REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.11330 of 2018

CC and CE and ST, NOIDA ...Appellant(s)

Versus

M/s Interarch Building Products Pvt. Ltd.....Respondent(s)

J U D G M E N T

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated

09.11.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, Regional Bench at Allahabad (hereinafter referred to as 'the Appellate Tribunal') by which the learned Tribunal has allowed the said appeal preferred by the respondent and has set aside the Order-in-Original dated 31.03.2017 disallowing the CENVAT Credit, the Revenue has preferred the present appeal.

2. The facts leading to the present appeal in nutshell are as under:

2.1 The respondent – assessee was engaged in the business of manufacture, supply and erection at the site of prefabricated/pre-engineered steel buildings and parts thereof classifiable under

the relevant Headings/sub-headings of the First Schedule to the Central Excise Tariff Act, 1985. The respondent was having centralized registration for Service Tax with the Service Tax Department for services under "Commercial or Industrial Construction Service" and "Construction Services" right from the commencement of production. The goods manufactured were cleared from the place of manufacture on payment of central excise duty on which CENVAT Credit was made by the respondent. The unit at Greater Noida registered as a Centralized Service Provider, availed CENVAT Credit

(i) Excise duty paid by the units at the time of removal

(ii) duty paid on capital goods

(iii) service tax paid on input services.

They paid service tax on the gross amount of contract for engineering, procurements supply, construction, erection etc. under the category "commercial or industrial constructions services" as referred under Section 65(105)(zzq) of the Finance Act, 1994 (hereinafter referred to as 'the Act, 1994').

2.2 Based on specific intelligence that the respondent had wrongly classified the services rendered by them, availed inadmissible CENVAT Credit and short paid the Service Tax in cash. Department was of the view that the services rendered by the respondent amounted to Works Contract which were chargeable to tax under sub clause [zzzza] of Section 65(105]

of the Finance Act, 1994. Therefore, according to the Revenue on classifiable service under 'works contract service' the respondents availed CENVAT Credit on Central Excise duty paid on inputs.

2.3 Therefore, the Department issued a Show Cause Notice alleging *inter alia* that the respondent had utilized CENVAT Credit of Rs.1,12,60,92,760/- on building material during June, 2007 to March, 2012 which was inadmissible. It was alleged that the said amount had been recovered as service tax from the customer under Section 73(1) of the Act, 1994. It appeared to the Revenue that services should have been classified under "Works

Contract Service". It was mandatory for the respondent to either follow Rule 2A of Service Tax (Determination of Value) Rules, 2006 or adopt Composition Scheme. The said Rule 2A and Composition Scheme do not allow the availment of CENVAT Credit on input. Therefore, it appeared to the Revenue that the CENVAT Credit of Rs.112,60,92,760/- as availed on input was inadmissible and therefore, the said debit has resulted in short payment of Service Tax.

2.4 The Show Cause Notice was related to the period from June, 2007 to March, 2012. The respondent was called upon to show cause as to why the services being provided by them be

reclassified under "Works Contract Service" in place of "Commercial or Industrial Construction Services", inadmissible CENVAT Credit of building material amounting to Rs.112,60,92,760/- be disallowed in terms of Rules 2 & 3(1) of CENVAT Credit Rules, 2004; an amount of Rs.22,37,01,811/- on account of short paid Service Tax towards the liability debited from the inadmissible Cenvat Credit on construction materials be recovered under Section 73(1) of the Act, 1994; an amount of Rs.90,23,90,907/- alleged to have been collected as cash in excess of the Service Tax assessed/determined by passing the inadmissible CENVAT Credit to their recipients of taxable service be demanded under Section

73A of the Act, 1994 along with the appropriate rate of interest under Sections 73B and 75 of the Act and the penalties be imposed under Sections 77 & 75 of the Act, 1994 read with Rule 15(3) of CENVAT Credit Rules, 2004. By Order dated 28.03.2004 the Adjudicating Authority who disallowed the CENVAT Credit amounting to Rs.1,12,60,92,760/- confirmed the amounts of Rs.22,37,01,811/- being short paid, confirmed the claim in the show cause notice.

