with respect to any of the matters in the List authorized to the particular legislative level, is exclusive. This is clear from the provisions of Article 246 and the position is also normatively settled. Abstinence by Parliament or a State Legislature, from legislating at all or to the limit of its exclusively allocated powers would not have the effect of transferring to the other legislative level the field exclusively assigned to the abstaining legislature. The corollary of such exclusivity is that if Parliament or the legislature of a State fails to legislate, at all or to the full limits of its allocated powers, such failure does not augment *pro-tanto* powers of the other legislature. The Constitution does not countenance delegation (of legislative powers), expressly or by abstinence in exercise thereof, by Parliament to State legislatures or *vice-versa* (subject of course to provisions *inter alia* such as in Articles 252 and 253).

The position is equally well settled, that residuary legislative power stands allocated to the Union under Entry 97 of List I r/w Art. 248 and that

[4] (1990)1 SCC 109
[5] (2005)2 SCC 515

the residuary allocation does not cover fields of legislation (whether general or pertaining to taxing powers) elsewhere enumerated in Lists I, II & III of the Seventh Schedule; that Article 248 r/w Entry 97 is the last refuge, only when all Entries in the three Lists are absolutely exhausted and only if the subject-matter cannot be comprehended in any Entry in the three Lists – ***Subrahmanyam Chettiar vs. Muthuswami Goundan***[6]; ***Manikkasundara Bhattar vs. R. S. Nayudu***[7]***;*** and ***Second Gift Tax Officer vs. D.H. Nazareth***[8].

Absent specific enumeration of a legislative field (authorizing levy and collection of taxes on services) either in Lists I or II, such authority is traceable to the residuary powers of legislation authorized to the Union *qua* Article 248 read with Entry 97 of List I. The legislative field, ***Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92 A*** *of* List I is assigned to States, under Entry 54, List II.

All power, authority or jurisdiction consecrated under or *qua* the constitutional grant is limited by limitations, conditions or boundaries expressed in the organic charter, inherent therein or implied therefrom – *vide* ***Kesavananda Bharati vs. State of Kerala***[9]. While plenary within the scope of their assigned powers, the Union and State legislatures are

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[6] AIR 1941 FC 47
[7] (1946) FCR 67
[8] AIR 1970 SC 999
[9] (1973) 4 SCC 225

nevertheless limited by the distribution of powers assigned and the within the compass of fields/heads of legislation enumerated in the three Lists, as to the subject-matters upon which the Union or State legislatures (or concurrently, under List III) may legislate. Since under our federal arrangement, allocation of taxing powers(to the Union and to States) is exclusive and not concurrent, there is no authority consecrated (except to the extent specified in the Constitution), either to the federal (Union) or the provincial (State) legislature(s), to overlap, smother, swamp or trench upon taxing powers allocated to the other level. - ***United Provinces vs. Atiqa Begum***[10]; ***Ref under Article 143***[11]; and ***In re Cauvery Water Disputes Tribunal***[12].

Thus it is, that a fiscal exertion by one level of legislation must be precisely designed and so calibrated to avoid encroachment, poaching into or trenching upon the authorized and delineated field(s) allocated to another level. Harvesting revenue, by levy and collection of taxes *qua* legislation by Parliament must therefore clearly avoid encroachment into the field(s) authorized to States; and *vice-versa*.

These are the foundational premises substrating consideration of the issues presented to us for resolution.

5. Events leading to the reference:

[10] AIR 1941 FC 16
[11] AIR 1965 SC 765
[12] 1993 Suppl (1) SCC 96

Service Tax appeal No. 58658 of 2013 was filed by L&T, challenging an adjudication order confirming a demand of service tax on the consideration received pursuant to a turn-key contract executed, by characterizing it as a taxable service falling within the ambit of CICS, defined in Section. 65 (105) (25b), of the Act. The appellant filed an application (in the appeal), contending that there is an extant conflict among decisions rendered by two sets of larger (three member) benches, on whether such transactions which amount to works contracts and were thus taxable prior to 01-06-2007, the date with effect from which works contract is specifically legislated to constitute a taxable service, by introduction of sub-clause (zzzza) in Sec. 65(105), *vide* the Finance Act, 2007.

Decisions of three member benches of CESTAT, in ***Jyoti Ltd. vs. CCE***[13] and in ***CCE vs. Indian Oil Tanking Ltd.***[14] had ruled that works contracts were taxable only w.e.f 01-06-2007, on introduction of sub-clause (zzzza) in Sec.65 (105) but not prior thereto, by classification under other and pre-existing taxable services. An earlier two member Bench decision in ***Daelim Industrial Co. Ltd. vs.CCE***[15], which assumed the same position was doubted and referred to a three member Bench, by the President, CESTAT. The reference was answered in ***CCE vs. BSBK Pvt. Ltd.***[16]. This three member Bench ruled that turn-key contracts could be vivisected; and

[13] 2008 (9) S.T.R 373
[14] 2010 (18) S.T.R 57
[15] 2003 (155) ELT 457
[16] 2010 (253) ELT 522

discernible service elements therein abstracted and classified for levy of service tax, provided such services are taxable services defined under the Act. Though sensitized to the contrary ruling by the three member Bench in ***Jyoti Ltd.***, the ***BSBK Pvt. Ltd.*** larger (three member) Bench neither analyzed nor disagreed with the operative *ratio* delineated in the earlier decisions by co-ordinate (three member) Benches. It is axiomatic that ***BSBK Pvt. Ltd.*** (a three member Bench) could have neither decided contrary to nor overruled *rationes* by co-ordinate Benches and ought only to have, if in disagreement therewith, referred the conflict/issue to a Bench of five members. Be that as it may.

Sensitized to the piquant situation, the order dated 09-09-2013, opined that the noticed conflict requires reference to a larger Bench, of five members and directed the relevant papers be placed before the President, for an appropriate order. Para 15 of the order reads:

Pursuant to the aforesaid analysis, since there is a conflict of opinion between Larger Bench decisions of this Tribunal in Jyoti Ltd., Indian Oil Tanking Ltd., and BSBK Ltd., we consider it appropriate that in the interests of precedential coherence, the issue whether a composite contract, involving transfer of property in goods and services which is taxable only form 01-06-2007 onwards and not earlier thereto, in view of the provisions of Section. 65(105)(zzzza), could be vivisected and service components of such composite

contract could be subjected to tax by classification of such service components under other taxable services such as commercial or industrial construction service or erection, installation and commissioning service, construction of residential complex service etc. for the period prior to 01-06-2007, must be referred to a larger bench of five members. Accordingly, we direct the Registry to place the papers before the Hon'ble President, for an appropriate decision.

The President, CESTAT referred the issues for consideration of the Larger Bench. We are assembled to answer the reference.

Revenue filed two miscellaneous applications, for rectification of mistake/recall of orders dated 09-09-2013 and 05-05-2014 (recommending reference to a larger bench; and reframing the issues for consideration by the five member bench). These and certain connected applications were disposed of on 08-08-2014. Revenue's miscellaneous applications were dismissed.

The Principal Commissioner of Service Tax (presumably representing the Union of India), preferred CEAC. No.94/2014 before the Hon'ble Delhi High Court: (1) *To decide whether the Misc. Order dated 09-09-2013 and the Order dated 08-08-2014 passed by CESTAT are correct;* and (2) *To set aside the Misc. Order dated 08-08-2014.* The High Court disposed of the appeal on 11-11-2014, as under (relevant portion extracted):

"2. By order dated 9th September, 2013 passed by the Customs, Excise and Service Tax Appellate Tribunal, a 5 Member Bench was constituted to examine the question of taxability of works contract service prior to 1st June*, 2007. The said order was passed noticing conflict of opinions expressed by different benches.*

3. The submission on behalf of the appellant/Revenue is that this issue was subsequently resolved and decided by a decision dated 24th November, 2013 in the case of ***G.D. Builders and Others versus Union of India and Another***[17]*, reported as (2013) 32 STR 673 (Del.).*

4. Consequent to the pronouncement in G.D. Builders (supra), the Revenue filed an application for rectification, which has been dismissed by the impugned order dated 8th August, 2014.

5. During the course of hearing of the appeal consensus has emerged.

6. Learned Additional Solicitor General submitted that the 5 Member Bench can examine as a preliminary issue whether the question raised is covered by the decision in G.D. Builders case (supra) and in case the question raised is covered, then the matter can be closed.

7. Learned Senior Counsel for the assesse submits that he has no objection and accepts the suggestion. He, however, submits that there are conflicting decisions and contrary view has been expressed by the Karnataka High Court and Madras High Court. Learned Additional Solicitor General states that the said contention can be also raised at the time of preliminary argument before the Tribunal and appropriate direction/order can be passed.

8. Learned Additional Solicitor General and learned Senior Advocate for the assessee in view of the said consensus state that the appeal may be treated as disposed of and no substantial question of law may be framed. Counsel shall bring the order passed today on the basis of concessions given by the two sided to the notice and knowledge of the Special Bench of the Tribunal.

9. The appeal is disposed of".

6. Hearing of the reference by this Bench commenced on 10-11-2014. Revenue, at commencement of the proceedings pleaded that the hearing be adjourned, to await the outcome of the appeal preferred by Revenue to

[17] 2013 (32) S.T.R 673 (Del)

the Delhi High Court. We orally declined this request since the Bombay High Court had directed expeditious hearing of the reference, in another matter on the Board of that High Court and as constitution of a special bench involved considerable and avoidable logistic hassle.

7. We have carefully perused the order dated 11-11-2014 of the Delhi High Court. We note that we are required to consider whether the decision in ***G.D. Builders*** and contrary decisions of the Karnataka and Madras High Courts cover the issue(s) referred, for consideration of this Bench. Senior counsel Shri N. Venkataraman (representing L&T) referred to decisions in ***CST vs. Turbotech Precision Engineering Pvt Ltd.***[18]; and ***Strategy Engineering Pvt. Ltd. vs. CCE***[19], which concluded contrary to ***G.D. Builders*** and ruled that a works contract is not chargeable to service tax prior to 01-06-2007. Shri Venkataraman further urged that the ***G.D. Builders*** conclusion (regarding assessablility of a works contract prior to 01-06-2007 as well), was recorded despite petitioners in that case not contesting (in fact conceding) that position and in the circumstances, the decision cannot be considered an authority for the principle underlying the ruling and is devoid of precedential vitality.

Alternatively, L & T urges, ***G. D. Builders*** is *per-incuriam* since it fails to consider, account for and explain several operative, relevant and binding precedents in the area; the evolutionary history leading to enactment of a

[18] 2010 (18) S.T.R 545 (Kar)
[19] 2011 (24) S.T.R 387 (Mad)

distinct provision for bringing works contract within the service tax net w.e.f 01-06-2007; the expressed legislative intent in introducing this specific fiscal measure; and other relevant statutory provisions which should inexorably have led to the singular conclusion that works contract is not chargeable to service tax prior to 01-06-2007. Had the several facets of the constitutional limits; relevant legislative provisions, the enacting history of sub-clause (zzzza) and binding *rationes* been brought to the notice of the High Court, by the parties thereto, which, it is asserted the High Court was unfortunately not sensitized to, the conclusion would necessarily been otherwise, is the contention. Other learned counsel adopt these propositions. Shri Sahu takes a different approach (though he too contends that ***G.D. Builders*** is *per incuriam* but for a different reason). We shall deal with Shri Sahu's position later.

In support of the contention, that a declaration of law founded on a concession by a party to a *lis* or a declaration without adversarial engagement and argument does not operate as an estoppel or result in a judgment having precedential vitality, reliance is placed on ***Superintendent and Legal Remembrancer, State of West Bengal vs. Corporation of Calcutta***[20]; ***Laxmi Shankar Srivastava vs. State (Delhi Admin)***[21]; ***Sanjeev Coke Manufacturing Co vs. Bharat Coking Coal Ltd. and***

[20] AIR. 1967. SC. 997
[21] (1979) 1 SCC 229

another[22]; ***Uptron (India) Ltd. vs. Shammi Bhan and another***[23]; ***P. Nallamal vs. State***[24]; ***Central Council for Research in Ayurveda and Siddha vs. Dr. K. Santhakumari***[25]; ***Union of India vs. Mohanlal Likumal Punjabi***[26]; ***M. P. Gopalakrishnan Nair vs. Kerala***[27]; and ***Dr. Rajbir Singh Dalal vs. Chaudhary Devi Lal University***[28].

8. <u>Should *G.D.Builders* be accorded precedential authority – analyses</u>:

We notice that as the Karnataka and Madras High Courts have taken a diametrically contrary position (to that of ***G. D. Builders***) on the identical issue; primary analyses of the constitutional and legislative dynamics and of the relevant statutory provisions considered in the light of applicable interpretive principles and precedential authority, is inescapable. CESTAT, a National Tribunal operates within the jurisdiction of the several High Courts in the country. It is trite that decisions of the Karnataka and Madras High Courts cannot be disregarded as *per-incuriam* the Delhi High Court's ***G.D. Builders*** ruling nor vice-versa. We are therefore required to clarify which is the correct position in law (insofar as we are able to); whether the views of the Delhi High Court and of the Karnataka and Madras High Courts constitute the ordained legal position in the respective territories; to identify and declare the legal position that is operative in territories not

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[22] (1983) 1 SCC 147
[23] (1998) 6 SCC 538
[24] 1999 (Crl.LJ) 3967
[25] (2001) 5 SCC 60
[26] 2004 (166) ELT 296 (SC)
[27] (2005) 11 SCC 45
[28] (2008) 9 SCC 284

governed by extant rulings of these High Courts; and in the alternate, whether the decisions, of the Delhi or the Karnataka and Madras High Courts are devoid of precedential vitality (on *per incuriam* or *sub silentio* grounds). Primary analyses is thus unavoidable in the circumstances. A holistic, empirical and primary analyses of the field, guided by the distillate of a large catena of precedents, is thus a point of commencement.

9. *G.D.Builders* analyses and the conclusion therein that works contracts are taxable prior to 01-06-2007 as well, whether based on concession and is thus bereft of binding force?

The principles relevant to our analyses, distilled from the above precedents are:

1. a wrong concession on a question of law, made by counsel neither binds the party nor would constitute a just ground for a binding precedent; a decision made on a concession by the parties even though the principle conceded was accepted by the court without discussion, cannot be given the same value as one given upon a careful consideration of the pros and cons of the question raised; and absent an argument raised before the court on all relevant aspects of a contention, it is not possible to predicate what the court would have said if the relevant considerations had been placed before it; such decision cannot be taken as finally deciding the question that is subsequently raised– *vide* ***Corporation of Calcutta*** (1967 S.C);

2. It is open to any party to resile from a concession once made in the court on a legal proposition; the construction of a statutory provision cannot rest entirely on the stand adopted by any party in the *lis*; parties cannot be bound to a position on the legal interpretation which they adopted at a particular time since saner thoughts can throw further light on the same subject at a later stage; and thus a wrong concession of law cannot bind the parties, particularly on the interpretation of a statutory provision;

3. The decision based solely on a concession as to a particular interpretation of a statutory provision would not have the vitality of a precedent, particularly when the conclusion is based on no reasoning; and

4. --- the applicability of a statute or otherwise to a given situation or the question of statutory liability of a person/institution under any provision of law would invariably depend upon the scope and the meaning of the provisions concerned and has got to be adjudged not on any concession made. Any such concession would have no acceptability or relevance while determining rights and liabilities incurred or acquired in view of the axiomatic principle, without exception that there can be no estoppel against a statute – *vide* para 9 in ***Mohanlal Likumal Punjabi***.

Revenue contests appellants' contention that the ***G. D. Builders*** ruling is based on concession and is thus of no precedential value.

We now consider ***G. D. Builders***, at this stage of our analyses, to ascertain whether its conclusion (that works contract is a taxable service even prior to 01-06-2007) is predicated wholly on the basis of concession by petitioners therein, that such is the position in law.

10. <u>The *G.D. Builders* landscape</u>:

G.D. Builders petitioners' *inter-alia* contended:

> a) *"composite or works contracts" are excluded from the ambit of levy of service tax under Section 65(105)(zzq)&(zzzh);*
>
> b) *Section 65(105)(zzq)&(zzzh) apply only to "service contracts" and not to "composite or works contract"; and*
>
> c) *There is a conflict between Section 65(105)(zzzza); (zzq) and (zzzh); and what is covered by Section 65(105)(zzzza) cannot be covered by Section 65(105)(zzq) and (zzzh). The two sets of provisions cannot co-exist. Subsequent legislation shows that the earlier legislation will not cover "composite or works contract"*(para 2);

Paras 3 to 6 trace the evolution and legislative dynamics of the Act, to the extent "construction service", "commercial or industrial construction service", "construction of complex service" and "works contract service" were periodically defined/introduced during 2003, 2004, 2005 and 2007. Paras 7 to 11 extract relevant provisions of exemption notifications (issued under Section 93 of the Act) and advert to challenged portions of these notifications. The specific challenge is noticed in para 11. Para 12 adverts to the genesis and evolution of service tax legislation, its gradual expansion in terms of coverage of a variety of services over time; and the current phase, of the negative list. Paras 13 to 15 advert to Sections 65A and 67 of the Act. Para 16 onwards set out the discussion by the Court. In para 16

the Court recapitulates statements by counsel, as recorded in its order dated 1st July, 2013, thus:

> *Learned counsel appearing for the petitioner accepts and states that "service component" in composite contracts can be taxed, but not as works contract per se. Learned counsel for the petitioner further states that the respondents are also competent to bifurcate and tax the service component alone* (extracted to the extent relevant to this part of the analysis).

Para 18 reiterates a brief analysis and the Court's conclusions on pre and post 01-06-2007 leviability of works contract to service tax. Paras 19 to 30 refer to several judgments of, a full bench of that Court and of the Supreme Court, to support the conclusions set out in para 31. Paras 32 to 35 set out analyses of arguments regarding the impeached exemption notifications and the Court's conclusions on that aspect. Para 36 summarizes the facets/principles, which in the Court's view follow consequent to the judgments considered and the preceding discussion. Para 37 is again regarding validity of exemption notifications; and para 38 records the operative portion.

Though from the facts recorded in para 16 (excerpted above) there appears some *acceptance/concession* by petitioners, we are unable to comprehend the precise nature of the concession. What is recorded is a statement to the effect: ***service component in composite contracts can be taxed but not as works contract per se***; ***learned counsel for the petitioner further states that the respondents are also competent to bifurcate and tax the service component also***. The issues presented in

G. D. Builders were clearly in respect of the period prior to 01-06-2007 and works contract is a species of composite contracts, as the latter expression is understood in the world of commerce, of law and in constitutional and legislative practice. We are thus unable to flesh out the precise nature of what was conceded by ***G. D. Builders*** petitioners.

We therefore premise that the Court proceeded on the basis that the challenge to non-leviability of service tax on works contract, was either not eschewed or the interpretation of legislative provisions - their trajectory and contours, cannot rest on mere concession but ought to be considered on merits, after analyses. In fact, in paras 19 to 30, the Court referred to several decisions and spelt out its analyses for resting the conclusions recorded, specifically in para 18 and generically in paras 31 & 36.

In para 31 ***G.D. Builders*** records: *The contention that there was/is no valid levy or the charging section is not applicable to composite contracts under clauses (zzq) and (zzzh) of Section 65(105) stands rejected. But the petitioners have rightly submitted that only the service component can be brought to tax as per provisions of Section 67 which stipulates that value of taxable service is the 'gross amount charged' by the service provider for such services provided or to be provided by him and not the value of the and not the value the goods provided by customers of service provider and the Service Tax cannot be charged on the value of the goods used in the contract*.

Para 36 summarizes (excerpted to the extent relevant):

(1) *After the 46th amendment to the Constitution, composite contracts can be bifurcated to compute the value of goods sold/supplied in contracts for construction of buildings with labour and material. The service portion of the composite contracts can be made subject matter of service tax. Aspect doctrine is applied for bifurcating/vivisect the composite contract;*

(2) *Service tax can be levied on the service component of any contract involving service with sale of goods, etc. Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for computation, it does not follow that no tax is leviable;*

(3) *The notifications in question are in alternative and optional. An assessee may take advantage or benefit of the notifications, but cannot be compelled to pay service tax on the proportion or value of a composite contract as per the notification. This is because the formula framed by way of delegated legislation is presumptuous and based on assumption; and*

(4) *An assessee can state that the service component of a composite contract should be computed in a fair and reasonable manner and accordingly taxed.*

Para 18 states:

Service Tax in the facts in question has been imposed in three stages. In the first stage Service Tax was imposed on construction of industrial and commercial complexes. In the second stage Service Tax was imposed on residential complexes of 12 or more residential units and in the third stage Service Tax was imposed on works contracts of any nature except for exclusion in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. Each provision or levy has its own scope and ambit. While the first two provisions were primarily specific and targetted, the third inclusion i.e. works contract is a very broad and wide term and will include within its ambit and scope construction of industrial and commercial complexes or construction of residential complexes as specified. Introduction and imposition of

Service Tax on works contract by Finance Act, 2007 does not mean that we have to read down the scope and ambit of the provisions enacted levy on (enacting levy for) *tax on contracts relating to 'commercial and industrial construction' service or 'construction of (residential) complexes service as specified by finance Act, 2004* (1994) *and Finance Act, 2007 respectively. The new levy imposed by Finance Act, 2007 does not indicate or show that works contract relating to 'construction of industrial and commercial complexes' or 'construction of (residential) complexes as specified would only be applicable when the contractor was providing labour or service and was paid for the same and not to composite contracts when the contractor was providing labour/services as well as goods used for construction of industrial and commercial complexes or residential complexes as specified. It would cover any and every contract when the contractor was only supplying labour or undertaking construction services whether with or without supply of material i.e. composite contract. The levy is valid when the provisions of Section 65(105)(zzh) and 65(105)(zzq) of the Act are satisfied. The only condition and requirement is that the Service Tax should be levied and imposed on the 'service' element and not levied and charged on material or goods used, as the power to levy sales tax or value added tax on the sales of goods is with the State Governments.*

In ***YFC Projects (P.) Ltd. vs. Union of India***[29], the Delhi High Court reiterated and followed its earlier ruling in ***G. D. Builders***. We therefore avoid a detailed survey of this reiteration.

11. Since the Hon'ble High Court adverted to the pre and post 01-06-2007 provisions of the Act; referred to certain judgments and the observations therein; and rested its conclusions on the discussion and

[29](2014) 44 gst 334/43 taxmann.com 219 (Delhi)

precedents referred to (albeit despite the concession, even if there were one such), the contention that ***G. D. Builders*** is devoid of precedential vitality, for being the product of concessions by a party to that *lis* (on a question of law in issue), does not commend acceptance. We reject this argument.

12. Alternatively counsel contend, ***G. D. Builders*** is *per-incuriam*; several of its *rationes* are passed *sub silentio* and must therefore be distinguished/ignored. On elaboration, the contention is that the several intricate, inter-dependent and manifolding principles/nuances flowing from the evolutionary history of taxation on accretional sale and purchase of goods and on services; the delicate balance (crafted by our federal Constitution) between and the exclusive assignment of fields of legislation authorizing taxation, to the Union and States, for plenary harvesting towards revenue augmentation or regulation; the clear constitutional prohibition, on one level of legislation trenching upon the field(s) committed exclusively to the other level - in Lists I & II of the Seventh Schedule; the specific definition of the several relevant taxable services (CICS, COCS, ECIS & WCS); the charging and valuation provisions of the Act; the exemption and abatement notifications issued under the Act; the speech of the Hon'ble Finance Minister while introducing Finance Bill, 2007-2008 (explaining reasons for introducing WCS as a new levy); the contemporaneous circulars issued by CBEC/TRU; the rules issued for valuation and for composition of works contracts (on and since 01-06-

2007); and the settled jurisprudence ordaining a non-derogable obligation to entrench clear provisions in the statutory schemata for levy and collection of service tax, to ensure confinement of the levy to service and associate components of composite/works contract transactions(which comprise both 'service/labour' and 'transfer of goods' elements), by engrafting an explicit statutory regime for proper, non-discretionary and non-arbitrary computation/valuation and for negating overreach into legislative field(s) and components thereof which are exclusively allocated to States, compel but the singular conclusion that works contract is enacted to be a taxable service only w.e.f 01-06-2007; and not earlier thereto.

Primary analyses of the issue whether and by what legislative/statutory measures, 'sale and purchase of goods' and 'service' components of composite/works contract could be vivisected and extracted by State and Union fiscal legislation, for levy of Sales Tax and Service Tax, respectively, is thus the primary step, antecedent to considering whether ***G. D. Builders*** is *per incuriam.* This analyses follows.

13. <u>Relevant provisions of the Act, Rules, Notifications and other relevant material</u> (prior to 01-06-2007)**:**

<u>Provisions of the Act</u>:

Service Tax was introduced in 1994 through insertion of Chapter V in the Finance Act, 1994, initially containing Sections 64 to 96. The levy was, at introduction confined to only three services. The Act has been amended periodically thereafter, bringing new and more services into the fold and/or

consolidating, carving out or relocating existing services. For instance, *Telephone* service introduced w.e.f 01-07-1994, *Pager* service introduced w.e.f 01-11-1997; *Facsimile, Leased Circuit*, *Telegraph* & *Telex* services introduced w.e.f 16-07-2007 and *Internet Telephony* service introduced w.e.f 01-05-2006, were merged with *Telecommunication* service introduced w.e.f 01-06-2007. The frequent amendments engendered regnant conflict and litigation.

Mining of mineral, oil or gas was introduced w.e.f 01-06-2007. *Supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances* was inserted as a taxable service w.e.f 16-05-2008. Revenue's claim that supply of tangible goods/equipment in relation to mining of mineral/oil/gas was taxable even prior to 16-05-2008 was rejected in ***Indian National Shipowner's Association vs. Union of India***[30]. Bombay High Court held that the entry respecting supply of tangible goods is a new taxable service; not a carve out from the entry relating to mining of mineral, oil or gas and that earlier to 2008 supply of tangible goods for use was not a taxable service.

Enumerations and definitions of relevant taxable services:

Taxable services:

[30] 2009 (14) S.T.R 289 (Bom)

Section 65 (105) of the Act enumerates taxable services, which are spelt out in several sub-clauses thereunder. According to this provision: *"taxable service" means any service provided or to be provided*;

Sub-clause (zzq) enumerates **CICS** and reads: *to any person, by any other person, in relation to commercial or industrial construction* (the Explanation inserted w.e.f 01-07-2010 is not relevant for this *lis*);

Sub-clause (zzzh) enumerates **COCS** and reads: *to any person, by any other person, in realtion to construction of complex* (the Explanation inserted w.e.f 01-07-2010 is not relevant for this *lis*);

Sub-clause (zzd) enumerates **ECIS** and reads: *to any person, by a commissioning or installation agency in relation to erection, commissioning and installation;*

Relevant definitions (status pre – 01-06-2007)**:**

CICS:

Sec. 65(25b) – *"commercial or industrial construction service" 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;

COCS:

Section 65(30a) – *"construction of complex" means –*

(a) *construction of a new residential complex or part thereof; or*

(b) *completion and finishing services in relation to residential complex 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; or*

(c) *repair, alteration, renovation or restoration of, or similar services in relation to, residential complex*;

Section 65(91a) - *"residential complex" means any complex comprising of –*

(i) *a building or buildings, having more than twelve residential units;*

(ii) *a common area; and*

(iii) *any one or more of facilities or services such as park, lift, parking space, community hall, common*

(iv) *water supply or effluent treatment system,*

located with a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

(a) *"personal use" includes permitting the complex for use as residence by another person on rent or without consideration;*

(b) *"residential unit" means a single house or a single apartment intended for use as a place of residence*;

ECIS:

Section 65(39a) –

"erection, commissioning or installation" means any service provided by a commissioning and installation agency, in relation to , -

(i) *erection, commissioning or installation of plant, machinery, equipment or structures whether prefabricated or otherwise; or*

installation of –

(a) *electrical and electronic devices, including wirings or fittings therefor; or*

(b) *plumbing, drain laying or other installations for transport of fluids; or*

(c) *heating, ventilation, or air-conditioning including related pipe work, ductwork and sheet metal work; or*

(d) *thermal insulation, sound insulation, fire proofing or water proofing; or*

(e) *lift and escalator, fire escape staircases or travelators; or*

(f) *such other similar services*;

The charging provision:

Section 66–

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of **specified** *per cent of the value of taxable services referred to*

in sub-clauses (**enumerated**) *of clause (105) of section 65 and collected in such manner as may be prescribed* (emphasis added).

With the introduction of new taxable services or amendments to or relocation of taxable services, the relevant sub-clauses resulting therefrom, were incorporated in Section 66, to authorize the levy.

The expression *prescribed* is defined in Section 65(86) to mean *prescribed by rules made under this Chapter* (Chapter V).

Power to exempt:

Section 93 –

(1) *If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally or subject to such conditions as may be specified in the notification, taxable service of any specified description from the whole or any part of the service tax leviable thereon.*

(2) *If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt any taxable service of any specified description from the payment of whole or any part of the service tax leviable thereon, under circumstances of exceptional nature to be stated in such order.*

Rule making power:

Section 94 sets out the power to make rules. Finance Act, 2006 substituted Section 67 (dealing with valuation of taxable services, noticed *infra*) and also inserted clause (aa) in sub-section 2 of Section 94. This clause reads: (aa) *the determination of amount and value of taxable service under section 67*. Thus, the power to frame rules for the purposes set out in sub-clause (aa), is specifically provided for.

Valuation of taxable services for charging service tax:

Section 67, was substituted by Finance Act, 2006 w.e.f 18-04-2006.(prior to such substitution, the provision was amended by Finance Acts, 1996, 1997, 1998, 2001, 2003 2004; and in 2005 w.e.f 13-05-2005).

We first extract the provision as on 13-05-2005 (until its substitution by Finance Act, 2006):

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 provided or to be provided 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 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 form the policy holder;*

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

(e) *the commission, fee or any other sum 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 motor car, light motor vehicle or two wheeled motor vehicle 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 enexposed 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* (emphasis added)*; 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.

Explanation. 3. - *For the removal of doubts, it is hereby declared that the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.*

comment:

While exclusionary sub-clause (vii) excludes the cost of parts or other material, if any sold during the course of providing ECIS, there is no provision incorporated for deductions in case of CICS and COCS, nor for other deductions associated with deemed sale of goods and associated costs/profits nor a specification of the point at which the deemed sale presumptively occurs, in respect of either CICS, COCS or even ECIS. The point at which deemed sale occurs and other deductions mandated by the federal allocation of powers is spelt out in binding curial authority, referred to later hereunder.

The Valuation provision, as amended by the Finance Act, 2006, w.e.f 18-04-2006:

Section 67. *Valuation of taxable services for charging service tax*

(1) *Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,*

(i) *in a case where the provision of the 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 as, with the addition of service tax charged, is equivalent to the consideration;*

(ii) *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.*

(2) *Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of the service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.*

(3) *The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.*

(4) *Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.*

Explanation*: For the purposes of this section,-*

(a) *"consideration" includes any amount that is payable for the taxable services provided or to be provided;*

(b) *"money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value*[31]*;*

(c) *"gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "suspense account" or by any other name, in the books of account of a person*

[31] omitted by Finance Act, 2012, w.e.f 01-07-2012

liable to pay service tax, where the transaction of taxable service is with any associated enterprise][32]

Determination of Value Rules, 2006:

As earlier noticed, Section 94 (power to make Rules) was amended by Finance Act, 2006 and clause (aa) inserted in sub-section (2), which reads: *the determination of amount and value of taxable service under Section 67.*

By Notification No.12/2006-ST, dated 19.04.2006 (in exercise of the powers conferred by Section 94 (2)(aa) of the Act), Central Government framed the Service Tax (Determination of value) Rules, 2006 (the 2006 Rules). These Rules came into force w.e.f 18-04-2006 (contemporaneous with Section 67 as substituted w.e.f 18-04-2006). To the extent relevant for our analyses, suffice it to note that upto 01-06-2007 (introduction of WCS as a taxable service), the 2006 rules contained no provision for valuation of complex issues of computation which have a critical bearing on *federal context competence* issues, inevitably presented in works contract transactions. Rule 5(1) of the 2006 Rules provides:

3. *Inclusion in or exclusion from value of certain expenditure or costs.-*

(1) *Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.*

Rule 5(1) was struck down in ***Intercontinental Consultants & Technocrats Pvt. Ltd***[33](by the Delhi High Court) as being beyond the scope and ambit of the charging provision and thus *ultra vires* Section 67 of the Act.

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[32] substituted for 'book adjustment' by Finance Act, 2008, w.e.f 10-05-2008

[33] 2013 (30) STR 347 (Del)

Rule 6 of these Rules enumerated cases in which the commission, costs, etc., will be included or excluded; and set out 9 categories of inclusions which are comprehended within the scope of the value of taxable services (set out as sub-clauses (i) to (ix) in sub-rule (1) thereof); and 4 elements which are not includable as the value of taxable services (set out as sub-clauses (i) to (iv) in sub-rule (2) of this Rule). A typographic error in Rule 6(2)(iii) was corrected by a substitution *vide* Notification No. 24/2006-ST, dated 27-06-2006.

Interestingly, exclusionary sub-clauses in Rule 6(2) did not include sub-clause (vii) of the exclusionary clause in the Explanation to Section 67 (as it stood prior to its substitution by Finance Act, 2006). To recapitulate, sub-clause (vii) of the unamended Section 67 read: *but does not include ---- (vii) the cost of parts or other material, if any, sold to the customer during the course of providing erection, commissioning or installation service;* While the included and excluded components for valuation of a taxable service were part of the Act itself, under Section 67 (prior to 18-04-2006), these are now (excised from the Act but) enumerated in the 2006 Rules; but for the significant (by design or default) omission of sub-clause (vii), adverted to earlier.

Exemption/abatement notifications: (relevant to CICS, COCS & ECIS)**:**

As noticed earlier, exemption notifications may be issued by the Central Government under Section 93. This provision authorizes grant of exemption (generally or subject to conditions as specified in the notification), from the whole or any part of the service tax leviable on a taxable service of any specified description. A notification issued under Section 93 thus presupposes that exemption provided thereby is of the service tax leviable (under the Act) in respect of the taxable service(s)

specified therein. At the least, an exemption notification evidences the Executive (Central Government's) assumption that the exempted quantum or percentage of tax is that which is leviable under the Act.

Now to the Notifications:

***Notification No. 12/2003-ST, dated 20-06-2003*:**

----- *exempts so much of the value of all taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under Section (66) of the said Act, subject to the condition that there is documentary proof specifically indicating the value of the said goods and materials* (brought into force w.e.f 01-07-2003).

***Notification No. 15/2004-ST, dated 10-09-2004*:**

----- *exempts the taxable service provided by a commercial concern to any person, in relation to construction service, from so much of the service tax leviable thereon under Section 66 of the said Act, as is in excess of the service tax calculated on a value which is equivalent to thirty-three per cent of the gross amount charged from any person by such commercial concern for providing the said taxable service:*
Provided that this exemption shall not apply in such cases where –

(i) *the credit of duty paid on inputs or capital goods has been taken under the provisions of the Cenvat Credit Rules, 2004; or*
(ii) *the commercial concern has availed the benefit under the notification of the Government of India, in the Ministry of Finance, (Department of Revenue) No. 12/2003 – ST, dated 20th June 2003*.

***Notification No. 04/2005-ST, dated 01-03-2005*:**

(amendment to Notification No. 15/2004-ST, dated 10-09-2004; adding an explanation to it).

Explanation: For the purposes of this notification, the 'gross amount charged' shall include the value of goods and materials supplied or provided or used by the provider of the construction service for providing such service.

