
(2021) 03 CESTAT CK 0117

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 11218 Of 2015

C.C.E. And S.T.-Ahmedabad-iii

APPELLANT

Vs

Kalpataru Power Transmission Ltd

RESPONDENT

Date of Decision : 18-03-2021

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzq), 65(105)(ZZZZA), 67, 75, 76, 77
Sale of Goods Act 1930 — Section 2(7), 4, 6(3)
Central Excise Act, 1944 — Section 11C
Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 — Rule 3, 3(1), 3(1)(a)(i), 3(1)(a)(ii)
Service (Determination of Value) Rules, 2006 — Rule 2A

Citation : (2021) 03 CESTAT CK 0117

Hon'ble Judges : Ramesh Nair, J;Raju, Technical Member

Bench : Division Bench

Advocate : S.K Mathur, V Sridharan

Final Decision : Dismissed

Judgement

1. Brief facts of the case are that the respondents are engaged in various activities relating to manufacture of Transmission lines/towers, parts and accessories thereof at their factory situated at Gandhinagar. They are also engaged in providing various taxable services. Out of those services, they are providing services of erection of hightension transmission line towers and prior to 01.06.2007 they were discharging service tax on service classifying under the "Commercial or Industrial Construction Service" and subsequently classified under "Works Contract Service" with effect from 01.06.2007.

2. During the course of audit it was noticed that M/s Power Grid Corporation of India Ltd. (PGCIL) and various Electricity Distribution Authorities(in

short EDAs namely, M/s. West Bengal State Electricity Distribution Company Limited (WBSEDCL) M/S Rajasthan Rajya Vidhyut

Prasaran Nigam Limited (RRVPL), M/s. Madhya Pradesh Power Transmission Company Limited (MPPTCL), Adani Power Ltd

(APL) and Gujarat Energy Transmission Corporation Limited (GETCL) had allotted contracts of manufacture, supply and Erection,

Commissioning and Installation of transmission towers including civil works to the respondent.

2.1 Further department observed that prior to 01.06.2007 the respondent was classifying their activities of erection of high tension transmission line

towers under the Commercial or Industrial Construction Service as defined under section 65(105)(zzq) and were discharging applicable service

tax @ 12.36%. Subsequent from 01.06.2007, they have changed the classification of these contracts of Erection, Commissioning or Installation

activity from Commercial or Industrial Construction Service to Works Contract Services and started paying service tax thereon under the

works contract (Composition scheme for payment of service tax) Rules, 2007. However, it was observed that they were discharging service tax under

the Works Contract only on the value of erection parts and were not taking into consideration the value element of supply of goods required for

completion of the contract. The EDAs have floated tenders and invited bid for the purpose of Purchase of Transmission Towers and

Erection thereof at their pre-determined sites. The contractor (here the respondent) to manufacture the parts and accessories at its factory

premises at Gandhinagar for further erection of transmission tower on various sites, transport such part and accessories (bear the inland freight

charges) to the various sites for erection and installation as per the bid documents. The contractor was paid for the manufacturing of parts of

transmission towers the insurance charges and the transportation of goods up to the sites and erection, commissioning and installation therefore, the

qualifier of bid and the EDAs discussed the project requirements and minutes record note of Post-bid discussion was prepared which was signed by

representative of the Bid winner (the respondent) and the EDA in token of having accepted the conditions of the contract. On selection as successful

bidder, the respondent had entered in the contract with various buyers namely M/s. PGCIL and various other State Electricity Boards/Electricity

Distribution Authorities for supply of transmission line tower parts under the supply contract and as per the terms and conditions of supply contract the

assesses supply the towers, parts and accessories and erection work is carried out by the respondent under the second contract namely Erection

Contract. The documents submitted by the respondent revealed that they had entered into 12 contracts with PGCIL, 5 Contracts with MPPTCL, 2

Contracts with GETCL, 1 Contract with APL, 3 Contracts with RRVPNL and 1 contract with WBSETCL, wherein they opt for payment of Service

Tax under Works Contract Service and had paid services under the Works Contract (Composition scheme for payment of service tax) Rules,

2007. From the general conditions of the contracts both for supply materials and erection of the transmission towers the revenue has observed as

under.

i) The supply contract includes supply of various types of transmission line towers/tower extensions, bolts, nuts, hangers, D shackles, tower

accessories like phase plates, number plates, danger plates, circuit plate, anti climbing devices, wind measurement equipment, earth wires hardware

fitting accessories etc. on ex-work basis.

ii) The erection contract stipulates that the ownership of equipment / material received under the 'First Contract' shall rest with Power Grid

Corporation /EDAs and the assessee shall take full responsibility for their transportation handling at site, storage erection testing and commissioning in

terms of bidding documents. The liabilities of The assessee shall not be over till the Transmission line is successfully commissioned till handed over to

PGCIL / EDAs. Â

iii) The assessee has entered into separate contracts relating to supply and erection of transmission lines for power. However these supply and

erection contracts are interconnected through a cross fail reach clause i.e. a failure in execution of one contract shall mean a failure in the other

contract and are awarded on single source responsibility basis.

iv) The assessee has entered into only supply and erection contracts with the service receiver, yet they are also engaged in incorporation of

conductors and insulators into the transmission line towers.

2.2 From the above it was observed that the respondent may have entered into different contracts but they happen to be only one Â??Works

Contractâ? wherein, the work assigned was supply installation and commissioning of towers transmission lines. Further, it was also observed that the reference of invitation to bid for the package was given in supply portion and erection portion both the contracts had emanated from the single bid

which was later divided into two contracts namely, â??Supply Portion and Erection Portionâ?? the general terms and conditions are almost common

in 24 contracts entered into by the respondent with EDAs, it was further contended with various EDAs work floated tender erection of transmission

towers and lines. The respondents were filling this tender and successfully qualified on financial grounds. It was observed that those contracts were

bifurcated in 2 portion namely, Supply Portion and Erection Portion for their convenience only the respondent manufactured parts of the Transmission

Towers and the other parts of the towers as required to be supplied were taken to the sites by the respondent and the erection activity was carried at

predetermined sites. The scrutiny of the ST-3 return indicated that the assessee had classified their activities under Works Contract Services and

were paying the service tax under (Composition scheme for payment of service tax) Rules, 2007. (for the projects entered by them)prior to

07.07.2009. Scrutiny of documents submitted by the respondent further revealed that while calculating gross value they were not including value of

supply portion and were not paying service tax on portion of Supply Contract. The revenue contended that since the respondent paying the service tax

under Works Contract (Composition scheme for payment of service tax) Rules, 2007 value of the material supplied and used for erection of the

Transmission Towers needs to be included in the gross value of services and service tax payable on the total value, thus by not including the value of

manufactured goods supplied by the respondent, they have short paid service tax accordingly, Show Cause Notice No V ST/15- 02/Off/OA/2012 was

issued. The adjudicating authority vide impugned order vacated the proceeding initiated against the respondent in the aforesaid Show Cause Notice.