2.5 The department had issued further Show Cause Notices/statement of demands for the subsequent period also.

2.6 By order dated 18.11.2015, the learned Tribunal set aside the adjudication order and remanded the matter back to the adjudicating authority with the direction that the tax liability be re-determined after hearing the respondent.

On remand the adjudicating authority passed a fresh order dated 31.03.2017 and confirmed the demands. The Commissioner held that the services rendered by the respondent was classifiable as 'Works Contract Service' and rejected the availability of CENVAT Credit amount and directed recovery under Section 73A of the Act, 1994. The Order-in-Original passed by the adjudicating authority was the subject matter of the present appeal before the Tribunal.

2.7 Before the Tribunal the Order-in-Original passed by the Adjudicating Authority was challenged on the following grounds:

(i) "The Id. Commissioner disallowed Cenvat credit availed on inputs in terms of Rule 2 & 3(1) of Cenvat Credit Rules, 2004 to the extent of Rs.1,12,60,92,760/- in case of show cause notice dated 23.10.2012 and the amounts in case other 3 notices as specified above and that such order is not sustainable in law.

(ii) The provision of Rule 2A of Service Tax (Determination of Value) Rules, 2006, start with expression "subject to the provisions of Section 67" which means the provision prescribed under said Rule 2A, is subject to the provisions of Section 67 of the Finance Act, 1994.

(iii) Opening Para of Rule 3 of Composition Scheme reads as- "Notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Service Tax (Determination of Value) Rules, 2006, the person liable to pay Service Tax in relation to Works Contract Service shall have the option to discharge his Service Tax liability on the Works Contract Service." It clearly indicates that it is one of the options given

to the Service Provider to discharge Service Tax liability in respect of Works Contract Service and it is not mandatory to adopt the said Rule under Composition Scheme for discharge of Service Tax liability.

(iv) Section 67 of the Finance Act, 1994 provides for arriving at assessable value which states "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 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 provide by him." Therefore, the said provision which is fundamental in nature and is applicable to any taxable service.

(v) The demand towards Cenvat credit confirmed in case of show cause notice dated 23.10.2012 is substantially time barred.

(vi) In the impugned order, Id. Commissioner has distinguished the judgment of this Tribunal in the case of S.V. Jiwani (supra) and the grounds on which Id, Commissioner distinguished the judgment are invalid."

2.8 By the impugned judgment and order the learned Tribunal has allowed the appeal preferred by the respondent and has set aside the Order-in-Original passed by the adjudicating authority by observing that the composition scheme is optional and the provisions of Rule 2A of the said Rules are subject to provisions of Section 67 of the Act, 1994. The learned Tribunal has also observed that it is clear from the provisions of sub-section 4 of Section 67 of the Act, that where value cannot be determined as provided under sub-rule (1) to (3) of Section 67 of the Act, then only the value is to be determined as provided under the Rules. Therefore, the Tribunal held that there is no question on applicability of

Rule 2A nor there was any question of forcibly applying the option of Composition Scheme. The learned Tribunal held that in both these circumstances, the respondent was entitled to CENVAT Credit on inputs.

2.9 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Tribunal setting aside the Order-in-Original, the Revenue has preferred the present appeal.

3. Shri N. Venkataraman, learned ASG has appeared on behalf of the Revenue and Shri V. Raghuraman, learned Senior Counsel has appeared on behalf of the respondent – assessee.

4. Shri N. Venkataraman, learned ASG appearing on behalf of the Revenue has made the following submissions challenging the correctness and legality of the impugned order passed by the CESTAT:

(i) That the period under dispute is January, 2007 to March, 2014. He has submitted that the definition of 'works contract service' was brought into the Finance Act, 1994 w.e.f. 01.06.2007. Therefore, he has fairly conceded the demand for the period January, 2007 to 31.05.2007 shall not be maintainable in light of the decision of this Court in the case of ***Commissioner of Central Excise vs. Larsen and Toubro, (2016) 1 SCC 170*** as well as

Total Environment Building Systems Pvt. Ltd. vs. Deputy Commissioner of Commercial Taxes, (2022) SCC Online SC 953.

4.1 It is submitted that therefore the demand for the period January, 2007 to May, 2007 is not sustainable and therefore to that extent the demand should go.