***Notification No. 01/2006-ST, dated 01-03-2006*:**

***-----** exempts the taxable service of the description specified in column (3) of the Table below and specified in the corresponding entry in column (2) of the said Table, from so much of the service tax leviable thereon under Section 66 of the said Finance Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (5) of the said Table, of the gross amount charged by such service provider for providing the said taxable service, subject to the relevant conditions specified in the corresponding entry in column (4) of the Table aforesaid:*

TABLE

S. No	Sub clause of Section 65 (105)	Description of the taxable service	Conditions	Percentage
1	2	3	4	5
5	zzd	Erection, commissioning or installation, under a contract for supplying a plant, machinery or equipment and erection, commissioning or installation of	This exemption is optional to the commissioning and installation agency. Explanation – The gross amount charged from the customer shall include the value of the plant, machinery, equipment, parts and any other material sold by the commissioning and installation agency, during the course of providing erection, commissioning or installation service.	33

		such plant, machinery or equipment		
7	zzq	Commercial or industrial construction service.	This exemption shall not apply in such cases where the taxable services provided are only completion and finishing services in relation to building or civil structure, referred to in sub-clause © of clause (25b) of Section 65 of the Finance Act. Explanation – The gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of the construction service for providing such service.	33
10	zzzh	Construction of complex	This exemption shall not apply in cases where the taxable service provided are only completion and finishing services in relation to residential complex, referred to in sub-clause (b) of clause (30a) of Section 65 of the Finance Act. Explanation – The gross amount charged shall include the value of goods and materials supplied or provided or used for providing the taxable service by the service provider.	33

Provided that this notification shall not apply in cases where,-

(i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used

for providing such taxable service, has been taken under the provisions of the CENVAT credit Rules, 2004; or

(iii) the service provider has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 12/2003-ST, dated 20-06-2003.

<u>Note</u>: The above excerpts are of provisions of the Act (defining CICS, COCS & ECIS); provisions enumerating these as taxable services; the charging and valuation provisions; provisions authorizing grant of

exemption and framing of rules; the relevant exemption/abatement notifications issued under Section 93; and the 2006 rules for determination of valuation, as were in force during the relevant period w.e.f which CICS, COCS & ECIS were promulgated to be taxable services and upto 01-06-2007, the date w.e.f which WCS is enacted to be a distinct taxable service. Exemption/abatement notification Nos. 12/2003-ST; 15/2004-ST; 04/2005-ST; and 01/2006-ST, however continue in force even after 01-06-2007.

We now extract and advert to provisions of the Act; the amendment to the 2006 Rules (inserted w.e.f 01-06-2007), providing for valuation of works contract; Rules issued for composition of works contract; the contemporaneous aids facilitating proper interpretation of the scheme of the new taxable service (WCS) and its contemporary legislative and statutory habitat *vis a vis* the appropriate interpretation warranted, of the true scope of earlier taxable services - CICS, COCS & ECIS.

WCS: (introduced by Finance Act, 2007, w.e.f 01-07-2007): this service is specified to be a taxable service and is defined in:

Section 65(105): *"taxable service" means any service provided or to be provided;*

(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 completion and finishing service, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or*

(d) *turnkey projects including engineering, procurement and construction or commissioning (EPC) projects.*

The 2007 amendment inserting Rule 2-A in the 2006 Rules:

The 2006 Rules were further amended by the Service Tax (Determination of Value) (Amendment) Rules, 2007, brought into force w.e.f. 01.06.2007. This amendment inserted Rule (2A) in the 2006 Rules, which reads:

2A. *Determination of value of services involved in the execution of a works contract:*

(1) *Subject to the provisions of section 67, the value of taxable service* ***in relation to services involved in the execution of a works contract (hereinafter referred to as works contract service), referred to in***

sub-clause (zzzza) of clause (105) of section 65 of the Act*, shall be determined by the service provider in the following manner:-*

(i) *Value of works contract service determined shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.*

Explanation: *For the purposes of this rule,-*

(a) *gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid, 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;*

(ii) *Where Value Added Tax or sales tax, as the case may be, has been paid on the actual value of transfer of property in goods involved in the execution of the works contract, then such value adopted for the purposes of payment of Value Added Tax or sales tax, as the case may be, shall be taken as the value of transfer of property in goods*

involved in the execution of the said works contract for determining the value of works contract service under clause (i).

The Composition Rules, 2007:

In exercise of powers conferred by Section 93 (Power to exempt) and by Section 94 (Power to make rules) of the Act, the Works Contract (composition scheme for payment of service tax) Rules, 2007 was issued by Notification No. 32/2007-ST dated 22.05.2007, brought into force w.e.f. 01.06.2007. Relevant provisions of these rules are:

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

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

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

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

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

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

Explanation.- *For the purposes of this rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or*

sales tax, as the case may be, paid on transfer of property in goods involved in the execution of the said works contract.

(2) *The provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.*

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

14. The *per incuriam* and *sub-silentio* principles:

It is contended, that the ***G. D. Builders*** conclusion(that *works contract* is subject to the levy of service tax prior to 01-06-2007 as well, under earlier provisions [like (zzq) & (zzzh)]; that these earlier provisions legitimately signal the authorization to charge works contract to this levy; that bifurcation/vivisection follows directly as a consequence of the 46th Constitution amendment, not dependant on authorization *qua* a specifically legislated charge in this behalf; that the authority for bifurcation/vivisection is a natural corollary of the aspect theory; and that service portions/components of composite works contract could be extracted and levy of service tax confined to service components so extracted, even in the absence of statutory provisions for computation of these elements in a composite transaction; and that computation of service component(s) is a

mere matter of detail, a procedural and calculation aspect and not a matter touching upon the validity of the impost/tax or one relating to legislative competence), are conclusions which are fundamentally flawed, contrary to settled jurisprudence in the area; and rest on inadequate and clearly erroneous statutory and precedent analyses. Counsel contend that the manifest error in ***G. D. Builders*** conclusions is the consequence of inadequate pleadings, unstructured forensic assistance and incoherent presentation (at the Bar), of holistic principles, relevant and applicable to the central issue. To support the contention, reliance is placed on:

1. ***B. Shama Rao vs. Union Territory of Pondicherry.***[34];
2. ***State of U.P vs. Synthetics & Chemicals Ltd and another.***[35];
3. ***Municipal Corporation of Delhi vs. Gurnam Kaur.***[36];
4. ***Divisional Controller, KSRTC vs. Mahadeva Shetty and Another***[37]
5. ***Purvanchal Cables & Conductors Pvt. Ltd. vs. Assam Electricity Board and Anr.***[38].

The above decisions explicate the following principles:

(a) in practice *per incuriam* means *per ignorantium* (founded on ignorance).

(b) This rule developed to relax the rigour of the rule of *stare decisis*. *The quotable in law is avoided and ignored if it is rendered in ignorantium of a statute or other binding authority* – ***Young vs. Bristol Aeroplane Co, Ltd.***[39];

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[34] AIR 1967 SC 1480
[35] (1991) 4 SCC 139
[36] (1989) 1 SCC 101
[37] (2003) 7 SCC 197
[38] (2012) 7 SCC 462
[39] (1944) 2 All.E.R. 293

(c) *Sub-silentio* is another principle which excludes the norm of precedential vitality. **Salmond**[40] explains the principle thus: *A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub-silentio.* Precedents *sub-silentio* and without argument are of no moment (emphasis added);

(d) A precedent which is not express, founded on reasons, or fails to proceed on consideration of relevant issues cannot be deemed to be law declared to have binding effect as is contemplated by the stare decisis rule; That which escapes in the judgment without any occasion is not *ratio decidendi;* a mere declaration or conclusion is not the *ratio*; and a decision is binding not because of its conclusions but in regard to its reasons and principles, laid down therein;

(e) Precedents sub silentio and without argument are of no moment. Mere casual expressions carry no weight at all, nor exery passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority;

(f) A decision which predicates its conclusions in ignorance of relevant statutory provisions, binding precedents or other binding authority, is said to be *per incuriam*; and

[40] **Salmond** - Jurisprudence 12th Ed; pg.153

(g) **Dias**[41]explains that one shade of meaning to be attached to the expression *ratio decidendi* is: *The rule of law proffered by the judge as the basis of his decision*.

15. Suffice it to notice that Karnataka and Madras High Courts (in ***Turbotech Precision Engineering Pvt. Ltd.*** & ***Strategy Engineering Pvt. Ltd.***), recorded a diametrically contrary conclusion; and held that prior to 01-06-2007 (introduction of sub-clause (zzzza) in Section 65(105) of the Act), works contract was not a taxable service. Revenue (in the written submissions) distinguishes the Karnataka and Madras High Court decisions by reference to the different taxable services involved and the facts considered therein, designedly glossing over and ignoring the fact that the decisions clearly and categorically record the conclusion that the transactions in issue therein were works contracts and WCS was not a taxable service prior to 01-06-2007.

16. We are conscious that judgments of High Courts are binding precedents on the CESTAT (a Tribunal) – *vide* ***East India Commercial Co. Ltd. vs. Collector of Customs***[42]. The Delhi High Court is also the jurisdictional High Court, for the Principal Bench. We are also alive to the principle that within the compass of heirarchial discipline enjoined by *stare decisis*, binding precedents ought to be followed unreservedly. We are equally mindful and are advised, of the overarching principle that a precedent otherwise binding ceases to be so if it be *per incuriam* or a

[41]**Dias** – Jurisprudence, 4th Ed; pg. 180
[42]AIR 1962 SC 1893

proposition therefrom passes *sub-silentio*. Curial enunciation of relevant principles in this area are brought to our consideration.

17. Before we test judgments in ***G. D. Builders***; ***Turbotech Precision Engineering Pvt. Ltd***; and ***Strategy Engineering Pvt. Ltd*** on the anvil of *per incuriam* and *sub-silentio* principles, we must and do proceed to consider and analyse the several contentions by Ld. Counsel for assessees and Learned A.R's representing Revenue:

- on the evolutionary history of service tax and of works contract;
- the jurisprudence of taxation of composite transactions (elements whereof fall under insular legislative fields covered by distinct Entries in exclusive legislative fields; in particular where different components of composite transactions fall within discrete and insular domains assigned to different legislative levels *qua* Entries in the Union and State Lists;
- whether a legislation intending to extract components of composite transactions and levy tax only on authorized components thereof must specify such intent categorically and employ unambiguous and appropriate verbal formulae, to so signify its specific intention;
- alternatively, whether ambiguous or overbroad significations would suffice;
- whether the cornucopia of extant statutory instruments (provisions of the Act and the relevant Rules made thereunder, during the period upto 01-06-2007) compel non-discretionary and non-arbitrary exclusion(from the measure of service tax) of those components of composite transactions which are beyond the legislative competence of the Union, i.e., what degree of enacting/drafting precision (of the Act and of rules framed thereunder) is required;

- whether provisions of the Act and the complementing and facilitative rule regime considered together, must necessarily and clearly spell out the prohibition from trenching into the domain of States' legislative field; and
- the compelling interpretive outcome mandated by the several binding precedents cited.

18. <u>The competing contentions</u>:

Written and rejoinder submissions are filed on behalf of L&T and Revenue. Shri Puneet Agrawal has also filed written submissions. These reiterate and supplement in brief, the oral arguments. We therefore summarize the respective oral and written submissions. Shri Sahu has also filed written submissions, in elaboration of oral argument and propounds bases distinct from those of L&T and other counsel. We deal with Shri Sahu's contentions/submissions later. We also integrate contentions of other Ld. Counsel, including written submissions by Shri Puneet Agrawal into contentions/submissions proffered on behalf of L&T and refer to them for brevity, as the <u>L&T position</u>. We omit reference to the several precedents cited during oral argument and adverted to in written submissions by both parties, at this stage of our analyses. We analyse precedents as part of our adjudication.

<u>The L&T position</u> (summarized)**:**

01. Revenue submissions (written), regarding limitations imposed on this special Bench by the Delhi High Court decision dated 11-11-2014, are wholly misconceived and proceed on elementary misconception of the High Court's order. Neither was any concession made on behalf of

L&T before this Bench that the ***G. D. Builders*** decision covers the issues referred nor did the High Court declare that ***G. D. Builders*** is the sole or a binding precedent. Revenue submissions in this area are *false, frivolous, absolutely incorrect and denied in toto*; ---- are *grossly mischievous and completely calculated to cause grave* prejudice. The order dated 11-11-2014, itself is a complete refutation of Revenue's elementary misconception on this aspect;

02. Works contract is a composite, indivisible, distinct and insular contractual arrangement, a specie distinct from a contract for mere sale of goods or one exclusively for rendition of services. The world of commerce recognizes and law and the Constitution accommodate and distinguish between the different species that belong to the genus - contracts;

03. Prior to the 46th Amendment to the Constitution, *sale of goods* was not defined in the Constitution. Several States however legislated to levy sales tax on the goods portion involved in works contracts. Challenges to such State legislations eventually gravitated to the Supreme Court. The first ***Gannon Dunkerley*** decision ruled that States had no legislative competence to tax the sale of goods component(s) in works contract, on the basis of the interpretation put upon Entry 48 of the GOI Act, 1935 (corresponding to Entry 54 of List I of the Constitution) and held that *sale of goods* in Entry 48 of the 1935 Act has the same meaning as in the Indian Sale of Goods Act, 1930 and that in a works contract there is no agreement to sell materials as such and that property in them does not pass as movables; *the expression 'sale of goods' in Entry 48 is a Nomen Juris, its essential ingredient being an agreement to sell movables for a price and property passing therein pursuant to an Agreement*. The Court explained: *In a building contract which is, as in the present case, one entire and indivisible* ***and that is its norm****, there is no sale of goods*

and it is not within the competence of the provincial legislature under Entry 48 to impose a tax on the supply of materials used in such contract treating it as a sale (emphasis added);

04. As a consequence of the first ***Gannon Dunkerly*** ruling and pursuant to the 61st Law Commission recommendations, the 46thAmendment to the Constitution ensued. This Amendment introduced clause (29-A) into Article 366 bringing [six types of transactions, which in conventional sense and *qua* the first ***Gannon Dunkerley*** ruling are not comprehended within the scope of sale of goods (under Entry 54 of List I)], within the ambit of 'sale or purchase of goods'. Article 366 (29-A) incorporated a definition to the expression: *a tax on the sale and purchase of goods*; expanding the traditional meaning of the expression by an inclusionary clause, embracing the six categories of transactions, set out in sub-clauses (a) to (f). Sub-clause (b) reads: ***a tax on the transfer of property in goods* (*whether as goods or in some other form*) *involved in the execution of a works contract***;

05. The 46th Amendment expanded the locus of the legislative field enumerated in Entry 54 of List II and thereby facilitated States the authority to levy tax, *inter alia* and *vide* sub-clause (b), on the transfer (by way of accretion) of property in goods, involved in the execution of works contracts. The 46th Amendment does not *per se* legitimize levy of taxes on works contract transactions;

06. The 46th Amendment is the product of a constituent exertion under Article 354 and does not amount to an ordinary legislation, made in exercise of ordinary legislative powers *qua* Articles 246 or 248 r/w Entries in the three Lists. The 46th Amendment does not purport to and *qua* the text and context of the Constitution incapable of being considered a fiscal legislative measure, as is the mandated requirement under Article 265;

07. Parliament, *qua* residuary legislative powers allocated to it has, since inception of the Constitution, the authority to charge and levy tax on services. States however derived legislative authority, to charge and levy tax *on sale or purchase of goods (whether as goods or in some other form) involved in the execution of a works contract*, pursuant to the 46th Amendment expanding the scope of Entry 54 of List I and in respect of the other five categories of transactions, enumerated in sub-clauses (a) to (f) of Article 366 (29-A). Mere allocation of residuary legislative powers to Parliament; nor to States post the 46th Amendment's facilitative regime (widening the scope of Entry 54 of List I), does not *per-se* tantamount to enacting of a law made under Article 265 nor liberate the Parliament or State legislatures from the obligation to undertake an appropriate legislative exertion. If the appropriate legislature intends to introduce a measure to levy tax on service components or on the goods components involved in execution of a works contract, as the case may be; legislation clearly signifying that the appropriate legislature has evinced the intention to tax services or sale of goods, is a non-derogable constitutional requirement;

08. Building contracts (of the works contract variety) inhere components of both, labour/service(s) and deemed transfer of property in goods; the earlier sub-set susceptible to the taxation domain of the Union (under Entry 97 of List I) and the later to that of States' (under Entry 54 of List II);

09. In view of the discrete, insular and exclusive allocation of taxing powers *qua* lists I & II, to the two levels of legislatures supra, when intending to tax exertion of labour/rendition of service(s) on the one hand; or the transfer of property in goods, involved in the execution of a works contract on the other, the legislation must be so designed as to ensure avoidance of trenching upon or encroachment into the domain of the other level of legislature;

10. If the legislation by one level accommodates levy of tax by including the value of components which, under our federal constitutional arrangement stand allocated to the other level of legislature, by conscious design or a structural or phraseological overreach *qua* provisions of the relevant Statute, such legislation would seriously be in jeopardy on constitutional incompetence grounds; and the encroachment cannot be glossed over by, ***it is merely the measure of tax***, defence. In the context of taxation of works contracts, the Union and States must so calibrate the respective legislations as to clearly avoid computation of unauthorised components into the measure of their respective tax regimes, on labour/services and on sale, respectively;

11. The charging; valuation and computation provisions in Union legislation, when enacting provisions to tax exertion of labour/rendition of services; and corresponding provisions of State legislation, intending to tax transfer of property in goods, involved in the execution of a works contract, must clearly and expressly signify the intention to restrict the levy to those aspects of such composite transactions, as fall within their respective and authorized fields of legislation *qua* the appropriate Entry in List I or List II, as the case may be;

12. Since it is the settled interpretive principle, that a legislation or a statutory instrument, when susceptible to successful *ultra vires* challenge, must be narrowly construed or read down, to give the statute/provision in question an *intra vires* trajectory and to cabine it within authorized limits, legislation facially structured in broad language having an unconstitutional reach on a broader construction of its

provisions, must be restrictively construed or read down to confine the reach to constitutionally authorized *locii*, of the enacting legislature;

13. Definitions of CICS, COCS and ECIS do not signify the categorical legislative intent to levy tax on work contracts. The charging and valuation provisions (Sections 66 and 67) nor even contemporaneous delegated legislation (prior to introduction of sub-clause (zzzza) in Section 65 (105), w.e.f 01-06-2007, issued under Section 94 of the Act), mandate or even signal exclusion (of components comprising *transfer of property in goods involved in the execution of works contracts*),from the gross consideration received, for rendition of the taxable services defined as CICS, COCS and ECIS which is exigible to tax *qua* Section 67 r/w Section 66 of the Act;

14. Elements which comprise services and stand allocated to the taxation domain of the Union; and elements that comprise transfer of property in goods involved in the execution of a works contract which stand allocated to States, are deducible from an unvarying catena of binding precedents;

15. Definitions of CICS, COCS and ECIS read with the charging and valuation provisions (Sections 66 & 67) do not authorise levy of service tax on works contract; the charging and valuation provisions (prior to 01-06-2007), on a true and fair construction thereof, clearly authorize levy of tax at the specified rate on the gross consideration received for rendition of the taxable service. ‘Works Contract’ is defined and the

charge and levy thereon is enacted for the first time by the provisions of the Finance Act, 2007;

16. Notifications by Central Government, issued under Section 93 of the Act do not amount to delegated legislation. *Qua* its specific text and explicit intendment, Section 93 authorises the Union Executive to *exempt generally or subject to such conditions as may be specified --- taxable service of any specified description from the whole or any part of the service tax leviable thereon* (emphasis added). Thus, exemption could be granted only in respect of a taxable service, legislated to be so; and only in respect of the whole or any part of the service tax leviable thereon. On text and in context, **Section 93 authorizes grant of exemption only in respect of the taxable value of a taxable service**;

17. Section 93 does not confer rule making powers. Consequently, exemption notifications do not amount to delegated legislation. A provision requiring laying of exemption notifications also before Parliament, even where such requirement is identical to a similar requirement in respect of Rules made under the Act (i.e., delegated/subordinate legislation), would not *per se* elevate exemption notifications to the status of delegated legislation. It is axiomatic that rules framed under an enactment may neither transgress provisions of the parent legislation, impede the legislative command nor dis-apply its mandate. This is too elementary and established a principle of

administrative law. Exemption notifications in their very nature and intent impede (switch off, wholly or *pro-tanto*) the trajectory of the Act and eclipse the legislated levy. Therefore, exemption notifications cannot logically elucidate or augment the scope of taxable services, the charging or the valuation/computation provisions of the Act;

18. in fact, exemption notifications issued under the Act [excluding the value of the transfer of property in goods involved in execution of composite contracts from the scope of the gross value charged (under Section 67) or providing for a composition schemata involving abatement packages] indicate that in the view of the Union executive, *the transfer of goods elements involved in transactions falling within taxable services under the Act* are an integral and clearly taxable component of defined taxable services and the value thereof is equally subject to levy of tax; but exemption from the legislated levy is being granted, in executive discretion, as a policy choice and in the public interest;

19. Exemption notifications issued under Section 93 cannot be construed/reckoned for analyses and identification of the reach and contours of the Act. Legislation must be construed solely on the text/language of the enactment;

20. Since the transactional value subject to levy of service tax cannot (*including as a measure for the levy*) extend to those elements of composite transactions which stand exclusively allocated to States

under Constitution's mutually exclusive distribution of taxation powers, the Act itself must express the restrictive scope i.e., must explicitly ordain and in clear terms, that the levy there under is confined only to service components and that elements amounting to sale/purchase of goods are excluded from the scope of the federal levy. The protocol/modality, for computation of the value of those elements of composite transactions as fall within the federal tax domain may however be delegated for regulation by rules framed in accordance with the grant of power in this behalf in the enactment;

21. Where the Act and or *intra-vires* rules made thereunder, omit to provide for computation norms restricted to the value of taxable service elements integrated within complex and indivisible transactions, the charging provision itself is rendered *brutum fulmen* and fails;

22. Prior to 01-06-2007 no charging provision was enacted in the Act, explicitly authorising levy of service tax on works contracts, signifying the legislative intention to levy tax on works contract. Such intention is categorically verbalized only by the Finance Act, 2007. The speech of the Hon'ble Finance Minister while moving the Finance Bill, 2007 clarifies this position (as to introduction of a new levy) beyond doubt; and

23. Even if it were presumed, on a strained construction, that a charging provision for works contracts could somehow be accommodated within the broad definitions of CICS, COCS and ECIS, that premise would

abort for lack of appropriate computation provisions (to contain the prohibited overreach), either in the Act or in contemporaneous Rules made thereunder;

Summary of Revenue position:

01. It is settled (*it is therefore a given*) that ***G. D. Builders*** *is a binding precedent, even though other decisions of other High Courts on this subject could be stated to the CESTAT to assist them to arrive at a decision* (para 1. of Revenue's written submissions);

02. Counsel for L&T admitted during submissions (before this Bench) that the reference is covered by the ***G. D. Builders*** decision. Consequently, unless L&T places contrary decisions, of other High Courts, ***G. D. Builders*** provides a complete answer on the reference. Arguments that ***G. D. Builders*** is not binding for being *ex-concessi* or *per incuriam*, travel beyond the scope of deliberations fixed by the Delhi High Court *vide* the order dated 11-11-2014 (para 6 of written submissions);

03. Four different definitions were set out in the Act in relation to the construction sector, on different dates. ECIS w.e.f 01-07-2003; Construction service introduced w.e.f 10-09-2004, renamed CICS in 2005; and COCS introduced in 2005. From 01-06-2007 all species of 'works contract' *were brought to taxation* except in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams *vide* Section 65(105)(zzzza). Section 66 imposes a charge an all taxable services enumerated in different sub-clauses of Section 65(105);

04. Section 67 is a general provision for valuation of all taxable services. The measure of taxation is further refined to suit specific situations either by rules issued under Section 94 or by exemption notifications issued under Section 93 of the Act (emphasis added). Provisions of the Act and the notifications issued under Sections 93 and 94 together form the statutory framework for the levy and measurement of service tax on

composite transactions, including those that pertain to the construction sector.

05. The gross value charged by building contractors includes the cost of material like cement, steel, fittings, fixtures and tiles etc.,. Since it is not the intention of Parliament to levy service tax on these elements, Government issued Notification No. 12/2003–ST, for all services including construction contracts wherein the value of goods and materials used in providing taxable services was exempted. Consequently, the scope of the levy of service tax is restricted to the service aspect; and goods and material portions is excluded from the ambit of the levy;

06. In recognition of the practical difficulties in providing proof of the value of goods/materials used, Government also issued Notification Nos. 15/2004-ST; and 01/2006-ST, granting abatement of 67% in respect of composite contracts. As a result of the abatement, the levy would be restricted to the value of service components only;

07. Government also issued the 2006 Rules and by Rule 2-A thereof computation/valuation of the service and associated elements of works contract is enabled by vivisection of the composite transaction.

08. Service tax was and is leviable, both prior and subsequent to 01-06-2007; earlier under CICS, COCS and ECIS and since the Finance Act, 2007 under WCS, w.e.f 01-06-2007;

09. Rules issued under Section 94 and notifications issued under Section 93 are two distinct kinds of ***legislative instruments***, employed for taxation of construction services. Sections 93 & 94 exertions are both subordinate legislation; Rules are issued to carry out the purposes of the Act and power is delegated to issue exemption notifications, which though designed to reduce tax liability ***also enable adjustments in the measure of tax to suit requirements under the law*** or fiscal policy; Rules and exemption notifications operate in tandem, as an integrated

code, to limit the levy to the service elements and exclude the goods/material components (emphasis added);

10. Neither of the powers, to frame Rules or to issue exemption, is unfettered and is subject to Parliamentary oversight *qua* the mandated laying procedure and the rigour of legislative scrutiny in view of the provisions in *Chapter XXI of the Rules of Procedure and Conduct of Business in Lok Sabha*.

11. The ruling in ***Govind Saran Ganga Saran*** is distinguishable. Unlike in that case, where the Chief Commissioner by a notification had specified the point of taxation and despite power conferred by the legislation on the State Government to issue a Notification, and therefore (the Chief Commissioner's notification was) invalidated, in the present case the integrated statutory framework is legal and sufficient;

12. The decision in ***G. D. Builders*** is not based on a concession but is on a consideration of all factors. *Besides, no value should be given to this argument of the appellants because they were not a party to the* ***G. D. Builders*** *lis and there is nothing in the judgment to support their view*. Even if based on concession the decision is not devoid of precedential value since it is based on proper consideration of all relevant issues. Further, what is argued to have been conceded is merely a reiteration of the legal principle that all construction contracts can be vivisected for levy of taxes;

13. The decision in ***G. D. Builders*** was considered and reiterated in ***YFC Projects (P) Ltd.*** by the Delhi High Court, which further observed: *The grievance of the petitioner with regard to assessment and computation cannot be equated with the challenge to the constitutional validity of the impugned provision. It is open to the petitioner to raise issues of computation before the appropriate Adjudicating authority/Appellate authority and demonstrate the extent to which service tax can be imposed on the services that are provided by them. To be clear it is*

open to the petitioner to demonstrate the extent of the service element included in the composite contract and to pay service tax only on that component;

14. The decision in ***Mahim Patram*** pointed out (in para 25), that it is well settled that *the machinery provisions for calculating the tax or the procedure for its calculation are to be construed by ordinary rules of construction. Whereas a liability has been imposed on a dealer by the charging section, it is well-settled that the court would construe the statute in such a manner as to make the machinery workable*;

15. ***G. D. Builders*** is not *per incuriam* since it considered various judgments and analysed these with reasons;

16. The ***G. D. Builders*** ruling has been followed by several decisions of CESTAT; and

17. The ***Turbotech Precision Engineering Pvt. Ltd*** and ***Strategic Engineering Pvt. Ltd.*** rulings of the Karnataka and Madras High Courts, are distinguishable on their facts and do not relate to works contracts;

19. *Appropos* the competing positions on issues falling for our consideration, we survey the precedential landscape, for guidance as to the appropriate interpretation to be put upon the prior and post 01-06-2007 provisions of the Act, to ascertain whether works contracts were taxable prior to the aforesaid date as well, *inter alia* under CICS, COCS and ECIS.

Works contract is a generically distinct species of contractual arrangements and a lawful inhabitant of the commercial world. It has come to be so recognized in law, in jurisprudence and in curial discourse and exposition. This distinct commercial phenomenon inheres in its architecture facially indivisible (but legally distinct for taxation purposes) elements of

sale or purchase of goods (by incorporation or accretion); and of supply of labour/rendition of services. These constitutive elements of works contract, particularly seen in construction contracts, are susceptible to State and Union taxation exertions, respectively. In our federal constitutional construct, allocation of legislative fields pertaining to taxation, to the federal partners– States and the Union and in particular the consequent authority to levy and collect tax; is distinct, exclusive, insular, impermeable, non-delegable and plenary.

Hitherto and predominantly, charging, valuation/computation, and measure of tax conflicts were pursuant to State-centric claims/demands predicated on State legislative provisions. To unravel the complex and nuanced conflicts, an impressive body of curial pharmacopea emerged. A study of the several precedents in the area reveals the trial, error and stabilization progression in the understanding of the jural framework required for managing the delicate balance, between competing and insular federal context taxation regimes *qua* works contracts. Precedents that have identified the legislative limits and conditions for State taxation of works contracts provide us guidance to flesh out the constitutional limits and non-derogable conditions for valid Union taxation (for levy of service tax) on works contracts, as well. The constitutional boundaries are the same, the limits corollary and the exclusivity identical.

20. <u>Taxation of works contract jurisprudence in India – analyses of precedents</u>:

01. Tax on sale or purchase of goods is a field allocated to exclusive provincial (State) legislation, under Entry 48 of List II of the G.O.I Act, 1935 (corresponding to Entry 54, List II of the Constitution). Several States ushered in legislation to levy sales tax on works contract and incorporated legislative/statutory provisions creating appropriate charging provisions and provisions for confining the levy to the transfer of property in goods involved in the execution of a works contract. Challenge to such State exertions on grounds *inter alia* of legislative competence and the proper interpretation of the scope of the relevant legislative field, was considered in ***The State of Madras vs. Gannon Dunkerley & Co., (Madras) Ltd.***[43](first ***Gannon Dunkerley***). The constitution Bench ruled that the expression *Tax on the sale or purchase of goods* (in Entry 48 of List II of the G.O.I Act, 1935), has the same meaning as the expression *sale* bears under the Indian Sale of Goods Act, 1930; that on a true interpretation 'sale of goods' requires an agreement between the parties for the sale of the very goods in which eventually property passes; that *sale of goods* is a *nomen juris,* its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement; that in a building contract (*which is, as in the present case, one, entire and indivisible* – ***and that is its norm***), there is no sale of goods; that such building contract is a distinct species of the family of commercial agreements (distinct from an agreement for sale of goods simplicitor) and is a single indivisible agreement for transfer of property in goods by accretion together with rendition of labour/service; that in a works contract, the property in goods does not pass from the contractor to the contractee as goods nor is there in works contract an agreement to sell chattel (goods) *qua* chattel; and consequently,

[43](1958) 9 STC 353 (SC)

States have no legislative competence to tax the goods component involved in composite indivisible works contract.

note: It requires to be noted that neither in the context of the facts involved nor from the magisterial and clinical analyses in the first ***Gannon Dunkerley*** judgment, is the principle discernable that even if there be constitutional authority to tax composite and indivisible works contracts, State legislatures were yet incompetent to vivisect/bifurcate such composite transactions and confine the levy of tax to the sale of goods elements involved therein. The established principle that composite economic/social transactions could be regulated/charged to tax by applying the aspect theory, but within the scope of legislative field(s), allocated to the appropriate legislature, was not disturbed by the first ***Gannon Dunkerley***.

02. After the first ***Gannon Dunkerley***, as a consequence thereof and pursuant to recommendations by the 61st Law Commission, the 46th Amendment to the Constitution ensued. Article 366 was amended and clause (29-A) inserted therein. Six categories of transactions (not conventionally considered as sale of goods) were deemed to constitute sale and purchase of goods, thereby *pro tanto* expanding the scope of Entry 54, List II. The Statement of Objects and Reasons appended to the 46th Amendment, with reference to works contract sales, stated: *while in the case of works contract, if the contract treats the sale of material separately from the cost of labour, the sale of materials would be taxable but in the case of indivisible works contract it is not possible to levy sales tax on the transfer of property in the goods involved in the execution of such contracts as it has been held that there is no sale of the materials as such and property in them does not pass as movables*. Post the 46th Amendment, Article 366 (29-A) reads:

Article 366. Definitions.- In this Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say –

(29-A) 'tax on the sale or purchase of goods' includes –

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;

(d) a tax on the transfer of the right to use any foods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made;

03. Challenge to the 46th Amendment and whether the power of State legislatures extends to levy of tax on the transfer of property in goods involved in the execution of a works contract, referred to in sub-clause (b) of Article 366 (29-A), fell for consideration by the constitution Bench

in ***Builders Association of India vs. Union of India***[44] (first ***Builders Association of India***). The challenge to the *vires* was repelled. Suffice it to notice for our analyses, that the Court observed and ruled:

Sub-clause (b) of Article 366 (29-A) does not amount to a separate Entry in List II, per-se enabling States to levy tax on sales and purchases, independent of Entry 54 thereof. Post the 46th Amendment as well, the power of States to levy taxes on sales and purchases of goods including on 'deemed' sales and purchases of goods under clause (29-A) of Article 366 is only qua and under Entry 54 of List II and not outside it;

After the 46th Amendment works contract which was an indivisible one is by legal fiction altered into one which is divisible into one for sale of goods and the other for supply of labour and services. It has (since) *become possible for States to levy sales tax on the value of goods involved in a works contract, in the same way in which sales tax was leviable on the price of goods and materials supplied in a building contract entered into in two distinct and separate parts*;

The true scope of sub-clause (b) of Article 366 (29-A) is to enlarge the scope of ***tax on the sale or purchase of goods*** *wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to sales tax. So construed the expression 'tax on the sale or purchase of goods' in Entry 54 of the State List, therefore, includes a tax on the transfer of property in goods*

[44](1989) 2 SCC 645

(whether as goods or in some other form) involved in the execution of a works contract also;

The tax leviable by virtue of sub-clause (b) of clause (29-A) of Article 366 is thus subject to the same discipline which any levy under Entry 54 of List II is subject to under the Constitution; a fortiori sales tax levy by States is subject to restrictions and conditions mentioned in each clause or sub-clause of Article 286 as well; and resultantly, sales tax laws of a State must comply with the restrictions specified in the Central Sales Tax Act, 1956, insofar as the Central legislation's provisions apply to a particular transaction.

04. In ***Gannon Dunkerley & Co. and others vs. State of Rajasthan and others***[45] (the second ***Gannon Dunkerley***), validity of provisions relating to imposition of tax on the transfer of property in goods involved in the execution of a works contract, contained in sales tax laws of Rajasthan, Tamilnadu and Andhra Pradesh States was impeached on several grounds. The constitution Bench ruled:

The expression 'tax on the sale or purchase of goods' in Entry 54 of List II includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also and the tax leviable by virtue of sub-clause (b) of Article 366 (29-A) is subject to the discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution;

The legislative power under Entry 54 is not available in respect of transactions of sale or purchase which take place in the course of inter-State trade or commerce. In view of Article 286 (1) the legislative power under Entry 54 does not extend to imposing tax on a sale or purchase of goods which takes place outside the State or in the course of import or export of goods. While enacting a law imposing a tax on

[45](1993) 088 STC 0204

sale or purchase of goods under Entry 54 of List II r/w Article 366 (29-A)(b), it is impermissible to the State legislature to make a law imposing a tax on such deemed sales which constitutes a sale in the course of inter-State trade or commerce under Section 3, an outside sale under Section 4, a sale in the course of import or export under Section 5; or on goods declared to be of special importance in inter-State trade or commerce under Section 14 except in accordance with the restrictions and conditions contained in Section 15 of the Central Sales Tax Act;

A State cannot frame a legislation under Entry 54 ***in a manner as to assume power*** *to impose a tax on such transactions* ***and thereby transgress these constitutional limits*** (emphasis added);

The legislative power of States to impose tax on transfer of property in goods involved in the execution of works contract is not however contingent upon nor is eclipsed till enactment of a law by Parliament under Article 286(3)(b); so however that in the event of such law having been made by Parliament, the exercise of State legislative power under Entry 54, to impose a tax of the nature referred to in sub-clauses (b), (c) and (d) of Article 366(29-A), would be subject to restrictions and conditions in regard to the system of levy, rates and other incidence of tax, contained in such federal law;

the second ***Gannon Dunkerley*** **on the legitimate measure for levy of sales tax on the goods portion in a works contract and the normative and non-derogable deductions mandated by this ruling.** (summarized):

As pointed out in (the first) ***Builders Association of India****, the measure for the levy of the tax contemplated by Article 366(29A)(b) is the value of the goods (whether as goods or in some other form) involved in the execution of a works contract. Though the tax is imposed on the transfer of property in goods involved in the execution*

of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of a works contract. Incorporation of the goods in the works forms part of the contract relating to work and labour which is distinct from the contract for transfer of property in the goods and therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by Article 366(29-A)(b).In view of the legal fiction introduced by the 46th Amendment, whereby works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services (emphasis added). *Thus*:

(a) *labour charges for execution of the works*;
(b) *amount paid to a sub*-contractor for labour and services;
(c) *charges for planning, design and architect's fees*;
(d) *charges for obtaining on hire machinery and tools used in the execution of the works contract*;
(e) *cost of consumables such as water, electricity, fuel etc.*, *which are consumed in the execution of a works contract; and similar expenses for labour and services;*
(f) *cost of establishment of the contractor to the extent it is relatable to supply of labour and services;*

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

(h) *profit earned by the contractor to the extent it is relatable to supply of labour and services, must be deducted from the entire value of a works contract* (emphasis added).

comment:

The above are the mandated exclusions from the gross value of a works contract, since States' legislative field under Entry 54 of List II, as defined in Article 366(29-A)(b), restricts the domain to the goods involved in the execution of a works contract (excluding charges relating to the contract for supply of labour and services). The exclusion is the consequence of constitutional limits upon States' legislative reach, under Entry 54, List II.

other deductions mandated *qua* provisions of the Central Sales Tax Act, 1956:

The value of goods which are not taxable in view of Sections 3, 4 and 5 of the Central Sales Tax Act; goods covered by Sections 14 and 15 of this Act; and goods exempt from tax under the sales tax legislation of the State must also be excluded. The value of goods involved in the execution of a works contract will have to be determined after making these deductions and exclusions from the value of the works contract.