3. Being aggrieved by the said impugned order the revenue filed the present appeal.

4. Shri S.K Mathur, Learned Special Counsel appearing on behalf of the revenue made the following submissions. That the respondent got 24

contracts with various Electricity Distribution Authorities for supply of Transmission Towers and parts and erection of Transmission Towers. The

Reference of invitation bid was common in regard to Supply Portion and Erection Portion and the respondent entered into two different contracts with

EDAs one for Supply of Transmission Towers and Parts and Another for Erection Installation Commissioning towers and transmission lines since,

both contracts were emanated from the single bid should be considered one Composite Project. Therefore, they were supposed to include the value of

supply contract in the value of services of erection, installation, commissioning of towers transmission line.

4.1 The learned Adjudicating Authority erred in consideration of the contract of the respondent with EDAs were divisible contracts. He further

submits that the contracts are emanated from the single bill and bid security is also for each tower package and not separately for supply and erection

part therefore, a contract does not becomes divisible simply because it has to be completed in parts or stages. The Respondent was engaged with

EDA for the composite work of design, manufacture, test, deliver, install, complete and commission the towers which involved fabrication, galvanizing,

delivery of tower structures at the sites and commissioning the said contract are on turnkey basis. He submits that as per various dictionary meaning

of "turnkey" is a job in which the contractor has to complete the entire operation, having the building, a plant etc. ready for use. Therefore, the

contract on turned key basis should be one contract hence not divisible. He also referred to boards letter B1/ 16/2007-TRU dated 22.05.2007 which

clarifies that "works contract is the Composite Contract for the supply of goods and services". He also invited attention to the board's

clarification under D.O.F No. 334/13/2009-TRU dated 06.07.2009 mentioned at para 32 that the composition scheme is available only such works

contract where the gross value of works contract includes the value of all goods used in relation to execution of the Works Contract whether received

Free of costs or for consideration under any other contract.

4.2 He further submits that the respondent has submitted full and correct details sought by the department and the present issue was raised only during

the audit on the basis of bid document, contracts and agreement which was otherwise not accessible by the department. The argument of the

respondent of having filed ST-3 return has not legal force as it contains only the statistical data of value of services provided and service tax payable

under each category thus the extended period of limitation is rightly applicable.

4.3 He further submits that Learned Adjudicating Authority in giving various findings in the impugned order the transfer of ownership of the goods to

EDAs on basis does not having the case of the respondent as the fact remains that parts of transmission towers were manufactured and supplied to

EDAs as per design specification and requirement and execution of the contract which stood executed on completion of successful installation and on

operational test certificate by EDA as per terms and conditions of the contract. He submits that merely transfer of title shall not relieve the respondent

with its responsibilities and all risks, losses or damages to the equipment and material remain with the respondent.

4.4 As regard the judgements relied upon by the adjudicating authority in the case of M/S Essar Project India Limited -2014 (33) STR 696 the said

judgement was appealed against in Honâ??ble Supreme Court which is reported at 2014 (36) STR J153. As regard the judgement in the case of

Power Grid corporation of India reported in 2007 (108) ITD (340) HYD passed by the Income Tax Appellate Tribunal is not relevant in the case of

service tax matter. Similarly the case of Gupta Enterprise Pvt Ltd reported at 2015 (37) STR 273 (Tri-Mum) is not applicable as the conclusion in the

judgement seems misplaced by the adjudicating authority. He further submits that as per the definition of Works Contract Service in the Finance Act,

1994 the essence of works contract lies primarily on the satisfaction of one basic condition involved in execution of contract. As the parts supplied in

the Supply Contract and goods supplied during the erection of transmission line therefore, value ought to be included in the gross payment of service

under Works Contract. He placed reliance on the judgement of Honâ??ble Supreme Court in the case of Kone Elevator India Pvt Ltd Vs State of

Tamil Nadu as reported in 2014 (304) ELT 161 (SC) wherein, it held that Works Contract includes supply of goods and services which is not divisible

contract. Therefore, findings of adjudicating authority are incorrect hence, the impugned order deserves to be set aside and demand of service tax to

be confirmed. He further relied upon the following judgements.

â?¢ Siemens Limited-2020 (36) G.S.T.L 467 (App. A.A.R - GSTMah.)

â?¢ EMCO Limited-2019 (20) G.S.T.L 401 (A.A.R-GST)

4.5 Shri S.K Mathur, Learned Special Counsel filed a post hearing written

submission dated 23.11.2020 in the said submission also precisely he submits that even though there are two contracts one for supply of material manufactured by the respondent and another for erection, installation and commissioning of transmission towers it is indivisible contract and the same are integral parts of each other. He reiterates the reliance made in the case of Kone Elevator India pvt ltd (Supra).

4.6 He further submits that the entire operational transmission line was handed over to EDA concerns as per the terms of the tender/bid. Therefore the entire project is outcome of a single bid. He also referred to the provision of section 2(7) and 6(3) of the Sale of Goods Act 1930 whereby, he submits that the two contracts one for goods and other for services are none else than an agreement of sale of transmission lines by the respondent and in the terms of the provision in the works contract the value of goods were required to be added for the purpose of payment of service tax as there is no exemption provisions with effect from 01.06.2007.

4.7 He further submits that even for the works contract which remain continued prior to the crucial date 01.06.07 in the absence of any exemption provision for value of material in discharge of service tax under Works Contract Service applies. He submits that the position would be different if there are different parties in the two contracts but in the instant case the parties to the two contracts are one hence for the purpose of service tax the respondent were required to include the value of material also. He also submits that even if the price is paid with legal tax and whereby, ownership said to have been transferred by no stretch of imagination would be term as free supply to exclude the value of material while utilizing the benefit of scheme by the respondent.