4.2 It is submitted that however, for the period commencing 01.06.2007 to 31.03.2014 the demands are sustainable and the Orders-in-Original need to be restored.

4.3 Shri N. Venkataraman, learned ASG has taken us to the relevant provisions of the Act, 1994 more particularly Chapter 5 and the definition

of 'works contract' and the definition of 'taxable service' contained in Section 64(54) and Section 65(105)(zzzza) respectively. It is submitted that post 01.07.2012, the Finance Act, 1994 underwent major amendments by the insertion of both negative list and declared services. It is submitted that Section 66E was introduced for the first time which defined declared services. He has taken us to sub-clause (h) of Section 66E of the Act.

4.4 It is submitted that the Service Tax (Determination of Value) Rules, 2006 came into force w.e.f. 19.04.2006 vide Notification No.12/2006 – Service Tax. Rule 2A has been inserted vide notification 29/2007 dated

22.05.2007 w.e.f. 01.06.2007 which reads as under, which has been amended periodically:

"Prior to 01.07.2012 it reads as under:

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;

(ix) 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)."

4.5 It is submitted that vide notification 32/2007 – ST dated 22.04.2007 the Central Government in exercise of its powers conferred by Sections 93 and 94 of the Act, 1994 introduced the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. Rule 3(1) of the said Rules reads as under:

> "**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.
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> *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."

4.6 It is submitted that the sub-rules came to be amended vide Notification No.23/2009 – ST dated 07.07.2009 and further amended by Notification 1/2011 – ST dated 01.03.2011.

4.7 It is submitted that Section 67 of the Act, 1994 deals with valuation of taxable services reads as under:

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

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

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

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

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of 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

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed.

(iii) Any amount retained by the lottery distributor or selling agent from gross sale amount of lottery tickets in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at

which the distributor or selling agent gets such ticket.

(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 [2][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 liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]]"

4.8 It is submitted that the Central Board of Excise and Customs vide letter dated 22.05.2007 issued clarifications regarding various amendments brought out Vide Finance Act, 2007. It is submitted that paras 9.1 to 9.7 which are relevant read as under:

"9.1 Works contract is a composite contract for supply of goods and services. A composite works contract

is vivisected and, -(i) VAT/sales tax is leviable on transfer of property in goods involved in the execution of works contract [Art.366 (29A)(b) of the Constitution of India], and

(ii) Service tax will be leviable on services provided in relation to the execution of works contract.

9.2 Service tax is chargeable on the gross amount charged by the service provider for the taxable services provided (Section 67). In the case of works contract, the taxable value of services is to be determined by vivisecting the composite works contract. Rule 2A of Service Tax (Determination of Value) Rules, 2006 [Notification No.29/2007-Service tax, dated 22.05.2007], provides that value of works contract service 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. Thus, wherever the service provider maintains records, the value of services shall be the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of works contract.

9.3 Wherever VAT/sales tax on transfer of property in goods involved in the execution of works contract is paid on actual value, the same value is also taken for the purpose of determining the value of works contract service. In other cases, value of works contract service shall be determined based on the actual. It has also been explained that 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 hir or otherwise, machinery and tools uses for the execution of the works contract; (v) cost of consumables such as water, electricity, fuel, used in the execution of the works contract, the property in which is not transferred in the course of execution of works contract; (vi) cost of establishment of the contract 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 service;

9.4 If the gross amount charged for the works contract is inclusive of VAT

or sales tax, the value for the purposes of service tax shall be computed as follows: [Gross amount charged – (value of transfer of property in goods involved in the execution of works contract and VAT or sales tax paid, if any, on the said transfer of property in goods involved in the execution of said works contract)].

9.5 As a trade facilitation measure and also for ease of administrative convenience, the service provider has been given an option to adopt the composition scheme for payment of service tax on works contract service. The Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 has accordingly been notified vide Notification No.32/2007-Service Tax, dated 22.05.2007.

9.6 The scheme provides that the service provider shall have an option to pay an amount equivalent to 2% of the gross amount charged for the works contract instead of paying service tax at the rate specified in section 66. Gross amount charged for the works contract shall not include VAT or sales tax paid on transfer of property in goods involved in the execution of the said works contract. The provider of taxable service opting to pay service tax under the said

> composition scheme is not entitled to take CENVAT Credit of duty on inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.
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> 9.7 The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and cannot be withdrawn until the completion of the said works contract."