On the validity of the Rajasthan Sales Tax Act, 1954:

After noticing and adverting to provisions of the Rajasthan Sales Tax Act and the Rajasthan Sales Tax Rules, 1955 as amended post the 46th Amendment, the second ***Gannon Dunkerley*** ruled:

The legislature (in the Rajasthan Sales Tax Act) has not made any express provision for exclusion of transactions constituting deemed sales which take place in the course of inter-State trade or commerce or outside the State or in the course of import or export in relation to which the State Legislature lacks the competence to impose tax under Entry 54 of the State List; Not has any provision been made with regard to sale of goods which are declared to be of special importance in inter-State trade or commerce and are governed by Section 14 & 15 of the Central Sales Tax Act. The matter has been left to the discretion of the rule-making authority to prescribe whether deductions in respect of such transactions should be allowed or not.

The interactive trajectory of Section 5(3); 2(t); 5(1); and 2(s) indicates that *in relation to works contracts the Legislature has made a departure in the matter of chargeability of the tax; and by using the expression 'turnover' instead of 'taxable turnover' in Section 5(3), has enlarged the field of taxability to permit levy of tax on sales in the course of inter-State trade and commerce, sales outside the State and sales in the course of import and export and to ignore the conditions and restrictions placed by Section 15 of the Central Sales Tax Act in relation to imposition of tax on goods which are declared to be of special importance in inter-State trade or commerce under Section 14 of the Central Sales Tax Act. The proviso to Section 5(3) does not oblige the rule-making authority to frame a rule allowing deductions for the turnover of the amount of proceeds of sale of goods on*

which no tax is leviable under the Act so as to exclude the abovementioned sales from levy of tax. The rule making authority would not be contravening the mandate of the statute if it does not allow deduction of the amount of proceeds for sale of goods on which no tax is leviable under the Act from the turnover (emphasis added).

The constitutional validity of a statute has to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed and if, so judged, it does not pass the test of constitutionality it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements. Rules made under the Rajasthan Sales Tax Act would not, therefore, be of any assistance in resolving the question regarding the validity of Section 5(3) (emphasis added).

Section 5(3) of the Rajasthan Sales Tax Act, 1954 and Rule 29(2)(i) of the Rajasthan Sales Tax Rules, 1957 are therefore declared unconstitutional and void.

05. The nature of transactions by which mobile phone connections are enjoyed; whether it is one of sale or of service or both; and if both, whether both legislative authorities (States and the Union) could levy their separate taxes together or only one of them, were the issues considered in ***Bharat Sanchar Nigam Ltd. vs Union of India***[46]. Relevant for our guidance in this *lis* is the conclusion: *-----, it is sufficient for the purposes of this judgment to find, as we do, that a telephone service is nothing but a service. There is no sales element*

[46] 2006 (2) STR 161 (SC)

apart from the obvious one relating to the handset if any. That and any other accessory supplied by the service provider in our opinion remain to be taxed under the State Sales Tax Laws (para 78). The Court clarified that there may be circumstances in particular transactions wherefrom it may legitimately transpire that SIM cards would be separate objects of sale and in such situations it would be open to authorities of the State to levy Sales Tax thereon (para 80). The principle, that trenching by one legislature into the exclusive taxation domain of the other is prohibited, including by valuation overreach stratagms, is reiterated (para 81). The Court *inter alia* ruled: *The aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service* (para 85.E, emphasis added).

06. A two judge Bench in ***Larsen & Toubro Ltd. vs. State of Karnataka***[47], doubted the correctness of an earlier decision in ***K. Raheja Development Corporation vs. State of Karnataka***[48] and referred the matter for the consideration by a larger Bench. The reference was answered by the constitution Bench in ***Larsen & Toubro Ltd. vs. State of Karnataka***[49]. After adverting to the litigative history regarding taxability of a works contract, commencing from the first ***Gannon Dunkerley***, the ***Larsen& Toubro Ltd.*** constitution Bench answered the reference and remitted the matters for disposition by the regular Bench. The Court summed up the legal position thus (extracted to the extent relevant to the present *lis*):

a) For sustaining the levy of tax on goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the

[47](2008) 17 VST 460 (SC)
[48](2005) 5 SCC 162
[49](2014) 1 SCC 708

property in those goods must be transferred to a third party either as goods or in some other form.

b) For the purpose of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three conditions are fully met. It is so because in the performance of a contract for construction of a building, the goods (chattels) like cement, steel, bricks, etc., are intended to be incorporated in the structure and even though they lose their identity as goods but this factor does not prevent them from being goods.

c) Contracts comprising both a works contract and a transfer of immovable property does not lose its character of being a works contract; the term 'works contract' in Article 366(29-A)(b) takes within its sweep all genres of works contracts, not restricted to one specie i.e., a contract to provide for labour and services alone.

d) Building contracts are a specie of works contract.

e) In a composite/works contract the distinction between a contract for sale of goods and for work/service is virtually diminished.

f) Even if the dominant intention of the contract is not to transfer the property in goods and is for rendition of service or the ultimate transaction is transfer of immovable property, then too it is open to States to levy tax on the materials used in such contract if it otherwise has elements of works contract. The dominant nature test has no application and the enforceability test is also not determinative of the true nature of the transaction involved.

g) Even a single indivisible works contract has now, by the 46th Amendment been brought on par with a contract containing two separate agreements **and States have no power to levy sales tax on the value of the material used in the execution thereof** (emphasis added).

h) Post the 46th Amendment Entry 54, List II facilitates enacting a charge for levy of sales tax on the goods element even after incorporation, **provided the tax is directed to the value of goods and does not purport to tax the transfer of immovable property**. **The value of the goods <u>which can constitute the measure for the levy of tax</u> has to be the value of the goods at the time of incorporation of the goods in works** even though the property passes, as between the developer and the flat purchaser after such incorporation (emphasis added).

<u>comment</u>:

The (***Larsen & Toubro Ltd.***) constitution Bench also clarified the scope and circumstances for levy of sales tax on deemed transfer of goods involved in a transaction under a development agreement involving transfer of immovable property, an aspect not germane to the present *lis*.

07. Whether a composite agreement for manufacture, supply and installation of lifts should be treated as one for 'sale of goods' or a 'works contract' was the core issue considered by the recent decision in ***Kone Elevator (India) Pvt. Ltd. vs. State of Tamil Nadu***[50]. Correctness of a three judge Bench ruling in ***State of A.P vs. Kone Elevator (India) Ltd***[51] was doubted and the reference ensued. The constitution Bench again and exhaustively surveyed the entire gamut of jural and constitutional aspects involved; the by now formidable body of relevant precedents; the post 46th Amendment accretion to the scope of Entry 54 of List II of the Constitution; and culled out the following principles (extracted to the extent relevant for our purposes):

- Four concepts are now established; (i) <u>works contract is an indivisible contract but by legal fiction is divided into two parts, one</u>

[50] 2014 (304) ELT 161 (SC)
[51] (2005) 3 SCC 389

for sale of goods and the other for supply of labour and services; (ii) the concept of 'dominant nature test', 'degree of intention test' or the 'overwhelming component test' for treating an agreement as a works contract is inapplicable; (iii) the term works contract employed in Article 366(29-A)(b) includes all genre of works contract and is not to be restrictively construed to cover one species of contract i.e., to provide for supply of labour and services alone; and (iv) once the characteristics of works contract are fulfilled in an agreement between the parties, any additional obligation incorporated therein would not change the nature of the contract (emphasis added);

- The two contentions of the State of Haryana [*(a) that a contract for supply and installation of a lift should be treated as an agreement for sale simplicitor, on the basis of the overwhelming component test; and (b) that the rules issued under the State's VAT Act provided for a deduction for works contract and job works, under the heading 'Labour, service and other like charges', enabling thereby 15% deduction towards fabrication and installation of lifts and escalators*], are self contradictory, *for once it is treated as a composite contract invoking labour and service as a natural corollory, it would be a 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* (para 52) (quoted verbatim, emphasis supplied);
- Neither the overwhelming component test, major component test, dominant intention test or degree of labour and service test have any application, once the transaction/agreement between the parties amounts to a works contract; and this has been so determined in

earlier decisions in the first ***Builders Association of India Ltd.***; the second ***Gannon Dunkerley***; ***B.S.N.L*** and ***Larsen & Toubro Ltd***; and

- The 2005 (three judge Bench) decision in ***Kone Elevator (India) Pvt. Ltd.*** does not correctly lay down the law and is accordingly overruled.

08. In ***Hotel Dwaraka, Hyderabad vs. Union of India.***[52], the Andhra Pradesh High Court rejected the contention by the State that the 46th Amendment and the consequent expansion of the scope of Entry 54 of the State List (*vide* sub-clause (f) of Article 366 (29-A) was sufficient authority for levy of sales tax on supply of eatables and beverages to customers during the course of petitioner's business as hoteliers and keepers of bars and restaurants. The Court ruled that the Amendment was merely facilitative and authorized the necessary legislation but appropriately structured provisions (amending the definitions of "sale" and "turnover" in the State Act) were however a *sine qua non*. Without necessary amendments in the State legislation there is no law providing for levy and collection of the tax, concluded the Court and quashed the impugned provisional assessments;

09. The Patna High Court in ***Larsen and Toubro Ltd. vs. State of Bihar.***[53], quashed the impugned assessment orders on the ground that Rules (framed under the relevant State sales tax Legislation) did not fully follow upon and incorporate the necessary computation/machinery provisions for all requisite deductions from the value of works contracts relatable to labour/services and allied charges, as pointed out in the second ***Gannon Dunkerley*** decision. The Court negated the State's defence that the entitled benefit (in the matter of appropriate

[52](1985) 058 STC 0241

[53](2004) 134 STC 0354 (Pat)

deductions) could be given to the petitioners even in the absence of rules prescribing the manner and the extent relating to deductions in relation to other charges; and ruled that the State cannot be heard to contend that it would not provide/prescribe the necessary framework in the rules but would nevertheless observe the law as declared in the second ***Gannon Dunkerley***; *The law is not the handmaid of the State Government*, observed the Court;

10. In ***Larsen and Tourbro Ltd. vs. State of Tamil Nadu.***[54], the Madras High Court rejected the challenge to and read down provisions of Section 3-B of the Tamil Nadu General Sales Tax Act, 1959 (the provision was introduced by the TNGST (fourth Amendment) Act, 1986), which provided for levy of tax on the 'turnover' and not on the 'taxable turnover'. The Court explained that the levy and collection of tax under Section 3-B could be understood as confined to the taxable turnover. Rules 6-A and 6-B of the TNGST Rules, 1959 (challenged on grounds *inter alia* of omission to provide for deductions and exclusion of turnover relating to inter-State sales and sales in the course of import/export), were however struck down, for being in contravention of the *ratio* and principles of the second ***Gannon Dunkerley*** ruling, reiterated in ***Builders Association of India vs. State of Karnataka***[55] (the second ***Builders Association of India***)***.*** Orders passed and action initiated on the basis of these rules were declared invalid in law; liberty was given to the State to effectuate Section 3-B, by appropriate legislation, including subordinate legislation in accordance with the principles and dicta laid down in the second ***Gannon Dunkerley*** and the second ***Builders Association of India*** decisions;

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[54](1993) 088 STC 0289 (Mad)
[55](1993) 88 STC 248 (SC)

11. In ***Sundaram Industries Ltd. vs. CTO and others.***[56], the Madras High Court found from the nature of the contracts in issue that the deemed sale of goods occurred in the course of inter-State trade and commerce and consequently the turnover arising out of the transactions could not be brought to tax because of restrictions imposed by Article 286; that in the circumstances the petitioner was entitled to deduction as provided by Section 3-B(2)(a) of the State Act and in view of the inter-State nature of the transactions, the location of the situs of the sale as is specified in the sales tax legislation of the State would have no bearing on the chargeability of tax on such sales. The transactions in issue pertained to the assessment year 1987-88, prior to amendment to the Central Sales Tax Act, 1956 incorporating (only in 2002) provisions for levying Central Sales Tax on inter-State works contracts. The Tamil Nadu levy was thus declared as beyond the legislative competence of the State;

12. The Supreme Court, in ***Jharkhand vs. Voltas Ltd.***[57] specifically approved the judgment of the Patna High Court in ***Larsen and Tourbro Ltd.*** (53 supra); referred to and followed the second ***Gannon Dunkerley*** judgment and declared that not merely labour charges but all other associated charges/amounts, except the value of goods sold in execution of a works contract must be deductible, under matrices of a State sales tax legislation;

13. Sales tax assessments in respect of works contracts under the Orissa Sales Tax Act, 1947 were considered in ***Larsen and Toubro Ltd. vs. State of Orissa***[58]. Challenge, to *vires* of certain provisions of the State legislation was eschewed in oral argument but the challenge to two circulars (dated 30-07-1999 & 09-02-2001), issued by the

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[56] (2002) 128 STC 358 (Mad)
[57] (2007) 7 VST 317 (SC)
[58] (2008) 012 VST 0031 (Orissa)

Commissioner of Commercial Taxes was pressed. The 1st Circular referred to an earlier Circular dated 07-04-1986 which stipulated specified percentage deductions for specified categories of works contracts, towards labour charges and directed the field formations to follow the specified deductions, scrupulously. The 2nd Circular directed levy of tax (including TDS) from the main contractor, regardless of engagement of a sub-contractor.

The High Court observed that though the State legislation contemplated framing of rules for the purpose of ascertaining deductions in the case of taxable turnover of works contract, no rules were framed to effectuate the purposes of the Act. The impugned Circulars were declared invalid. The Court declared that the assessee's liability to remit tax remains but in order to assess, the State has to frame Rules under its rule-making powers and thereafter the assessing authority can pass fresh orders of assessment, on the basis of such statutory Rules. In the absence of any statutory basis for calculation of the taxable turnover, the Act remains unworkable and the gap/hiatus in the statute cannot be filled up by purely ad hoc and administrative circulars, ruled the Court and observed: ***It is a well-settled principle that in matters of taxation either the statute or the Rules framed under the statute must cover the entire field. Taxation by way of administrative instructions which are not backed by any authority of law is unreasonable and is contrary to article 265 of the Constitution of India*** (emphasis added).

21. <u>Valuation/computation provisions, whether a *sine qua non* for operability of the charging provision</u>:

<u>Analyses of precedents</u>:

a) The constitution Bench in ***Jagannath Baksh Singh vs. State of U.P***[59] pointed out: --- *if a taxing statute makes no specific provision about machinery to recover tax and the procedure to make assessment of the tax and leaves it entirely to the executive to device such machinery as it thinks fit and to prescribe such procedure as appears to it to be fair, an occasion may arise for the courts to consider whether the failure to provide for a machinery and to prescribe a procedure does not tend to make the imposition of the tax an unreasonable restriction within the meaning of Article 19(5). An imposition of tax which in the absence of a prescribed machinery and the prescribed procedure would partake of the character of a purely administrative affair can, in a proper sense, be challenged as contravening Article 19(1)(f)* (emphasis added)*;*

b) In ***Rai Ramkrishna vs. State of Bihar***[60]another constitution Bench restated the principle thus: --- *the power of taxing people and their property is an essential attribute of the Government and Government may legitimately exercise the said power by reference to the objects to which it is applicable to the utmost extent to which Government thinks it expedient to do so. The objects to be taxed so long as they happen to be within the legislative competence of the legislature can be taxed by the legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the legislature, and In dealing with the contention raised by a citizen that the taxing statute contravenes Article 19, courts would naturally be circumspect and cautious. Where for instance it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery*

[59] AIR 1962 SC 1563
[60] AIR 1963 SC 1667

for assessment or levy of tax, or that it is confiscatory, Courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the legislature for achieving its confiscatory purposes (emphasis added);

c) In ***C.I.T., Bangalore vs. B.C. Srinivasa Setty***[61], the issue was whether goodwill generated in a newly commenced business is an asset within the meaning of Section 45 of the Income Tax Act, 1961, its transfer is subject to tax under the head 'capital gains'; and whether the charging provision could be considered as reaching out to transactions for which no appropriate computation provisions exist in the statute.

The Court pointed out: *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 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*

[61](1981) 2 SCC 460

a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided to each head (emphasis added)*;*

d) The interplay of Sections 14 & 15 of the Central Sales Tax Act, 1956 imposes certain restrictions and prescribes certain conditions to be fulfilled in a State sales tax legislation. In respect of goods declared under the former provision to be of special importance in inter-State trade and commerce, the later provision prescribes the maximum rate at which the turnover of such goods may be subjected to tax under the sales tax law of a State and requires that such tax shall not be levied at more than one point. If either of the two conditions are not satisfied, the impost by the State will be invalid. Whether the legislative/statutory provisions in question conformed to this regulatory regimen was considered by the Supreme Court, in ***Govind Saran Ganga Saran vs. Commissioner of Sales Tax and Others***[62]. The following passage is of particular relevance for our guidance:

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 uncertainity or vagueness in the legislative scheme defining any of those components of levy will be fatal to its validity*** (emphasis added);

e) Ambiguity in charging provisions and failure to embed appropriate legislative/statutory provisions for valuation/computation of(within and

[62](1985) 060 STC 0001 (SC)

beyond the authorized levy of tax) elements of composite/ works contract transactions, including failure to stipulate mandatory deductions/exclusions in respect of charges for and in respect of labour and services and of components not taxable under provisions of the Central Sales Tax Act, 1956 (in the Rajasthan Sales Tax Act, 1954), led to a declaration of invalidity of certain provisions of the State Act and the 1957 rules made thereunder, in the second ***Gannon Dunkerley*** judgment of the constitution Bench (considered and analysed in detail supra);

f) The Supreme Court in ***Mathuram Agrawal vs. State of Madhya Pradesh***[63] considered the question whether an ambiguity in the relevant provision results in no tax liability, in the context of provisions of the M.P. Municipalities Act, 1961. The proviso to Section 127-A(2) was declared *ultra vires* the charging provision. The constitution Bench reiterated that the three components of a tax statute ie., *the subject of the tax; the person who is liable to pay the tax and the rate at which the tax is liable to be paid, must be clearly enacted*; ***if there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law***; and it is then for the legislature to the needful in the matter (emphasis added);

g) In ***M/s. K. Damodarasamy Naidu & Bros. and others vs. The State of Tamil Nadu***[64]the constitution Bench considered the entitlement of States to levy tax on the sale of food and drink. Levies and demand of sales tax on food and beverages supplied in restaurants etc., was challenged in respect of legislations *inter alia* of Tamil Nadu, West Bengal, Maharastra and Uttar Pradesh. Suffice it to note (for the present case) that on behalf of owners of residential hotels in Maharastra it was contended that sales tax could not be levied on the

[63](1999) 8 SCC 667
[64]AIR 1999 SC 3909

composite charge for boarding and lodging unless the State made rules which set down formulae for determining that component of the composite charge which was exigible to the tax on food and drink (para 11). The State admitted that its competence was confined to the food and drink elements of the composite charge; but contended that no Rules need be framed and Sales tax officers would make assessments depending on the facts of each individual case (para 12).

The constitution Bench, in the context, observed: *It is in practical terms impossible for the sales tax authorities to make assessments upon the basis of the facts relevant to each individual customer in each individual hotel. Generalisations are, therefore inevitable and there is every likelihood that the basis of the generalisation made by one Sales Tax Officer would differ from the basis of the generalisation made by another, leading to unacceptable arbitrariness. Rules that indicate to Sales Tax Officers how to treat composite charges for lodging and boarding would eliminate substantial differences in their approach and, thus, arbitrariness* (para 13) (emphasis added). Applying this *ratio*, the Court directed Maharastra, to henceforth refrain from making assessments of the tax on the supply of food and drink on hotel owners who provide lodging and boarding arrangements for a composite sum *until it frames Rules that set out formulae for such assessment which take into account of the fact that residential hotels may provide lodging and full or part board. If the Rules are framed by 1st June, 2000 the assessments that are not completed only by reason of this order may be proceeded with. If the Rules are not framed by the said date, these assessments shall lapse. No proceedings for assessments shall be commenced hereafter until Rules have been framed. At the same time completed assessments as of today shall not be affected by this order, and the assessees would be entitled to adopt proceedings thereagainst, subject to law* (para 26).

h) The ***Govind Saran Ganga Saran*** ruling was applied again in ***State of Rajasthan vs. Rajasthan Chemists Association***[65] for confirming the judgment of the High Court which ruled that *Section 4-A of the Rajasthan Sales Tax Act, 1994 was not legally sustainable to the extent tax on the first point of sale of drugs, medicines or any formulation or for that matter any other commodity by a manufacturer/wholesaler/distributor to retailer where "Minimum Retail Price" is published on package, measure to which rate of tax is to be applied cannot be with reference to such published MRP which is neither charged on sales or on purchase by the parties to sale under Section 4-A and the concerned Notification in this regard.*

After extracting the four components which enter into tax (formulated in ***Govind Saran Ganga Saran***), the Court observed: *Obviously, all the four components of a particular concept of tax have to be inter related having nexus with each other. Having identified the tax event, tax cannot be levied on a person unconnected with the event, nor the measure or value to which the rate of tax can be applied be altogether unconnected with the subject of the tax, though contours of the same may not be identified*. The Court further observed that the subject of the tax (in that case) being sale, the measure of tax for the purpose of quantification must retain the nexus with 'sale' which is the subject of the tax. The Court continued: *primarily the rate of tax relates to the measure of tax to come into existence simultaneous with the occurrence of the taxing event. The machinery provisions relating to its quantification and collection can take place later.* ***Providing measure to which the rate is to be applied is integrally connected with the charge itself*** (emphasis added);

[65] 2006 (202) E.L.T 217 (SC)

Does *Mahim Patram* signify a doctrinal departure from or overrule established principles?

i) A division Bench of the Supreme Court in ***Mahim Patram (P) Ltd. vs. Union of India and Others***[66], expressly reiterated the settled principle (para 27), of the integrality and mutual dependence of charging and computation/valuation provisions and quoted with approval earlier decisions of the Court in ***B.C. Srinivasa Setty*** and ***Govind Saran Ganga Saran***. Revenue places substantial reliance on the last phrase in para 27 of the ***Mahim Patram*** ruling. This ghost of the Revenue misconception, founded on a comminuted reading of this single phrase in a sentence in the judgment, must be exorcised. We therefore analyse ***Mahim Patram*** in some detail.

The relevant phrase in the judgment, which is the lynchpin of Revenue's assumption (that failure to frame appropriate Rules under the Act, prior to 01-06-2007 does not lead to non leviability of service tax on a works contract; and that machinery provisions in sales tax legislations by States are a legitimate port of call for proper valuation of service elements in a works contract), reads: ***but it is equally well settled that only because rules had not been framed under the Central Act, the same per se would not mean that no tax is leviable.***

comment:

There are established principles for ascertaining *rationes* and elucidating those reasons that bind, in precedents. Thus, while applying the decision in a later case, the later Court must ascertain the true principle laid down by the previous decision, in the context of the questions involved in that case from which the decision takes its colour. The later court would not

[66](2007) 3 SCC 668

be bound by those reasons or propositions which were not necessary for deciding the previous case; the later Court should not unnecessarily expand the scope and authority of a precedent; and the reasoning of one decision can not be applied in another case in the absence of parity of situation or circumstances. A judgment is to be read in the context of the facts and of the questions which arose for consideration in the case in which the judgment was delivered and not as embracing all aspects of every question relating to the subject or as laying down principles of universal application – *vide* ***Shah Prakash Amichand vs. State of Gujarat***[67]***; Krishena Kumar vs. Union of India***[68]***; Mittal Engineering Works (P) Ltd. vs. Collector of Central Excise, Meerut***[69]***; Singla O.P vs. Union of India***[70]. It is equally impermissible to read a sentence from a judgment of the Supreme Court, divorced from the complete context in which it was given and to build up a case treating as if that sentence is the complete law on the subject – *vide* ***J.K. Industries Ltd. vs. Chief Inspector of Factories and Boilers***[71]; ***Sukhwant Singh vs. State of Punjab***[72]. The well known Latin maxim exhorts: *Cessante Ratione Legis Cessat Ipsa Lex* (Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself). Reason predicated on a factual matrix is equally the soul of a judgment.

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[67] AIR 1986 SC 468
[68] (1990) 4 SCC 207
[69] (1997) 1 SCC 203
[70] (1984) 4 SCC 450
[71] (1996) 6 SCC 665
[72] (1995) 3 SCC 367

Now to the ***Mahim Patram*** ruling:

the facts:

The activities of the appellant admittedly amount to a works contract in the course of inter-State trade or commerce (para 2);

In deference to the second ***Gannon Dunkerley*** ruling, Parliament, in 2002, amended Section 2(g) of the Central Sales Tax Act, 1956. The assessing authority however, relying on or on the basis of Section 9(2) of the Central Act applied the provisions of the U.P. Trade Tax Act, 1948 and the Rules framed thereunder for calculating the sale price of the transfer of property in goods involved in the execution of a works contract in the course of inter-State trade or commerce, for Assessment years 2002-03 and 2003-04 (para 7);

the issue:

Appellant contended that in the absence of any Rule for determination of the sale price in respect of works contract sale of goods as envisaged in Section 2(h) of the Central Act, the taxable turnover under Section 8-A of this Act cannot be computed for the levy of sales tax on the deemed sale of goods involved in execution of a works contract in the course of inter-State trade and commerce (para 9);

The State contended that the 1956 Act provided for the charging provision, deductions could be granted for the purpose of determination of the quantum of tax and provisions of Sections 9 & 13 of the Central Act set out the mode and manner whereby the quantum of tax is required to be determined (para 11);

***Mahim Patram* analyses and conclusions:**

Mahim Patram found:

(i) Section 2(g) was substituted (by Finance Act, 2002) to encompass works contract sales within the definition of *sale*, in the Central Sales Tax Act, 1956;

(ii) in 2005, the Act was further amended incorporating clause (ja) defining *works contract*;

(iii) in Section 13 thereof this clause was inserted: *(aa) the manner of determination of the sale price and the deductions from the total consideration for a works contract under the proviso to clause (h) of Section 2* (paras 7 &15 to 17);

(iv) Sections 6 and 8-A set out the charging provision and for determination of turnover;

(iv) Section 9(2) authorizes, subject to the provisions of the Central Act and the rules made thereunder, the authorities under general sales tax legislation of the appropriate State, on behalf of the Central Government to assess, reassess, collect and enforce payment of tax, including any interest or penalty, payable by a dealer under this Act, **as if the tax, or interest or penalty payable by a dealer under this Act is a tax or interest or penalty payable under the general sales tax law of the State; and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to** (a wide range of enumerated circumstances are specified), **shall apply accordingly** (relevant phrases of Section 9(2) highlighted);

(v) the proviso to Section 9 enacts that if in any State or a part thereof there is no general sales tax law in force, the Central Government, may by rules make necessary provision for all or any of the matters specified in this sub-section;

(vi) Section 13(3) authorizes the State Government to make rules, not inconsistent with the provisions of the (Central) Act and the rules made under sub-section (1), to carry out the purposes of this Act (para 18);

(vii) the State (U.P) introduced necessary amendments in the State's 1948 Act; and

(viii) framed the Central Sales Tax (U.P) Rules, 1957 and amended the U.P Trade Tax Rules, 1948, Rule 44-B whereof set out provisions for determination of turnover of goods involved in the execution of works contracts; being an adequate matrix of provisions to enforce a levy on deemed sales involved in works contract in the course of transactions covered by the Central Act (paras 19-22);

comment:

On detailed analyses of ***Mahim Patram*** it is abundantly clear that the Court did not evolve a generic norm or a principle, that a Union legislation could be sustained (even if inadequate) on the basis of adequacy of support therefor in a State legislation or rules made under the later. It is the specific authority conferred by the Central Sales Tax Act, 1956, authorizing framing of appropriate rules under State sales tax legislation which formed the basis and foundation for the Court's observations, including in para 27 of this judgment. We analyse ***Mahim Patram*** in greater detail later in this judgment.

j) In ***C.I.T, Bangalore vs. Infosys Technologies Ltd.***[73], the Court quoted with approval the decision in ***Govind Saran Ganga Saran***, observing at para 7: *in* ***Govind Saran Ganga Saran*** *this court held that there are four components of tax. The first component is the*

[73](2008) 2 SCC 272

character of the imposition, the second is the person on whom the levy is imposed, the third is the rate at which tax is imposed and the fourth is the value to which the rate is applied for computing tax liability. It was further held that if there is ambiguity in any of the four concepts then levy would fail. In this case, we are concerned with the fourth concept. There is one more principle which is required to be noted. A benefit/receipt under the 1961 Act must be made taxable before it can be regarded as 'income' (emphasis is in the judgment);

k) In ***PNB Finance Ltd. vs. Commissioner of Income Tax – I, New Delhi***[74] the question, whether in the facts and circumstances of the case, transfer of Banking Undertaking gave rise to taxable capital gains under Section 45 of the Income Tax Act, 1961, fell for consideration. Suffice it to note, for our purposes that the Court found that there were, at the relevant time, no computation provisions in that Act as would be applicable to the transaction of the nature in issue. The Court observed: *As regards applicability of Section 45 is concerned, three tests are required to be applied. In this case Section 45 applies. There is no dispute on that point. The first test is that the charging section and the computation provisions are inextricably linked. The charging section and the computation provisions together constituted an integrated Code. Therefore, where the computation provisions cannot apply, it is evident that such a case was not intended to fall within the charging section, which, in the present case, is Section 45* (emphasis added). This judgment followed its earlier ruling in ***B.C. Srinivasa Setty***, and concluded that since it was not possible to compute capital gains, the specified amount was not taxable under Section 45 of the 1961 Act;

[74] (2008) 1 SCC 94

l) In ***Heinz India Pvt. Ltd. vs. State of Uttar Pradesh & Others***[75], the question whether the U.P. Krishi Utpadan Mandi Adhiniyam, 1964 is ineffective to sustain the levy and collection of market fee since the legislation failed to provide the prescribed machinery for assessment/recovery and for dispute adjudication, was considered. Quoting with approval and following the decisions in ***K. T. Moopil Nair vs. State of Kerala***[76]; ***Jagannath Baksh Singh***; ***Rai Ramkrishna***; ***and State of A.P vs. Nalla Raja Reddy***[77], the Court reiterated the settled principle that a total absence of machinery provisions for assessment/recovery of the tax levied under an enactment, which has the effect of making the entire process of assessment and recovery of tax and adjudication of disputes relating thereto administrative in character, is open to challenge; and the fact, whether or not the enactment levying the tax makes a machinery provision either by itself or in terms of the Rules that may be framed under it is, however, a matter that would have to be examined in each case.

m) Levy of Entertainment Tax on DTH (direct to home broadcast provided by the appellants to their respective customers on payment of consideration), under provisions of the M.P. Entertainment Duty and Advertisements Tax Act, 1936, was considered in ***Tata Sky Ltd. vs. State of M.P***[78]. Following the earlier rulings in ***B.C. Srinivasa Setty***; ***Commissioner of Income Tax Ernakulam, Kerala vs. Official Liquidator, Palai Central Bank Ltd***[79]; and ***PNB Finance Ltd***, the Court concluded that the machinery for collection of duty provided by the 1936 Act has no application to DTH and thus provisions of this Act cannot be extended to cover DTH operations. In an alternate defense,

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[75](2012) 5 SCC 443
[76]AIR 1961 SC 552
[77]AIR 1967 SC 1458
[78]2013 (30) STR 337 (S C)
[79](1985) 1 SCC 45

the State relied on a Gazette notification, dated 05-05-2008 issued under Section 3(1) of the 1936 Act (fixing the percentage of duty leviable in respect of every payment made for admission to an entertainment), to sustain the impugned levy. The Court rejected this contention observing: *it is elementary that a notification issued in exercise of powers under the Act cannot amend the Act. Moreover, the notification merely prescribes the rate of entertainment duty at 20 percent in respect of every payment for admission to an entertainment other than cinema, video cassette recorder and cable service. The notification cannot enlarge either the charging section or amend the provision of collection under Section 4 of the Act read with the 1942 Rules. It is, therefore, clear that the notification in no way improves the case of the State. If no duty could be levied on DTH operations under the 1936 Act prior to the issuance of the notification dated May 5, 2008 as fairly stated by Mr. Dave, we fail to see how the duty can be levied under the 1936 Act after the issuance of the notification.*

analyses of other precedents, proferred by Revenue to contend that computation/machinery provisions are neither essential nor a prerequisite:

Apart from ***Mahim Patram*** (considered supra), Revenue relied on ***Asst Commissioner, Central Excise vs. National Tobacco Co. of India Ltd***[80]; ***Inspector of Central Excise vs. S.T Venkataramanappa***[81]; ***Commissioner of Wealth Tax vs. Sharvan Kumar Swarup & Sons***[82]; ***Great Eastern Shipping Co. Ltd. vs. U.O.I***[83]; ***Tamil Nadu Kalyana Mandapam Assn. vs. U.O.I***[84]; and ***Association of Leasing & Financial***

[80](1978) 2 ELT J.416 (SC)
[81] (1986) 24 ELT 484 (Kar)
[82] (1994) 6 SCC 623
[83] (2002) 150 ELT 1403 (Del)
[84] (2006) 3 STR 260 (SC)

Service Cos. vs. U.O.I[85], for the proposition that: (a) computation/valuation/machinery provisions in the Act or the Rules made thereunder are not a *sine qua non* for inferring existence of a charge of tax on works contract; (b) that CICS, COCS & ECIS as defined, include supply of labour in relation to /rendition of these services, even where these are provided as part of a works/composite contract; and (c) that computation/valuation/machinery provisions in sales tax legislations by States validly constitute a supporting architecture for proper execution of provisions of the Act, i.e., for lawful levy of service tax on CICS, COCS or ECIS, when these are provided under a works contract. We now analyse these judgments.