4.8 As regard the judgment relied upon by the respondent he mainly submits that most of the judgments have been appealed against before the Honâ??ble Supreme Court and the revenue appeals are admitted therefore, the judgments have no application in the present case.

4.9 He also tried to distinguish the judgment cited by the respondent on the issue related to claim of Notification No 45/2010-ST dated 20-07-2010 issued under section 11C of Central Excise Act, 1994. He submits that the said notification has no application as the exemption is only in respect of payment of service tax of transmission and distribution of electricity whereas the

instant case is not relating to payment of service tax on transmission and distribution of electricity but the works contract relating to erection, installation and commissioning of transmission lines. The activity of transmission and distribution of electricity subsequent to erection, installation and commissioning of transmission line and hence reference of the respondent is totally misplaced. The similar submission was made in respect of Notification No. 11/2010- ST dated 27.02.2010. With the above submissions he prays that the appeal is maintainable on facts, merits, legality and be allowed in favour of revenue.

5. Shri V Sridharan, Learned Senior Counsel appearing on behalf of the respondent reiterates the finding given by the Adjudicating Authority in the impugned order. He further submits that all the 24 contracts which are under dispute in the present matter have been started/ under progress on or before 06.07.2009. The appellant had paid service tax on such 24 Contracts on the Works Contract Service under (Composition Scheme for payment of service tax) Rules, 2007 which were amended with effect from 07.07.2009. He referred to said rule pre and post its amendment. He further submits that the explanation to rules 3 of Works Contract Rules, 2007 was amended and according to which the explanation provided to the Rule 3 of works contract 2007 shall not apply where the execution in the said contract has commenced on or before 7th day of July 2009. He submits that in the present case the amended Rule 3 is applicable and according to which if the supply of goods is under any other contract for consideration or otherwise the same shall not be included in the gross amount charged for the works contract. He submits that the above change in statutory provision have been explained by CBEC vide circular DOF No 334/13/2009-TRU dated 06.07.2009 where it was clarified in para 5.1 vided circular No. 150/1/2012- ST dated 8.02.2012 again clarified on the said amendment in Rules 3 of works Contract Rules 2007.

5.1 He submits that Learned Commissioner has observed in para 36.2 of impugned order in original dated 22.01.2015 with all the 24 contracts in the present dispute are prior to 07.07.2009 and payment of service tax of all the 24 contracts have been made and the same was disclosed in the periodical ST-3 Return filed by the respondent. He submits that the respondent provided contract wise / invoice wise details along with ST-3 return

filed by the respondent before the jurisdictional Authorities. He invited our attention to a letter dated 21.10.2010 issued by Chief Commissioner concern of Central Excise, Ahmedabad wherein, Honâ??ble Chief Commissioner has appraised the Member (Service tax) CBEC that according to the office of chief commissioner, Central Excise, Ahmedabad, the amendment carried out under Rules 3 of Works Contract Rules, 2007 is prospective only. Therefore audit objection raised on the issue of valuation of Works Contract are not proper. He pointed out that letter dated 21.10.2010 refers to the audit objection being raised in the case of the respondent placing reliance from the circular dated 06.07.2009, 08.02.2012 and letter dated 21.10.2010 issued by the office of the chief Commissioner Central Excise Ahmedabad, Learned Commissioner has dropped/vacated proceedings in the present case. He submits that the revenue department has no contention that the facts recorded by learned Commissioner are erroneous or produced any material which would indicate the factual confirmation that all the 24 contracts disputed in the present matter have not been executed prior to 07.07.2009.

In support of this submission he placed reliance on the following judgments :

- â?¢ TATA PROJECTS LIMITED- 2019 (31) G.S.T.L (436) (Tri-Hyd).
- â?¢ TATA PROJECTS LIMITED- 2020 (35) G.S.T.L (309) (Tri.Hyd)
- â?¢ M/s ESSAR PROJECTS (INDIA LIMITED) 2014 (33) STR 696
- â?¢ ESSAR PROJECTS (INDIA LIMITED) 2014 (36) STR 681 (Tri- Ahmd.)
- â?¢ GAMMON INDIA LTD. - 2015 (37) STR(225) (Tri- Mum).

Relying on the above judgment and submissions made, he submits that the issue is squarely covered in their favour and therefore revenue

departmentâ??s appeal is liable to be dismissed on the above grounds.

5.2 Without prejudice, he also submits that the basis on which assessee has opted to pay service tax under composition scheme has been changed by

insertion of proviso to explanation under Rule 3 of Composition Scheme, in such case the composition scheme cannot be thrust upon the assessee

since the entire basis of payment of service tax was sought to be amended by amendment effective from 07.07.2009. The composition scheme will be

in applicable in the present case. In such case the assesses has choice to pay service tax on full rate of tax of service portion of erection contract.

Therefore, it was submitted that the manner of calculation of service tax while including the value of material supply in the material supply contract is erroneous and not sustainable in law. He further submits that as submitted above the law is settled in the favour of the respondent, hence the appeal filed by the revenue department has no merits.

5.3 The show cause notice dated 24.10.2012 alleged suppression and wilful mis-statement on the part of the respondent and invoked the extended

period of limitation. The period of dispute in the present appeal is 01.06.2007 to 31.03.2012. He submits that there is no suppression of any fact of

wilful mis-statement on the part of the respondent. On the contrary, the respondent have informed the Jurisdictional Authorities vide letter dated

02.07.2007 and 03.08.2007 recording the classification of their services and also their decision to exercise the option to pay service tax under Works

Contract (Composition scheme for payment for service tax) Rules, 2007. Further it was audited by the Revenue Authority for the period 2007-08

however, no objection raised by the revenue auditors further the issue of valuation or services provided by the respondent was raised. The respondent

have represented the matter before the chief commissioner and also before the CBEC. It is also worth to note here that the chief Commissioner while

representing the matter to the CBEC in the letter dated 21.10.2010 has clearly mentioned with the amendment in Works Contract Rules, 2007 with

effect from 07.07.2009 would be prospective only and in the present case it would not apply at all. The above communication clearly shows that there

is no suppression or Wilful Mis-statement on the part of the respondent. In the issue of the limitation he placed reliance on the judgment of

Honâ??ble Supreme Court in the case of Pragathi Concrete Products reported in 2015 (322) ELT 819 (SC). The present proceeding at the can be

categorized as changed in views of the revenue department. All this shows that there is no suppression on the part of the respondent. However,

Revenue department cannot suo moto change the terms on which assessee opted to pay service tax. He submits that in view of the above facts the

present proceedings are hit by limitation also.