4.9 Relying upon the above provisions, rules and regulations and the circulars, it is submitted that works contract is contract involving supply of goods and services together. A composite works contract gets vivisected into transfer of property into goods liable to sales tax/VAT in terms of Article 366 (29A)(b) of the Constitution of India and the service portion liable to service

tax w.e.f. 01.06.2007. Reliance is placed on the decision of this Court in the case of ***Larsen and Toubro (supra) (paragraphs 14 to 16).***

4.10 It is submitted that the ratio of this Court in ***Larsen and Toubro (supra)*** would be that the list of service elements as found in ***Gannon Dunkerly and Co. vs. State of Rajasthan, (1993) 1 SCC 364*** case will suffer service tax and the goods portion would suffer VAT or sales tax.

4.11. It is submitted that the Constitutional Bench of this Court in the case of ***Gannon Dunkerly and Co. (supra)*** while dealing with the measure of tax vide para 47 had provided a list

of exclusions from the cost of valuation of goods and as to what would constitute the service elements. He has heavily relied upon para 47 of the said decision. It is submitted that this Court observed in para 47 in the case of ***Gannon Dunkerly and Co. (supra)*** as under:

> "**47.** ..... The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover—
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> (a) Labour charges for execution of the works;
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> (b) amount paid to a sub-contractor for labour and services;
>
> (c) charges for planning, designing and architect's fees;
>
> (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;

(e) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and

(f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

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

(h) profit earned by the contractor to the extent it is relatable to supply of labour and services.

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor."

4.12 It is submitted that the above service elements have found a statutory recognition as the same stood incorporated as part of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 w.e.f. 01.06.2007.

4.13 It is submitted that consequently this Court while dealing with the decision of ***Larsen and Toubro (supra)*** had specifically addressed this issue by bringing the similarity of the service elements as mentioned in Constitution Bench's decision in ***Gannon Dunkerly (supra)*** and framed as Rule 2A of the Valuation Rules, 2006. Reliance is placed on paras 25 and 26 of the said judgment.

4.14 It is submitted that the decision of this Court rendered in ***Larsen and Toubro (supra)*** came up for reconsideration in the batch of matter in the case of ***Total Environment Building Systems Pvt. Ltd. (supra)*** wherein this Court vide para 28 rejected the request to refer the

matter to the larger Bench by observing in paragraph 28 which reads as under:

> **"28.** While appreciating the prayer/submission made on behalf of the Revenue to re-consider the binding decision of this Court in the case of *Larsen and Toubro Limited* (supra) and to refer the matter to the Larger Bench, few facts are required to be taken into consideration, which are as under:—
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> (i) The decision of this Court in the case of *Larsen and Toubro Limited* (supra) has been delivered/passed in the year 2015, in which, it is specifically observed and held that on indivisible works contracts for the period pre-Finance Act, 2007, the service tax was not leviable;
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> (ii) After considering the entire scheme and the levy of service tax pre-Finance Act, 2007 and after giving cogent reasons, a conscious decision has been taken by this Court holding that the service tax was not leviable pre-Finance Act, 2007 on indivisible/Composite Works Contracts;
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> (iii) While holding that for the period pre-Finance Act, 2007, on indivisible/Composite Works Contracts, the service tax is not leviable, number of decisions have been dealt with and

considered by this Court in the aforesaid decision;

(iv) That subsequently, the decision of this court in the case of *Larsen and Toubro Limited* (supra) has been followed and considered by this Court in the case of *Commissioner of Service Tax and Ors. Bhayana Builders Pvt. Ld. And Ors, (2018) 3 SCC 782,*;

(v) That after the decision of this Court in the case of *Larsen and Toubro Limited* (supra) rendered in the year 2015, the said decision has been consistently followed by various High Courts and the Tribunals;

(vi) The decisions of the various High Courts and the Tribunals, which were passed after following the decision of this Court in the case of *Larsen and Toubro Limited* (supra) have attained finality and in many cases, the Revenue has not challenged the said decisions;

(vii) No efforts were made by the Revenue to file any review application to review and/or recall the judgment and order passed by this Court in the case of *Larsen and Toubro Limited* (supra). If the Revenue was so serious in their view that decision of this Court in the case of *Larsen and Toubro Limited* (supra) requires re-consideration, Revenue ought to have filed

> the review application at that stage and/or even thereafter. No such review application has been filed even as on today.
>
> (viii) Merely because in the subsequent cases, the amount of tax involved may be higher, cannot be a ground to pray for reconsideration of the earlier binding decision, which has been consistently followed by various High Courts and the Tribunals in the entire country."