(i) Supreme Court in ***National Tobacco Co. of India Ltd.*** proceeded on the basis of the established rule of construction that a power to do something essential for the proper and effectual performance of the work which the statute has in contemplation may be implied; that Rule 10-A of the Central Excise Rules, r/w Section 4 of the Act indicates consecration of residuary powers of making a demand in special circumstances not forseen by the framers of the Act or the rules; and there is no express prohibition against an assessment at any other time in the circumstances of a case *like the one before us* where no 'assessment', as it is understood in law took place at all.

comment:

This judgment neither deals with a legislation allegedly or facially trenching upon constitutionally prohibited fields and what interpretation

[85] (2010) 20 STR 417 (SC)

would be warranted in the circumstances; nor does it rule that where the charge; levy and collection; and assessment provisions are arbitrary (confer uncanalized and unguided discretion in executive agencies administering the legislative provisions) or potentially have an *ultra vires* trajectory, a benign construction of the processual provisions would cure the seminal pathology;

(ii) In ***S.T. Venkataramanappa***, the Karnataka High Court reiterated the established principle that a machinery provision in a fiscal statute should be so interpreted as to make the charging provision effective; and not so as to furnish a chance of escape and means of evasion (para 7).

comment:

The decision neither dealt with any dialectic ambiguities in the legislative text nor with total absence of relevant machinery/computation provisions. There was also no context of the ambit of the governing legislation being circumscribed by constitutional boundaries as regards the measure of tax thereby levied;

(iii) The Supreme Court in ***Sharvan Kumar Swarup & Sons***, concluded that rule 1-BB of the Wealth Tax Rules, 1957 partakes the character of a Rule of evidence; it deems the market value to be the one arrived at on the application of a particular method of valuation, which is also one of the recognized and accepted methods; that even in the absence of rule 1-BB it would not have been objectionable, nor would there be any legal

impediment, to adopt the mode of valuation embodied in the said rule, namely the method of capitalization of income on a number of years' purchase value. Since rule 1-BB is in the nature of a rule of evidence, it could be construed as retrospective (emphasis added).

comment:

The essential question in this judgment (set out in para 1) was whether Rule 1-BB of the Wealth Tax Rules, 1957 is a provision which affects and varies/alters substantive rights or is merely procedural. The judgment concludes that the rule is procedural, not a substantive provision; and that: *even in the absence of Rule 1-BB it would not have been objectionable or would there be any legal impediment to adopt the mode of valuation* (para 23). Significantly, unlike in the present *lis*, the issue in ***Sharvan Kumar Swarup*** involved no issue regarding constitutional limits on legislative powers while taxing a composite works contract transaction comprising constituent elements which are distinctly and exclusively allocated to States and the Union, including as a measure of the charge and levy under such legislation;

(iv) In ***Great Eastern Shipping Co. Ltd***, the Delhi High Court negated the petitioner company's contention that mere failure to frame rules under Section 115(2) of the Customs Act, 1962 would render the search improper or unreasonable (para 20).

comment:

The judgment deals neither with constitutional limits on legislative reach, challenge to provisions relating to chargeability to tax nor regarding adequate or appropriate computation/valuation provisions;

(v) In ***Tamil Nadu Kalyana Mandapam Association***, a specific charge and categorical definition of 'mandap keeper including any services rendered as a caterer' was enacted in Sections 65(41p), r/w 65(10), (19) & (20); ['mandap keeper' enumerated as a taxable service now in Section 65(105)(m); 'caterer' defined in Section 56(24)]; and 'mandap' and 'mandap keeper' in Section 65 (66) & (67)].It is significant to notice that though provisions of Section 67(i) of the Act(the valuation provision relevant to 'mandap keeper' service) were noticed, which provided that the gross amount charged *would include charges for catering, if any* (in para 11), the judgment proceeded on the premise the exemption notifications (granting percentage abatement to cover *inter alia* the cost of sale of food items), rendered the provision benign and *intra vires*. This decision is clearly not one involving (factual and legal) circumstances of a construction/building works contract, a transaction which invites (in greater intensity), altogether different and distinct problems of *federal allocation of powers* conflicts. We set out our comment on this decision *infra*.

comment:

The prior constitution Bench decision in ***K. Damodarasamy Naidu*** was adverted to in para 25; and in para 38 it is stated that paras 8 & 9 of this decision were relied upon (presumably by appellant's counsel), *for the proposition 'Sale' in Article 366(29-A)(b)*. The *ratio* of ***K. Damodarasamy Naidu*** constitution Bench, regarding the ineffectiveness of the Maharastra legislation due to absence of statutory rules prescribing formulae for proper computation of the measure of tax (discussed in paras 9 to 14 & 25 of ***K. Damodarasamy Naidu***), was however neither adverted to, distinguished or dissented from. We are not advised at the Bar, that a binding precedent (i.e., the ruling of a larger Bench) stands overruled by non application of its *ratio*, by a Bench of lesser strength; and we are aware of no such principle.

We are not in the totality of circumstances persuaded to conclude, that the learned division Bench in ***Tamil Nadu Kalyana Mandapam Association***, could be understood as having overruled or distinguished the clear *ratio* of the larger and constitution Bench ruling in ***K. Damodarasamy Naidu****,* which reiterated the established position that a statutory framework for computation/valuation is a *sine qua non* for operative vitality of the charging provision. Thus, the observations in this judgment must be comprehended in the light of its conclusion that mandap keepers and outdoor caterers transactions, are not concerned with: ***the splitting up of any works contract here*** (see para 37 of ***Tamil Nadu Kalyana Mandapam Association***).

(v) We now come to the decision in ***Association of Leasing and Financial Service Cos***. Revenue relies on this ruling for the proposition that overlapping levies i.e., imposition of sales tax and service tax on the composite consideration received for the same transaction (i.e., on the entire value of a works contract), is not *per se* invalid. This contention is misconceived and is predicated on a total misreading of the judgment.

The challenge in the above judgment was to the legislative competence of the Union to levy service tax, on the ground that the impost is unsustainable insofar as it relates to financial leasing services including equipment leasing and hire purchase transactions which fall within the exclusive State legislative field, in view of Article 366(29-A) - [see - para 2]. Quoting with approval and following the earlier 2006 decision in ***B.S.N.L.*** (which categorically restated the established principle that dual and overlapping levies, of sales tax and service tax, on the same elements of a composite transaction are impermissible), the Court concluded that the transaction (in issue before it) was a pure and simple service and did not involve both sales and service; that the impugned tax is not on material or sale but is on the activity/service rendered by the service provider to its customer; that a loan transaction inheres three components, i.e., the principal amount, the interest component and processing charges; that the principal amount is not liable to service tax while the other two components are so liable, subject to any exemptions granted - (para 37); that the

measure of service tax levy is on the income by way of interest/finance charges which do not invite a dual levy, of both sales tax and service tax (para 39); and that on this interpretation, the provision is *intra vires* (para 40).

comment:

Revenue's premise that this decision is rendered in the context of one variety of a works contract, is in the context of the facts and analyses in the judgment, without basis.

22. Shri P.K. Sahu's position:

Counsel submits:

i. Works contract has always been described by the Supreme Court in several rulings as a contract for work and labour and may include pure labour or a combination of labour and use of goods for delivering the agreed service *vide* - ***Sentinel Rolling Shutters and Engineering Co. vs. Commr. of Sales tax***[86]; ***State of Rajasthan vs. M/s Man Industrial Corpn. Ltd.***[87]; and ***The State of Punjab vs. Associated Hotels of India Ltd.***[88]

ii. The 46th Amendment has no application to any law other than sales tax. Union's power to levy service tax is unaffected thereby, *vide* -the second ***Gannon Dunkerley***; ***B.S.N.L.***; ***Southern Petrochemical***

[86](1978) 4 SCC 260 (see end of para 7)
[87](1969) 1 SCC 567 (para 9)
[88](1972) 1 SCC 472 (para 12)

Industries Co. Ltd. vs. Electricity Inspector &ETIO[89]; ***Geo Miller & Co. vs. State of M.P***[90]; and ***The Federation of Hotels and Restaurant Association of India vs. UOI***[91];

iii. Service tax and sales tax on deemed sale are different aspects of the same transaction and there can be overlapping, as a whole or in part, as regards the measure of the tax. Thus, the whole of works contract became taxable (to service tax w.e.f 01-06-2007) under Section 65(105)(zzzza). There is nothing in law that prohibits the Union from levying service tax on the value of a contract that is also subject to sales tax as a deemed sale; *vide* – ***Tamil Nadu Kalyana Mandapam Owners Association***; ***Association of Leasing & Financial Service Cos.***; and ***India Hotels & Restaurants Association vs. UOI***[92];

iv. Service tax is a transaction based tax. Hence, an activity other than that which is agreed between the parties cannot be covered without a deeming fiction. There cannot be a concept of deemed service for service tax as there is deemed sale for sales tax. No such fiction is enacted prior to 01-06-2007;

v. The European Court of Justice (ECJ), in ***Card Protection Plan Ltd. vs. Customs and Excise Commissioners***[93], clarified that where one

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[89](2007) 5 SCC 447
[90](2004) 5 SCC 209
[91]ILR 2007 (Del) 1059
[92]2014 (34) STR 522 (Bom)
[93](1999) Simon's Tax Cases, 270 ECJ

element constituted the principal service and others were merely ancillary, there was a single supply, in that they did not constitute for customers aims in themselves but simply a means of better enjoying the principal service; what constitutes a single supply in economic sense should not be artificially split. This ECJ guidance was followed by the House of Lords in ***Customs & Excise Commissioners vs. British Telecommunications Plc.***[94]; and in ***Card Protection Plan Ltd. vs. Customs & Excise Commissioners***[95];

vi. It is impermissible to split up an 'EPC' or a 'turnkey' contract into some of its constituent/component elements and tax such elements under different taxable services such as on 'drawings and designs', 'consulting engineer' or 'ECIS', prior to 01-06-2007. This is so since works contract or an EPC or turnkey agreement, is an indivisible commercial understanding where the constituent elements are inseperable and breach of any one or more components would lead to breach of the entire contract; and In a works contract, no component activity would amount to any taxable service, specified in Section 65(105);

vii. Rule 2-A of the 2006 Rules is not the machinery provision for computing tax for WCS. Section 67 is the basic machinery provision and this is the provision applicable for all taxable services; and

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[94](1999) 1 WLR 1376

[95](2001) 2 WLR 329

viii. The ***G. D. Builders*** ruling is *per incuriam* since it invoked the 46th Amendment to truncate works contract for levy of service tax and applied the aspect theory erroneously and not in the manner propounded by Supreme Court decisions.

23. <u>Summation of our primary analyses *qua* the precedential guidance -L & T and Revenue positions interfaced</u>:

i. Stand-alone contracts, for supply of goods (transfer of property in goods – chattel *qua* chattel) or for rendition of services/supply of labour simplicitor, on the one hand; and a works contract (including one where elements of transfer of property in goods by accretion/incorporation and supply/rendition of labour/services are integrated into an indivisible and composite transactional charter) on the other, are distinct sub-sets of contractual arrangements, naturally and lawfully occurring in the commercial habitat, for long so recognized, in jurisprudence, in our constitutional context, in unvarying series of binding precedents and explicitly so in Central and State legislation as well – *vide* the first and second ***Gannon Dunkerley*** judgments (Supreme Court - 1958 & 1993); the first ***Builders Association of India.*** (Supreme Court -1989); ***B.S.N.L. Ltd.*** (Supreme Court – 2006); ***Voltas Ltd.*** (Supreme Court - 2007); ***Larsen and Toubro Ltd.*** (Supreme Court - 2013); ***Kone Elevators*** (Supreme Court -2014); ***Hotel Dwaraka*** (A.P. High Court - 1985); ***Larsen and Toubro Ltd.*** (Madras High Court - 1993); ***Sundaram Industries Ltd.*** (Madras High Court - 2002); ***Larsen and Toubro Ltd.*** (Patna High Court - 2004); ***Larsen and Toubro Ltd.*** (Orissa High Court - 2008). Reference can be made (as to the established practice in legislative drafting) to the Central Sales Tax Act, 1956 (amended in 2002, for bringing *inter alia* 'works contract' within the scope of the Union levy by

expanding the definition of 'sale' *vide* Section 2(g); inserting a proviso in Section 2(h) which defines 'sale price'; defining 'works contract' in Section 2 (ja); and incorporating a specific power to make rules in this behalf, *vide* Section 13(1)(aa) of this Act); to sales tax legislations and complementary rules framed by the several States (amending respective enactments after the 46th Amendment, by specifically including works contract in the definitions of 'sale' and of 'turnover' and inserting appropriate legislative and statutory provisions for proper computation/valuation of the deemed sale of goods elements involved therein); and to the Act, i.e. its amendment by the Finance Act, 2007 introducing 'works contract' as a categorically specified and expressly defined category of service together with complementary valuation rules (Rule 2-A), issued under Section 94 of the Act (as an integrated and synchronized package), to ensure proper valuation and confinement of the levy strictly to service components of a works contract by expressly mandating specified exclusions/deductions of the value of deemed sale of goods and associated elements embedded therein (from the gross consideration received from execution of a works contract); and ushering in a statutory composition package as well, also w.e.f 01-06-2007.

ii. Post 01-06-2007,the integrated legislative and statutory landscape of the Act (to the extent of WCS) confirms to constitutional limits and eliminates uncanalized executive discretion by confining both, the charge and the measure of the tax on works contract, to supply of labour/rendition of service and associate elements; while excluding deemed/accretion sale of goods and associate elements from the measure of tax, in strict conformity with the declaration of law and of legislative limits on States and the Union taxation in this area, spelt out in the second ***Gannon Dunkerley*** and all subsequent rulings, including the latest, in ***Kone Elevator India Ltd.*** (2014).

iii. The legislative field authorizing taxation of sale and purchase of goods (*whether as goods or in any other form involved in the execution of a works contract*), stands exclusively assigned to States under Entry 54, List II (on expansion of the *locii* of this Entry, *qua* the 46th Amendment). The legislative field for taxation of inter-State sales (and post the 46th Amendment, deemed inter-State sales as well) stands exclusively assigned to the Union *vide Entry 92*-A, List I. The Legislative field of taxation of services falls within the exclusive domain of Parliament *qua* Entry 97 of List I, r/w Article 248 (the residuary legislative field).

iv. After the 46th Amendment and as a consequence thereof, the residuary legislative field of the Union (under Entry 97 of List I, r/w Article 248) is confined [*to the extent of taxation of transactions falling within the ambit of sub-clauses (a) to (f) of Article 366 (29-A)*], to such aspects of these transactions as fall within the Union's residuary legislative field; and *a fortiori* excluding those aspects which fall within the legislative field committed to States under Entry 54, List II or even those committed to the Union legislative field *qua* any other Entry of List I (for instance Entry 92-A of List I). This is the inevitable *distribution of powers* consequence of the expansion of the meaning of the expression "tax on the sale or purchase of goods", by virtue of the 46th Amendment. Thereafter, the *locii* of both legislative fields (enumerated in Entry 92-A, List I and in Entry 54, List II) got incremented to the extent specified in sub-clauses (a) to (f) of Article 366 (29-A). The 46th Amendment expanded *inter alia* the scope of Entry 54, List II (to the extent specified in the Amendment). As a consequence and corollary thereof, a corresponding and consequent constriction, of the scope of the residuary legislative field allocated to the Union *qua* Article 248 r/w Entry 97, List I, inevitably occurred, reference - decisions explaining the scope of the residuary field, *vide*- ***Subrahmanyam Chettiar***;

Manikkasundara Bhattar; ***Second Gift Tax Officer***; ***Atiqa Begum; Ref u/Art 143***; ***and In re Cauvery Disputes Tribunal*** (cited supra).

v. The contention that the 46th Amendment has application to and impacts exclusively the legislative power of States under Entry 54 of List I (but has no effect whatsoever on the Union's legislative powers/fields), is on the above analyses and to this extent, fallacious and the result of inadequate analyses of the holistic dynamics of constitutional space and the inexorable alteration of the scope of the Union (Entry 97, List I - residuary) and State (Entry 54, List II), exclusive taxation field allocations, consequent on the 46th amendatory exertion. It is axiomatic that the *locii* of allocations and distributions of legislative fields/powers, particularly those commitments which are exclusive and not concurrent, is dependent on the scope of allocations to each of the federal partners in our constitutional design, of distribution of powers. When therefore, there occurs an accretion of legislative field(s) assigned to States (as by the 46th Amendment), there must and does consequently occur a corresponding and resonating constriction of the legislative space including of those assigned to the Union, in relation to the fields enumerated in the several Entries in Lists I & II. This is the essence of the geometry of federal power distribution; of the cartography of constitutional landscape; and its complex and dynamic spatial arrangement.

vi. As a consequence of the exclusive, discrete and insular allocation of legislative powers pertaining to taxation, neither of the federal partners (the Union or States, who are competing *magisteria*), are authorized; and are on explicit text, compelling intent and express constitutional command; fortified by binding curial exposition of the constitutional boundaries, forbidden from encroaching into or trenching upon the exclusive domain allocated to the other federal partner.

vii. In view of the exclusivity and insularity so ordained, sales tax legislations are required to evince and express the intention to levy a tax on deemed sales involved in the execution of a works contract, by employing specific and non-ambivalent language. Imprecise legislation and which accommodates constitutionally prohibited trenching (by design or default in drafting) and/or in the fond hope that such an overreaching legislation would be administered in a benign fashion (by executive agencies presumably having sufficient scholarship of the jurisprudence of and the limits upon legislative powers, imposed by a federal constitutional arrangement), would not pass judicial muster, *vide* – the first ***Builders Association of India*** (S.C – 1989); the second ***Gannon Dunkerley*** (S.C – 1993)***; Voltas Ltd.*** (S.C – 2007); ***Hotel Dwaraka*** (A.P – 1985)***; L &T Ltd.*** (Patna – 2004)***; L & T Ltd.*** (Madras – 2002)***; Sundaram Industries Ltd.*** (Madras – 2002); and ***L & T Ltd.*** (Orissa – 2008).

viii. As an inevitable consequence, a vague/overbroad definition of a taxable service coupled with an ambiguous charging and an indeterminate valuation provision, would not suffice, *vide* – precedents referred to in sub-para (vii) *supra*.

ix. Such legislation is further required to provide an appropriate statutory architecture (either specified in the legislation or through appropriately calibrated rules, framed pursuant to enacted facilitating provisions), to ensure proper and within legislative limits valuation and computation, of those elements/aspects of a works contract, which fall within States' authorized legislative domain. An ambivalent or ambiguous text would not legitimately support a valid charge for the purpose and in the context, *vide* - precedents referred in sub-paragraph (vii)*supra*; and ***Jagannath Baksh Singh*** (S.C - 1962); ***Rai Ramkrishna*** (S.C - 1963); ***B.C. Srinivasa Setty*** (S.C - 1981); ***Govind Saran Ganga Saran*** (S.C - 1985); ***Mathuram Agrawal*** (S.C - 1999); ***K. Damodarasamy Naidu***

(S.C - 1999); ***Rajasthan Chemists Association*** (S.C - 2006); ***Mahim Patram*** (S.C - 2007); ***Infosys Technologies Ltd.*** (S.C - 2008); ***PNB Finance Ltd.*** (S.C - 2008); and ***Tata Sky Ltd.*** (S.C - 2013).

x. Where the charging and/or valuation/computation provision(s), on a true and fair construction thereof, fall short of the requisite specificity and thereby result in an actual; or enable a potential breach of the impregnable boundaries demarcated by the Constitution, for State legislative exertions in the area, the relevant State legislative or statutory matrix would be declared invalid, inadequate, dormant or unworkable, as the case may be; and the intended levy and collection of sales tax on works contract would fail. – *vide* precedents referred in sub-paragraphs (vii) and (ix) *supra*.

xi. Since the wall of separation and exclusivity drawn in the Constitution, for Union and State legislative exertions in the matter of taxation (including on a works contract), is a common boundary, it logically follows that what is forbidden to States is *a fortiori* forbidden and complementarily, to the Union as well. Thus, the Act (a Union legislation referrable to Entry 97, List I) cannot legitimately levy service tax on the deemed sale of goods components and associate elements, involved in the execution of a works contract.

xii. The above position is the consequence of the 46th Amendment, whereby the power to legislate for levy and collection of ***tax on sale or purchase of goods as goods or in some other form involved in the execution of a works contract***, stands abstracted from the residuary field in Entry 97, List I as a consequence of its committal to Entry 54, List II and to Entry 92-A, List I (by virtue of the 46th Amendment). The forbidden legislative territory for Union taxation on services (under its residuary legislative field/powers) is therefore and clearly, the entirety of the legislative field allocated to States under

Entry 54 of List II, including the accreted scope of this Entry, post the 46th Amendment.

xiii. Union's legislative intention, to levy tax only on labour/service elements must therefore be categorically expressed in the charging provision *per se*; or in the charging provision read together with the definition of the relevant taxable service and the valuation provision. Such intention is explicated only by Section 65(105)(zzzza); but not in the cornucopia of (pre 01-06-2007) charging, definition and valuation provisions, insofar as these relate to CICS, COCS & ECIS.

xiv. Components which fall within the contours of labour/services and associate costs/expenses are spelt out in the second ***Gannon Dunkerley*** ruling and have been reiterated (without a caveat, dissent, exception, or reservation), in all precedents ever since, including recent constitution Bench rulings in ***Larsen & Toubro Ltd.*** (2013) and ***Kone Elevator India Pvt Ltd.*** (2014).

xv. Wherever the statutory architecture (the synthesis of legislation and rules made thereunder or authorized thereby) failed to express the event horizons of the levy and/or failed to specify or incorporate appropriate valuation or computation provisions, Courts have either (a) struck down the relevant provision; (b) declared the charging provision dormant to the extent of the deficit; (c) declared the levy inoperative; or (d) have declared that the charging provision was not intended to cover the arena to which extant computation/valuation provisions do not apply. See - ***B. C. Srinivasa Setty***; ***Govind Saran Ganga Saran***; ***Mathuram Agrawal***; ***K. Damodarasamy Naidu***; ***Rajasthan Chemists Association***; ***Voltas Ltd.***; ***Infosys Technologies Ltd.***; ***PNB Finance Ltd.***; and ***Tata Sky Ltd.*** (Supreme Court rulings); and ***Larsen & Toubro Ltd.*** judgments of the Patna, Madras and Orissa High Courts.

xvi. In the light of the analyses above, the taxable value of a works contract, including the measure of it, reckoned for the levy (of service

tax) must (by or under the Act) clearly exclude/deduct (deemed or accretion) sale of goods and associate elements, in computation of the taxable value thereunder. Further, appropriate valuation/computation norms must be firmly embedded in the Act or (where the legislation so authorizes by clear textual exposition or a compelling implication thereof, that the taxing trajectory thereunder is restricted to service elements alone and does not extend to deemed sale of goods elements), by Rules made thereunder, – *vide* the second ***Gannon Dunkerley***; the second ***Builders Association of India***; ***Mahim Patram***; and ***Voltas Ltd*** judgments of the apex Court; reiterated in ***Larsen and Toubro Ltd.*** judgments of Patna, Madras and Orissa High Courts.

xvii. *ex hypothesi*, assuming that definitions of CICS, COCS or ECIS r/w the charging provisions in Section 66 of the Act could authorize levy of service tax on a works contract, even so the charge would fail for sterility in the supporting architecture. This is the consequence of the demonstrable deficit of appropriate valuation/computation provisions in the Act and in the statutory rules made thereunder, prior to 01-06-2007 – *vide* ***Jagannath Baksh Singh***; ***Rai Ramkrishna & others***; ***B.C. Srinivasa Setty***; ***Govind Saran Ganga Saran***; ***Mathuram Agarwal***; ***Mahim Patram***; ***Voltas Ltd.***; ***Infosys Technologies Ltd***; ***Heinz India Pvt. Ltd***; ***Larsen and Toubro Ltd*** (Pat); and ***Larsen and Toubro Ltd.*** (Orissa).

xviii. It is an elementary principle of constitutional and administrative law that an *ultra vires* legislative/statutory regime cannot be sustained by benign or *intra vires* executive administration thereof. As **Schwartz**[96] observes: *If an agency acts within the statutory limits (intra vires), the action is valid; if it acts outside (ultra vires), it is invalid. No statute is needed to establish this; it is inherent in the constitutional position of*

[96] Administrative Law (1984) 153

agencies and courts. See also – the first ***Builders Association of India***, the second ***Gannon Dunkerley*** and ***Voltas Ltd.*** (Supreme Court); ***Larsen and Toubro Ltd.*** (Pat. - 2004); and ***Larsen and Toubro Ltd.*** (Orissa - 2008). This principle is too well established to justify a further and idle parade of familiar and settled curial and textual authority.

xix. It is an equally established interpretive principle that where two constructions are fairly possible, the construction which sustains the legislation should be adopted instead of one which renders it invalid (known variously as ***Heydon's rule***[97]; rule of purposive construction; absurdity, inconsistency or repugnancy avoidance rule; rule of harmonious construction; principle of reading down etc.,), *vide* - ***In re Hindu Women's Right to Property Act***[98]; and see for contrast ***Vaijnath vs. Guramma***[99]; also ***Shamrao vs. District Magistrate, Thana***[100]; and ***Bengal Immunity Co. vs. State of Bihar***[101].

xx. **Scope of the charging and valuation provisions r/w definitions of CICS, COCS & ECIS - analyses:**

- CICS, COCS & ECIS are defined in the respective clauses of Section 65 and enumerated to be taxable services in respective sub-clauses of Section 65(105), excerpted earlier;
- Section 66 enjoins the levy of service tax (at the rate specified therein), of the value of taxable services enumerated thereunder. The above three are defined (in clauses of Section 65) and enumerated (in Section 66) taxable services, subjected to the enacted levy;
- prior to its substitution w.e.f 18-04-2006, Section 67 (the valuation provision) read: *the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to*

[97](1584) 3 Co. Rep. 7a
[98]AIR 1941 FC 72
[99](1999) 1 SCC 292
[100]AIR 1952 SC 324
[101]AIR 1955 SC 661

be provided by him. We shall shortly deal with the inclusive and exclusionary clauses set out in Explanation I, to the Section;

- enumeration of the taxable services in Section 65(105) must be read with the definition of the various services set out in the several clauses of Section 65. Such is the integrated structure of drafting adopted in the Act. Thus the levy *qua* the charging provision is on the taxable services defined and enumerated in the clauses and sub-clauses of Section 65 and Section 65(105), respectively;
- a synthesized analyses of Section 67 r/w definitions in relevant clauses of Section 65, enumeration of taxable services in sub-clauses of Section 65(105) and the charging provision in Section 66, leads to the compelling inference that the gross amount charged by the service provider for providing CICS, COCS or ECIS, as the case may be, shall be the taxable value of such service;
- Section 67 does not enjoin that the taxable value of an enumerated and defined service shall be the gross amount charged **for the service component** of the taxable service, nor do the definitions (set out in the several clauses of Section 65) clarify that service component(s) of the defined transactions/activities would alone constitute the taxable service. As earlier noticed and extracted, Section 67 enacts that the taxable value **shall be the gross amount charged by the service provider for such service (i.e., the taxable service), provided or to be provided by him**. Taxable services are catalogued in the charging provision - Section 66; enumerated in relevant sub-clauses of Section 65(105); and defined in the relevant clauses of Section 65;
- The interpretation proferred by Revenue, that the taxable value *qua* Section 67 is the amount/consideration received only for the services portion (of a composite contract), does not follow from the language of the Section. The expression 'gross' means '***absolute, entire***' (Whartons Law Lexicon); '***total, with no deductions***' (Chambers 21st Century

Dictionary). Thus, on a true and fair construction, the entire amount/consideration received by a provider for providing CICS, COCS or ECIS (as ingredients of these services are defined), is the taxable value under Section 67;

- The above inference is reinforced by the internal structure of the provision itself. None of the several exclusionary clauses under Explanation 1 to Section 67 provided (prior to amendment of this Section in 2006), that the value of goods sold or deemed to have been sold in execution of a works contract is excluded from the scope of the taxable value referred to in Section 67. Clause (vii) of the exclusionary clause (being in the nature of an exception to the enacting provision) under the said Explanation (prior to the 2006 amendment) merely specified: *the cost of parts or other material, if any, sold to the customer during providing erection, commissioning or installation service* (ECIS), shall be the excluded component from the taxable value under the valuation provision. No such exclusion is specified in respect of CICS or COCS. Clauses (iii) and (vi) of the exclusionary clause excluded the cost of parts or accessories etc., sold in the course of providing service or repair of specified classes of motor vehicles and in maintenance or repair services, respectively.
- There are several instances of departmental adjudication where it was held (both in cases of ECIS and maintenance or repair services), that sold means, sold chattel *qua* chattel. The exclusionary clauses thus suggest and emphatically, that but for the enacted exclusions, these elements would be comprehended within the scope of the taxable value and that the exclusionary clauses are in the nature of exceptions;
- Even on and since its substitution w.e.f 18-04-2006, Section 67(1) provides that where *service tax is chargeable on any taxable service with reference to its value, then such 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. Section 67(1)(iii) provides that 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. 'Prescribed' is defined [in Section 65(86)] to mean *by rules made under this Chapter*, i.e., Rules made under Section 94; not by exemption notifications issued under Section 93;

- There are a very large number of appeals pending before CESTAT where departmental adjudicating authorities had interpreted Section 67 as enjoining the total consideration received under composite transactions by a service provider to be the taxable value and have rejected claims for exclusion of the value of accretion sale of goods.
- This is the inexorable pathology which results on accommodating a minimalistic legislative/statutory framework administered by and under a maximized executive discretion albeit of the *quasi judicial* variety, frowned upon in ***Jagannath Baksh Singh***; ***Rai Ramkrishna***; the second ***Gannon Dunkerley***; ***B.C. Srinivasa Setty***; ***Mathuram Agrawal***; ***K. Damodarasamy Naidu***; ***Govind Saran Ganga Saran***; ***Voltas Ltd.***; ***Infosys Technologies Ltd.***; ***PNB Finance Ltd.***; ***Tata Sky Ltd.***; and in the ***Larsen & Toubro Ltd.*** rulings of the Patna, Madras and Orissa High Courts;
- Exemption Notification Nos. 12/2003-ST, 15/2004-ST, and 1/2006-ST (extracted earlier), attest to the fact that the Central Government was clearly of the view that the value of goods and materials sold by a service provider to the recipient of service during the course of provision of a taxable service is included in the taxable value under Section 67. It would be incredulous to assume that pure sale transactions were sought to be excluded by these exemption notifications, since a transaction of sale of goods simplicitor (whether intra-State or inter-State) is always (even prior to the 46th Amendment), beyond the

legislative scope of the Union's residuary legislative powers, *vide* the first ***Gannon dunkerley*** (1958);

- Even Notification No. 12/2003-ST does not indicate the methodology for valuation of the goods and materials sold during the course of execution of a works contract. The second ***Gannon Dunkerley*** categorically ordained that the value of goods sold during execution of a works contract is the value at the time of incorporation; that the profit margin on the purchase value of the goods (booked while incorporating into a works contract); and the cost of storage, transportation etc on the goods component would be taxable as sale value and these are thus necessarily excluded from the value attributable to labour/service and associate component(s). None of these incontestably excludable factors are integrated into any of the exemption notifications. There is not even a Board or TRU circular pointing to or even hinting at such exclusions.
- This is perhaps the inevitable consequence of relegating ***constitutional limits on legislative powers problematics*** to discretionary executive curatives. Precedents considered by us caution against such interpretive extravagances;
- WCS is enacted as a specific taxable service w.e.f 01-06-2007, by insertion of sub-clause (zzzza) in Section 65(105). Explanation (i) to this provision annotates the requisite signification by Parliament, by indicating that this species is a contractual arrangement wherein: *transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods*, thereby expressing (Parliament's recognition) that a works contract inheres distinct components/elements, some of which (the deemed/accretion transfer of property in goods) stand exclusively committed to States' legislative field under Entry 54, List II, as the scope of this Entry stands expanded by the 46th Amendment.

- There is an established principle of statutory interpretation that the legislature is presumed (not conclusively though) to be aware of the contemporaneous state of the law. Applying this principle, we infer that with the insertion of sub-clause (zzzza), Parliament, by adopting a drafting shorthand had incorporated the whole of post 46th Amendment jurisprudence on works contract into the scheme of the Act.
- Paragraph (ii) of the Explanation, in Section 65(105)(zzzza), enumerates categories of transactions which fall within the scope of this taxable service. Suffice it to note that substantially the integers of CICS, COCS & ECIS are incorporated as (a) to (d) apart from 'turnkey' and 'EPC' projects set out as (e), under this paragraph. Works contract, in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams are however wholly excluded from the ambit of WCS as seen from the preambular portion of this sub-clause.
- Even after 01-06-2007, CICS, COCS & ECIS continue to be taxable services, since there is neither a repeal/omission of these provisions nor are these excluded from the list of taxable services catalogued in the charging provision, Section 66.
- If, as Revenue contends and would invite us so to assume, the scope of CICS, COCS & ECIS include rendition of these services *qua* a works contract mode as well and provisions of the Act including the charging and valuation provisions read with the exemption notifications do confine the levy (of service tax) to those components of a works contract as are clearly within the competence of the Union, what was the need for the insertion of sub-clause (zzzza), while continuing existing provisions? Revenue does not offer an explanation. Legislature does not engage in vacuous and avoidable exertions is also an interpretive presumption.
- Rule 2-A was (issued under rule making powers conferred by Section 94) inserted in the 2006 (valuation) Rules on the same day (WCS was

inserted in the Act), i.e., 01-06-2007. This Rule excludes deemed/accretional sale of goods and associate components (verbatim as spelt out in the second ***Gannon Dunkerley*** ruling, followed thereafter in several binding decisions, with unvarying regularity). It is important to note that Rule 2-A expressly [see Rule 2-A(1)], stipulates that: *the value of taxable service in relation to execution of a works contract (hereinafter referred to as WCS), shall be determined by the service provider with reference to the service enumerated in sub-clause (zzzza) of clause (105) of Section 65*.

- On its terms therefore, Rule 2-A has no application to CICS, COCS or ECIS, even after 01-06-2007. Revenue neither suggests nor contends, that Rule 2-A applies to CICS, COCS & ECIS as well, at least post 01-06-2007.
- Thus a wholly unnecessary amendment (inserting WCS in the Act); and a wholly unnecessary rule (Rule 2-A, inserted in the 2006 Rules) to cater to a situation admirably administered by existing legislative and statutory provisions, as contended by Revenue!
- A composition regime titled, the *Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007* (the composition Rules), was also promulgated and w.e.f 01-07-2007, issued in exercise of powers under Sections 93 & 94 of the Act. It is legitimate to infer that though termed as a set of Rules, the composition scheme was issued invoking provisions of Section 93 (dealing with the power to exempt) as well, since in a scheme of composition there is a potential of eschewing some quantum of the legislated levy, since the idea of a composition scheme is to avoid the tedious process of accounting and proof of value of excludable/deductible components and proceeds on aggregate assumptions of what percentage of the gross consideration might constitute the legitimate measure of tax. The composition Rules also define WCS w.r.t Section 65(105)(zzzza) – *vide* [Rule 2 (c)].

• Paragraph 154 in Chapter XIII, Part-B of the speech of the Hon'ble Minister of Finance (Budget 2007-2008), explains the basis for insertion of sub-clause (zzzza). The relevant portion reads:

> **154. State Governments levy a tax on the transfer of property in goods involved in the execution of 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 percent of the total value of a works contract** (emphasis added).

• Para 158 of the Budget speech (supra) states that the scope of some services that are currently taxed is being expanded or redefined and it is thus evident and thereby that WCS is a new levy.

• From the interface of paras 154 and 158, it is clear that WCS is not a relocation, expansion or re-definition exercise with respect to ingrediants of any extant taxable service. In our considered view the Budget speech adverted to *supra* signals the understanding of the Union political executive and is so presented to the House, that (a) the transfer of goods component involved in the execution of a works contract is being subjected to (sales) tax by State Governments; (b) service components of a works contract were hitherto not charged to service tax; (c) that 'works contract' was not an extant taxable service; (d) that WCS is proposed as a new levy; and (e) that along therewith a composition scheme is also being introduced.

• Explaining the purport of amendments to the Act proposed in the Budget, 2007-08 (vide the Finance Bill, 2007 introduced in the Lok Sabha on 28.02.2007) TRU issued a letter dated 28.02.2007 stating *inter-alia* (para 4) that the Finance Bill proposes to:

(a) Levy service tax on more services,

(b) Expand or clarify the scope of existing services, and

(c) Carve out separate services from the existing services and specify them as separate taxable services

Services which are proposed to be specifically included in the list of taxable services are referred to in para 6. Sub-clause (iv) of this para mentions service provided in relation to execution of works contract. Para 6.4 of the TRU letter is relevant and reads:

6.4. ***Service involved in the execution of a works contract*** *[section 65(105)(zzzza): VAT/sales tax is leviable on transfer of property in goods involved in the execution of a works contract. The proposed taxable service is to levy service tax on services involved in the execution of a works contract. It may be noted that under the service only the following works contracts wherein transfer of property in goods involved in execution of such works contract is leviable to VAT /sales tax are covered, namely:-*

(i) works contract for carrying out erection, commissioning or installation
(ii) works contract for commercial or industrial construction
(iii) works contract for construction of complex
(iv) works contract for turnkey projects including Engineering Procurement and Construction or Commissioning (EPC) projects.

6.4.1 Works contract in respect of specified infrastructure projects namely roads, airports, railways, transport terminals, bridges, tunnels and dams are specifically excluded from the scope of the levy.

6.4.2 Taxable value under this service is that part of the value of the works contract which is relatable to services provided in the execution of a works contract. Such value is to be determined on

actual basis based on the records maintained by the assessee. However, it is proposed to give an option to an assessee to opt for a composition scheme. Under the composition scheme, the assessee is required to pay 2% of the total value of the works contract as service tax. Assessee opting for the composition scheme is not entitled to avail Cenvat Credit of capital goods, inputs and input services required for use in the works contract. Valuation of works contract and details of the composition scheme will be notified separately.