5.4 An additional submission was also filed by the respondent through their counsel which was taken on record. In the said additional submission it is

submitted that there are two separate contracts first is for sale of goods namely

transmission line/tower parts along with accessories and second is for supply of services in nature of erection, installation and commissioning of transmission line towers. In the first contract the goods were sold at factory gate and property in the goods are transferred at the recipient factory gate of the respondent and local VAT or CST as the case may be applicable on such sale of goods. Accordingly it is clearly a sale as per section 4 of Sales of Goods Act, 1930. The second contract i.e. supply of service in the nature of erection, installation and commissioning of transmission towers itself is the works contract in its own right. The respondent use steel, cement, paint, grit, sand, coal etc and simultaneously undertaking erection activity of transmission lines. The ownership in this material is transferred from the respondent to EDAs (Customers), during the course of undertaking of the erection work. The ownership of these contracts material does not get transferred as contract of sale. The property in the goods is transferred during the undertaking the work as accretion/accession automatically while undertaking the work. It is therefore submitted that the necessary condition for works contract is that the property in the goods should pass on during the execution of a Works Contract as accretion / accession as per definition of Works Contract as defined in 65(105)(ZZZZA) of Finance Act, 1994. The transfer of property in goods involved in the execution of such contract is leviable to sale of goods before the commencement of work, the property in the goods is with contractor. On completion of the work the property in the goods should vest with the employer. During the completion of work the property in the goods is vested with the employer without any delivery of the goods to the employer. The respondent relied upon Supreme Court judgment in the case of Commissioner of sales tax , MP Vs. Purshottam Premji reported in 1970 (26) STC 38 (SC) = 1970(2) (SCC) 287.

5.5 It is submitted that in view of the aforesaid judgment the transfer of property in goods during the execution of works contract is necessary to be classified as Works Contract under the scheme of Service Tax. The respondent submits that the property in tower/ tower parts are transferred to the respondent at the factory gate of the respondent, this fact is not in dispute. The transferred property in goods under the first contract of sale of tower/tower parts cannot be considered as part of the Works contract therefore, the property in tower/tower parts and accessories supplied along is

not getting transferred by accretion/ accession during the execution of the Works Contract and therefore, the value of towers/ towers parts cannot be

considered as parts of Works Contract. It was further submitted that the definition of Works Contract under the scheme of levy of service tax is

linked with the classification of Works Contract under the Sales Tax Legislation which is treated as Works Contract under sales tax legislation alone

can be covered under levy of service tax under taxable category of Works Contract. They referred to TRU circular B1/16/2007 TRU dated

22.05.2007 which clarifies this position. It was further submitted that in the present case, there are 24 Contracts which are relevant and were

executed by the respondent prior to amendment in Works Contract (Composition scheme for payment of service tax) Rules, 2007 i.e. for the period

prior to 07.07.2009. Therefore, reference to the amended Rules 3 of Works Contracts 2007 is not required in the present matter.

5.6 The Counsel on behalf of the appellant also filed a written submission dated 11.12.2020 summarizing the submission made earlier and overall

during hearing and superseding the synopsis earlier submitted. The same has been taken on record and also considered carefully.

6. We have heard both sides and perused the records. The issue involved in the present case is that whether the value of materials supplied by the

respondent under a separate material supply contract with EDAs is required to be included in the gross value of Works Contract Service or otherwise.

As per the facts prevailing on records and argued by both the sides there is no dispute that there is separate contract for supply of goods/ Sale of

goods and contract for services namely erection, installation and commissioning of transmission line at site. The contention of the department in the

appeal is that even though there are two contracts but it is a composite work undertaken by the respondent that is erection, installation and

commissioning of transmission line therefore, it should be construed as one single contract. Consequently, the value of both the contract should be

clubbed and considered for the purpose of payment of service tax under Works Contract Service. The respondent in respect of the relevant contracts

discharging the service tax in terms of Works Contract (Composition scheme for payment of service tax) Rules, 2007. The said composition scheme

rules amended with effect from 07.07.2009 therefore, it is necessary to refer to the said rules pre and post its amendment.

A.4 Rule 3 of Works Contract (Composition Scheme for payment of Service tax) Rules, 2007 pre- amendment read 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 percent 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.

A.5 The above explanation to Rule 3 of works contract (Composition Scheme for payment of Service Tax) Rules, 2007 was amended as under:-

Explanation:- For the purposes of this sub-rule, gross amount charged for the Works Contract shall be the sum, -

(a) Including-

(i) The value of the goods used in or in relation to the execution of the works contract, whether supplied under any other contract for a

consideration or otherwise; and

(ii) The value of all the services that are required to be provided for the execution of the works contract;

(b) Excluding-

(i) The Value Added Tax or Sales Tax as the case may be paid on transfer of property in goods involved; and

(ii) The cost of machinery and tools used in the execution of the said works contract except for the charges for obtaining them on hire:

Provided that nothing contained in this explanation shall apply to a works contract, where the execution under the said contract has

commenced or where any payment, except by way of credit or debit to any account has been made in relation to the said contract on or

before the 7th Day of July, 2009,â??.

6.1 From the perusal of explanation to Rule 3 of Works Contract (Composition Scheme for payment of service tax) Rules, 2007 it is clear that the

above amendment in Rule 3 (explanation to rule 3) would not be applied to any works contract where the execution under the said contract has

commenced or where any payment has been made in relation to the said contract on or before 07.07.2009.

6.2 The Central Board of Excise and Customs vide circular D.O.F NO 334/13/2009-TRU dated 06.07.2009 has clarified the above change and

statutory provision as under:-

5. Amendments in Rules (pertaining to service taxpayers):

5.1 Changes in the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007: These rules provide a simplified

procedure for working out the tax liability by the service providers providing works contract service. Instead of working out the service

element from the value of works contract and paying service tax at full rate (i.e. 10%) the service provider is allowed to pay 4% on the

gross amount charged for the works contract. The reason for prescribing the lower rate under the scheme is that the service

provider need not bifurcate the gross value of works contract. It was expected that the gross value should be shown to include the total value

of materials as well as services used in providing the taxable services. However, it has been reported that in certain cases, the taxpayers are

not including the full value of the goods required for execution of works contract for working out 4 service tax liability under the

Composition Scheme by either excluding the value of goods received free of cost from their client or splitting the contract into a sale contract

(for a portion of goods required to execute the works contract) and works contract (for only a portion of the total value of goods and the labor

charges), thus reducing the value of works contract for the purposes of calculating service tax. In order to plug this loophole, the

Explanation appearing in sub-rule (3) is being amended to provide that the composition scheme would be available only to such works

contracts where the gross value of works contract includes the value of all goods used in or in relation to the execution of works contract

whether received free of cost or for consideration under any other contract. This condition would not apply to those works contracts, where

either the execution of works contract has already started or any payment

(whether in part or in full) has been made on or before the date of the amendment, i.e. 07.07.2009, from which the said amendment becomes effective (refer notification No.23/2009-ST dated 07.07.2009).â?