4.15 It is submitted that therefore what is taxed under Section 65(105)(zzzza) which later became Section 66E(h) of the Finance Act, 1994 is the service portion in the execution of works contract. That Section 67(1) makes it abundantly clear that service tax is chargeable only on the taxable service with reference to its value. It is submitted that this Court in the case of ***Larsen and Toubro (supra)*** as reiterated in ***Total Environment Building***

(supra) has made it clear that the goods value in the nature of transfer of property of goods would suffer sales tax/VAT and the service components or elements would suffer service tax w.e.f. 01.06.2007 by virtue of the definition of taxable service under Section 65(105)(zzzza) and later as Section 66E(h) as a declared service post 01.07.2012.

4.16 It is submitted that the incorporation of taxable service w.e.f. 01.06.2007 also resulted in the introduction of Rule 2A in the Valuation Rules, 2006 clearly identifying the service elements or components which would constitute the value for determination and payment of service tax. These components again were retained even

after the insertion of Section 66E(h) post 01.07.2012.

4.17 It is submitted that this Court in the case of ***Larsen and Toubro (supra)*** vide para 25 had referred to Rule 2A of the Valuation Rules, 2006 and its purport by holding that the said Rule goes on to say that the service component of the works contract is to include the 8 elements laid down in the second ***Gannon Dunkerly's case*** and the value attributable to the service in the works contract would be the service elements in such contracts as this scheme alone would comply with the constitutional requirements as it seeks to bifurcate a composite indivisible works contract

and takes care to see that no element is attributable to the property in goods transferred pursuant to such contract enters into the computation of the service tax. It is submitted that therefore the purport of Rule 2A of the valuation rules is only to bring the elements of service tax as that alone would meet the constitutional requirements and no elements attributable to the property in goods should enter in the computation of service tax. It is, therefore, the entire contention of the respondent - assessee that they have a legal right to pay tax even on the goods portion as service tax and also take input credit on the duty paid on the goods is clearly contrary to para 25 of the ***Larsen and Toubro (supra)***

judgment and Rule 2A of the Valuation Rules, 2006.

4.18 Now so far as the composition scheme is concerned, it is submitted that the assessee falling under the definition of 'works contract service' from 01.06.2007 has to discharge service tax liability either under Rule 2A of the valuation rules only on the service components without taking any CENVAT Credit on the input goods or go for the option of a composition scheme in which case the rates of tax specified at various points of time should have been complied with on the total contract value. It is submitted that the invented method of the respondent – assessee by seeking to pay service tax on entire contract

value after taking the CENVAT Credit on the input goods is clearly unsustainable in law. The contention that Rule 2A is subject to Section 67 which according to the respondent – assessee permits payment of tax on the contract value including the goods runs counter to the scheme of works contract service. It is submitted that the what would constitute as goods under Article 366 (29A)(b) of the Constitution cannot be construed as a taxable service and as a value of taxable service.

4.19 It is submitted that Finance Act, 1994 read with the Rules permit only 2 options either to pay service tax on the service elements as

envisaged under Rule 2A of the Valuation Rules, 2006 without taking the CENVAT Credit on input goods or opt for composition. It is submitted that the third variant of paying service tax on the total contract value including goods and correspondingly availing CENVAT Credit on the input is not only misconceived but also legally untenable besides a Constitutional bar.