Para 7 states that Rule 2A is inserted in the 2006 rules which provides for valuation of services provided in relation to the execution of a works contract, covered by Section 65(105)(zzzza); and that as a trade facilitation measure and for administrative convenience, the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 has also been notified, whereby a service provider is given an option to pay service tax equivalent to 2% of the total value of the works contract instead of paying service tax at the rate specified in Section 66.

By way of a post Budget clarification, the Board (CBEC) issued a letter dated 22.05.2007 stating in para 5.(iv) therein, that service provided in relation to the execution of a works contract is a specifically mentioned category of taxable service. Para 9 of this letter explains the scope of amendments made to the 2006 Rules and as to introduction of the composition scheme, both w.e.f. 01.06.2007.

xxi. We have referred to the enacting history of sub-clause (zzzza) and to the administrative construction of the newly introduced taxable service, since these throw additional light on and provide supportive guidance

regarding the appropriate interpretation to be put upon the scope of provisions existing prior to its insertion.

xxii. Established principles of interpretation posit that when the earlier Act or a provision thereof is truly ambiguous i.e., fairly and equally open to diverse meanings, the later Act may in certain circumstances serve as a Parliamentary exposition of the former. Lord Sterndale in ***Cape Brandy Syndicate vs. IRC***[102] observed: *I think, it is clearly established - that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceeds upon an erroneous construction of previous legislation, cannot alter that previous legislation, but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier* (emphasis added); see also ***Ram Kishana Ram Nath vs. Janpad Sabha***[103]; ***ITO, Kanpur vs. Maniram***[104]; ***Jogendranath Naskar vs. C.I.T***[105]; ***Sone Valley Portland Cement Co. Ltd. v. General Mining Syndicate Pvt. Ltd.***[106]; ***Thiru Manickam & Co vs. State of Tamil Nadu***[107]; ***UP Co-operative Cane Union Federation Ltd. v. Liladhar***[108]; ***State of Bihar v. S.K. Roy***[109]; ***Ghanshyam Dass v. Dominion of India***[110]; and ***Gem Granites v. CIT***[111].

xxiii. **Interpretive compulsions from the Act, Rules and exemption notifications issued till the introduction of WCS:**

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[102](1921) 2 KB 403 (AC)
[103]AIR 1962 SC 1073
[104]AIR 1969 SC 543
[105]AIR 1969 SC 1089
[106]AIR 1976 SC 2520
[107]AIR 1977 SC 518
[108]AIR 1981 SC 152
[109]AIR 1966 SC 1995
[110](1984) 3 SCC 46
[111](2005)1 SCC 289

xxiv. Section 67 of the Act, on a true and fair construction, neither expressly nor by a compelling implication of its text, authorizes or accommodates exclusions/deductions (of the value of accretion/deemed sale of goods and associate costs)from the gross amount (consideration) received for rendition of CICS, COCS or ECIS (except to the extent exclusions from the gross consideration and in respect of specific taxable services, including ECIS but excluding CICS & COCS) were spelt out in the provision itself, prior to its amendment in 2006). Until 18-04-2006, exclusionary sub-clause (vii) under the Explanation to this Section excluded the value of goods and materials used only in providing ECIS, but neither CICS nor COCS. The substituted Section 67 (w.e.f 18-04-2006) omitted sub-clause (vii) altogether.

xxv. CICS, COCS & ECIS are not defined as to cover only the service element(s) or to enjoin exclusion of deemed/accretion sale or purchase of goods element(s) therefrom. Further, these definitions do not clearly signal the intention to cover works contract embedded renditions of services. Till 01-06-2007, the 2006 Rules contained no provision for valuation of a works contract and Rule 2-A, inserted w.e.f 01-06-2007 is expressly confined in its application to WCS as defined in Section 65(105)(zzzza).

xxvi. Neither provisions of the Act, any rule made thereunder nor even exemption notifications issued under Section 93 indicate how (and at what point in time during execution of a works contract), the value of goods and materials used in execution thereof are to be valued for applying deductions. This judgment is left to the uncanalised and unguided executive/*quasi-judicial* discretion. Exemption Notification No. 12/2003-ST allows deductions towards value of goods/materials sold while providing taxable services, on furnishing proof of such sale. This notification however does not provide for computation of profits

booked by a builder while incorporating goods involved in the execution of a works contract (a component assessable to sales tax) - the second ***Gannon Dunkerley*** ruling mandates that a builder's profit which is booked on a deemed sale of goods is leviable to sales tax. Other costs and expenses associated with accretion sales (pointed out in this constitution Bench judgment and followed thereafter), are also not included or indicated in any exemption notification or in a Board or TRU circular/clarification.

xxvii. Rule 2-A is inserted in the 2006 Rules only w.e.f 01-06-2007. This provision categorically states that works contract means the service defined in sub-clause (zzzza). The computation Rules, 2007 also introduced w.e.f 01-06-2007 are equally confined to the service enumerated in sub-clause (zzzza).

xxviii. The Hon'ble Finance Minister, in the Budget speech (extracted *supra*) categorically stated that a new levy is proposed, to impose service tax on works contract;

xxix. All the above contemporaneous signals converge to compel the singular and inescapable conclusion, that works contract [as defined and enumerated in sub-clause (zzzza) of Section 65(105)] is a new taxable service operative only since 0-06-2007. A works contract was neither a taxable service earlier thereto nor was integral to extant taxable services such as CICS, COCS or ECIS. WCS is not a carve out or an extraction from pre-existing taxable services; nor even a mere separate/distinctive enumeration, say for statistical purposes (a premise not advanced by Revenue either);

xxx. The carve out theory offered in defense is woolly for several reasons; (a) there is no evidence in the enacting history of sub-clause (zzzza) which supports this hypothesis; (b) sub-clause (zzzza) is not a mere enumeration exertion *per-se*. it integrates a distinct definition, indicates that this species inheres elements committed to another and exclusive

legislative field (of States under Entry 54, List II), enacts generic exclusions in the preambular portion and encompasses rendition of turnkey or EPC projects as well; (c) the Budget speech (by the Hon'ble Minster of Finance) in respect of sub-clause (zzzza) emphatically negates the proposition that works contract was a taxable service earlier as well; and (d) the simultaneous introduction of specially tailored valuation provisions (Rule 2-A of the 2006 Rules) and the 2007 Composition Scheme, both w.e.f 01-06-2007 should have to be considered a vacuous exercise (in accepting the contrary view), since according to Revenue wholesome computation and valuation provisions were in place in the Act and *qua* exemption/abatement notifications (issued under Section 93), even prior to 01-06-2007;

xxxi. Revenue argues that exemption/composition/abatement notifications (issued by the Central Government), in exercise of powers conferred by Section 93 of the Act are species of delegated/subordinate legislation, since the laying (before Parliament) requirement for such notifications is the same as it is for rules issued under Section 94, -*vide* Section 94(4) of the Act. This is a contention that is stated to be rejected.

On text (Section 94(1) of the Act), on principle and settled authority, rules framed under a legislation must be in conformity with and are intended to give effect to the legislative purposes, not to transgress the legislative mandate. Rules may be made to regulate interstitial hiatus in a legislation but in conformity with the *ratio legis*; and not to override or smother the parent legislation – *see* ***Wade and Forsyth***[112]; ***United States vs. Two Hundred Barrels of Whisky***[113]; ***Mohd. Yasin vs. Town Area Committee***[114]*; **Chester vs. Bateson***[115]; ***State of U.P vs.***

[112] Administrative Law (2009) 745-757
[113] 95 US 571 (1877)
[114] AIR 1952 SC 115

Renusagar Power Co.,[116]; and ***Agricultural Market Committee vs. Shalimar Chemical Works***[117].

xxxi. The settled principle of administrative law followed and applied with unvarying regularity in India is this; essential legislative functions cannot be delegated; while the core legislative policy cannot be left to the discretion of a delegate, legislative power may be delegated subject to the legislature exercising the essential legislative function which consists of laying down a policy or rule of conduct to guide the exercise of delegated authority. The U.S. Supreme Court in ***J.W. Hampton, Jr, & Co. vs. United States***[118]observed: So long as Congress *shall lay down by legislative act an intelligible principle to which the person or body authorized to* (exercise the delegated authority) *is directed to conform, such legislative action is not a forbidden delegation of legislative power*; ------ *The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law intends to make its own action depend*; see also – ***Queen vs. Burah***[119]; ***Russel vs. Queen***[120]; ***Hodge vs. Queen***[121]; ***Powell vs. Apollo Candle Co***[122]; ***Jatindra Nath Gupta vs. Province of Bihar***[123]; ***In re Delhi Laws Act***[124]; and ***Hari Shankar Bagla vs. State of M.P***[125]. In a powerful dissent in ***Mistretta vs. United States***[126]**,** Justice Scalia cautioned: *It is difficult to imagine a principle more essential to democratic government that that upon which the doctrine of*

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[115](1920) 1 KB 829
[116](1988) 4 SCC 59
[117](1997) 5 SCC 516
[118]276 US 394
[119]5. I.A. 178
[120](1882) 7 AC 829
[121](1883) AC 117
[122](1885) 10 AC 282
[123]AIR 1949 FC 175
[124]AIR 1951 SC 332
[125]AIR 1954 SC 465
[126]488 U.S. 361 (1989)

unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our members of Congress could not, even if they wished, vote all power to the President (in the context of the Act, to the Union Executive, for issue of an exemption notification; to the Board/TRU for issue of circulars/clarifications, by way of periodical treatises on interpretation of a federal constitution and the scope of taxing powers thereunder; or to the adjudicating additional Commissioners or Commissioners (of Customs, Central Excise or Service Tax) to sensitively apply profound and complex federal constitutional principles, to evaluate taxable components of a works contract) *and adjourn sine die*.

xxxii. The power conferred under Section 93 (to grant exemption) is thus in the nature of delegation of a contingent power, to be exercised on fulfilment of specified conditions for its exercise, namely effectuation of public interest. An exemption notification will therefore be subject to the test/scrutiny whether the condition/contingency stipulated in the provision is satisfied, if challenged. Exclusion of the value of goods/materials sold during execution of a works contract is not a public interest contingency. Such exclusion is the inexorable prerequisite of a constitutional limit on the power of the Union to levy service tax on this component; a limit which defines the contours of Entry 97, List I. This constitutionally defined limit must be acknowledged in the tent of the Union Legislation, which intends to levy service tax on a works contract and such acknowledgment find utterance in the legislative text. This is a requirement emphatically dictated by Article 265 which mandates a tax legislation to enact the taxable event and the extent of inherence of tax thereby imposed;

xxxiii. Notifications issued under Section 93 however (by the specific legislative grant thereby consecrated to the Executive Branch of our

Government), grant immunity ***from the levy and collection of tax, of the whole or any part of service tax leviable on taxable service of any specified description***. If a notification under Section 93 is treated as a species of subordinate legislation (and *pari passu* rules made under Section 94) then the consequence would be that execution of the Parliament's mandate (to levy and collect service tax on defined and enumerated services) is enslaved to executive discretion, to effectuate (or disregard) the mandate, on its conception/discretion of what is in the public interest; a constitutional blasphemy and a negation of essential attributes of parliamentary democracy. The contention is a conceptual and an egregious assault on the foundations of our Parliamentary democracy.

xxxiv. Such construction would further expose Section 93to serious *ultra vires* jeopardy, on grounds that the provision amounts to clear abdication of essential legislative functions. Power to exempt and the power to frame rules are well established to be distinct species of legislative grant and are subject to distinct administrative law norms, disciplines and controls. Essentially, rules framed under legislation are subject to *ultra vires* scrutiny while an exemption notification enjoys greater operative latitude within the contours of rational policy choices, explicated in the grant of such power.

xxxv. Further, on this assumption, the scope of Section 93 (*power to grant exemption from the levy of service tax on taxable services*); and of Section 94 (*power to make rules* ***for carrying out the provisions of this Chapter***- Chapter V of the Act), would bear no distinction, in text or substance and one of the modes of ***carrying out the functions of the Chapter***, would lawfully be by issue of an exemption notification, eschewing levy and collection of the service tax leviable under the Act.

xxxvi. If the power consecrated to the Executive Branch *qua* Section 93 (to grant exemption from the service tax leviable under Section 67, on

taxable services defined in Section 65 and enumerated in the charging provision in Section 66) is interpreted as a power to effectuate the purposes of the Act and a provision in the nature of a supporting or reinforcing architecture for the valuation provision (Section 67), then issuance of an exemption notification would cease to be a discretionary (**may**) power and would partake the nature of a mandatory/statutory (**shall**) duty, susceptible to a writ of mandamus. On this construction, Section 93 would be a sub-set of the valuation provisions in Section 67, *pro tanto*;

xxxvii. The above proposition of Revenue is extravagant and invites peremptory rejection. We accept the invitation and reject this proposition.

xxxviii. For reasons set out in sub-paras (xxiv) to (xxxviii) above, we reject Revenue's proposition that Section 93 itself or exemption notifications issued thereunder, are adjunct computation or valuation provisions which could be referred to as indicative of and annotate the scope and reach of the computation/valuation provisions of the Act. This contention is also clearly contrary to the text and purposes of Section 93.

24. We now summarize the guidance we infer from precedents cited at the Bar:

a. Norms resulting from the second ***Gannon Dunkerley*** ruling:

- neither Article 366 (29-A) nor Entry 54, List II (post the 46th Amendment) *per se* amount to a legislation authorising levy and collection of sales tax. Enacting an appropriate legislation is thus mandatory in view of Article 265.
- such legislation must clearly enact the intention to tax works contract and incorporate therein a charging provision enjoining

confinement of the levy within the limits of the enacting legislature, in terms of the limits of allocation specified in the Constitution;

- provisions for computation/valuation of the taxable event/transaction within such authorized limits or a provision clearly indicating the limits while facilitating valuation/computation by rules framed under the enactment must be embedded in the statutory architecture;
- if the legislation, ***on the basis of its provisions and on the ambit of its operations as reasonably construed****,* do not pass the test of constitutionality, mere possibility of benign or within constitutional limits administration, would not pass constitutional muster; and
- *a fortiori*, the constitutionally delineated authorized measure, for levy and collection of tax on services, by Parliament *qua* a legislative exertion under Entry 97 of List I, is a corresponding limitation, identical to and *pari passu*, the constitutional obligation of States, in this regard. We discern these as the compelling inferences from *rationes* of the second ***Gannon Dunkerley*** constitution Bench.

b. <u>What facts has ***Mahim Patram*** considered and what the ruling signals</u>:

The analyses in the ***Mahim Patram*** ruling (paras 29 to 40) reveals that adequate machinery provisions, in the relevant State sales tax legislation, were in place (adverted to in paras 19 to 22);

- that in the Central Sales Tax Act, Section 2 (g) defines *sale* to include works contract sales, Section 8 provides for rates of tax on sales in the course of inter-State trade or commerce, Section 8-A for determination of *turnover*, Section 9 for levy and collection of tax and

penalties; and this provision covers inter-State works contracts as well;

- that Section 9(2) of the Central Act authorizes (by plenitudinous grant of powers) the State (sales tax) machinery to administer the mandate of the Central Act as well;
- that Section 13(3) of the Central Act authorizes State Government to make rules (not inconsistent with the Central Act or any rules made under Section 13(1) thereof), to carry out the purposes of the Central Act; and
- that State rules are made applicable (for assessments of the Central levy) by the enabling/facilitation framework of provisions explicitly enacted in the Central Act (paras 29 to 33);
- the peculiar and specific context of the inter-meshed statutory architecture (the Central Act authorizing assessments by State actors and authorizing the State to make rules to carry out the purposes of the Central Act), which persuaded ***Mahim Patram*** to conclude that the charging and levy provisions of the Central Act were effectuated by the (duly and legislatively authorized) reinforcing/supporting matrix of State machinery rules, for ensuring proper valuation/computation of the Central levy.
- to construe ***Mahim Patram*** as enunciating a generic or a *meta* norm authorizing/accommodating framing of rules by a State so as to embed the appropriate machinery/computation architecture required to sustain the vitality of Union taxation, *de-hors* consecration of such authority in the relevant Central legislation, is a plain and seminal misreading of the ruling and a product of inaccurate analyses and construction of the last phrase of the sentence in para 27 of ***Mahim Patram***, read in isolation and divorced from its contextual and factual habitat, which received extensive consideration in that judgment.

- in our considered view, ***Mahim Patram*** reiterates and emphatically, the established principle that computation/machinery provisions are non-derogable integers of the levy of tax and these must be either enacted in the legislation *per se* or provided in rules framed under **or pursuant to authorizing provisions in**, the governing legislation. The conclusion is compelling, that if provisions of the Central Sales Tax Act, 1956 had not authorized application of provisions of State sales tax legislations and the rules framed thereunder, for levy and collection of CST or failed to incorporate and integrate/harness the machinery provisions of the State statutory architecture to enforcement of the Central levy, ***Mahim Patram*** would inevitably have quashed the assessments impugned therein.
- no decision has been brought to our notice, which sustains a Central levy on the **singular** basis that relevant and appropriate computation/valuation/machinery provisions exist in a State legislation or *vice versa***.** What would result if, in a given situation, there were no appropriate computation/valuation provisions in a State sales tax legislation? Would the Act be unconstitutional in that State? Or would it be proper to derive assistance from another State's legislative/statutory provisions, and if so of which State? Such speculative hypotheses are inconcievable in rational statutory interpretation!

c. **<u>What the other precedents cited on behalf of Revenue indicate</u>**:

- The rulings/observations in the judgments cited on behalf of Revenue (i.e., ***Mahim Patram***; ***S.T. Venkataramanappa***; ***Sharvan Kumar Swarup & Sons***; ***Great Eastern Shipping Co. Ltd.***; ***T.N. Kalyana Mandapam Association***; and ***Association of Leasing and Financial Service Cos.***), are in the peculiar and respective factual and statutory settings involved therein; do not expound

principles which are contrary to nor overrule the overwhelming catena of binding precedents including of constitution Benches; and have no application to factual matrices which invite clear constitutional limits upon legislative fields allocated to the Union and to States (under Entries 97 and 54 of Lists I & II, respectively), as regards the authorized boundaries of taxation, including the measure of levy thereby. We have recorded brief comments while referring to these rulings, earlier.

- On the essential question (before us) i.e., as regards contours of CICS, COCS & ECIS as defined; of the charging provision (Section 66), r/w the valuation provision (Section 67); and the established absence of statutorily embedded computation and machinery provisions (prior to 01-06-2007), limiting the charge and levy of service tax only to the value of labour/services and associated expenses; while wholly excluding the value of elements related to deemed sale of goods and associated expenses, involved in execution of a works contract, we find no precedent (brought to our consideration) which propounds a *ratio*/principle vouchsafing immunity from the mandated constitutional fidelity, to drafting discipline, precision and exactitude. These precedents offer no manner of assistance for a conclusion that CICS, COCS & ECIS, include in their definitional, charging or valuation orbit, works contracts as well.
- In ***Tamil Nadu Kalyana Mandapam Association*** there was no contention presented that there was no charge on the service in issue. As regards adequacy of an exemption notification granting abatement, no argument was asserted, no issue framed; nor is any principle enunciated nor a conclusion recorded by the Court, that in the absence of legislated exclusions (in the Act, including in the valuation provision therein) of the value of accretion sale of goods in

relation to composite/catering contracts and supporting statutory framework for proper valuation/computation, relevant provisions of the Act are rendered invalid for legislative incompetence and for encroachment into the exclusive legislative field allocated to States under Entry 54 of List II, as the scope of this Entry stood expanded *vide* Article 366 (29-A)(f). The judgment (by two learned judges) neither expressly nor by a compelling implication of its text, either distinguishes, doubts or overrules the binding, larger Bench including constitution Bench decisions, commencing from ***Jagannath Baksh Singh*** to ***B.C. Srinivasa Setty***, these being judgments, rendered prior to this judgment.

- Further, this decision, neither expressly nor by implication doubts, distinguishes nor dissents from the long line of consistent binding authority (***Jagannath Baksh Singh*** to ***Tata Sky Ltd.***), which with unvarying regularity expound the *meta* principle, that appropriate and complementing computation, valuation and machinery provisions are a *sine qua non* for sustaining and providing vitality to charging provisions in a tax statute.
- Also, under our constitutional scheme, as explained in every precedent on the aspect, a works contract (pertaining to building/construction transactions), is a distinct species which includes elements of sale of goods and of supply/rendition of service(s). Each set of these elements falls within the exclusive taxation domain of States and of the Union, respectively. The exclusivity mandated by the Constitution prohibits cross taxation and overlapping levies. We infer that the prohibition ensures preservation of the substrates/elements of composite transactions for availability to the appropriate legislature to harvest revenue by taxation, without depletion of these substrates by cross taxation exertions by the other federal partner.

- In the circumstances, a synergy between charging and valuation/computation provisions, to ensure confinement of the levy and collection of tax within the allocated/demarcated boundaries of each level of legislation, is a non-derogable constitutional command. Categorical signification of the limits of the levy; and providing a symbiosis of charging and computation provisions, in State or a Union legislation, is thus an unavoidable fundament of an *intra vires* legislative architecture.
- It is also an established *stare decisis* norm that a stray instance of non application of an entrenched set of *rationes* illustrated by a long catena of binding precedents, in a specific or idiosyncratic factual setting does not render long settled principles obsolescent nor amount to implied overruling of established *rationes*. Further, these principles were invariably applied and the earlier precedents quoted with approval and followed in several decisions thereafter, including in ***Rajasthan Chemists Association***; ***Infosys Technologies Ltd.***, and ***Tata Sky Ltd***, illustrating the undisturbed vitality of the *meta* norm.

d. <u>The recent (2014) ***Kone Elevator*** constitution Bench reiterates the following principles</u>:

- a composite transaction pursuant to an agreement where the parties thereto are *ad idem* that the transaction is not one exclusively for either supply of labour/rendition of services or for sale of goods *qua* goods; but is one for an integrated delivery of goods by incorporation by expending services for such incorporation, i.e., a works contract, cannot lawfully be classified as a distinct contract for either sale of goods or rendition of services.
- the *overwhelming, major component, dominant intention* or *degree of labour and service* tests (the traditional tests) have no application

to and cannot be employed for extracting a works contract from its constitutional and legal orbit as such;

- works contract is a distinct commercial entity, inhering components of sale of goods by incorporation/accretion; and of rendition of labour/service towards facilitation of such incorporation/accretion;
- consequently, the Union and/or State legislative, statutory architecture(s) must provide for confinement of their respective charge/levy(of tax), to those elements/components of a works contract as are constitutionally committed to their assigned fields of legislation. Thus, a Union legislation must specify exclusion of deemed sale elements and associated profits, costs and expenses; and a State legislation, exclusion of labour/service elements and associated profits, costs and expenses;
- compliance with the above principle/discipline requires that the relevant legislation must clearly recognize this distinct commercial entity (a works contract) as such and categorically enact the intention to charge and levy tax thereon; must enact proper computation and/or valuation provisions, which negate overreach into or trenching upon the domain of the exclusively allocated legislative field committed to the other level, in the administration of its provisions; and must ensure (by providing for) non-arbitrary assessment of the liability to the authorized levy thereunder; and
- ambiguous legislative provisions, which do not specify the intent to levy a tax on works contract and fail to enact or provide for framing of relevant rules for appropriate computation/valuation, compel the inference that either there is no charge on works contract or that the charge fails for sterility in the area of valuation/computation provisions (this conclusion of the Court is a compelling inference), from the operative portion of the majority judgment *per* Dipak Misra. J, *vide* para 65.

25. On the aforesaid analyses we are compelled to the conclusion that:

a. works contract was not a taxable service prior to 01-06-2007;

b. definitions of CICS, COCS and/or ECIS r/w the charging provision (Section 66) and the valuation provision (Section 67) do not comprehend works contract (comprising an amalgam of deemed/accretion sale of goods and supply of labour/service) within their ambit;

c. there was no charge of service tax on works contract prior to insertion of sub-clause (zzzza) in Section 65(105);

d. that prior to 01-06-2007, there were no valuation/computation provisions in the Act or the rules authorized thereby and made thereunder which enable computation/valuation of works contract so as to confine levy of service tax to service and associate components in such a contract, thus comprising an integrated code of charging and computation provisions;

e. that works contract is enacted as a taxable service (WCS) only by the Finance Act, 2007 and w.e.f 01-06-2007 *vide* sub-clause (zzzza) of Section 65(105), specifically defined with a legislated signification of intent to levy service tax on this distinct commercial entity, which inheres components which are exclusively allocated to States; and introduced with an integrated package of computation/valuation rules (Rule 2-A of the 2006 Rules),specially tailored to cater to this special category of transaction which has exclusive and competing taxation elements/components and a composition rules matrix (the 2007 Rules), enacted/framed in fidelity to the second ***Gannon Dunkerley*** ruling of the constitution Bench.

Analyses of Shri Sahu's position:

a. From the preceding analyses we conclude, that the 46th Amendment though directed towards and defining the expression 'sale' wherever it occurs in the Constitution and thereby expanding the scope *inter alia* of the legislative field enumerated in Entry 54, List II, has also altered the scope/contours of other legislative fields consequently affected. Thus, the residuary field *qua* Entry 97, List I now excludes from its ambit the accreted legislative field falling under Entry 54, List II. The contention that the 46th Amendment has no impact on the breadth and scope of Union's residual legislative field under Entry 97, List I r/w Article 248 is resultantly, fallacious. This contention assumes that the residuary field is static in the sense of its contents and reach being the residue of other specific allocations *qua* other Entries in the three Lists, say as on the date of adoption of our Constitution. The constitutional position, as we perceive, is that the residual field or any field *qua* any other Entry in the three Lists of the Seventh Schedule, is reactive to dynamic/periodic allocations/re-allocations, of legislative powers under the Constitution.

b. The second ***Gannon Dunkerley*** ruling clearly records what components of a works contract fall outside the measure of sales tax leviable by States and what amounts from the gross consideration received on a works contract are compulsorily deductible for a valid assessment of sales tax. It is axiomatic that whatever is the legitimate measure for levy of sales tax is the impermissible measure for levy of service tax. This is so since Union's legislative field *qua* Entry 97, List I is the residue of subjects/fields committed for State exertions *qua* Entry 54, List II. Post the 46th Amendment, deemed/accretion sale of goods involved in a works contract and associate elements (i.e., elements excerpted and catalogued in the second ***Gannon Dunkerley***), are unauthorized components for levy of service tax. This to our mind is an elementary conclusion flowing from the inescapable position that under

our constitutional scheme of distribution of legislative powers, the residuary field is the last port of interpretive call and whatever legislative fields are comprehended in enumerated Entries (in the three Lists) are clearly outside the scope of the residuary field.

c. We have given unto ourselves a federal Constitution and within the allocated/assigned fields of legislation, in Lists I & II, each legislating partner of our federal compact, is supreme and plenary; not subject to exertions of legislative power by the other partner. Heirarchical allocation of legislative fields/powers is only in respect of List III (concurrent List) enumerated fields, r/w Article 254.

d. The contention (that unlike States' legislative power, under Entry 54, List II), Union's legislative power (under Entry 97 List I) to impose (service) tax on the whole value of a works contract, including the value of deemed sale of goods and associate elements is absolute and untrammelled, is one that has no basis in the constitutional text, no precedential support nor does the contention rest on the foundational principles of our federal constitutional construct and its peculiar arrangement and distribution of legislative powers, in particular, taxation powers.

e. We have considered this aspect in our analyses supra and reiterate our conclusion, that Union's residual legislative field is the residue *inter alia* of the field abstracted to States under Entry 54, List II, read in the light of the 46th Amendment.

f. It requires to be noted that the decisions (referred to by Shri. Sahu) in ***Sentinel Rolling Shutters & Engineering Co.***; ***M/s Man Industrial Corpn. Ltd.***; the second ***Gannon Dunkerley***; ***B.S.N.L***; and ***Associated Hotels of India Ltd.***, were quoted, referred to and analysed in the 2014 constitution Bench decision in ***Kone Elevator India Pvt. Ltd.*** This, (the ***Kone Elevator***) ruling settles the position that:

(i) works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services;

(ii) the concept of 'dominant nature test' or, for that matter the 'degree of intention test' or 'overwhelming component test' for treating a contract as a works contract is not applicable;

(iii) the term 'works contract' as used in clause (29-A) of Article 366 of the Constitution takes in its sweep all genre of works contract and is not to be narrowly construed to cover one species of contract to provide for labour and services alone; and

(iv) once the characteristics of works contract are met with in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract (para 42).

g. Reliance on paras 43,105 to 107 of the ***B.S.N.L*** ruling is equally misplaced. The context and interpretive position emerging from the ***B.S.N.L*** observations is explained in constitution Bench decisions in ***Larsen & Tourbro Ltd.*** (2013) and ***Kone Elevator*** (2014). ***Kone Elevator*** explains this aspect by referring to the (2013) ***Larsen & Toubro Ltd.*** constitution Bench reiteration of the principle (para 58 of ***Kone Elevator***) thus:

87. It seems to us (and that is the view taken in some of the decisions) that a contract may involve both a contract of work and labour and a contract for sale of goods. In our opinion, the distinction between a contract for sale of goods and contract for work (or service) has almost diminished in the matters of composite contract involving both a contract for work/labour and a contract for sale for the purposes of Article 366(29-A)(b). Now by legal fiction under Article 366(29-A)(b), it is permissible to make such a contract divisible by separating the transfer of

property in goods as goods or in some other form from the contract of work and labour. A transfer of property in goods under clause (29-A)(b) of Article 366 is deemed to be sale of goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made. For this reason, the traditional decisions which hold that the substance of the contract must be seen have lost their significance. What was viewed traditionally has to be now understood in light of the philosophy of Article 366(29-A). -----

97.5 A contract may involve both a contract for work and labour and a contract for sale. In such composite contract, the distinction between contract for sale and for work (or service) is virtually diminished.

97.6 The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative (emphasis added).

h. We have carefully perused the judgment in ***Southern Petrochemical Industries Co. Ltd.*** and find no support therein for the contention canvassed by Shri. Sahu. Paras 145 to 147 of this ruling refer to the provisions of Article 366(29-A); Entries 53 & 54, List II; to the first

Gannon Dunkerley and ***B.S.N.L*** judgments to conclude that the several sub-clauses of Article 366(29-A) have no application to Entry 53, List II and are applicable only to Entry 54 thereof. With respect, the conclusion is impeccable. Clause (29-A) of Article 366, on its text and purpose defines 'tax on the sale or purchase of goods' with the inclusive content enumerated in sub-clauses (a) to (f) thereunder. The Amendment thus has clearly no application to Entry 53, List II which enumerates: *taxes on the consumption or sale of electricity*.

i. The decision in ***Geo Miller & Co. (P) Ltd.*** similarly offers no assistance for the proposition that the 46th Amendment has no impact whatsoever on the scope of Union's legislative field under Entry 97, List I. This decision concluded that provisions of Article 366(29-A) have no application to a State legislation relatable to imposition of entry tax which is referrable to Entry 52; and not Entry 54, of List II.

j. The Delhi High Court in ***The Federation of Hotels & Restaurants Association of India & Others***[127], held that supply of mineral water and soft drinks in hotels and restaurants do not constitute sale; that provisions of the Standard of Weights and Measures Act, 1976 and of the SWM (Packaged Commodities) Rules, 1977 made thereunder are inapplicable, though by the deeming fiction *qua* Article 366(29-A)(f), the supply, by way of or as part of any service, is considered as sale.

[127] ILR (2007) 1. Delhi. 1059

This ruling does not, expressly or by compelling implication, posit the position that the 46th Amendment's expansion of the scope *inter alia* of Entry 54, List II has no impact on the scope of the residuary field *qua* Entry 97, List I, r/w Article 248.

k. The rulings in ***Sultan Brothers Pvt. Ltd. vs. CIT***[128]; ***BSES Ltd. vs. Fenner India Ltd.***[129]; and ***Indure Ltd. vs. CTO***[130] are cited for contending that where the agreement between the parties reflects an intention to render, perform or deliver an integrated or amalgamated service, product or outcome, the same cannot be dissected/vivisected, for the purpose of levy of different taxes on constituent components of such integrated agreement. This contention stands refuted by the authoritative decisions *inter alia*, of ***Builders Association of India*** (1989), the second ***Gannon Dunkerley*** (1993)***, B.S.N.L*** (2006); ***Larsen & Toubro Ltd.*** (2013) and ***Kone Elevator Pvt. Ltd.*** (2014).

l. None of the decisions cited by Shri. Sahu (adverted to in sub-paras (f) to (k) supra have any bearing on nor support his contention that the 46th Amendment does not impact the content/scope of Union's legislative field under Entry 97, List I. The fact that provisions of sub-clauses (a) to (f) of Article 366(29-A) enlarge the scope of the expression 'taxes on the sale or purchase of goods' and thus the scope *inter alia* of Entry 54, List II does not derogate from the position

[128] AIR 1964 SC 1389
[129] (2006) 2 SCC 728
[130] (2010) 9 SCC 461

that the constituent exertion also diminutes the scope of Union's residuary legislative field under Entry 97, List I. The impact of this Amendment on the residuary field is, in our view, inescapable. A contrary construction would amount to transfer of Entry 97, List I and Entry 54, List II, to List III (the concurrent List); amendment of the Constitution, by interpretation!.

m. No decision by any Court has been brought to our consideration which rules so. In fact, the Second ***Gannon Dunkerley*** decision(ruling by implication, that the taxable value of services is the value of those components which are outside the purview of sales tax); the ***B.S.N.L*** ruling which observes (at para 89): *the Centre cannot include the value of SIM cards, if they are ultimately found to be goods, in the cost of the service*; and the ruling in ***G. D. Builders*** itself (to the extent it concludes that the value of deemed/accretion sale of goods involved in execution of a works contract is beyond the scope of Section 67 of the Act), are compelling indicia to the singular interpretive destination, that the scope of Union's residuary legislative field is confined to areas not covered by States' legislative field under Entry 54, List II as incremented by the 46th Amendment. This is clearly the result of accretion of the contours of Entry 54, List II, as a result of Article 366(29-A).

n. We have already analysed the rulings in ***Tamil Nadu Kalyana Mandapam Association*** and ***Association of Leasing & Financial Service Cos.*** (the other decisions cited by Shri. Sahu). For the reasons recorded thereat, we find no support therein for the contention that the measure of service tax may legitimately include the whole of the consideration received, including the value of deemed/accretion sale of goods, involved in the execution of a works contract.

o. ***Super Polyfabricks Ltd. vs. CCE***[131], is not an apposite authority for the proposition that the intention of the parties, gathered from the relevant agreement considered as a whole, is the guiding factor for determining whether a transaction is a works contract or otherwise. The traditional - **dominant nature**, **degree of intention**, **overwhelming component**, **major component** or **degree of enforceability** tests are declared inapplicable and to be no longer relevant for determining whether a transaction amounts to a works contract, in the constitution Bench ruling in ***Kone Elevator*** (2014), following *inter alia* the decisions in ***B.S.N.L*** (2006) and ***Larsen & Toubro Ltd.*** (2013).

p. The ECJ and the House of Lords opinions in ***Card Protection Plan Ltd.*** and in ***British Telecommunications Plc.*** do not guide the construction/identification of the limits to legislative competence in the

[131] 2008 (10) STR 545 (SC)

Indian constitutional setting. Those opinions/rulings were in the particular and specific fact and legislative contexts considered therein. The principle is too well established, that the appropriate legislature is competent to enact fictions, subject only to constitutional limits upon its powers.

q. The aspect doctrine enables levy of tax on each distinct aspect of the same transaction, by recourse to legislation on fields committed to the particular legislature. The ***B.S.N.L*** ruling quoted with approval the following observations in ***Federation of Hotel & Restaurant Association of India vs. Union of India***[132]: *--- subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power. *****There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects*. (emphasis added).

r. In the Canadian Constitution's context, there evolved judicially, in that jurisdiction, the double aspect theory, to address complexities of overlapping (Federal and Provincial) legislations. The Canadian Constitution has Federal (Section 91) and Provincial (Section 92)

[132](1989) 3 SCC 634

assignments, 43 Entries in all, but none concurrent. The doctrinal origin of the double aspect theory is perhaps traceable to ***Hodge vs. The Queen***[133], in the statement of principle: *subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91*. In ***Multiple Access Ltd. vs. McCutcheon***[134], the Supreme Court of Canada ruled that if the court considers the federal and provincial features of an impugned legislation to be of **roughly equivalent importance** so that neither should be ignored respecting the division of legislative powers, then the statutory rule could be enacted by either the federal Parliament or provincial legislature; overlapping federal and provincial legislation will be tolerated as long as there are no operational inconsistencies. It however requires to be noticed that in ***Attorney General for Canada vs. Attorney General of Alberta***[135], Viscount Haldane advised great caution in the application of this theory and the reason for exercise of such caution was explained by the Canadian Supreme Court in ***Bell Canada vs. Quebec***[136], thus: *the reason for this caution is the extremely broad wording of the exclusive legislative powers listed in ss. 91 and 92 of the Constitution Act, 1867 and the risk that these two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy*

[133](1883) 9 App. Cas. 117
[134](1982) 2 S.C.R. 161
[135](1916) 1 A.C. 588
[136](1988) 1 S.C.R. 749

of federal legislation. Nothing could be more directly contrary to the principle of federalism underlying the Canadian Constitution (emphasis added).

s. Entries in our Constitution were drafted with greater precision and clarity and there is in addition a concurrent assignment of legislative fields in List III whereunder paramountcy is accorded to Union exertions, subject to conferment of operational efficacy for State legislation referable to List III Entries, on fulfilment of conditions set out in Article 254(2). The application of the aspect theory has therefore been adopted and applied in India with modifications to suit the peculiar and distinct features of our model of distribution of legislative powers, of the Union, States and Concurrent allocations.

t. Shri. Sahu's submissions also urge that assuming that even prior to 01-06-2007, the entire works contract excluding the goods part becomes amenable to service tax, the 46th Amendment does not enable further vivisection of the 'service portion' into smaller segments such as under categories of 'consulting engineer service' or 'drawing and designing part of the contract' and the like. We refrain from expressing any opinion on this contention, since the reference to this special Bench does not include the issue whether pre-existing taxable services *qua* their definitions, charging and valuation provisions authorize extraction of constituent elements of a composite

transaction, for levy of service tax on each distinct element on classifying it as a separate taxable service; the classification guidelines delineated in Section 65 A of the Act may perhaps be relevant. We decline to pronounce a view on this proposition however. For reasons alike, we express no view on the vitality of TRU budget letters, dated 28-02-2006 and 29-02-2008.

u. Suffice it to note, if provisions of Section 65-A are applied and the transaction in issue (involving renditions of service prior to 01-06-2007) is resultantly classified as falling within CICS, COCS or ECIS, as the case may be, the issue for our consideration is, if the agreement between the parties amount to a works contract, whether it is susceptible to the charge, levy and collection of service tax, prior to introduction of WCS *qua* Section 65(105)(zzzza). That is the only issue we consider and answer.