6.3 The CBEC once again clarified on the said amended Rule 3 of Works Contract Rules, 2007 vide circular no 150/1/2012-ST dated 8.02.2012 as

under:-

â??Subject: Meaning of the expression â??gross amountâ?? appearing in Rule 3(1) of the Works Contract (Composition Scheme for

Payment of Service Tax) Rules, 2007, as it stood prior to 07th day of July 2009 - regarding.

Reference has been received from a field formation seeking clarification as to whether â??gross amountâ??, for the purpose of payment of

service tax under the Works Contract Composition Scheme, included the value of free of cost supplies, for the period prior to 07/07/2009.

2. The issue has been examined. The meaning of the expression â??gross amountâ?? appearing in Rule 3(1) of the Works Contract

(Composition Scheme for Payment of Service Tax) Rules, 2007, is qualified by the Explanation inserted in the said Rule with effect from

07/07/2009. Since the Explanation inserted in Rule 3(1) with effect from 07/07/2009 is clarificatory and prospective in nature, inclusion of

value of free-of-cost supplies of goods and services in or in relation to the execution of Works Contract [mentioned in the Explanation to

Rule 3(1) (a) (i) and (ii)] in the â??gross amountâ?? for the purpose of payment of service tax on works contract under the composition

scheme, is a legal requirement, only with effect from 07/07/2009 when the Explanation became a part of Rule 3(1).

3. The explanation appended to Rule 3(1) with effect from 07/07/2009, categorically says in the proviso that â??â?|nothing contained in

this Explanation shall apply to a works contract where the execution under the said contract has commenced or where any payment, except

by way of credit or debit to any account, has been made in relation to the said contract on or before the 7th day of July, 2009.â? Where

execution of works contract has commenced prior to 07/07/2009 or where any payment(except payment through credit or debit) has been

made towards a works contract prior to 07/07/2009, then in those cases â??

gross amountâ?? for the purpose of payment of service tax does not include the value of free of cost supplies.

4. The above clarification may be communicated to the field formations and service tax assesseees through Trade Notice/ Public Notice.

Hindi version to follow.â??

6.4 As per the clear provision under the amended Rule 3 reads with amended explanation and two circular clarifying provision of the said amendment,

it is clear that any contract which is executed or payment there against (except the way of credit/ debit) made prior to 07.07.2009, the value of goods

supplied under the separate contract cannot be included in the gross value of Works Contract Service. As per the undisputed fact and also finding

given by the learned commissioner in the impugned order execution of 24 contracts have been commenced prior to 07.07.2009 therefore, the

contention of inclusion of value of goods in the gross amount charged for the works contract as provided under explanation (a)(1) is not applicable. It

is pertinent to note that prior to 07.07.2009 there was no clear provision irrespective of separate contract for supply of goods / supply of service value

of both to be clubbed to arrive at gross amount charged for Works Contracts. Therefore, admittedly there are two separate contracts one for supply

of goods and other for supply of services prior to 07.07.2009. The contract value of supply of goods cannot be included in the gross value of works

contract service.

6.5 As regard the contention of the revenue that the respondent have executed one composite works contract irrespective of having two separate

contract one for supply of goods and other for supply of services, it should be treated as one contract and value of both the contract should be taken

together for arriving at gross value of the works contract.

6.6 We find that there is a clear terms and conditions between the respondent and the service recipient i.e. EDAs that separate contract has to be

entered into, one for manufacture and sale of goods and other is works contract service of erection, installation and commissioning of transmission

line. All the service recipient i.e. EDAs are government organization and it cannot be imagined that the government organization will enter into this

malpractices to evade service tax by bifurcating the one composite contract into two. It is a fact on records that as regard the supply contract mainly it

is a transmission tower which is admittedly manufactured by the respondent in their factory and cleared there from. These goods were sold at factory gate of respondent therefore, the property in the said goods stands transferred the moment it is cleared from the gate of the respondent. Therefore, it cannot be said that the appellant have provided the Works Contract Service along with the goods manufactured and supplied by them. In this transaction the appellant executed the Works Contract Service with the labour and certain other material used in erection, installation and commissioning. As regard the goods manufactured and supplied by the respondent the same belongs to service recipient i.e. EDAs therefore, the value of the said goods cannot be included in the gross value of Works Contract Service.

6.7 This is not a case where the service provider i.e. appellant and the service recipient i.e. EDAs have colluded and with intention to evade service tax entered into two contract one for supply of goods and other for providing service of erection, installation and commissioning of transmission line. In the bid document itself which was offered by the service recipient put a clear condition that two separate contracts need to be entered into i.e. one for supply of service and other for supply /sale of goods therefore, both the contracts are separate contract and cannot be clubbed together.

6.8 As per the definition of the Works Contract Service one of the condition is that the property in goods used in execution of works contract must be transferred during the execution of contract. In the present case the appellant while clearing the transmission towers from their factory issued the sale invoices accordingly, the property in the said goods does not remain with the respondent but the same was transferred to service recipient and while execution of the works contract service the property in the said goods was with the recipient. Since the transfer of property in the said goods is not taking place during the execution of the Works Contract Service the Value thereof cannot be included in the Works Contract Service. At the same time the respondent have used certain accessories and parts for execution of Works Contract Service and value thereof was admittedly included for the reasons that the property in the said good was transferred only during execution of works contract service. Therefore, there is a clear distinction between goods property of which is transferred prior to execution of Works contract Service and the property in the goods transferred during the

execution of Works Contract Service. In view of the clear provision under Works Contract (Composition Scheme for Payment of Service Tax) Rules,

2007 as amended by Notification No 23/2009-ST dated 07.07.2009 the value of the goods, property of which belongs to service recipient before

execution of Works Contract Service, shall not be included in the gross amount of Works Contract Service.