4.20 Now so far as the reliance is placed upon the decision of this Court in the case of ***Commissioner of Service Tax and Ors. Bhayana Builders Pvt. Ld. and Ors, (2018) 3 SCC 782*** is concerned, it is submitted that on facts it has no relevance. It is submitted that

on the contrary the decision of this Court in the case of ***Larsen and Toubro (supra)*** would apply. It is submitted that even the circular dated 22.05.2005 makes it amply clear as to how a works contract service needs to be taxed and vide para 9.2 referred to Rule 2A of the Valuation Rules, 2006 to affirm that the value of works contract service 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 contract and vide para 9.3 rings out the elements of services which matches exactly with the elements laid down by this Court in the case of ***Gannon Dunkerly (supra).***

5. Making above submissions it is prayed to allow the present appeal.

6. Present appeal is vehemently opposed by Shri V. Raghuraman, learned Senior Counsel appearing on behalf of the respondent – assessee.

6.1 While opposing the present appeal and in support of the impugned order passed by the CESTAT, learned counsel appearing on behalf of the respondent has made the following submissions:

(i) That the composition scheme is optional as per Rule 3(1) of the Composition Rules;

(ii) Provisions of Rule 2A of the Valuation Rules are subject to the provisions of Section 67 of the Finance Act, 1994;

(iii) Once the provisions of Section 67 of the Finance Act, 1994 have been complied

with, neither the question of applicability of Rule 2A of the Valuation Rules arise nor was there any question of forcibly applying option of Composition Scheme on the assessee;

(iv) Even if the services of the respondent are considered as classifiable under 'works contract service' after 1st June, 2007, as claimed by the Revenue, the further claims of the Revenue that there were only two options as above for valuation of the works contract service namely the composition rules and the Rule 2A of the Valuation Rules available to the assessee and consequential non-admissibility of CENVAT Credit has no merit.

(v) It is submitted that in case of 'works contract service' also, the assessment can be done under the provisions of Section 67 of the Finance Act, 1994 and that valuation methods prescribed under Rule 2A or composition scheme are merely options provided to the assessee;

(vi) Therefore, the benefit of CENVAT Credit on inputs cannot be denied to the respondents in absence of any specific bar or prohibition in the CENVAT Credit Rules, 2004 or the Finance Act, 1994.

6.2 It is further submitted by learned counsel appearing on behalf of the respondent that while passing the impugned order the learned Tribunal has rightly followed its earlier decision

in the case of ***CCE vs. S.V. Jiwani, 2014 (35) STR 351*** affirmed by the Bombay High Court which is squarely applicable. It is submitted that in the said case it was held that the composition rules and Rule 2A of the Valuation Rules are merely options provided to the service provider to discharge of service tax liability vis-à-vis options available in Section 67 of the Finance Act, 1994.

6.3 It is further submitted that Rule 2A of the Valuation Rules begins with the words 'subject to provisions of Section 67'. It is submitted that this would mean that Rule 2A would apply only when value of the service involved in execution of the works contract could not be determined under Section 67 of the Act.

6.4 It is further submitted by learned counsel appearing on behalf of the respondent – assessee that prior to 01.07.2012 the assessee had three options:

(i) Follow the tenets of Section 67 and pay tax on the full value and take input tax credit.

(ii) Rule 2A of the Valuation Rules: to pay service tax at the full applicable rate on the taxable value as determined in terms of Rule 2A of the Valuation Rules. No bar to avail CENVAT Credit on inputs.

(iii) Composition Rules: To pay service tax @ 2.06% (increased to 4.12% w.e.f. 01.03.2008) on the gross amount charged for the Contract, in terms of the Composition Rules. Cenvat credit on inputs would be inadmissible.

6.5 After 01.07.2012 the assessee had three options:

(i) Follow the tenets of Section 67 and pay tax on the full value and take input tax credit.

(ii) Rule 2A(i): To determine the taxable value of service after deducting the actual value of the material involved.

(iii) Rule 2(ii): To pay service tax on specified percentage of the total amount charged for the works contract.

6.6 It is submitted therefore under the above scheme the assessee had the option to pay the service tax at full value on the entire amount charged towards providing construction service

or works contract services under the provisions of Section 67 of the Finance Act, 1994.

6.7 It is submitted that in this case the assessee would be eligible to full CENVAT Credit and input, input services and capital goods under CENVAT Credit Rules, 2004 OR to pay service tax under the head construction services by opting for abatements specified in Notification under 15/2004 – HT, as amended from time to time or replaced with new notification; OR to pay service tax under the head 'works contract services' either in terms of Rule 2A of the Valuation Rules or in terms of the Composition Rules.