25. For reasons recorded by us in earlier analyses; and in particular the preceding sub-paras, we find no merit in Shri. Sahu's contentions that:

- the measure of service tax levy could extend to the whole value of a works contract including the value of the goods component involved therein;
- that the 46th Amendment does not have any bearing on the scope of Union's powers *qua* Entry 97, List I;
- that it is not Rule 2-A of the 2006 Rules but Section 67 of the Act which provides a wholesome measure for levy of service tax on works contracts even prior to 01-06-2007;

- that a works contract is essentially a service contract simplicitor; and
- that post 01-06-2007, not merely the service portion of a works contract but the whole of it is leviable to service tax.

As indicated supra, we decline to answer other contentions urged by Shri. Sahu as are outside the scope of the reference to this Bench.

26. We now deal with the question whether the Hon'ble Delhi High Court's ruling In ***G. D. Builders*** or the Karnataka and Madras High Court decisions in ***Turbotech Precision Engineering Pvt. Ltd.*** and ***Strategic Engineering Pvt. Ltd.***, are binding precedents and whether *per incuriam* or *sub silentio* principles denude any of these decisions of their binding force.

We notice that ***Turbotech Precision Engineering Pvt. Ltd.*** (in paras 9 & 10) clearly ruled that as Section 65(105)(zzzza) of the Act came into force w.e.f 01-06-2007; the contract in issue falls under Explanation (a) and (e) thereunder; and that Revenue has no power to levy service tax, since the contract covered the prior period, i.e., 1997 and 2001. The Madras High Court in ***Strategic Engineering Pvt. Ltd.***, allowed the writ petition and quashed the show cause notice and the impugned order. Revenue's demand for service tax for rendition of ECIS and Scientific and Technical Consultancy service was invalidated on the ground that WCS was made a taxable service w.e.f 01-06-2007, the transaction in issue was prior to that date and thus the demand (treating the transaction as rendition of a works contract, *vide* the additional counter) was not supported by legislative authority (paras 16 to 18). We do notice that while ***G. D. Builders*** sets out

analyses for its conclusion that works contract is taxable prior to 01-06-2007 as well, ***Turbotech Precision Engineering Pvt. Ltd.*** and ***Strategic Engineering Pvt. Ltd.*** record a finding without a comparable measure of analyses, while clearly recording the conclusion that a works contract is not taxable prior to 01-06-2007.

Now to the ***G. D. Builders*** ruling and the precedents considered and analysed therein (paras referred to are of the this judgment).

- In para 19, propositions flowing from ***Home Solutions Retail (India) Ltd. vs. Union of India & Anr.***[137] (of the full Bench of the Delhi High Court)are set out; a judgment which has no bearing on the question whether works contract is taxable under CICS, COCS & ECIS.
- In para 20, the decision in ***Tamil Nadu Kalyana Mandapam Association*** is adverted to and it is noted that in the case of mandap keepers service, tax was payable on a composite contract which included provision of food, furniture, electrical fittings, tents etc. This ruling is again considered in para 28 and passages from it excerpted, including the following observations in ***Tamil Nadu Kalyana Mandapam***: *It is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of the gross charges for catering cannot alter or effect the legislative competence of Parliament in the matter*. This passage cannot be interpreted as propounding a universal norm. While, with respect, these observations may be apposite in the facts and circumstances of that case, the established principle that the measure of a tax must have a nexus to the taxable event under the particular legislation and that must be within the competence of the legislature, cannot be considered

[137] 2011 (24) STR 129 (Del)

as having been overturned or eschewed. The nexus and limits (legislative competence) tests are established by a long catena of binding authority including of constitution Benches, including the second ***Gannon Dunkerley*** and ***K. Damodarasamy Naidu***. We have also analyzed other facets of the ***Tamil Nadu Kalyana Mandapam*** ruling earlier and reiterate that analyses.

In any event, glossing over the factor of non existence of a statutory computation/valuation mechanism is consistent with the finding: *a tax on services rendered by mandap keepers and outdoor caterers, is in pith and substance, a tax on services and not a tax on sale of goods or on hire-purchase activities* (the observation in para 28 of ***Tamil Nadu Kalyana Mandapam Association***). It is axiomatic that if the entirety of mandap keepers and/or outdoor caterers activities amount to a service and inhere no elements/components of sale of goods, then no issue of exclusions/deductions therefrom would be warranted! In our respectful view, the ***Tamil Nadu Kalyana Mandapam*** decision at any rate cannot be considered as having dissented from or overruled entrenched principles consistently expounded, reiterated and implicitly followed, in ***Jagannath Baksh Singh***; ***Rai Ramkrishna***; ***B. C. Srinivasa Setty***; ***Govind Saran Ganga Saran***; ***Mathuram Agarwal***; ***K. Damodarasamy Naidu***; ***Mahim Patram***; ***P. N. B. Finance Ltd.***; ***Infosys Technologies Ltd.; Heinz India (P) Ltd.***; and ***Tata Sky Ltd***. Revenue has failed to explain and reconcile this aspect. In fact Revenue neither adverted to nor attempted to reconcile the above decisions and the compelling *rationes* flowing therefrom.

- Para 21 refers to ***K. Raheja Development Corpn. vs. State of Karnataka***[138], for concluding that definition clauses in the Act for applying Section 65(105) (zzq) & (zzzh); [CICS & COCS, respectively], have to be given full effect. It requires to be noticed that in ***K. Raheja***

[138](2005) 5 SCC 162

Development Corpn., the legislation in issue - the Karnataka Sales Tax, Act, 1957 specifically defined 'works contract' in a comprehensive manner and this fact is noticed in this para of ***G. D. Builders***, as well. Giving full effect to overbroad/ambiguous verbal formulae in legislative texts is also a deeply problematic interpretive issue. Textual ambiguities may be of the grammatical, syntactic or contextual varieties and *purposive construction* and *dynamic interpretation* tools are employed to arrive at the legal meaning of a text where the grammatical meaning leads to overreach and does not correspond to the legal meaning.

- Para 22 adverts to the 2013 constitution Bench ruling in ***Larsen & Toubro Ltd.*** and to observations in para 100 thereof. The Hon'ble High Court deduced from that decision certain propositions/principles which include the indicia for identifying a works contract - that neither the 'dominant nature test' nor the 'enforceability test' have application if ingredients of the transaction in issue reveal a works contract; and that post the 46th Amendment the sale of goods element in a works contract could be subject to sales tax even after incorporation of the goods, provided the tax is directed to the value of goods and does not purport to tax the transfer of property and the measure of the levy is value of the goods at the time of incorporation (emphasis added).
- Para 23 refers to the second ***Gannon Dunkerley*** judgment and notes that this decision requires the measure of levy of sales tax to be the value of the goods incorporated during execution of a works contract and the value at the time of such incorporation.
- Paras 24 to 27 notice the ***Mahim Patram*** decision; excerpt paras 5, 6, 15 and 27 to 29 of this decision and highlight this phrase in para 27 thereof: ***but it is equally well settled that only because rules had not been framed under the Central Act, the same per se would not mean that no tax is leviable.***

- We have (in our primary analyses of precedents, earlier herein), analyzed ***Mahim Patram*** and have demonstrated that this decision is not an authority for a generic principle that a computation/valuation regime deficit in a Central legislation stands cured by availability of such provisions in a State legislation, without adaptive provisions in the Central legislation authorizing such adoption; and that the ***Mahim Patram*** text and internal analysis of relevant facts, is proof positive of this very principle (ie., that the Central Sales Tax Act, 1956 embedded an elaborate legislative architecture for adoption of State legislative measures, assessment processes and for application of State rules for assessment of the Central levy (following an adaptive/referential drafting process). It is the specific context of such adaptive legislative stipulations in the Central Act, which led to upholding the composite and integrated (Union & State) statutory framework, as adequate.
- We are therefore persuaded to accept the contention of Learned Senior and other Counsel that the inadequate sensitization (by counsel in ***G. D. Builders***), of the specific provisions of the Central Sales Tax Act, 1956 and the critical reasoning process which formed the basis of the observations in para 27 of ***Mahim Patram***, presumably led ***G. D. Builders*** to the clear and palpably erroneous impression/premise that ***Mahim Patram*** lays down a broad principle that a Central legislation bereft of proper computation or valuation provisions would nevertheless be valid on account of existence of supporting/reinforcing, computation/valuation provisions in a State legislation. That however is clearly not the ***Mahim Patram*** *ratio.*
- The Supreme Court ruling in ***All India Federation of Tax Practitioners & Others vs. Union of India***[139] is considered in para 29. The analyses of this judgment provides no guidance to the issue whether a works contract is taxable prior to 01-06-2007 or

[139](2007) 7 SCC 527

computation/valuation provisions are eschewable integers of a valid and operative charging and valuation integrated, scheme of taxation.

- The judgment in ***Association of Leasing & Financial Service Cos.*** is adverted to in para 30, which again provides no assistance to the issues referred for our resolution.
- Paras 31 to 35 deal with exemption/abatement notifications issued under Section 93 of the Act and advert to decisions in ***State of Kerala & Another vs. Builders Association of India & Others***[140]; ***Gujarat Ambuja Cements Ltd. vs. Union of India***[141]; ***Nagarjuna Construction Co. Ltd. vs. Union of India***[142]; and ***Nagarjuna Construction Co. Ltd. vs. Union of India***[143] to conclude that notifications impugned therein are not *ultra vires* provisions of the Act.
- Para 36 sums up the principles the Hon'ble Court distills from its preceding analyses. Relevant for our purposes is the summation set out in items (1) & (2) of this para. The Court states that: *(i) Aspect doctrine is applied for bifurcating/vivisect*(ing) *the composite contract*; and *(ii) Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for computation, it does not follow that no tax is leviable.*

<u>comment</u>:

(1) The rulings in ***Federation of Hotel & Restaurants Association of India*** (1989);***B.S.N.L*** (2006); ***Larsen & Toubro Ltd*** (2013);and ***Kone Elevator India Pvt. Ltd*** (2014) emphatically and conclusively establish the position that the 'aspect doctrine' merely deals with legislative

[140](1997) 2 SCC 183
[141]AIR 2005 SC 3020
[142]2010 (19) STR 321 (A.P)
[143](2013) 1 SCC 721

competence, the principle being; *subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power; There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects; the Centre cannot include the value of goods in the cost of the service;* and *the 'aspect theory' would not apply to enable the value of services to be included in the sale of goods or the price of goods in the value of the service*; and

(2) The rulings in ***Jagannath Baksh Singh*** to ***Tata Sky Ltd.*** consistently enjoin the inexorable and seminal norm, that appropriate computation/valuation provisions and complementary machinery provisions are non-derogable integers of a valid charge and for legitimate levy and collection of tax; and in the absence of proper computation/valuation provisions (which are integral components of a taxing legislation), the charging provision would fail. The distillate of binding precedents leads to the position that, while the measure of tax *per se* would not determine the limits of legislative competence, a taxing legislation may not transgress the distribution of powers limits prescribed by the Constitution and trench upon elements of a composite transaction which stand assigned to another legislative level and tax such prohibited elements on the pretext of the

overreach constituting merely the measure of tax. That would amount to a colourable exercise of legislative powers.

27. In the light of the formidable catena of consistent and binding precedential authority, we respectfully conclude; and are compelled so to do, that the ***G. D. Builders*** conclusions:

i. *that works contract is a taxable service even prior to 01-06-2007(under CICS, COCS & ECIS);*
ii. *that merely because no rules are framed for computation, it does not follow that no tax is leviable;*
iii. *that the measure of the levy per se and in all contexts has no impact on the competence of the legislative exaction; and*
iv. *that a deficit in a Central legislation with respect to computation/valuation provisions is offset by existence of such provisions in a State legislation*,

are contrary to settled and binding expositions of relevant principles *qua* binding precedents which have either not been brought to the notice of the Hon'ble High Court; or the critical analyses whereunder were not sensitized to the Court in the appropriate internal legal and factual matrices of the particular precedents (adverted to by us earlier herein). The ***G. D. Builders*** decision (to the extent of the conclusions set out as (i) to (iv) supra), is thus and with great respect to the formidable weight accorded to a jurisdictional High Court, in error on *per incuriam* and *sub silentio* grounds.

28. The decisions of the Karnataka and Madras High Courts, in ***Turbotech Precision Engineering Pvt. Ltd.*** and in ***Strategic Engineering Pvt. Ltd.*** have clearly concluded that a works contract is not leviable to service tax prior to 01-06-2007. Though, with respect there is not

discernible a holistic analyses of the relevant statutory framework involved nor of the several precedents which support the conclusion recorded (in ***Turbotech*** and ***Strategic***), as is found in the painstaking effort apparent in ***G.D. Builders***, in our respectful view the conclusion that a works contract is defined, charged and is subject to the levy of service tax only w.e.f 01-06-2007 (on insertion of sub-clause (zzzza) in Section 65(105) of the Act), is consistent with the overwhelming catena of binding precedents considered and analysed by us hereinbefore.

29. Before recording our conclusions on issues referred for our resolution, we advert to certain submissions by Revenue, which in our view are not germane to either our jurisdiction to answer the reference or assist determination of the question referred. Revenue (in its written submissions) referred to the following orders/decisions of the Tribunal which followed the ***G.D. Builders*** ruling, subsequent to the reference order dated 09.09.2013. These are:

i) Misc. order dated 20.11.2013 in ***Hindustan Aeronautics Ltd. Vs. Commissioner of Service Tax, Bangalore***[144];
ii) ***MIL Industries Ltd. Vs. Commissioner of Service Tax, Chennai***[145];
iii) Misc. order dated 13.02.2014 in ***Tata Hitachi Construction Machinery Co. Ltd., vs. CST, Bangalore***[146];
iv) Final order dated 31.03.2014 in ***JMC Projects (India) Ltd., vs. Commissioner of Service Tax, Ahmedabad***[147];

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[144] 2013 (32) STR 783 (Tri.-LB)
[145] 2014 (35) STR 74 (Tri. Chennai)
[146] 2014 (35) STR 149 (Tri. Bang.)

v) Final order dated 08.05.2014 in ***CCE, Indore vs. Gopal Enterprises***[148];

vi) Final order dated 26.08.2014 in ***Kalpik Interiors vs. CST, Delhi*** (no citation is provided); and

vii) Final order dated 15.10.2014 in ***Vadhera Builders Pvt. Ltd. Vs. CST, New Delhi*** (no citation is provided);

There are other decisions of this Tribunal rendered prior to the reference to this special Bench, some of which have been brought to our notice. These decisions concluded that a works contract is not taxable prior to 01.06.2007. It is stated at the Bar that there are other decisions which have come to a contrary conclusion. Counsel have referred to the following decisions (tabulated), which ruled that a works contract is not taxable prior to 01-06-2007.

S. No	Case tile and citation
1	B.H.E.L vs. C. Ex & S.T, Dibrugarh – 2008 (10). STR. 218 (Kolkata Bench)
2	Diebold Systems (P) Ltd. vs. CST, Chennai – 2008 (9). STR. 546 (Chennai Bench)
3	Cemex Engineers vs. CST, Cochin – 2010(17).STR.534 (Bangalore Bench)
4	ABB Ltd. vs. CST, Bangalore – 2011(24).STR.199(Bangalore Bench)
5	Khurana Engineering Ltd. vs. C. C. Ex, Ahmedabad – 2011(21).STR.115. (Ahmedabad Bench)

Since there is no earlier decision of a five member Bench which has ruled on the chargeability to service tax of a works contract prior to 01.06.2007, none is brought to our notice, the decisions referred to hereinabove are of

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[147] 2014 (35) STR 577 (Tri. Ahmd.)
[148] 2014 (36) STR 674 (Tri. Del.)

no precedential relevance nor are binding on this special Bench. It is axiomatic that the answer recorded by us in this reference would be the operative precedent on the issue and the rulings contrary to our conclusions herein, stand overruled.

30. We record our appreciation to Learned Senior Counsel Shri. N. Venkatraman, Learned Counsel, Shri. P.K. Sahu, Shri.B.L. Narasimhan, Shri. Puneet Agrawal and to Learned A.R's Shri. Amresh Jain and Shri Govind Dixit, for the valuable assistance provided.

31. Conclusions:

We answer the reference, recording the following conclusions:

A. Neither CICS, COCS nor ECIS, as these services are defined in respective clauses of Section 65, read with the charging provisions in Section 66, the valuation provisions in Section 67 of the Act, the 2006 Rules (prior to insertion of Rule 2-A therein, w.e.f 01-06-2007)) and exemption notification Nos –12/2003-ST, 15/2004-ST, 04/2005-ST and 01/2006-ST, authorize a charge of Service Tax on a works contract (which is a distinct contractual arrangement inhering integrated elements of accretion sale of goods and of exertion of labour/rendition of services);

B. Taxable services defined and enumerated as CICS, COCS & ECIS cover only such contracts/transactions which involve pure supply of

labour or rendition of service(s), falling within the ambit of the respective definitions;

C. Only since the insertion of sub-clause (zzzza) in clause (105) of Section 65, w.e.f 01-06-2007, complemented by the amended 2006 Rules (inserting Rule 2-A therein) and the 2007 Composition Rules, that the requisite and appropriate statutory framework, for charging, levy, collection and assessment of Service Tax, supported by appropriate computation/valuation machinery on a works contract stands incorporated. This framework defines 'works contract' (in the Act) by clearly enacting the legislative recognition that this distinct species of contractual arrangements inheres components of sale of goods which fall within the (exclusive) taxation domain of States, for levy of sales tax;

D. Rule 2-A of the 2006 Rules [applied exclusively to 'works contract' referred to in sub-clause (zzzza)] inserted w.e.f 01-06-2007, mandates specified exclusions/deductions from the gross amount received on execution of a works contract (in terms of the principles/norms particularized and catalogued in the second ***Gannon Dunkerley*** ruling and reiterated in subsequent precedents); and

E. The 2007 Composition Rules, also introduced w.e.f 01-06-2007 (and made explicitly applicable only to WCS),provide an optional composition protocol which enables availment of calibrated deductions, particularly appropriate to situations where proof of the value of sale of

goods by accretion/incorporation cannot be furnished or the nature of the transaction is such as to render the necessary accounting process cumbersome, impractical or inadequate;

F. The enactment of a specific legislative provision – sub-clause (zzzza); and the simultaneously introduced supportive and reinforcing provisions of the 2006 and 2007 Rules (all w.e.f 01-06-2007) signal (1) the enactment of a charge of Service Tax on a works contract; and (2)incorporation of the requisite computation, valuation and machinery provisions, which facilitate a coherent, fair, rational, stable and legitimate exaction of tax, confined to such components/elements of this composite, facially indivisible transaction as fall within the taxation domain of the Union, under Entry 97, List I of the Seventh Schedule of the Constitution of India. Only upon introduction of such integrated statutory architecture, w.e.f 01-06-2007, has uncanalized executive/quasi-judicial discretion been, substantially eliminated; and assessment of service components and associate components/elements involved in the execution of a works contract, by lawful and *intra vires* valuation, levy and collection of Service Tax, ensured to be non-discriminatory and rational; and

G. Consequently, the CESTAT larger Bench decision in ***C.C.E. vs. B.S.B.K. Pvt Ltd***, to the extent it rules that a works contract is a taxable service prior to 01-06-2007 as well is, with respect, declared to be in error; and is overruled.

32. We answer the reference as above. The appeals listed on the board of this special Bench are remitted to the appropriate division Bench, to be heard and disposed of on their respective merits and in the light of the conclusions recorded herein.

(Pronounced on 19.03.2015)

Justice G. Raghuram
President

(Archana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

(P.R. Chandrasekharan)
Member (Technical)

(R. K. Singh)
Member (Technical)

Per: P.R.Chandrasekharan

I have had the pleasure and privilege of going through the elaborate order recorded by the hon'ble President. I have also benefited from a reading of the said order as it has dealt with and explained lucidly several legal concepts involved in the issue for consideration before the Larger Bench. However, with due respects, I am unable to agree with the views expressed and the conclusions drawn in the said order. Therefore, I proceed to record a separate order. Since the background of the

case, the contentions for and against made by the Appellants and the Revenue on the issue under reference have already been discussed in detail in the order recorded by the hon'ble President, I shall not repeat them. However, I shall refer to them as and when required while undertaking the factual and legal analysis. I shall also try to be brief without indulging in any verbosity or legalese.

2. Before I proceed, I consider it necessary to record certain concerns/apprehensions I have about the fruitfulness (or futility?) of the present exercise. The present reference has arisen in view of the conflicting views expressed by three Larger Benches of this Tribunal. In the case of Jyoti Ltd. and Indian Oil Tanking Ltd., two larger benches of this Tribunal held the view that 'a works contract service' is not leviable to service tax prior to 1-6-2007, when a specific entry was introduced in the taxable service list in Budget 2007. However, in BSBK case, another Larger Bench took a contrary view and held that a works contract service can be vivisected and discernible service elements can be subjected to service tax prior to 1-6-2007, provided the services involved are taxable services. The decisions in the Jyoti Ltd. and Indian Oil Tanking case have been challenged by the Revenue before the Supreme Court and the appeals have been admitted in July, 2008 and August, 2010 and have been pending disposal since then. Nothing has been brought on record by either side with respect to the decision in the BSBK case. Therefore, when the hon'ble apex court is seized of the matter, I am not sure what useful purpose would be served by the present larger bench considering the very same matter. Secondly, it is seen that the hon'ble Delhi High Court, on two occasions, has considered the very same matter in the GD Builders and M/s YFC Projects (P) Ltd. case and has taken a view that a works contract can be vivisected and discernible taxable service elements could be subjected to service tax prior to 1-6-2007. This Tribunal being sub-ordinate to both

the apex Court and the High Court would be bound by these decisions. Besides, the issue before the larger bench is not a recurring matter which needs some finality at the Tribunal level. After 1-6-2007, there is no dispute at all pending which needs a resolution. The dispute essentially relates to cases arising during 2004 - 2007 concerning the taxability or other-wise of CICS, COCS and ECIS services involved in a composite contract.

2.1 The second concern I have arises from the fact that after making the present reference to the Larger Bench vide order dated 9-9-2013 and after the pronouncement of the decision in the GD Builders case, various benches of the Tribunal have taken a call on the matter. I shall refer to three such decisions.

(1) *In CCE, Indore vs. Gopal Enterprises [2014 (36) STR 674 (Tri.-Del) decided on 8-5-2014* (much after the present reference was made), the very same issue was considered by a Division Bench comprising of the hon'ble President and hon'ble Member (Technical) (who are also members of the present Larger Bench). The question for consideration in the said case was whether the activity of civil or industrial construction or erection, installation and commissioning, although taxable as works contract service under section 65 (105) (zzzza) of the Finance Act, 1994 with effect from 1-6-2007, was taxable prior to 1-6-2007 under section 65 (105) (zzq) read with section 65(25b). This Tribunal in the said case held as follows:-

> ***"5.*** *There is no dispute that both the respondents during the period of dispute had provided the services of commercial or industrial construction which were taxable at that time under Section 65(105)(zzq) read with Section 65(25b). The respondent's plea is that since w.e.f. 1-6-2007, their activity became taxable as works contract service under Section 65(105)(zzzza), during the period prior to 1-6-2007, their activity would not be taxable.* ***But this plea of the respondent is not acceptable in view of***

> ***judgment of Hon'ble Delhi High Court in the case of G.D. Builders v. Union of India (supra), wherein this very issue has been decided by the Hon'ble Delhi High Court against the respondent.*** *Moreover, the Tribunal also in the cases of Alstom Projects India Ltd. v. CCE reported in 2011 (23) S.T.R. 489 (Tri.-Del.) and Instrumentation Ltd. v. CCE, Jaipur-I reported in 2011 (23) S.T.R. 221 (Tri.-Del.) taken the same view.* ***In view of this, the impugned orders holding that during the period prior to 1-6-2007 the services of civil or industrial construction or erection, installation or commissioning, provided as indivisible works contract were not taxable, are not sustainable.*** *The same are set aside and the orders passed by the original Adjudicating Authority are restored. The appeals are allowed. The cross objections filed by the respondent are also disposed of accordingly."*

(2) In the case of *Kalpik Interiors vs. CST, Delhi [2014 (36) STR 1283 (Tri.-Del)]* another division bench comprising of the hon'ble President and another hon'ble Member (Technical) (who is also a member of the present Larger Bench), considered a question relating to leviability of service tax on 'completion and finishing services in relation to building or civil structure' prior to 1-6-2007 when works contract service was made taxable and held as follows:-

> ***"****11.* ***At this juncture it is pertinent to refer to the appellants' contention and cited case laws that their contracts being composite contracts covered under the scope of works contracts were not liable to service tax prior to 1-6-2007 when works contract service was made taxable. In this regard, it is to state that this contention is rendered untenable by the decision of Hon'ble Delhi High Court in the case of M/s. G.D. Builders (supra) and the case laws cited by the appellants are of the years prior to the year of the said judgments of Hon'ble Delhi High Court. ……."***

After quoting extensively from the Delhi High Court decision in GD Builders case including the several case laws relied upon and cited in the said decision, this Tribunal concluded that,-

> ***"Thus the Hon'ble Delhi High Court judgment in case of M/s. G.D. Builders (supra) is not per incuriam and therefore is good law on the issue."***

Thereafter, the Tribunal proceeded to further hold as follows:-

> ***"12.*** *Needless to say, the classification of service is to be determined as per the definitions of various taxable services prevalent during the relevant period and merely because the classification changes with the introduction of a taxable service under which an existing service gets more specifically covered in no way means that the said service was not necessarily taxable during the period prior thereto. The contents of above reproduced Para 31 of the Delhi High Court judgment in the case of G.D. Builders (supra) has categorically held that :*
>
> *"as per the provisions of Section 65(105)(zzq) and (zzzh), service tax is payable and chargeable on the service element of the contract for construction of industrial and commercial complexes and contract for construction of complexes and in case of composite contract, the service element should be bifurcated and ascertained and then taxed". The Hon'ble High Court in the same para goes further to add that :*
>
> ***"the contention that there was/is no valid levy or the charging section is not applicable to composite contracts under clause (zzq) and (zzzh) of Section 65(105) stands rejected." Needless to say these are not obiter dicta; these are the distillates of proper analysis of the legal provisions and therefore constitute an integral part of the judgment (decision) in the said case."***

(3) One more decision where ratio of GD Builders was followed pertains to a decision by a Larger Bench presided over by the hon'ble President in the case of Hindustan Aeronautics Ltd. vs. CST, Bangalore [2013 (32) STR 783 (Tri.-LB)]. The question referred to the Larger Bench in the said case whether benefit of notification No. 12/2003-ST is confined to sale of goods, excluding "deemed sale". The Larger Bench declined to answer the reference on the ground that the issue already stands settled by the decision of the Delhi High Court in the GD Builders case.

2.2 After consistently holding that the GD Builders decision is not *per incuriam* and is a good law, that too, after making the present reference, can the Tribunal take a different view now and perform a judicial somersault ? The frequent change of views by the Tribunal only adds to the uncertainty and might impact the institutional integrity. I find that there are no changes in circumstances either by way of any retrospective change in law

or a decision of a higher authority warranting a change in view. I should make it clear that it is not my intention to embarrass any one, least of all my brother Members, all of whom I hold in high esteem. My only object is to place a note of caution that we should not be hasty in drawing conclusions/passing orders which has the effect of upsetting the settled positions in law, which are, in any case, under challenge and consideration before the highest court of the land. In my humble view, not only the legality but also the propriety of rendering a decision is equally important and should weigh.

3. With these reservations, I now proceed to express my views on the question posed before the Larger Bench. The decision to constitute the Larger Bench vide order dated 9-9-2013 was challenged by the Revenue before the High Court of Delhi in CEAC 94/2014 on the ground that the issue referred to the larger bench had already been resolved and decided by the decision dated 24th November, 2013 in G.D. Builders and Others vs. Union of India and Another reported in [(2013) 32 STR 673 (Del.)]. While disposing of the said petition vide order dated 11-11-2014, under a consensus reached between the ld. Addl. Solicitor General appearing for the Revenue and the ld. Senior Counsel for the assessee, Larsen & Toubro Ltd., the hon'ble High Court directed that the 5 member larger bench can examine as a preliminary issue whether the question raised is covered by the G.D. Builders case and in case the question raised is covered, then the matter can be closed. However, as urged by the ld. Senior Advocate for the assessee, there are conflicting views expressed by the Karnataka and Madras

High Courts and the said contention can also be raised before the Tribunal and appropriate direction/order can be passed.

3.1 It is necessary at this juncture to see what were the issues for consideration before the Delhi High Court in the G D Builder's case and the rationale for the decision thereon. The issues raised by the appellants in the said case were crystallized in para 2 of the said order dated 24-11-2013 as under:-

> *"(i) Service tax levied from time to time by Finance Act, 1994 and subsequent amendments is in exercise of power under residual entry 97 of List I of the Seventh Schedule of the Constitution of India. It is levied on taxable service as defined in Section 65(105) read with definition clauses.*
>
> *(ii) Service tax is applicable only in respect of service element and the Central Government does not have any power under the residual entry to impose tax on entries under List II of the Seventh Schedule of the Constitution.*
>
> *(iii) The Parliament cannot impose service tax on material or goods used in execution of works/composite contract. Central Sales Tax is payable and levied on material used in "works contract" with effect from 11th May, 2002 after amendment of the Central Sales Tax Act, 1956 vide Finance Act, 2002.*
>
> *(iv) The "composite or works contracts" are excluded from the ambit of levy of service tax under Section 65(105)(zzq) and (zzzh).*
>
> *(v) Section 65(105)(zzq) and (zzzh) apply only to "service contracts" and not to "composite or works contract", therefore, exemption under notification to the extent of 67% to set off value of the goods involved in execution of "composite contract" is contrary to the charging provision and a nullity, as it amounts to enlarging and widening of charging section and would have the effect of including or imposing service tax even on goods or material used in a "composite/works contract". It is well settled that a notification cannot expand or enlarge the charging section or even amend the statutory provisions or the main enactment.*
>
> *(vi) The exemption notifications by which 67% of the contract value in a "composite contract" is abated has the effect of imposing service tax on "composite or works contract" which is not covered by the main statutory provision. Thus, what is not covered and cannot be covered by the principal enactment, have been covered and brought under the service tax ambit by the explanations appended to the notifications. Thus, abatement granted in the notifications is invalid and contrary to main enactment. The said argument is equally applicable to column 4 of serial numbers 5, 7 and 10 of the 2006 notification.*
>
> *(vii) As per Section 93 of the Finance Act, 1994, the Central Government is empowered to grant exemption from levy of service tax either wholly or in*

part but as "composite contracts" and "works contracts" are not covered under Section 65(105)(zzq) or (zzzh) Central Government cannot grant exemption by way of notification.

(viii) Service tax has been imposed on services involved in execution of "composite/works contract. only with effect from 1st June, 2007 under Section 65(105)(zzzza). Rule 2A of Service Tax (Determination of Value) Rules, 2006 determines value of services involved in "works/composite contracts" and it is levied @ 2%, enhanced to 4% with effect from 1st March, 2008. The said levy is not applicable to "services" covered under Section 65(105)(zzq) and (zzzh).

(ix) There is a conflict between Section 65(105)(zzzza), (zzq) and (zzzh) and what is covered by Section 65(105)(zzzza) cannot be covered by Section 65(105)(zzq) and (zzzh). The two sets of provisions cannot co-exist. Subsequent legislation shows that the earlier legislation will not cover "composite or works contract."

(x) Section 66 is the charging section and provisions of Section 67 are the valuation provisions. Value of taxable services under Section 67 is the gross amount charged by the service provider for such "services provided or to be provided.. Service tax can be charged only for the specified "taxable services" as defined in sub-clauses of Section 65(105). Tax can be only on the value of services and not beyond. There is no provision for a notional value or to enable the authorities to reduce or subtract value of material or goods. The gross amount charged or the value of service cannot include value of goods and material supplied/used.

(xi) Vagueness or uncertainty makes a levy invalid and illegal."

3.2 The hon'ble High Court examined at great length – (1) the legislative history of service tax; (2) the various statutory provisions governing service tax; and(3) the decisions rendered in the following cases, namely:-

1. All India Federation of Tax Practioners & Ors. Vs. Union of India (2007-TIOL-149-SC-ST)

2. Association of Leasing and Financial Service Companies vs. Union ofIndia (2010-TIOL-87-SC-ST- LB)

3. CIT v. B.C. Srinivasa Setty (2002-TIOL-587-SC-IT- LB)

4. *Delhi Chit Fund Association Vs. Union of India (2013-TIOL-331-HC-DEL-ST)*

5. Federation of Hotel and Restaurant Assn. of India v. Union of India (2002-TIOL-699-SC- MISC)

6. *Gannon Dunkerley and Co. vs. State of Rajasthan (2002-TIOL-103-SC-CT)*

7. Govind Saran Ganga Saran v.CST (2002-TIOL-589-SC-CT)

8. Gujarat Ambuja Cements Ltd. vs. Union of India (2005-TIOL-53-SC-ST)

9. Home Solutions Retail (India) Ltd. vs. UOI & Anr.(2011-TIOL-610-HC-DEL-ST-LB)

10. Intercontinental Consultants & Technocrats Pvt. Ltd. Vs. Union of India (2012-TIOL-966-HC-DEL-ST)

11. K. Raheja Development Corpn. Vs. State of Karnataka (2005-TIOL-77-SC-CT)

12. *Larsen & Toubro Limited versus State of Karnataka,* Civil Appeal No.8672 /2013 *-(2013-TIOL-46-SC-CT- LB)*

13. Nagarjuna Construction Co. Ltd. vs. Union of India and Anr. (2012-TIOL-107-SC-ST)

14. Nagarjuna Construction Company Ltd. Vs. Union of India (2010-TIOL-403-HC-AP-ST)

15. State of Kerala & Another Vs. Builders Association of India and Others (2002-TIOL-602-SC-CT)

16. Tamil Nadu Kalyana Mandapam Assn. vs. UOI and Ors. (2004-TIOL-36-SC-ST)

3.3 On the strength of the factual and legal analysis undertaken, findings and conclusions were arrived at which was summarized in para 36 as under:-

"36. The aforesaid judgments and discussion highlight the following facets/principles:

(1) After 46th Amendment to the Constitution, composite contracts can be bifurcated to compute value of the goods sold/supplied in contracts for construction of buildings with labour and material.