6.9 The revenue's contention is that appellant being common for supply of goods and provider of Works Contract Service cannot enter into

separate contract and in such case the one composite contract is not divisible. On this issue much water was flown. In the various courts have given

judgments on this issue some of the judgment cited :

â?¢ Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas & Co, AIR 1966 SC 543

â?¢ Tata Cellular VS. Union of India, (1994) 6 SCC 651

6.10 From the above judgments it can be seen that reliance on the tender or invitation to bid to decide the nature of the contract or the right and

obligation flowing under a contract entered pursuant thereto is wholly misplaced, which would be governed only by the contracts entered into two

between the parties. In the present case even though there is single bid that contain the condition of separate contract for supply of goods and supply

of service. The two separate contracts are correct and legal and the same cannot be clubbed and held that it is a composite contract. The bid/ tender

is only a offering to the prospective contracts however, the contract is an agreement between two parties and which is recognized as a legal document

therefore, when two separate contract are entered into between two separate parties, revenue cannot insist that there should be one composite

contract. Therefore, we are of the clear view that even though there is single bid / tender, the two separate contracts are legal and correct and no

question can be raised. In the following judgments the issue in question was considered.

â?¢ Madras Vs. Gannon Dunkerley & Co.(Madras) Ltd.(1958) 9 STC 353

â?¢ Hindustan Aeronautics Ltd Vs. State of Karnataka,(1984) 1 SCC 706

â?¢ Builders' Assn. of India Vs. Union of India , (1989) 2 SCC 645

â?¢ State of Karnataka Vs. Trans Global Power Limited 2015 77 VST 509

Reliance Infrastructure Ltd Vs Deputy Commissioner 2015 VIL 60 CAL

Ishikawajma Harima Heavy Industries Ltd Vs. Director of Income Tax, (2007) 3 SCC 481

6.11 In the above judgments one common issue has been considered that there can be two separate contracts, that is one for sale and another for

Works Contract Service as in the present case the value of goods sold, property of which in goods has already been passed on, cannot form part of

the value of the second contract i.e. Works Contract.

6.12 The Contention of the revenue is that it is necessary to enter a single indivisible contract is contrary to the principle that there are more than one

way for performing an act. It is for parties concerned to choose the method and manner. In this regard the Hon^{ble} Supreme Court in CIT vs.

Motors and General Stores (P) Ltd, (1967) AIR1968 SC 200 reads as under:

6. In a later case- Commissioners of Inland Revenue V. Wesleyan and General Assurance Society [30 TC II] - Viscount Simon expressed

the principle as follows:

.....

Secondly, a transaction which, on its true construction, is of a kind that would escape tax, is not taxable on the ground that the same result

could be brought about by a transaction in another from which would attract tax..

6.13 From the above judgment it is clear that even if it is contented that due to two separate contracts there is a shortfall in payment of tax that itself

cannot be a reason to reject the concept of two separate contract legally entered into between two parties. Therefore the revenue's contention

related to this is also not sustainable.

6.14 The revenue's main contention is that even though there are two contracts one for supply of goods and other is for Works Contract Service,

both the contracts are not divisible and should be considered as one contract and hence the value of goods supplied under separate contract should be

added in the Works Contract Service. This very same issue has been considered by this tribunal in The TATA PROJECTS LIMITED- 2019 (31)

G.S.T.L (436) (Tri-Hyd) wherein under the identical facts the following order was passed :

2. Thus, appellant had entered into two supply contracts and a contract for

services which included supply of material related to supply of services.

Appellant discharged Service Tax on the services contract taking it as a works contract. Revenue was of the view that the offshore and onshore

agreements also need to be included in the value of services rendered and surplus tax should have been discharged accordingly. It is the case of the

Revenue that umbrella agreement is the complete agreement and the three agreements viz; onshore supply, offshore supply and services are mere

components of the same. Therefore, while determining the service tax liability under works contract basis, the entire value should be reckoned. A

show cause notice was issued accordingly demanding differential service tax, for the period 2008-09 to 2013-14. Penalties were also proposed to be

imposed under Sections 76 and 77. It was also proposed to recover interest under Section 75 of the Finance Act, 1994. After following due process,

Ld. Commissioner confirmed the demands and interest and imposed penalties as proposed. Hence this appeal.â??

7. We have considered the arguments on both sides and perused the records. There is no dispute on the facts of the case that the appellant had

entered into three agreements with M/s. APPDCL as per the LOI issued by them, of which two are supply contracts and one is a contract for

services which also included supply of some material. He also had an umbrella agreement combining these three agreements. It is not also in dispute

that in addition to the supply, the appellant had discharged VAT/CST as the case may be in respect of the supply contracts. The only question remains

to be answered is whether the value of this onshore and offshore supplies by the appellants need to be included in the value of services rendered by

them under the works contract scheme. It is not in dispute that the material in question was supplied by the appellant with respect to this particular

contract and after the supply was completed, the goods which were supplied were given by APPDCL back to appellant for execution of the contract.

A plain reading of C.B.E. & C. Circular D.O.F. No. 334/13/2009-TRU, dated 6-7-2009 explains that such values became includible in the value of the

works contract as per the amendment made vide Notification No. 23/2009-S.T., dated 7-7-2009. By inserting an explanation, it was also clarified by

C.B.E. & C. themselves that the inclusion of the values would not apply to such contracts where either the execution of works contract has already

started or any payment (whether in part or in full) has been made on or before 7-7-2009. In this particular case, the payments in respect of all the three contracts were made prior to 7-7-2009. Needless to say that there is no separate payment under the umbrella contract because it was only a combination of the other three contracts. This issue was agitated by the appellant before the adjudicating authority who, however, did not agree with this contention on the following words:

¶7.1 The issue required to be decided in these proceedings is whether the contracts dated 12-8-2009 with service recipients, commenced before and payments received before 7-7-2009 can be considered as separate contracts or as one contract. It has been argued by the appellant that both the contracts are independent and cannot be considered as one for the purpose of determining taxable value of the service provided. It was further argued that even if two contracts are treated as one, still appellant's case will not be covered under the Explanation added with effect from 7-7-2009 in

Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. In view of the findings above and nature of EPC

works contract service and the existence of only one contract No. for all the supply and the service contracts, the scope of supply/work being the

same i.e. basic and detailed design, engineering, procurement, manufacture, assembly, pre assembly, inspection, tests at

contractors and/or his sub vendors' works, shock painting, packing, transportation to site, freight and insurance of balance of plant

systems and equipment package for 2×800 W thermal power plant; that the assessee is responsible for installation of the whole facility

under the EPC contract by using the Off-shore supply and On-shore supply procured by the assessee themselves, and therefore, the contracts have to

be considered as one. In this regard, it is observed that both, supply contract and service contract have no separate defects liability clauses and the

total price of the Contract, price variation being for the total price of the contract, and the Liquidated Damages applicable for the entire and complete

Design, Engineering, Procurement, manufacture, supply, erection, testing, commissioning, initial operation, reliability operation and

performance guarantee tests on EPC basis for Balance of Plant (BOP) systems and equipment for 2×800 MW supercritical coal fired

Thermal Power Plant, the contracts have to be considered as one.

8. In other words, the adjudicating authority held that the three contracts in question are essentially part of the same contract and they were

signed on 12-8-2009, hence the explanation w.e.f. 7-7-2009 to Rule 3 of the Works Contract (Composition Scheme for Payment of Service

Tax) Rules, 2007 is not relevant. On a plain reading of the contracts in question, we do not find it so. There are indeed three different

contracts and for which three different payments were to be made and were made. The umbrella agreement only combines all these three

agreements so as to give a complete perspective of the scope of the contract. In fact, there is no payment whatsoever under the umbrella

agreement. Further, the advances in respect of the three contracts were received prior to 7-7-2009 and hence the amended provisions do

not apply. In view of the above, we find that the value of the material supplied under offshore and onshore contracts cannot be included in

the value of the works contract service as the advance payment in respect of all the three contracts are received prior to 7-7- 2009.

9. We also find that this case is identical to the case of Essar Projects (India) Limited (supra) in which a similar view has been taken. In

view of the above, we find that the demand of service tax and interest and imposition of penalties in the impugned order are not sustainable

and the impugned order is liable to be set aside and we do so.

10. The appeal is allowed and the impugned order is set aside.â??

6.15 From the above decision it can be seen that the facts are identical and as much as the assessee in the said case entered into two supply contract

and a contract for service which included supply of that material which is related to supply of service. The assessee has charged service tax on the

service contract taking it as a Works Contract. Revenue raised the same contention that the value of both the contracts needs to be included in the

value of service rendered. The tribunal considering the same set of facts came to the conclusion that since the contracts were executed prior to

07.07.2009, hence the amended provision do not apply. Accordingly it was held that the value of material supplied under both the contracts cannot be

included in the value of Works Contract Service.

6.16 In the present case also the similar facts are involved and the contracts

were executed prior to 07.07.2009. Therefore, even if revenue is of the contention that both the contract i.e. one for supply of goods and other for Works Contract Service are meant for one composite contract by virtue of unamended provision, the value of supply contract cannot be included in Works Contract Service.

6.17 The Tribunal Hyderabad had occasion to once again examine the same issue in TATA PROJECTS LIMITED- 2020 (35) G.S.T.L (309)

(Tri.Hyd) wherein, considering the identical facts in the present case it was held as under:

“4. On examination of the matter, we find that the department seeks to include the value of goods supplied either under a different

contract or as a separate part of the same contract in the value of taxable services on which service tax on works contract service is to be

charged. We find that on an identical issue in respect of the same assessee in Appeal No. ST/22281/2015, after examining the amendment to

Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 vide Notification No. 23/2009-S.T., dated 7-7- 2009 and the

explanation of the amendment by C.B.E. & C. vide D.O.F. No. 334/13/2009-TRU, dated 6-7-2009 as discussed above, we held that

appellant is not liable to include the value of the goods as the contracts were signed/payments were made prior to 7-7-2009. We find no

reason to deviate from our earlier decision. This covers 13 of the 14 projects in respect of which the demand was raised. In respect of the

14th project namely project with respect to SALSETTE Borivli BM,C which was entered post-7-7-2009, we find from Sl. No. 10 in

Annexure-I to the show cause notice the differential tax payable, according to the show cause notice, is negative. Therefore, no Service Tax

is payable. In conclusion, the demands as confirmed by the impugned order are liable to be set aside and we do so. Consequently, the

interest and penalties associated with the demands are also set aside.”

6.18 From the amended provision as well as the judgment cited above, it is clear that to counter the situation like in the present case the amendment

was brought with effect from 07.07.2009. If the contention of the revenue is accepted it will amount to give retrospective effect to the amendment of

07.07.2009 which is not permissible under law as per the settled position by

Honâ??ble Supreme Court in various cases that any amendment cannot be made applicable. Retrospectively unless it is specifically mentioned therein, therefore even considering the undisputed fact of two contracts the value of goods supplied under separate contract cannot be added in the value Works Contract Service. The above judgments are based upon this tribunalâ??s judgments in the case of M/s ESSAR PROJECTS (INDIA LIMITED) 2014 (33) STR 696 wherein, the similar facts rise in the present case were involved where the tribunal has passed the following order:

â??2. Brief facts of the case are that appellant entered into two contracts with M/s. Vadinar Power Company Limited and M/s. Essar Power Gujarat Limited. One of the contracts was for supply of indigenous equipment and materials (supply contract) and the other one for the Construction/Erection/Installation of plant (construction contract). In addition, the service recipient also procured imported equipment and materials which was also supplied to the appellant for completing the construction contract. It is the case of the Revenue that both the contracts entered into by the appellant and the service recipients are artificially bifurcated and are required to be considered as one.

Revenue in their cross-objection under ST/CO/10461 of 2013 mainly argued that explanation to Rule 3(1) of the works contract

(Composition Scheme for Payment of Service Tax) Rules, 2007, substituted under Notification No. 23/2009-S.T., dated 7-7-2009, is not

applicable to the applicantâ??s case and both contracts should be treated as one.