6.8 It is further submitted that the words used in Rule 2A 'subject to Section 67' conveys the

clear idea that the valuation done under Section 67 is supreme and the rules are subject to the Act.

6.9 It is submitted that therefore the composition rules are completely optional for the assessee to exercise the assessee can opt for Section 67.

6.10 It is submitted that taking CENVAT duty on inputs is barred only if one opts for Composition Rules and not if tax is paid at normal prevailing rates on full gross value of contract under Section 67.

6.11 It is further prayed on behalf of the respondent that in case the appeal be allowed on merits, the Tribunal has not rendered any finding on extended period of limitation and/or other issues and therefore the matters may be remanded back to the Tribunal.

7 Heard learned counsel for the respective parties at length.

8 The short question which is posed for consideration before this Court is as to whether an assessee who is liable to pay service tax under works contract service has the legal right not to follow Rule 2A of the Service Tax (Determination of Value) Rules, 2006 nor the Composition Scheme on the ground that in terms of Section 67 of the Finance Act, 1994 an assessee is entitled to take the total contract value which includes both goods and services and remit service tax on the entire value as works contract service and in the process also entitled to avail the CENVAT Credit?

8.1 At the outset, it is required to be noted that as such services rendered by the respondent –

assessee can be said to be 'works contract service' as per the Finance Act, 1994 w.e.f. 01.06.2007 as per Section 64(54) read with Section 65(105)(zzzza).

8.2 As per the law laid down by this Court in the case of ***Larsen and Toubro (supra)*** and ***Gannon Dunkerly and Co. (supra)*** and the subsequent decision in the case of ***Total Environment Building Systems Pvt. Ltd. (supra)*** with respect to the works contract an assessee is liable to sales tax on the goods element and the service tax on the availment of service/value of service rendered.

8.3 In the case of ***Gannon Dunkerly and Co. (supra)*** while dealing with measure of tax in

para 47 this Court had provided a list of exclusions from the cost of valuation of goods and as to what would constitute the service elements. As per the law laid down by this Court in the aforesaid decision the following are to be excluded from the cost of valuation of the goods.

> "**47.** ..... The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover—
>
> (a) Labour charges for execution of the works;
>
> (b) amount paid to a sub-contractor for labour and services;
>
> (c) charges for planning, designing and architect's fees;
>
> (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
>
> (e) cost of consumables such as water, electricity, fuel, etc. used in the

> execution of the works contract the property in which is not transferred in the course of execution of a works contract; and
>
> (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;
>
> (g) other similar expenses relatable to supply of labour and services;
>
> (h) profit earned by the contractor to the extent it is relatable to supply of labour and services.
>
> The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor."

8.4 It is required to be noted that thereafter the above service elements have found a statutory recognition as part of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 w.e.f. 01.06.2007 which has been referred to hereinabove. The applicability of Rule 2A has been dealt with and considered by this Court in extenso in the case of ***Larsen and Toubro (supra)***.

Therefore, as per the law laid down by this Court in the case of 'works contract service' an assessee is liable to pay the service tax on the service element/value of the service rendered and the sales tax/tax on the element of goods transferred pursuant to the contract.

8.5 In light of the above now the next main question posed for consideration before this Court is required to be considered namely whether despite Rule 2A of the Service Tax (Determination of Value) Rules, 2006 and the Composite Scheme still the assessee is entitled to take the total contract value which includes both goods and services in terms of Section 67 of the Act, 1994 and remit service tax on the entire value as works contract service and the

assessee is also entitled to avail CENVAT Credit?

8.6 Rule 2A applicable prior to 01.07.2012 is reproduced hereinabove. It is to be noted that Rule 2A is the specific provision for determination of value of taxable service in relation to services involved in the execution of a works contact shall be determined by the service provider in the manner provided under Rule 2A(1)(i) i.e. value of works contract service determined shall be equivalent to the gross amount charged for the works contract. As per explanation to Rule 2A 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 works contract. The position is made more clear post 01.07.2012. Post 01.07.2012 as per Rule 2A value of service portion in the execution of a works contract shall be determined taking into consideration the value of service portion in the execution of a works contract equivalent to the gross amount charged for the works contract less the value of property of goods transferred in the execution of the said works contract. Therefore, as such the things which were already there as per the decision of this Court in the case of ***Gannon Dunkerly and Co. (supra)*** and Rule 2A earlier has been made explicitly clear.