The service portion of the composite contracts can be made subject matter of service tax. Aspect doctrine is applied for bifurcating/vivisect the composite contract

(2) Service tax can be levied on the service component of any contract involving service with sale of goods etc. Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for computation, it does not follow that no tax is leviable.

(3) The notifications in question are in alternative and optional. An assessee may take advantage or benefit of the notifications, but cannot be compelled to pay service tax on the proportion or value of a composite contract as per the notification. This is because the formula framed by way of delegated legislation is presumptuous and based on assumption.

(4) However, if an assessee wants to take benefit of the notification, he must comply and adhere to the terms and conditions stipulated as per the notification.

(5) An assessee to claim benefit or advantage as per a notification must meet the preconditions or stipulations stated therein. An assessee cannot take benefit or advantage of a part of a notification but claim that the other part of the notification should be ignored and thus not acted upon. Notification has to be applied in entirety.

(6) Notification has to be read as a whole keeping in mind its objective and purpose. Notification may provide a convenient, hassle free and adopt a non-discretionary formula for computing value of the service element in a composite contract. This curtails litigation, ambiguity, ensures clarity and consistency. A notification cannot be declared as invalid or ultra vires for this reason, provided it is optional.

(7) Authorities cannot compel and force an assessee to accept the notifications in question and pay tax accordingly, as seeking coverage under the notification is voluntary. An assessee can state that the service component of a composite contract should be computed in a fair and reasonable manner and accordingly taxed.

(8) The notifications meet the tests laid down under Section 93 and 94 of the Act because they relate to manner and mode of computation of service tax in a composite contract. The object and purpose is not to tax as non-service element or to include non-taxable part of the composite contracts.

(9) It has not been shown and established that the formula or the value prescribed in the notifications is absurd or irrational. The said notifications are not per se an arbitrary exercise and contrary to data or formula for computing service element. In taxation matters, classification should not be struck down as discriminatory unless there are strong and compelling reasons that show absurdity and, therefore, violation of Article 14 of the Constitution."

3.4 It would be relevant to note that an identical issue came up for consideration before another bench of the Delhi High Court in M/s YFC Projects (P) Ltd. vs. Union of India and after considering its earlier decision in the G D Builder's case, the High Court came to the conclusion that service elements of a composite contract can be subjected to service tax even prior to 1-6-2007. The relevant portion is extracted below:-

"14. Considering the arguments raised by counsel for the parties and having gone through the impugned provisions, we feel that the manner in which the Division Bench has read the said provisions in order to decide as to whether the notifications in question were intra vires the said provisions or not have adequately addressed the issue which is sought to be raised by the petitioners herein. The Division Bench has clearly and categorically interpreted the said provision as imposing service tax only on the service component of the composite contracts which fall under the impugned provisions. The Division Bench in G.D. Builders (supra) held that it is the service portion of the composite contract which alone could be made the subject matter of service tax and that the aspect doctrine would be applicable for bifurcating/vivisecting the composite contract into its service component and sale of goods component. While the sale of goods would be taxable under the authority of the State Legislature, the service component would be taxable by virtue of Parliamentary legislation which includes the Finance Act, 1994. It was further observed in G.D. Builders (supra) that the computation of the service component was only a matter of detail and not a matter relating to the validity of imposition of service tax. It was also observed that the notifications which were impugned before it were in the alternative and optional and it was for the assessees to take advantage or benefit of the said notifications , if the assessees so desired. However, it was also made clear that the assessee cannot be compelled to pay service tax on a proportion or value of a composite contract as per the notification.

15. ***On going through the impugned provisions, we do not find any encroachment by Parliament on the powers of the State Legislature to impose a tax on the sale of goods. The provisions clearly relate only to the service component of the composite contracts referred to in the impugned provisions.***

16. The grievance of the petitioner with regard to assessment and computation cannot be equated with the challenge to the constitutional validity of the impugned provisions. It is open to the petitioner to raise issues of computation before the appropriate Adjudicating Authority/Appellate Authority and demonstrate the extent to which service tax can be imposed on the services that are provided by them. To be clear, it is open to the petitioner to demonstrate the extent of the service element included in the composite contract and to pay service tax only on that component.

17. ***The Division Bench in G.D. Builders (supra) has already interpreted the impugned provisions and has taken the view that it is only the service element which is to be taxed under the impugned provisions. We agree with that view.*** *As such, there is no encroachment by Parliament on the exclusive powers of the State Legislature in respect of Entry No.54, List II and, therefore, the said provisions are constitutional. The computation of service tax is, of course, left to the Adjudicating Authority/Appellate Authority."*

3.5 In my opinion, the above decisions are binding on this Tribunal. To drive home this point, I quote from a decision of the hon'ble Apex Court

in *State of Punjab and Ors. Vs. Gurudev Singh, Ashok Kumar [1991 AIR 2219]* wherein it was held that,-

> ***"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."***
>
> ……
>
> *[See: Administrative Law 6 th Ed. P.352] Prof. Wade sums up these principles:*
>
> *"**The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances.** The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. **In any such case the 'void' order remains effective and is, in reality, valid.** It follows that an order maybe void for one purpose and valid for another, and that it may be void against one person but valid against another."*

3.6 In my considered view, the Tribunal being sub-ordinate to the High Court in the judicial hierarchy cannot sit in judgment on the correctness of a decision passed by the High Court notwithstanding the liberty granted. The liberty granted is conditional, that is, the larger bench has to consider first as to whether the decision in the GD Builder's case covers the issue before it and if so, the matter shall be closed.

4. Be that as it may, I now proceed to examine the rival contentions.

The ld. Senior Counsel for the appellant submits that the decision of the Delhi High Court is not a binding precedent for the following reasons:-

(a) it is based on a concession made by the Taxpayer appellant;

(b) It is *per incuriam*;

(c) Decisions of the Karnataka High Court and Madras High Court contradict the ratio laid down in G D Builder's case.

4.1 Now let us examine each of these contentions. As regards the argument that the decision in GD Builders case was given by way of concession, I agree with the hon'ble President that no case has been made out by the appellant in this regard. I would like to only add that by picking up one or two sentences here and there, one cannot come to the conclusion that the decision has been rendered on a concession. The observations of the hon'ble apex court in the case of *Dir. Of Settlements, A.P. & Ors vs M.R. Apparao & Anr.,* in Civil appeal No. 2517 of 1999 decided on 20-03-2002, clarifies the position:-

> *"Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts.* ***It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence****. To determine whether a decision has 'declared law' it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision.* ***A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered.*** *An 'obiter dictum' as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be denied that it is of considerable weight.* ***The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case.*** *……..The decision made on concession made by the parties even though the principle consisted was accepted by the Privy*

Council without discussion cannot be given the same value as one given upon a careful consideration of the pros and cons of the question raised. ***The aforesaid observation indicates the care and caution taken by the Court in the matter and therefore, merely because the pros and cons of the question raised had not been discussed the judgment of this Court cannot be held to be not a law declared."***

4.2 If we apply the above principle to the facts of the case before us, can it be said that the decision of the hon'ble High Court in G D Builder's case is a decision on concession? In my considered opinion, such a proposition would amount to mocking at the said decision. The hon'ble High Court has examined the issue before it at great length, analysed the provisions of law, considered the various binding precedents on the matter and thereafter, passed a detailed order. To contend that such a decision is based on concession would be an affront to common sense. It is also worth-remembering that the ratio of the G D Builders case was followed by another bench of the hon'ble High Court and by several benches of this Tribunal including a Larger Bench. Therefore, this proposition advanced by the ld. Counsel for the appellants has to be rejected outright.

4.3 The next question is whether the decision in the G D Builders case is *per incuriam.* The concept of *per incuriam* has been lucidly explained by the apex court in several judgments. For our present purposes, reference to two decisions would suffice. In Punjab Land Development ... vs Presiding Officer, Labour [1990 SCR (3) 111, 1990 SCC (3) 682], the hon'ble court explained the concept as follows:-

"Per Incuriam means through inadvertance. A decision can be said generally to be given per incuriam when the Supreme Court has acted in ignorance of its own previous decision or when a High Court has acted in ignorance of a decision of the Supreme Court. The problem of judgment per incuriam when actually arises, should present no difficulty as the Supreme Court can

lay down the law afresh if two or more of its earlier judgments cannot stand together."

In A.R. Antulay case [12 AIR 1980 SC 541], the hon'ble apex court observed thus:-

"Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

4.4 The argument advanced by the ld. Counsel for the appellants is that the decision in GD Builders case should be considered as *per incuriam* in as much as several decisions which should have been placed before the High Court was not so placed and therefore, in view of the lack of assistance from the counsels in the said case, the hon'ble High Court committed an error. I find this argument to be quite strange. In spite of the lack of assistance from the Counsels, while giving the findings in the said case, the hon'ble High Court considered 14 decisions (11 of the Supreme Court and 3 of the Delhi High Court) and examined each one of them at great length and came to the conclusions recorded therein. Each one of the cases considered were very relevant for rendering decisions on the issues involved. After examining the ratio decidendi laid down in those decisions, the hon'ble high court came to the conclusion that a composite works contract can be vivisected and the discernible service elements could be subjected to service tax if such services are taxable services, even prior to 1-6-2007, when some of the composite services were grouped under "works contract" category. The contention that such a decision is *per incuriam,* to put it mildly, borders on perversity. The decision in the G D Builders case has neither been passed inadvertently nor in ignorance of the various judicial pronouncements of the apex court on the subject matter. It is also relevant to note here that in the Kalpik Interiors case (supra), a Division Bench of

this Tribunal also found that the decision in the G D Builders case is not *per incuriam* and is a good law. In my view, only a court of higher status can set aside the said decision. Even a court of equal status, if it wants to disagree with the decision, should refer the matter to a larger bench. The ratio of the decision in *State of Punjab and Ors. Vs. Gurudev Singh, Ashok Kumar (supra)* applies. Therefore, this contention, fails miserably.

4.5 An argument has been advanced by the appellant that there are conflicting decisions of the Karnataka and Madras High Courts on the same/similar issue and therefore, the decision of the Delhi High Court cannot said to be final and binding. I have perused these decisions. As regards the decisions of hon'ble High Court of Karnataka in the case of CST vs. Turbotech Precision Engg. Pvt. Ltd. (supra) and of Madras in the case of Strategic Engg. Pvt. Ltd. (supra), the facts obtaining in those cases are completely different and hence distinguishable. In the Turbotech case, the contention of the department was that the activity of development, design review, installation and commissioning and technology transfer would be leviable to service tax under the category of "consulting engineer's services". The High Court noted that during the relevant period, that is, prior to 2006, the definition of consulting engineer did not include in its scope, such services rendered by "a body corporate or any other firm". Since the appellant was a body corporate, the engineering consultancy rendered by M/s Turbotech was held as not falling within the ambit of consulting engineer’s service. It is relevant to note that consulting engineer’s service never came within the ambit of “works contract service” either before or after 1-6-2007. Therefore, the question of the hon’ble High Court giving any finding about the vivisection of a works contract do not arise at all. A careful reading of the said decision makes it very clear that divisibility of a works contract was not at all an issue for consideration in the said case.

4.6 Similarly, in the case of Strategic Engineering, the appellant therein was engaged in the manufacture of FRP Pipes, falling under Chapter No.7014.00 of the Central Excise Tariff. The petitioner company also carried out the business of laying of GRP Pipes to its customers from whom it received labour charges. The GRP Pipes were laid inside the trench in the case of underground-buried construction. The buried pipe laying activity involved trenching, bedding and laying inside the trench and aligning appropriately. The pipe lowering into the trench was executed by two men using ropes and anchored to stakes. Erection of pipes involved connecting the laid pipes and subjecting the pipes to carry fluids. This activity was done by the customers themselves as per their own needs and requirements. The petitioner was issued a show cause notice, dated 30.05.2005, demanding service tax under following categories:-

(a) 'Erection, Commissioning and installation service' for receipt of labour charges for erection and laying of pipes; and

(b) 'Scientific or Technical Consultancy' service in respect of the services rendered to its non-resident clients.

After considering the rival contentions, the hon'ble high court held that,-

> *"13. Thus, the plumbing, drain laying or other installations for transport of fluids etc., was included in the definition of 'erection commissioning or installation', for the first time, on 16th June 2005."* (that is, for the period after the issue of show cause notice and hence not covered by the show cause notice)

The hon'ble High Court also took into account the additional ground urged by the appellant that the said activity came under the category of 'works contract services' taxable with effect from 1-6-2007 and concluded that,-

> *"17. The facts stated herein above prove beyond doubt, that the demand raised against the petitioner is not sustainable law, as the period for which the demand has been raised does not cover the services of the petitioner for imposition of service tax."*

The question whether a works contract can be vivisected and subjected to service tax was not an issue for consideration before the hon'ble high court. Therefore, the said decision has no relevance to the issues considered in the GD Builders case. If that be so, how can anyone say that the decision was contrary to the GD Builders decision ?

4.7 To buttress my argument, I shall quote certain passages from the decision of the hon'ble Apex Court in CCE, CALCUTTA V ALNOORI TOBACCO PRODUCTS [2004-TIOL-85-SC-CX] in Civil Appeal Nos. 4502-4503 of 1998.

> *"11. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. ……."*
>
> *12. In Home Office v. Dorset Yacht Co. [1970 (2) All ER 294] Lord Reid said, "Lord Atkin's speech…… is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board [1972 (2) WLR 537] Lord Morris said :*
>
> *"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. "*
>
> *13. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.*
>
> *14. The following words of Lord Denning in the matter of applying precedents have become locus classicus :*

> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*
>
> *"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches, else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."*

In the light of the principle discussed above, it cannot be said that any contrary view (to GD Builders case) was expressed either by Karnataka High Court or by the Madras High Court. **In other words, the ratio decidendi of the G D Builders case stands uncontroverted as of now and therefore, the same is binding on all sub-ordinate courts including this Tribunal** (irrespective of the strength of the bench which hears the matter).

5. Before I proceed to deal with the main issue of divisibility of a works contract for the purpose of levy of service tax prior to 1-6-2007, I would like to dispose of a contention raised in respect of valuation. The contention taken is that prior to 1-6-2007, there was no machinery provision prescribed for computation of tax on the service element comprised in a composite contract and in the absence of a machinery provision, the levy of service tax on a composite contract involving supply of goods and supply of labour is not legally tenable. I do not find any merit in this argument. There are four important and integral elements in a tax law. They are,- 1) taxable event (the activity which attracts the tax liability); 2) the rate of tax; 3) the measure of tax; and 4), the person liable to pay tax. Once these four elements are present, the validity of a tax law would be beyond any legal challenge. As far as service tax levy in India is concerned, these four elements are contained in Sections 65 (105) which defines the taxable service (taxable event), Section 66 which imposes the levy and prescribes the rate of tax, Section 67 which provides

the measure of tax and Section 68, which determines the person liable to pay tax. The sections referred to are sections of Chapter V of the Finance Act, 1994. Therefore, there cannot be any sustainable legal challenge to the levy of service tax.

5.1 Section 67 of the Finance Act provides for the measure of service tax and stipulates that the measure of tax is the gross amount charged by the service provider for the services rendered. It, therefore, follows that in the case of a composite contract which involves supply of goods as well as supply of services, the value of the goods supplied has to be excluded from the value of the composite contract so as to determine the value of services rendered and to arrive at the measure of tax. This issue was also considered by the hon'ble Delhi High Court in the G D Builders case in paras 18 & 19 of the order and the observations of the hon'ble court are reproduced below:-

> *"18. Service tax in the facts in question has been imposed in three stages. In the first stage, service tax was imposed on construction of industrial and commercial complexes. In the second stage, service tax was imposed on residential complexes of 12 or more residential units and in the third stage, service tax was imposed on works contracts of any nature except for the exclusion in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. Each provision or levy has its own scope and ambit, while the first two provisions were primarily specific and targeted, the third inclusion i.e. works contract is very broad and wide term and will include within its ambit and scope construction of industrial and commercial complex or construction of residential complexes as specified. Introduction and imposition of service tax on works contract by Finance Act, 2007 does not mean that we have to read down, the scope and ambit of the provisions enacted levy tax on contracts relating to "commercial and industrial construction. service or "construction of (residential) complexes" services as specified by Finance Act 2004 and Finance Act 2005 respectively. The new levy imposed by Finance Act 2007 does not indicate or show that works contract relating to "construction of industrial and commercial complexes" or "construction of (residential) complexes" as specified, would be only applicable when the contractor was providing labour or service and was paid for the same and not to composite contracts when the contractor was providing labour/services as well as goods used for construction of industrial and commercial complexes or residential complexes as specified. It would cover any and every contract, when the contractor was only supplying labour or undertaking construction services, whether with or without supply of material, i.e. composite contract. The levy is valid when the provisions of*

Section 65(105)(zzh) and 65 (105)(zzq) of the Act are satisfied. The only condition and requirement is that the service tax should be levied and imposed on the "service" element and not levied and charged on material or goods used, as the power to levy sales tax or value added tax on the sales of goods is with the State Governments.

19. The said legal principle is no longer res-integra, as the principle and concept underlining service tax was highlighted and stands elucidated by Full Bench of this court in Home Solutions Retail (India) Ltd. vs. UOI & Anr. 182 (2011) DLT 548 (FB) **=** *(2011-TIOL-610-HC-DEL-ST-LB), wherein after referring to several judgments, following propositions were set out:-*

"52. From the aforesaid pronouncements in the field, the following principles regarding service tax can be fruitfully culled out:

(i) The measure of taxation does not affect the nature of taxation and, therefore, the manner of quantification of the levy of service tax has no bearing on the factum of legislative competence.

(ii) Taxable services can include providing of premises on a temporary basis for organizing any official, social or business function but also other facilities supplied in relation thereto.

(iii) Levy of service tax on a particular kind of service cannot be struck down on the ground that it does not conform to a common understanding of the word "service" as long as it does not transgress any specific restriction embodied in the Constitution.

(iv) Service tax is a levy on the event of service.

(v) The concept of service tax is an economic concept.

(vi) "Consumption of service" as in case of "consumption of goods" satisfies human needs.

(vii) Service tax is a value added tax which, in turn, is a general tax applicable to all commercial activities involving provision of service.

(viii) Value added tax is a general tax as well as destination based consumption tax leviable on services provided within the country.

(ix) The principle of equivalence is in-built into the concept of service tax.

(x) The activity undertaken in a transaction can have two components, namely, activity undertaken by a person pertaining to his performance and skill and, secondly the person who avails the benefit of the said performance and skill. In the said context, the two concepts, namely, activity and the service provider and service recipient gain significance."

5.2 The hon'ble High Court also examined the provisions of notification nos. 15/2004-ST, 18/2005-ST and 1/2006-ST providing abatement in the

taxable value of specified services which entailed both supply of goods as well as services. Thereafter, in para 36, the high court concluded as follows:-

> *"(2) Service tax can be levied on the service component of any contract involving service with sale of goods etc. Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for computation, it does not follow that no tax is leviable.*
>
> *(3) The notifications in question are in alternative and optional. An assessee may take advantage or benefit of the notifications, but cannot be compelled to pay service tax on the proportion or value of a composite contract as per the notification. This is because the formula framed by way of delegated legislation is presumptuous and based on assumption.*
>
> *(4) However, if an assessee wants to take benefit of the notification, he must comply and adhere to the terms and conditions stipulated as per the notification.*
>
> *(5) An assessee to claim benefit or advantage as per a notification must meet the preconditions or stipulations stated therein. An assessee cannot take benefit or advantage of a part of a notification but claim that the other part of the notification should be ignored and thus not acted upon. Notification has to be applied in entirety.*
>
> *(6) Notification has to be read as a whole keeping in mind its objective and purpose. Notification may provide a convenient, hassle free and adopt a non-discretionary formula for computing value of the service element in a composite contract. This curtails litigation, ambiguity, ensures clarity and consistency. A notification cannot be declared as invalid or ultra vires for this reason, provided it is optional."*

5.3 The hon'ble President in his order has referred to the decisions in the case of B.C. Srinivasa Setty, Govind Saran Ganga Saran and K. Damodarasamy Naidu & Bros. to come to the conclusion that valuation/computation provisions are sine qua non for operability of the charging section. The Delhi High Courtin the G D Builders case has referred to the decisions in two cases, namely, Srinivasa Setty and Govind Saran Ganga Saran while examining the applicability in Mahim Patram's case and thereafter, came to the conclusion that section 67 provides for the measure of the levy in respect of service tax as per which the gross amount charged

for the services provided is the measure. In all the above three cases, the measure of levy was to be provided through rules to be made in this regard and since the rules were not framed, it was held that the charge was invalid. That is not the factual situation obtaining in the present case before us. Section 67 is a complete code in itself as regards the measure and any rules framed for quantification of tax is subject to the provisions of section 67. In other words, section 67 is the main provision for determination of measure and not the rules, which are sub-ordinate to the said section. Thus the ratio of the above three decisions has no application whatsoever to the facts of the case before us. The ratio of Al Noori Tobacco Products case shall apply in this regard.

5.4 An identical question arose for consideration before the hon'ble Apex Court in *Associated Cement Co. Ltd. vs. Commercial Tax Officer [1981 AIR 1887]* and the hon'ble court held that,-

> *"It is settled law that a distinction has to be made by court while interpreting the provisions of a taxing statute between charging provisions which impose the charge to tax and machinery provisions which provide the machinery for the quantification of the tax and the levying and collection of the tax so imposed. While charging provisions are construed strictly, machinery sections are not generally subject to a rigorous construction.* ***The courts are expected to construe the machinery sections in such a manner that a charge to tax is not defeated."***

5.5 Similarly in the case of *Assistant Collector of Central Excise vs. National Tobacco Co. of India Ltd. [1972 AIR 2563], the hon'ble Supreme Court* held that, **in a situation where no assessment took place for the reason of non-ascertainment of duty due to deficiency in quasi-judicial procedure, it can be made good with the use of the implied power in conjunction with the established rule of construction that power to do something essential for the proper and effectual performance of the work which the statute has in**

contemplation may be implied. It was held that in that case that the basic principle is that the Courts must endeavour to ascertain the legislative intent and purpose, and then adopt a rule of construction which effectuates rather than one that may defeat these.

5.6 A similar issue came up for consideration before the hon'ble Apex Court in the case of *C.W.T. vs. Sharvan Kumar Swarup & Sons 1994 SCC (6) 623*. The question before the Court was whether Rule 1BB of the Wealth Tax Rules, 1957 is a provision which affects and alters the substantive rights or is merely procedural and whether the Rules is attracted to all the proceedings pending at its enactment. The said Rule 1BB was concerned with mode of valuation of a house property wholly or mainly used for residential purposes, for the purposes of ascertaining the net wealth under the Wealth Tax Act, 1957. The hon'ble apex Court in that context held as follows:-

> *"10. The basis of distinction between statutes affecting rights and those affecting merely procedure is well-recognised. Dixon, C.J. in Maxwell v. Murphy drawing upon the following words of Lord Justice Mellish in Republic of Costa Rica v. Erlanger said:*
>
> *"No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changes, provided, of course, that no injustice is done."*
>
> *11. In WH. Cockerline & Co. v. IRC10, Lord Hanworth quoted with approvals following passage from the judgment of Sargent, L.J.:*
>
> *"The liability is imposed by the charging section, namely, Section 38 the words of which are clear. The subsequent provisions as to assessment and so on are quantified and when quantified to be enforced against the subject, but the liability is definitely and finally created by the charging section and all the materials for ascertaining it are available immediately."*
>
> *12. In, Halsbury's Laws of England (Fourth Edn., Vol. 23, para 29), referring to the machinery provisions it is stated:*
>
> *"It is important to distinguish between charging provisions, which impose the charge to tax, and machinery provisions, which provide the machinery for the quantification of the charge and the levying and collection of the tax in*

respect of the charge so imposed. Machinery provisions do not impose a charge or extend or restrict a charge elsewhere clearly imposed."

13. The distinction between substantive law and procedural provisions has been indicated in Black's Law Dictionary (Sixth Edn., p. 1203) as follows:

"As a general rule, laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are substantive laws' in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are 'procedural laws'."

14. In Salmond's Jurisprudence (Twelfth Edn., p. 462), the distinction between substantive law and law of procedure is indicated in the following words:

"What then, is the true nature of the distinction? The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions - jus quod ad actions pertinent - using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject matter. Substantive law is concerned with the ends which the administration of justice seeks. Procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated.

'…….. What facts constitute a wrong is determined by the substantive law; what facts constitute proof of a wrong is a question of procedure.

'…….. So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other. "

The hon'ble apex Court further held that,-

"a distinction has to be made by Court while interpreting the provisions of a taxing statute between charging provisions which impose the charge to tax and machinery provisions which provide the machinery for the quantification of the tax and the levying and collection of the tax so imposed. ***<u>While charging provisions are construed strictly, machinery sections are not generally subject to a rigorous construction. The courts are expected to construe the machinery sections in such a manner that a charge to tax is not defeated."</u>***

5.7 A machinery provision in a fiscal statute should be so interpreted as to make the charging provision of that statute effective is now well settled. In K. P. Varghese v. I.T.O. Ernakulam and Another - Bhagwati, J. (as His Lordship then was) referring to various passages of Lord Denning and

Learned Hand, has elaborately explained the principle of progressive construction of statutes in these words :-

> *"..... The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formula because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the Legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and, as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity". We can do no better than repeat the famous words of Judge Learned Hands when he said :*
>
> *"..... it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable source of interpreting the meaning of any writing; be it a statute a contract or anything else. But, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."*
>
> *"..... the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate re-course to the setting in which all appear, and which all collectively create."*

5.8 From the above decisions, it is crystal clear that there cannot be any challenge whatsoever to the levy of service tax, merely because there are no machinery provisions to compute or quantify the amount of tax. In my considered view section 67 itself provides the measure of the levy. Further there are several exemption notifications such as 12/2003-ST, 15/2004-ST and 1/2006-ST which provide for an alternative, optional, hassle free method of quantification of the tax liability subject to satisfaction of conditions stipulated therein.

5.9 Since 2004, the provisions of Cenvat Credit Rules, 2004, have been made applicable to service tax also. As per these provisions, duties/taxes paid on inputs (goods used in rendering of services) and input services (services used for rendering of services) are available as credit for payment

of service tax on the output service. The tax credit mechanism is a significant means of determination of value addition, both in respect of supply of goods as well as supply of services. The tax credit mechanism ensures that the tax on the output service is charged only on the value addition involved on account of rendering of service. Therefore, even in the absence of a specific machinery provision, the value of the service rendered is automatically captured through the Cenvat credit mechanism.

5.10 The three taxable services involved in the present dispute are ECIS, CICS and COCS. Sales tax /VAT is leviable on the sale value of goods involved in the works contract involving these services either on actual basis or composition basis ias per the various State ST/VAT laws. Therefore, the value of goods supplied in a composite works contract is well known or determined. From the total value of the composite contract, if the value for the supply of goods is deducted, the remainder would be the value of the service component. Therefore, at the practical level of implementation, there is absolutely no difficulty in determination of value of service rendered. Therefore, the argument of lack of machinery provision for determination of tax liability is only a figment of imagination and has no practical relevance. Therefore, the challenge to the levy on this ground is clearly unsustainable and I hold accordingly.

6. Now I come to the main issue which is, whether a works contract can be vivisected and subject to service tax prior to 1-6-2007. It is necessary at this juncture to understand the concept of a works contract and the difference between a contract for work and a contract for sale. There cannot

be a better authority to understand this concept than the Sixty-First Report of the Law Commission of India, (published in May 1974). In Chapter I A dealing with "Taxability of Works Contracts", paragraph 7, the Commission states as follows:-

'Difference between "works and sale"

1A.7. The primary difference between ***a contract for work (of service)*** *and a contract for the sale of the goods is that in the former there is in the person performing the work rendering a service, no property in the thing produced as a whole, even if part or even whole of the materials used by him may have been his property. Eventually the property passes; in the generality of building contracts, the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement, and in consideration therefor, he should receive the payment as provided therein. There is, in such agreement, neither a contract to sell the materials used in the construction, nor does property pass therein as movables. The materials pass to the owner of the building as an accretion to the building. A contract for the sale of materials cannot be implied from such an agreement.*

1A.8. Where the contract is indivisible, it cannot be split up, and even the fact the asssessee has split it up for his own purpose is immaterial.'

6.1 In the case of State of Madras vs. Gannon Dunkerley & Company and others, (Madras), the Apex Court had an occasion to consider whether in the building contract which was in the nature of a composite and indivisible works contract, there was a sale of goods. Apex Court held that there was no sale of goods. Likewise, the goods provided on lease for use was not liable to tax because it was not sale within the definition of Section 4 of the Sale of Goods Act. After the decision in the case of State of Madras Vs. Gannon Dunkerley & Company, the matter with regard to taxability of goods involved in the execution of works contract, was examined by the Law Commission, in its 61st report. On the recommendations of the Law Commission to levy sales tax on the goods used in the execution of the works contract and on the leasing transactions, to boost the revenue of the States, clause (29-A)

was added in Article 366 of the Constitution of India by the 46th Constitutional Amendment, enlarging the definition of sale. As a result of the Constitutional Amendment, States also amended their Trade Tax laws, and enlarged the definition of sale and levied the tax on the value of the goods involved in the execution of the works contract and transfer of right to use the goods. The validity of the Constitutional Amendment has been upheld by the Constitution Bench of the Apex Court in the case of Builders Association of India vs. Union of India. In brief, Apex Court held that by fiction, an indivisible contract has been made a divisible contract and the value of the goods involved in the execution of contract have been subjected to tax. Apex Court held that under the law, only the value of the goods used in the execution of the works contract is liable to tax and not the building as a whole. It has been further held that the levy would be subject to the restrictions and conditions mentioned in each clause or sub-clause of Article 286 of the Constitution of India. The law laid down by the Apex Court has been further elaborated by the Constitution Bench of the Apex Court in the second Gannon Dunkerley and Co. vs. State of Rajasthan.

6.2 It is worth noting that a contract of work is essentially and inherently a contract of service. Article 366 (29A), creates a legal fiction to hold certain types of work contract as a deemed sale of goods so that the States can levy sales tax on the value of the goods supplied as part of the works contract. The said fiction does not alter the basic nature of a works contract which is a contract of service. It is a settled position in law that a legal fiction has to be given effect to only for the limited purpose for which it has been created. In Sant Lal Gupta vs. Modern Co-operative Group Housing Society Ltd. [2010 (262) ELT 6 (SC)], the hon'ble apex court has explained this position as follows:-

"14. ……..It is the exclusive prerogative of the Legislature to create a legal fiction meaning thereby to enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist. Even if a legal fiction is created by the Legislature, the court has to ascertain for what purpose the fiction is created, and it must be limited to the purpose indicated by the context and cannot be given a larger effect. More so, what can be deemed to exist under a legal fiction are merely facts and no legal consequences which do not flow from the law as it stands. It is a settled legal proposition that in absence of any statutory provision, the provision cannot be construed as to provide for a fiction in such an eventuality. More so, creating a fiction by judicial interpretation may amount to legislation, a field exclusively within the domain of the legislature. (Vide: Ajaib Singh v. Sirhind Coop. Marketing-cum- processing Service Society Ltd. & Ors., (1999) 6 SCC 82)."

6.3 92nd amendment to the Constitution provided for a specific entry for "taxes on services" in the Union List under entry 92C. Prior to the said amendment, the residual entry 97 covered taxes on services. Thus the power of the Parliament to impose a tax on services was never in dispute. The following transactions were identified for levy of sales tax on a deemed sale basis in the 46th amendment to the Constitution, namely:-

'(29A) "tax on the sale or purchase of goods" includes-

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human

consumption or any drink (whether or not intoxicating), where\such supply or service is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;'.

6.4 In *Tamil Nadu Kalyana Mandapam Assn. vs. UOI [2004 (5) SCC 632],* a question arose before the Hon'ble Apex Court as to whether a tax on catering services [transaction covered by Art. 366 (29A) (f)] would amount to tax on sale and purchase of goods. The hon'ble Apex Court answered the question as follows:-

43. As far as the above points is concerned, it is well settled that for the tax to amount to a tax on sale of goods, it must amount to a sale according to the established concept of a sale in the law of contract or more precisely the sale of Goods Act, 1930. Legislature cannot enlarge the definition of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law. The following judgments and the principles laid down therein can be very well applied to the case on hand.

1. M/s. J.K. Jute Mills Co. Ltd. vs. The State of U.P. and Anr. (1962) 2 SCR 1;

2. M/s. Gannon Dunkerley & Co. and others vs. State of Rajasthan and others (1993) 1 SCC 364;

3. The State of Madras vs. Ganon Dunkerley & Co. (Madras) Ltd. (1959) SCR 379

4. The Sales Tax Officer, Pilibhit vs. M/s. Budh Prakash Jai Prakash (1955) 1 SCR 243;

5. M/s. George Oakes (P) Ltd. vs. State of Madras (1962) 2 SCR 570).

44. In regard to the submission made on Article 366(29A)(f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise includes the supply to services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article 'such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods". In other words, the operative words of the said sub-article is supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods.

45. The concept of catering admittedly includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering….

46. It is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of the gross charges for catering cannot alter or affect the legislative competence of Parliament in the matter.

……..…..

58. A tax on services rendered by mandap-keepers and outdoor caterers is in pith and substance, a tax on services and not a tax on sale of goods or on hire purchase activities. Section 65 clause 41 sub clause (p) of the Finances Act, 1994, defines the taxable service (which is the subject matter of levy of service tax) as any service provided to a customer

"by a mandap-keeper in relation to use of a mandap in any manner including the facilities provided to a customer in relation to such use also the services, if any, rendered as a caterer".

The nature and character of this service tax is evident from the fact that the transaction between a mandap-keeper and his customer is definitely not in the nature of a sale or hire purchase of goods. It is essentially that of providing a service. In fact, as pointed out earlier, the manner of service provided assumes predominance over the providing of food in such situations which is a definite indicator of the supremacy of the service aspect. The legislature in its wisdom noticed the said supremacy and identified the same as a potential region to collect indirect taxes. Moreover, it has been a well established judicial principle that so long as the legislation is in substance, on a matter assigned to a legislature enacting that statute, it must be held valid in its entirety even though it may trench upon matters beyond its competence. Incidental encroachment does not invalidate such a statute on the grounds that it is beyond the competence of the legislature (Prafulla Kumar vs. Bank of Commerce)….

6.5 In *Association of leasing and financial services Companies* Vs. *UOI [2010 (20) S.T.R. 417 (S.C.),* a dispute arose as to the leviability of service tax on financial leasing services [transaction covered by Art 366 (29A)(c)]. The hon'ble apex court after examining the scope of Article 366 (29A) and several other precedent decisions held as follows:-

"Scope of Article 366(29A):

30. If one examines Article 366(29A) carefully, one finds that clause (29A) provides for an inclusive definition and has two limbs. The first limb says that the tax on sale or purchase of goods includes a tax on transactions specified in sub-clauses (a) to (f). The second limb provides that such transfer, delivery or supply of goods referred to in the first limb shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery

or supply is made. Now, in K.L. Johar's case, this Court held that the States can tax hire-purchase transactions resulting in sale but only to the extent to which tax is levied on the sale price. This led the Parliament to say, in the Statement of Objects and Reasons to the Constitution (Forty- sixth Amendment) Act, "though practically the purchaser in a hire-purchase transaction gets the goods on the date of entering into the hire-purchase contract, it has been held by the Supreme Court in K.L. Johar's case that there is a sale only when the purchaser exercises the option to purchase which is at a later date and therefore only the depreciated value of the goods involved in such transaction at the time the option is exercised becomes assessable to sales tax which position has resulted in avoidance of tax in various ways." Thus, we find from the Statement of Objects and Reasons that the concept of "deemed sale" is brought in by the Constitution (Forty-sixth Amendment) Act only in the context of imposition of sales tax and that the words "transfer, delivery or supply" of goods is referred to in the second limb of Article 366(29A) to broaden the tax base and that as indicated in the Report of Law Commission prior to the judgment of this Court in Gannon Dunkerley's case, works contract was always taxed by the States as part of the word "sale" in Entry 48/54 of List II. The object behind enactment of Article 366(29A) is to tax the composite price so that the full value of the hire-purchase price is taxed and to avoid the judgment in K.L. Johar's case whose implication was to narrow the tax base resulting in seepage of sales tax revenue. It is in that sense "splitting" of the contract needs to be understood. Thus, it cannot be said that Parliament divested itself of the power to levy service tax vide enactment of the Constitution (Forty-sixth Amendment) Act. Even in the Report of the Law Commission, it has been observed that "if a hire-purchase transaction results in a sale, sales-tax is undoubtedly leviable by the States. No doubt, it is difficult to determine the "sale price" for the purpose of the sales tax law but this has no bearing on the question of legislative competence" (page 26). Thus, reliance placed by the appellant(s) on the expression "splitting up" in K.L. Johar's case is misconceived because the "splitting up" referred to in K.L. Johar's case was, as stated above, in regard to valuation and not in regard to legislative competence.

……

37. Applying the above decisions to the present case, on examination of the impugned legislation in its entirety, we are of the view that the impugned levy relates to or is with respect to the particular topic of "banking and other financial services" which includes within it one of the several enumerated services, viz., financial leasing services. These include long time financing by banks and other financial institutions (including NBFCs). These are services rendered to their customers which comes within the meaning of the expression "taxable services" as defined in Section 65(105)(zm). The taxable event under the impugned law is the rendition of service. The impugned tax is not on material or sale. It is on activity/service rendered by the service provider to its customer. Equipment Leasing/Hire-Purchase finance are long term financing activities undertaken as their business by NBFCs. As far as the taxable value in case of financial leasing including equipment leasing and hire-purchase is concerned, the amount received as principal is not the consideration for services rendered. Such amount is credited to the capital account of the lessor/hire-purchase service provider. It is the interest/finance charge which is treated as income or revenue and which is credited to the revenue account. Such interest or finance charges together with the lease

management fee/processing fee/documentation charges are treated as considerations for the services rendered and accordingly they constitute the value of taxable services on which service tax is made payable. In fact, the Government has given exemption from payment of service tax to financial leasing services including equipment leasing and hire-purchase on that portion of taxable value comprising of 90% of the amount representing as interest, i.e., the difference between the instalment paid towards repayment of the lease amount and the principal amount in such instalments paid (See Notification No. 4/2006 - Service Tax dated 1-3-2006). In other words, service tax is leviable only on 10% of the interest portion. (See also Circular F.No. B.11/1/2001-TRU dated 9-7-2001 in which it has been clarified that service tax, in the case of financial leasing including equipment leasing and hire-purchase, will be leviable only on the lease management fees/processing fees/documentation charges recovered at the time of entering into the agreement and on the finance/interest charges recovered in equated monthly instalments and not on the principal amount). Merely because for valuation purposes inter alia "finance/interest charges" are taken into account and merely because service tax is imposed on financial services with reference to "hiring/interest" charges, the impugned tax does not cease to be service tax and nor does it become tax on hire-purchase/leasing transactions under Article 366(29A) read with Entry 54, List II. Thus, while State Legislature is competent to impose tax on "sale" by legislation relatable to Entry 54 of List II of Seventh Schedule, tax on the aspect of the "services", vendor not being relatable to any entry in the State List, would be within the legislative competence of the Parliament under Article 248 read with Entry 97 of List I of Seventh Schedule to the Constitution."

6.6. From the decisions cited above, in respect of two transactions relating to catering services and hire purchase, the Apex court has clearly held that service tax can be levied on these services on the value attributable to the service component of the composite transaction. In other words, the issue of divisibility of an indivisible contract for the purpose of levy of service tax was confirmed and sustained by the Apex court.

6.7 Supply of goods and services are integrally connected with each other and it is difficult to segregate them. For example, while effecting a sales transaction, many services are inherently included such as freight, insurance, storage, and so on. Similarly rendition of many services entails supply of goods. To cite a few examples - i) Telecommunication services entail supply of goods in the form of sim cards, modem for internet and so

on; ii) Beauty parlour services involve supply/use of various cosmetics and toilet preparations; iii) Cable TV services include supply of cable , set-top box, dish antenna and so on; v) Banking services involve supply of goods such as cheque books, plastic cards to undertake ATM and similar transactions; vi) Repair and Maintenance services involve supply of spare parts and consumables; vii) Catering services include supply of food and drinks; ix) Supply of tangible goods for use service itself entails supply of goods; x) Photography services include supply of photographic films, paper, chemicals and so on; xi) Cleaning services need cleaning materials; xii) Sound recording services entail supply of recording medium and so on; xiii) Medical services include supply of medicines and other materials; xiv) Commercial coaching and training services entail supply of books and other study materials; xv) Leasing and Hire purchase of equipment services include supply of equipment and so on. One can cite such examples *ad infinitum*. It is very difficult to segregate supply of goods and services as they are inter-dependent and in my view such an exercise is a futile one. The vires of service tax levy on all such composite transactions have been upheld in quite a few decisions by the Supreme Court. This is where the doctrine of pith and substance and the doctrine of aspects come into play. The decision of the Supreme Court in *Federation of Hotel and Restaurant Assn. of India v. Union of India* has beautifully explained this proposition and I cannot resist the temptation of quoting a few passages from the said decision:-

> *2.2 Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the Courts, however difficult it may be, to ascertain to what degree and to what extent, the authority to deal with matters failing within these classes of subjects exists in each legislature and to define, in*

the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two provisions must be read together and the language of one interpreted, and, where necessary modified by that of the other.

2.3 The law 'with respect to' a subject might incidentally 'affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects.

2.4 The consequences and effects of the legislation are not the same thing as the legislative subject matter. It is the true nature and character of the legislation and not its ultimate economic results that matters."

Therefore, the contention that a composite contract consisting of supply of goods and supply of services cannot be vivisected for the purpose of taxation does not take into account the reality of economic transactions which are subjected to tax.

6.8 In its latest decision in **State of Karnataka v Pro Lab and Others** - *2015-TIOL-08-SC-CT-LB***,** decided on 30th January, 2015, another larger bench of the Supreme Court considered the issue of levy of sales tax on processing and supplying of Photographs. The hon'ble apex court held that ,- "*after insertion of clause 29-A in Article 366, the Works Contract which was indivisible one by legal fiction, altered into a contract, is permitted to be bifurcated into two: one for "sale of goods" and other for "services", thereby making goods component of the contract exigible to sales tax. While going into this exercise of divisibility, dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial. It follows, as a sequitur, that by virtue of clause 29-A of Article 366, the State Legislature is now empowered to segregate the goods*

part of the Works Contract and impose sales tax thereupon. Entry 54, List II of the Constitution of India empowers the State Legislature to enact a law taxing sale of goods. Sales tax, being a subject-matter into the State List, the State Legislature has the competency to legislate over the subject."

6.9 This latest decision of the Supreme Court clearly settles the issue about the divisibility of a works contract for the purpose of taxation. If by virtue of clause 29A of Article 366, the State Legislature is empowered to segregate the goods part of the works contract and impose sales tax thereon, the same logic would apply in respect of Central Legislation imposing service tax. In other words, the Parliament is empowered to segregate the service component of the works contract and impose service tax thereon. This is precisely what the Finance Act, 1994 has done when it sought to levy service tax on CICS , COCS and ECIS under sections 65(25b) r/w 65 (105) (zzq), 65(30a) and 65 (91a) r/w 65 (105)(zzzh) and 65 (39a) r/w 65(105)(zzd). In other words, whenever or wherever such services are rendered either as a pure labour contract or as part of the works contract, service tax liability is attracted, especially considering the fact that there is no restriction stipulated in the statute for levy of service tax on these services. Therefore full play and effect to the statutory provisions have to be given. Further a statutory provision cannot be interpreted so as to create discrimination among various classes of service providers, one set of people supplying services alone, liable to tax, and another set providing both supply of goods and services, not liable to tax. In my humble view, we cannot create discrimination through judicial interpretation.

6.10 The principle of statutory interpretation has been very beautifully expounded by Justice O. Chinnappa Reddy in R.B.I. v. Peerless General Finance, reported in [1987] 2 SCR 1, in the following words:-

> *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statutemaker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. ……"*

In Union of India & Anr. v. Deoki Nandan Aggarwal, AIR 1992 SC 96, the Supreme Court observed thus:-

> *"It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Court."*

In other words, the statute has to be interpreted in such a way so as to make it workable and not in a manner which would negate or defeat its object.

6.11 Reliance has been placed on the Finance Minister's speech to argue that works contract is leviable to service tax only with effect from 1-6-2007 and not earlier. It is worth remembering that statutes have to be interpreted based on the language used/employed by the legislature and not on the basis of Finance Minister's speech. In Doypack Systems Pvt. Ltd. vs. UOI

[1988 (36) E.LT. 201 (S.C.)], the hon'ble Apex Court held that reliance should not be placed on external aids such as notings in the government's file, Finance Minister's speech, etc., while interpreting statues. The Apex court has held that,-

> *"57. It has to be reiterated that the object of interpretation of a statute is to discover the intention of the Parliament as expressed in the Act. The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. That intention, and therefore the meaning of the statute, is primarily to be sought in the words used-in the statute itself, which must, if they are plain and unambiguous, be applied as they stand.*
>
> ***...***……
>
> *59. Contemporanea expositio, is a well-settled principle or doctrine which applies only to the construction of ambiguous language in old statutes. Reliance may be placed in this connection on Maxwell 13th Ed. page 269. It is not applicable to modern statutes. Reference may be made to G.P. Singh, Principles of Statutory Interpretation, 3rd Edn. pages 238 and 239. As noted in Maxwell on The Interpretation of Statutes, 12th Edition at page 269 that the leading modern cases on contemporanea expositio is the case of Campbell College, Belfast v. Commissioner of Valuation for Northern Ireland (1964 1 W.L.R. 912) in which House of Lords has made it clear that the doctrine is to be applied only to the construction of ambiguous language in the very old statutes. It is therefore well to remember what Lord Watson said in Clyde Navigation Trustees v. Laird (1983 8 A.C. 658) that contemporanea expositio could have no application to a modern Act. We, therefore, reject the attempt on the part of the petitioners to lead us to this forbidden track by referring to various extraneous matters which we have indicated before."*

6.12 In Khandelwal Metal & Engineering Vs Union Of India And Others decided on 11 June, 1985 [1985 AIR 1211], a question arose before the hon'ble Supreme Court as to whether the additional duty leviable under section 3(1) of the Customs Act, 1975 is a countervailing duty or a duty in addition to the duty under section 12 of the Customs Act, 1962. It was contended before the court that as per the Statement of objects and reasons,-

> *"Clause 3 provides for the levy of additional duty on an imported article to counterbalance the excise duty leviable on the like article made indigenously, or on the indigenous raw materials, components or ingredients which go into the making of the like indigenous article. This provision corresponds to*

section 2-A of the existing Act, and is necessary to safeguard the interests of the manufacturers in India."

The court held that,-

'the statement lends prima facie support to the contention of the appellants but, in the absence of any ambiguity in the wording of section 3 (1), we cannot treat the additional duty referred to therein as countervailing duty, nor, indeed, can we regard that provision as a charging section merely because the Statement says that section 3 "provides for the levy". The Statement of Objects and Reasons errs in being common to sub-sections (1) and (3) of section 3. It is more apposite to sub-section (3) though, even there, it may not be correct to say that it is a charging provision. The court held that the levy specified in section 3 (1) of the Tariff Act is a supplementary levy in enhancement of the levy charged by section 12 of the Customs Act and with a different base constituting the measure of the impost. In other words, the scheme embodied in section 12 is amplified by what is provided in section 3 (1). The customs duty charged under section 12 is extended by an additional duty confined to imported articles in the measure set forth in section 3 (1). Thus, the additional duty which is mentioned in section 3 (1) of the Tariff Act is not in the nature of countervailing duty.'

Thus the reliance placed on the statement of objects and reasons itself was rejected by the hon'ble apex court when the language of the statute was clear and unambiguous. The Finance Minister's speech has a lower status than the Statement of Objects and Reasons in interpreting the statute and therefore, the contention that reliance can be placed on such a speech is devoid of merits and needs to be rejected outright. Similarly in a recent decision, the hon'ble Madras High Court in CCE, Salem vs. Subramania Siva Co-op. Sugar Mills Ltd. [2014 (35) S.T.R. 500 (Mad.)] re-iterated this position by holding that ,-

"16. As far as the reliance placed on the Finance Minister's Speech in the course of budget presentation is concerned, Courts have consistently held that budget speech would not be taken in aid for understanding the scope of the clear terms of the provisions in the taxation enactment vide the decision of the Apex Court reported in 1998 (9) SCC 630 [Union of India v. Ganesh Rice Mills and Another]."

7. To conclude, I am of the considered view that the issue referred to the Larger Bench is fully and squarely covered by the G D Builders case decided

by the hon'ble Delhi High Court and the matter should rest there. Consequently, it has to be held that a composite works contract can be vivisected and discernible service elements therein can be levied to service tax provided such elements are declared as taxable services in the law, even prior to 1-6-2007 when a specific entry was created for certain type of works contract services. The reference should be answered accordingly and returned to the referring benches for decision on other questions such as, determination of value of the service component and quantification of service tax amount payable thereon, time bar, imposition of penalty, and so on, if any raised. I am sorry that the complexity and multiplicity of issues involved has made this order somewhat lengthy but I could not have done justice to the issues placed for consideration without a proper discussion.

(P.R. Chandrasekharan)
Member (Technical)

pj

Per Mr. R.K. Singh :

I have read with admiration the well crafted orders of my judicial guru Hon'ble Justice G Raghuram, President and my learned brother Shri P.R. Chandrasekharan, Member (Technical)

2. At the very outset, I would like to state that the Hon'ble Delhi High Court vide its order dated 11.11.2014 ordered that "the Five Member Bench may examine as a

preliminary issue whether the question raised is covered by the decision in GD Builders case (supra) and in case the question raised is covered, the matter can be closed". The only qualification to this direction was contained in para-7 of that order which, in effect, stated that the 'contention that there are conflicting decisions and contrary view expressed by Karnataka High Court and Madras High Court can be raised at the time of preliminary arguments before the Tribunal and appropriate direction/order can be passed'. As has been analysed by my ld. brother Shri PR Chandrasekharan, Member (Technical), the said judgments of Karnataka and Madras High Courts do not impinge upon the ratio/ decision of the Delhi High Court in the case of GD Builders with regard to the subject matter covered by the latter. It is hard to discern from the Hon'ble Delhi High Court order dated 11.11.2014 that the Hon'ble High Court at all intended that the order in case of GD Builders itself could be further questioned/ analysed to decide whether the same is per incurium. Viewed in this backdrop, it is too evident and obvious to need even a line of discussion that the subject matter referred to the Five Member Bench of the CESTAT is squarely and comprehensively covered by the said decision of the Delhi High Court. That said, as the ld. President has held otherwise, I proceed to record a few paragraphs in the context of some observations / findings of ld. President and ld. Member (Technical).

3. I cannot agree more with the conclusion of Hon'ble President that the GD Builders decision is not a product of concessions by a party to the *lis*.

4. Ld. Member (Technical) in para 5.6 of his order states that "from the above decisions, it is crystal clear that there cannot be any challenge whatsoever to the levy of service tax, merely because there are no machinery provisions to compute or quantify the amount of tax." I would like to state that this observation is not critical to the issue

and the ld. Member (Technical) has also not predicated his conclusion on the basis thereof as is evident from the very next sentence where he states, “In my considered view Section 67 itself provides the measure of levy”. Indeed, it needs to be stressed that Section 67 contained / contains the machinery provision for measure of value of taxable service which is in no way arbitrary by any stretch of imagination. Even prior to its amendment on 18.04.2006, Section 67 contained a clear provision that “the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him”. Thus, it is evident that tax was to be computed with reference to the value of the service provided and not the value of the goods sold. The said Section even contained elaborate explanations including the one to the effect that the “cost of parts or other material, if any sold to the customer during the course of providing ECIS” was not to be included in the value of taxable service. It will be a mis-interpretation to interpret this ‘explanation’ to mean as if the cost of goods sold/supplied while providing other services like Construction of Complex Service (CCS) or Commercial or Industrial Construction Service (CICS) was to be included in the value of taxable service. Explanations are meant to clarify and the one regarding the ECIS may have been added possibly because the Legislature may have been of the view that confusion regarding includibility of the value of goods in the value of ECIS may arise. With effect from 18.04.2006, the said Section (S.67) was amended. The amended Section contains a sub-section which states that subject to the provisions of sub-sections 1, 2 and 3, the value shall be determined in such manner as <u>may</u> be prescribed. Thus, the Valuation Rules framed are only to prescribe the manner of determining the value if the same cannot be determined in terms of sub-sections 1, 2 & 3 thereof. The word “may” (and not “shall”) used in that sub-section has a clear implication that even if the Rules were not framed, the levy with reference to the value determined in terms of Section 67 would not fail; save when in certain situations for certain services absence of Rules would necessarily lead to an ambiguity of such a high

degree as to make the measure of value arbitrary. In other words, absence of Rules would not necessarily eclipse or paralyse Section 67 which refers to the value of service, implying thereby that the value of goods "sold" in a composite contract was not to be a part of the value for the purpose of that Section. Thus, Section 67, even in its pre 18.04.2006 avatar in no way encroached upon the state Govt's domain relating to levy of sales tax. Indeed, Notification No.12/2003-ST needs, thus, to be viewed as a measure of abundant caution and care on the part of the Central Govt. to obviate even a remote possibility of service tax being charged on the value of goods "sold" as a part of a composite contract, and not as an attempt to imply that it has power to levy service tax on the same. It is pertinent to mention that any provisions regarding valuation, howsoever detailed, cannot entirely rule out the possibility of certain degree of interpretational uncertainty but that would not be fatal to the levy unless the uncertainty is of such a high degree as to lead to arbitrariness.

5. While being fully in agreement with the analysis culminating in para 6.9 of ld. Member (Technical)'s order, I may also add that merely because CCS, CICS, ECIS, provided as part of Works Contracts and hence becoming classifiable under Works Contract Service [S.65 (105)(zzzza)] w.e.f. 01.06.2007 in no way means that these services (as part of works contracts) were not taxable earlier (i.e. prior to 01.06.2007) under Section 65 (105) (zzzh), 65 (105)(zzq), 65 (105) (zzd) respectively because classification of a service is to be determined as per the definitions of various taxable services prevalent during the relevant period and merely because the classification changes with the introduction of a taxable service under which an existing service gets more specifically covered (by virtue of Section 65A), does not mean that the said service was not taxable during the period prior thereto. When works contracts are held to be divisible in the wake of the 46th Constitutional Amendment, it becomes immaterial for the

purpose of charging service tax whether a taxable service is rendered under a pure service contract or as part of a works contract. Incidentally, it may be mentioned in passing that if it was to be held that works contracts were not taxable under Finance Act, 1994 prior to 01.06.2007, the consequence would be that a works contract (to construct a commercial building) which involved (for the sake of argument) transfer of property in goods in the form of a single ordinary brick (of say value Rs.10) will not be taxable under CICS before 01.06.2007 and taxable service (like pholography service) provided as a part of works contract of the type not covered under Works Contracts Service [65 (105) (zzzza)] would neither be taxable prior to 01.06.2007, nor with effect from 01.06.2007 even if the transfer of property in goods in such works contract is a tiny fraction of the total value thereof.

6. In conclusion, much as I admire the phenomenal erudition of the Hon'ble President, I am not in a position to persuade myself to agree with his view. Indeed I am in complete agreement with my ld. brother Shri. PR Chandrasekharan that the issue referred to the Five Member Bench is fully and squarely covered by the Hon'ble Delhi High Court's judgement in the case of G.D. Builders.

(R.K. Singh)
Member (Technical)

SSK

Per. Rakesh Kumar :-

I have gone through the order recorded by the Hon'ble President and the orders recorded by my learned Brothers Shri P.R. Chandrashekharan and Shri R.K. Singh, Members (Technical). While, I fully agree with the order recorded by my learned Brother Shri P.R. Chandrashekharan, I am of the view that the question as to whether the service component of an indivisible works contract could be taxed during the period prior to 01/6/07, can be looked at from another angle also, for which it is necessary to go into the question as to what is a works contract.

2. The commercial transactions of sale of goods and sale of services constitute a spectrum. At one end of the spectrum are the pure sales transactions not involving the supply of any service and at the other end of the spectrum are the transactions of pure services not involving the supply of any goods. In between these transactions of pure sales and pure services, there is a vast variety of transactions in which there is supply of goods as well as provision of service.

2.1 Among such hybrid contracts, there is a group of contracts where under single instrument the parties enter into distinct and separate contracts – one for the transfer of material for money consideration and other for work to be done services to be provided for some valuable consideration. In such cases, as observed by the Apex Court in para 165 of its judgment in the case of **State of Madras vs. Gannor Durkerlay and Co. Ltd. –1958 AIR 560,** there would be no dispute, that the part of the contract for transfer of material for money consideration would attract sales tax and thereby implying that the other part of the contract regarding of provision of services would attract service tax.

2.2 The dispute in the present case is in respect of the indivisible contracts involving use of the goods and provision of service. Among such contract, there

may be contracts where the main objective is supply of goods for some valuable consideration and provision of service is ancillary or incidental (like a dealer selling air conditioners with installation charges and charges for repair during warranty period included in the sale price) and such indivisible contracts would be treated as sales contracts. Similarly the contracts where the main objective is the provision of service and the supply of goods is of purely incidental would be the contracts for service. Then there are indivisible contracts involving use of the goods as well as provision of service wherein both are prominent. Among such contracts, there are contracts where the objective of the contract is provision of service, which involves use of the goods which get consumed in course of provision of service. Such contracts would be the service contracts and the same are not the subject matter of dispute in the present case. The dispute in the present case is in respect of those indivisible contracts involving supply of goods as well as supply of service, where the work is done by the service provider on the immovable property – land, building etc. or on a chattel belonging to the service receiver and which involves affixing of material belonging to the service provider and the contract, alongwith the provision of service, involves transfer of property in the goods/material used to the service recipient through accretion. These contracts are called works contracts and the examples of such contracts are the indivisible contracts for erection, installation and commissioning of a manufacturing plant, commercial or industrial construction, construction of residential complex, repair and maintenance contracts which involve use of the material for repair or maintenance etc. In general, a works contract can be said to be a contract for some work (service) to be done by the service provider on the land/immovable property or on some movable property including intangible property belonging to the employer, which involves affixing of goods including intangible goods belonging to the service provider. The Apex Court's judgment dated 01/4/58 in the case of **State of Madras vs. Gannor Dunkerlay and Co. Ltd.** (supra) is in respect of building contracts wherein the Apex court held that in

such contracts there is no sale of goods involved and, therefore, the State Government could not levy sales tax on the transfer of property in goods involved in execution of such contracts.

2.3 When indivisible works contracts are those contracts involving provision of service, in which there is transfer of property in goods from the service provider to the service receiver through accretion, and this transfer of property in goods is not sale, such contracts have to be treated as service contracts as in such contracts, there is absolutely no intention of transfer of property in and delivery of the possession of, a chattel as a chattel to the service receiver. A service contract will not cease to be a service contract just because the provision of service involves use of goods, the property in which gets transferred to the service recipient through accretion. Even the Law Commission's Reports (Chapter IA para 7) refers to the works contract as "a contract for work (of service)".

2.4 In order to enable the State Governments to levy sales tax on transfer of property in goods involved in execution of works contract, by 46th Constitutional Amendment, Article 366 of the Constitution was amended by adding Clause (29A) to it, which expanded the scope of the entry 54 of list II of the 7th Schedule of the Constitution – "tax on sale or purchase of goods" so as to bring within its purview the tax on – (a) the transfer, otherwise in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration; (b) **the transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract**; (c) delivery of goods on hire purchase or any system of payment by instalments ; (d) the transfer of right to use any goods for any purpose (whether or not for specified period) for cash, deferred payment or other valuable consideration; (e) supply of goods by any incorporated

association or body of a persons to a Member thereof for cash, deferred payment or other valuable consideration; and (f) **supply, by the way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration**, **Clause (29A) also provided that such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made**. Thus, Clause (29A) of Article 366 of the Constitution introduced by 46th amendment is a legal fiction by which – (a) the transfer of property in goods, (whether as such or in some other form), involved in execution of a works contract became deemed sale by the person executing the works contract and the indivisible works contract, which is a service contract, became a divisible contract for provision of service and deemed sale of the goods involved in execution of the works contract; and (b) supply of food or drinks in the catering contracts, which were service contracts involving serving of food or beverages, become a deemed sale. Thus Clause (b) and (f) of Article 366 (29A) are a legal fiction created to enable the State Governments to levy sales tax the supply of goods in certain service contracts – works contracts and catering contracts. The legal fiction created by Article 366 (29A) does not change the basic character of a works contract or a catering contract, both of which are service contract.

3. It is well settled law that a legal fiction has to be given effect to only for the limited purpose for which it had been created and, therefore, Article 366 (29A) can be employed only to enable to State Governments to charge sales tax on certain contracts including the service contracts mentioned in Clause (a) and (f) of this

Article which do not involve sale in the sense, in which this term is understood in Sale of Goods Act, 1930 and Article 366 (29A) cannot be applied in the areas other than the levy by the State Governments of the sales tax on the deemed sale involved in the contracts mentioned in this article. Hon'ble Delhi High Court in case of **The Federation of Hotels and Restaurant Association of India vs. Union of India [ILR 2007 Delhi – 1059]** has held that extended meaning of 'sale' in Article 366 (29A) (f) is not applicable to Standards of Weights and Measures Act and the Rules made thereunder and accordingly the supply of packaged mineral water and soft drinks in hotels and restaurants does not constitute sale for the purpose of SWM Act and the Packaged Commodities Rules. Applying the ratio of this judgment, Article 366 (29A) would have no application to levy of service tax by the Central Government on the service contracts. In any case, the Central Government does not require any legal fiction to levy service tax on a service contract, whether it is a pure service contract or is a service contract involving use of goods for provision of service which either get consumed during provision of service or the property in which gets transferred to the service recipient through accretion. Since the works contract are the service contracts, the same would attract service tax even during period prior to 01/6/07, if the service is covered by the definition of 'taxable service'. If the service portion consists of a bundle of services, it is to be seen as to which service gives them their essential character and if that service was taxable, the works contract would be taxable. For this purpose the service tax would be leviable on the entire value of the contract including the value of the goods involved, as the works contract is one single indivisible contract for service and the transfer of property in goods involved in execution of works contract is deemed sale only for the limited purpose of levy of sales tax by the State Government. Therefore, levy of sales tax by the State Government on the goods component of a works contract by employing the legal fiction of Article 366 (29A) does not restrict the power of the Central Government to levy service tax on the works contract in

any manner and the Central Government has powers to levy service tax on the entire value of a works contract including the value of the goods involved in the execution of the works contract. Apex Court in para 42, 43, 44 and 45 of its judgment in case of **Tamil Nadu Kalyana Mandap and Association vs. Union of India** reported in **2004 (167) E.L.T. 3 (S.C.)** while upholding the constitutional validity of the levy of service tax on the service provided by a Mandap Keeper in relation to use of Mandap, has held that the fact that tax on sale of goods involved in the said service can be levied does not mean that service tax cannot be levied on the service aspect of catering and that it is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of gross amount charged for catering cannot alter or affect the legislative competence of the Parliament in the matter. Since the Central Government has powers to levy service tax on the entire value of a works contract, it also has power to exempt a part of the value of a works contract from the service tax.

3.1 The Central Government in order to avoid charging of tax on the goods involved in the execution of works contract on which State Government also levies the sales tax/VAT, has decided to exempt such contracts from the service tax to the extent the service tax is leviable on the value of the goods involved in the execution of the works contract and this has been done by issuing exemption notifications under Section 93 of the Finance Act, 1994 providing for abatement in the taxable value of the specified services which entail both supply of goods as well as service.

3.2 Just because the State Governments have power to levy sales tax on the transfer of property in goods involved in execution of a works contract by invoking the legal fiction Article 366 (29A), the power of the Central Government to levy

service tax on such works contract does not get restricted so as to confine the levy only and strictly to service portion of the works contract excluding the value of the goods used for providing the service. An indivisible works contract is one single service contract whose value would include the value of all the goods and services which have contributed to emergence of the service product. In general, the value of a service provided would include the value of all the elements – goods and/or service used in provision of the service and in this regard it would not be correct to interpret the words – "gross amount charged …. ….. for the service provided" in Section 67 of the Finance Act, 1994 as the amount excluding the value of the goods or other services used for providing the output service.

4. When this is so, no machinery provision for determining the precise value of the taxable service is required so as to completely exclude the value of the goods involved. Such machinery provision is necessary to enable the State Governments to levy sales tax on the goods component of certain type of service contracts – works contracts and catering contracts, as State Government had no power to tax a service contract and only by virtue of the legal fiction of Article 366 (29A) could levy tax on deemed sale involved in such service contracts for which a machinery provision for determining the value of the goods deemed to have been sold was necessary. However, no machinery provision is required for determining the value of a works contract by excluding the value of the goods, as –

(a) For the purpose of levy of service tax by Central Government, a works contract still remains one single indivisible service contract, even though for the purpose of levy of sales tax, by the legal fiction of Article 366 (29A) of the Constitution, it is deemed to be a divisible contract – one for service and the other for deemed sale of the goods involved in execution of the service contract (works contract) and

accordingly the value of a taxable service provided as a works contract would be the gross amount charged including the value of the goods, the property in which has been transferred to the service receiver through accretion ;

(b) the legal fiction of Article 366 (29A) has no application when it comes to levy of service tax by the Central Government on a service contract even if it involves transfer of property in goods to the service receiver through accretion, and

(c) measure of tax is independent of the nature of the tax and therefore service tax can be levied on a service contract involving transfer of property in goods to the service receiver through accretion, as a percentage of the gross amount charged.

4.1 In view of this legal position, exemption notifications issued by the Central Government under Section 93 of the Finance Act, providing for abatement of the taxable value of the specified services (including ECIS, CICS and CICS) which entail both supply of goods as well as services, as to exclude the value of the goods determined on average basis from the gross amount charged for such service contracts, are sufficient for avoiding the taxation of the same goods by the State Government as well as by the Central Government and no machinery provision for determination of precise value of the taxable service in such contracts by totally excluding to the value of the goods deemed to have been sold is necessary. Therefore, the view that during the period prior to 01/6/07, service tax could not be levied on the taxable service provided as works contract as there was no machinery provision to determine the value of service is not correct.

5. In the world of trade and commerce, the transactions of sale of goods and sale of service are so intermixed that insisting on absolute separation of goods and services for taxation by the State Government and the Central Government respectively would be only a futile exercise – some overlap in this regard is inevitable, which has to be ignored in the interests of smooth functioning of the laws governing the levy of tax on sale of goods by the State Government and levy of service tax on the service by the Central Government. For example the price of the goods sold by a dealer on which sales tax is charged may include the cost of a number of service like freight and transit insurance in case of FOR sales, advertisement expenses, installation and warranty repair charges etc. Similarly the amount charged by a service provider for the service on which service tax is payable may involve the cost of the goods used for providing the service. The principle of non encroachment by the centre into the taxation territory of States and vice versa does not mean that each service transaction should be examined with a microscope for removing the goods component or each sales transaction should be examined with a microscope to remove the service component – what is required for compliance with this principle is that -

(a) a hybrid transaction involving supply/use of goods and provision of service should be examined on the basis of its terms and tone and tenor and by applying the well settled tests to determine whether it is a contract for sale or a contract for service ; and

(b) once on the basis of the nature of the transaction, the taxing authority – whether Central Government or State Government is known, the whole transaction is taxed by that authority on the basis of the measure prescribed.

6. Separate and specific constitutional provision together with the machinery for determining the measure is required only when State Government wants to tax goods portion in a service transaction or the Central Government wants to tax service portion in a sales transaction. But for charging of service tax by the Central Government on a service transaction including a works contract, no machinery for excluding the value of the goods involved in the provision of service is required and for the lack of such machinery provision, the levy cannot be held to be invalid.

(Rakesh Kumar)

Member (Technical)

PK

Subject : Larger (Special) Bench reference pertaining to works contract – regd.

With reference to the DO letter dated 30th January, 2015 of Hon'ble President enclosing the draft judgment in the Larger (Special) Bench reference pertaining to works contract, I am enclosing a separate order concurring with the order recorded by Shri P.R. Chandrashekharan, Member (Technical).

(Rakesh Kumar)

Member (Technical)

Hon'ble President

CC to :-

Mrs. Archana Wadhwa, Learned Member (Judicial), Bangalore

Shri R.K. Singh, learned Member (Technical), New Delhi

Shri P.R. Chandrashekharan, learned Member (Technical), Mumbai

(Rakesh Kumar)

Member (Technical)

Per. Rakesh Kumar :-

I have gone through the order recorded by the Hon'ble President and the order and recorded by my learned Brothers Shri P.R. Chandrashekharan, and Shri R.K. Singh, Members (Technical). While, I fully agree with the order recorded by my learned Brother Shri P.R. Chandrashekharan, I am of the view that the question as to whether the service component of an indivisible works contract could be taxed during the period prior to 01/6/07, can be looked at from another angle also, for which it is necessary to go into the question as to what is a works contract.

2. The commercial transactions of sale of goods and sale of services constitute a spectrum. At one end of the spectrum are the pure sales transactions not involving the supply of any service and at the other end of the spectrum are the transactions of pure services not involving the supply of any goods. In between these transactions of pure sales and pure services, there is a vast variety of transactions in which there is supply of goods as well as provision of service.

2.1 Among such hybrid contracts, there is a group of contracts where under single instrument the parties enter into distinct and separate contracts – one for the transfer of material for money consideration and other for work to be done services to be provided for some valuable consideration. In such cases, as observed by the

Apex Court in para 165 of its judgment in the case of **State of Madras vs. Gannor Durkerlay and Co. Ltd. –**

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 10.11.14 to 14.11.2014

Date of decision: 19.03.2015

S. Tax Stay No. 59278 of 2013 in S.T. Appeal No. 58658 of 2013
S. Tax Appeal No. 550 of 2007

M/s Larsen and Toubro Limited — Appellant
M/s Kehems Engg. Pvt. Ltd.

Vs.

CST, Delhi/ CCE&ST, Indore/ CCE, Rajkot — Respondent

Excise Appeal No. 622 of 2007

CCE & ST, Indore — Appellant

Vs.

M/s Kehems Engineering Pvt. Ltd. — Respondent

Coram: Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, Member (Technical)
Hon'ble Mr. P. R. Chandrasekharan, Member (Technical)
Hon'ble Mr. R. K. Singh, Member (Technical)

Per: Justice G. Raghuram:

Pursuant to the order dated 09.09.2013, we heard the reference during 10.11.2014 to 14.11.2014. The President and the learned Member (Judicial) Ms. Archana Wadhwa concluded that a composite contract, involving transfer of property in goods and rendition of services, cannot be vivisected and services components thereof subject to the levy of service tax, on classification of the services under taxable services such as "Commercial or Industrial Construction"; "Construction of Complex" or "Erection, Commissioning or Installation" prior to 01.06.2007; and that service components in a

works contract are taxable only under Works Contract Service defined and enumerated in Section 65(105)(zzzza) of the Finance Act, 1994.

2. Hon'ble Members (Technical), Shri Rakesh Kumar, Sh. P.R. Chandrasekharan and Sh. R. K. Singh (by distinct concurring orders), concluded to the contrary, that service elements in a composite contract could be subject to service tax prior to 01.06.2007 as well, if these are appropriately classifiable under "Commercial or Industrial Construction"; Construction of Complex" or "Erection, Commissioning or Installation", as the case may be.

3. In view of the majority opinions recorded, we answer the reference as under:

Service elements in a composite (works) contract (involving transfer of property in goods and rendition of services), where such services are classifiable under "Commercial or Industrial Construction"; "Construction of Complex" or "Erection, Commissioning or Installation" (as defined), are subject to levy of service tax even prior to (01.07.2007) insertion of sub-clause (zzzza) in Section 65(105) of the Finance Act, 1994.

(Justice G. Raghuram)
President

(Archana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

(P.R. Chandrasekharan)
Member (Technical)

(R. K. Singh)
Member (Technical)