8.7 However, as per the Composition Scheme vide notification 32/2007 – ST dated 22.04.2007 by which works contract (Composition Scheme for payment of Service Tax) Rules, 2007 came to be introduced, as per Rule 3(1) and notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge the service tax at the rate specified in Section 67 of the Act, by paying an amount equivalent to 2% of the gross amount charged for the works contract. Explanation specifically provides that gross amount charged for the works contract shall not include the 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. At this stage, it is required to be noted that post 01.07.2012 Rule 2A specifically provides that the taxable service shall not take CENVAT Credit of duty or cess paid on inputs used in or in relation to said works contract, under the provisions of CENVAT Credit Rules, 2004.

8.8 It is the case on behalf of the respondent – assessee that as in Rule 2A and even in the Composition Scheme the word used are subject to the provisions of Section 67 the assessee had an option to pay the service tax on the entire contract value i.e. on gross amount charged by the service provider and that Rule 2A is not compulsory and the Composition

Scheme is optional. However, the aforesaid has no substance. If the submission on behalf of the assessee is accepted in that case Rule 2A and the Composition Scheme shall become otiose.

8.9 With respect to the 'works contract service' and/or the Composition Works Contract the valuation has to be made as per Rule 2A of the Valuation Rules, 2006. Even as per the Composition Scheme vide Notification 32/2007 dated 22.04.2007 an assessee has an option to discharge the 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 equivalent to 2% of the gross amount charged

for the works contract. It is to be noted that Rule 3(1) provides notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Service (Determination of Value) Rules, 2006. Therefore, as per the Scheme of the Act the determination of value of service portion in the execution of the works contract is to be made as per Rule 2A, however with an option to the assessee to avail the benefit of Composition Scheme. Therefore, either the assessee has to go for Composition Scheme or go for Determination of Value as per Rule 2A and the assessee has to pay service tax on the service element and can claim CENVAT Credit on the said amount only.

9 In view of the above the impugned judgment and order passed by the CESTAT taking the contrary view is unsustainable by which it is held that the assessee is entitled to take the total contract value which includes both goods and services and remit service tax on the entire value as 'works contract' and the assessee is also entitled to avail the CENVAT Credit on the same.

9.1 However, at the same time the service tax needs to be paid in terms of Rule 2A of Service Tax (Determination of Value) Rules, 2006 and since the assessee has not opted for composition scheme, the matter is to be remitted back for re-computation of the demands in terms of Rule 2A. As the issue

with respect to the extended period of limitation has also not been decided by CESTAT the matter is to be remanded to the CESTAT to decide the issue of limitation.

10 In view of the above and for the reason stated above, the present appeal succeeds. The impugned judgment and order passed by the CESTAT is hereby quashed and set aside and it is held that the assessee is not entitled to take the total contract value which includes both goods and services and remit service tax on the value as works contract service and, in the process, also entitled to avail the CENVAT Credit on the entire amount. It is observed and held that the assessee has to pay the service tax on the value of services as per Rule 2A of the (Determination of Value) Rules, 2006 and

thereafter to avail the CENVAT Credit accordingly. However, it is also observed and held that demand for the period January 2007 to May 2007 is unsustainable.

10.1 In that view of the matter now the service tax needs to be computed in terms of Rule 2A of the (Determination of Value) Rules, 2006 and as the assessee has not opted for the composition scheme, the matter is remitted back to the CESTAT for re-computation of the demands in terms of Rule 2A.

As observed hereinabove the Tribunal has also not decided the issue of extended period of limitation. Therefore, while quashing and setting aside the impugned judgment and order passed by the CESTAT, the matter is remitted back to the CESTAT limited only to decide the

issue of limitation and re-computation of the demands in terms of Rule 2A. The aforesaid exercise be completed by the CESTAT on remand within a period of three months from the date of the present order.

Present appeal is accordingly allowed. However, in the facts and circumstances of the case there shall be no order as to costs.

.....J.
(M. R. SHAH)

.....J.
(KRISHNA MURARI)

New Delhi,
May 2, 2023