B.4. As can be seen that the facts in the above referred case is identical with the facts of the present case. Considering the above facts,

Honâ??ble Court observed as under:

6. We have given our anxious thoughts to the arguments made by both sides and also perused the records. The issue required to be decided

in these proceedings is whether two contracts dated 24-8-2007, executed by the appellant with service recipients can be considered as

separate contracts or as one contract. It has been argued by the appellant that both the contracts are independent and cannot be

considered as one for the purpose of determining taxable value of the service provided. It was further argued that even if two contracts are

treated as one, still appellantâ??s case will not be covered under the Explanation

added with effect from 7-7-2009 in Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. The adjudicating authority in Para 30 of the impugned order has held that appellant is responsible for installation of the whole facility under the construction contract by using the indigenous machinery procured by appellant and, therefore, both the contracts have to be considered as one. In this regard, it is observed that both, supply contract and construction contract have separate defects liability clauses under Clauses 18 and 34 of the respective contracts. Relevant clause 18.1 of the supply contract and 34.1 of construction contract are reproduced below :-

Article 18 - Defects liability

18.1 - The owner shall have the right, but not the obligation, to instruct the Supplier, in writing to perform such additional supply or remedy any Defects or damage in the Balance of Plant or in the Supplier's Documents and any part thereof, as the case may be, during the Defects Notification Period or within 14 (fourteen) days after the expiration as a result of an inspection made by or on behalf of the Owner at any time or times prior to the expiration of the Defects Notification Period.

Article 34 - Defects liability

34.1 - The owner shall have the right, but not the obligation, to instruct the Contractor to perform such additional Supply or remedy any Defects or damage in the Facility (or any Unit thereof) or any Contractor's Documents and any part thereof arising out of or in relation to the Works, during the Defects Notification Period or within 14 (fourteen) days after the expiration as a result of an inspection made by or on behalf of the Owner at any time or times prior to the expiration of the Defects Notification Period.

7. It is evident that clause 18.1 of the Supply Contract talks about remedy of defects or damage in the balance of plant. As per the definition of the supply contract, balance of plant includes all such machinery permanent plant, equipment, material, etc. required for commissioning and maintenance of the balance of plant. On the other hand, defects liability mentioned under clause 34 of the Construction Contract talks of the remedy of defects/damages in the facility or to any

unit thereof. The word "facility" is defined under the

Construction Contract to mean a Thermal Power Project in relation to which the works are required to be carried out in accordance with

the contract. The word "defect" as per the definition clause means any defect, imperfection, deficiency or other fault in the facility or

part thereof arising from or in relation to the execution of work.

8. From the above clauses of the contracts, it is clear that there are separate defects liability clause under the contracts separately provided

for the defects in balance of plant and the defects that can creep in the working of the facility by the service provider for the service

recipient. Therefore, it is not correct to hold that defects liability clause of the construction contract also make provisions for maintenance

and repair of balance of plant.

9. The arguments made by the appellant, that the explanation added to Rule 3(1) of the Works Contract (Composition Scheme for Payment

of Service Tax) Rules, 2007 is applicable only for those contracts which are entered after 7-7-2009, has got some force. The clarification

issued by C.B.E. & C. under Circular No. 150/1/2012-S.T., dated 8-2- 2012, in Para 3, has clarified as follows :-

3. The explanation appended to Rule 3(1) with effect from 7-7-2009, categorically says in the proviso that "...nothing contained in

this Explanation shall apply to a works contract where the execution under the said contract has commenced or where any payment, except

by way of credit or debit to any account, has been made in relation to the said contract on or before the 7th day of July, 2009. Where

execution of works contract has commenced prior to 7-7-2009 or where any payment (except payment through credit or debit) has been

made towards a works contract prior to 7-7-2009, then in those cases "gross amount" for the purpose of payment of Service Tax does

not include the value of free of cost supplies."

9.1 It is clear from the above Circular issued by C.B.E. & C. that where execution of works contract has commenced prior to 7-7-2009, in

those cases gross amount, for the purpose of payment of Service Tax, will not include the free of cost supply by the service recipient. In this

regard, appellant has argued that as per clause 15.4 of the Supply Contract,

reproduced below, full rights/title/ownership in respect of

each item of the Balance of Plant stand transferred to the owner on delivery by the supplier at the site :-

15.4 - The full right, title, ownership and interest and all risks (except for those specifically retained by the Supplier in accordance with

the terms of this Contract) in each item of the Balance of Plant shall be transferred to the Owner upon Delivery by the Supplier of that item

of the Balance of Plant at the Site and upon endorsement of the documents required under Article 15.1.

9.2 In view of the above clause of the supply contract, the findings of the adjudicating authority that ownership of the Balance of Plant and

items stands transferred only at the time of completion of work, is not correct. In the case of imported equipments as well as the Balance of

Plant equipment, the ownership/title lies with the service recipient when the same are received at site. Accordingly, it has to be held that

after receipt of balance equipment, the title/ownership of the same is transferred to the service recipient. Accordingly, adjudicating

authority cannot go beyond the C.B.E. & C. Circular No. 150/1/2012-S.T., dated 8-2-2012 wherein it has been clarified that for the works

contract executed before 7-7- 2009, free of cost supplies are not required to be added to the gross amount, for the purpose of payment of

Service Tax. There is no evidence on record to convey that both, the supply contract and the construction contract were artificially

bifurcated after introduction of explanation to Rule 3(1) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

The identical issue has been further considered by this tribunal in the case of ESSAR PROJECTS (INDIA LIMITED) 2014 (36) STR 681 (Tri-

Ahmd.) where the tribunal as observed as under:

7. So far as adding the value of Supply Contract to the Service Contract is concerned, this Bench has already taken a view that such

clubbing cannot be done as per our order No. A/10908-10909/WZB/AHD/2013, dated 11-7-2013 in the case of Essar Projects (India)

Limited v. CCE & ST, Rajkot in Appeal No. ST/10138 of 2013 [2014 (33) S.T.R. 696 (Tri.)].

6.19 The similar view was taken by the tribunal Mumbai in the case of GAMMON

INDIA LTD. - 2015 (37) STR(225) (Tri- Mum) wherein, it was

held that even though there are separate contract which were commenced before 07.07.2009 the value of goods is not included in value of Works

Contract Service . In view of the consistent view taken in various above judgments by this tribunal there is no reason to deviate from the said view by

us. The revenue's ground as regard the above judgments is that all the judgments have been appealed against before the Hon'ble Supreme

Court and in some of the cases appeals are admitted.

7. We are of the view that merely because the revenue's appeal is pending in the Hon'ble Supreme Court, tribunal judgments do not lose its

binding nature in view of the judicial discipline. Therefore, following the above judgments we are of the view that the value of the goods supplied under

separate contract cannot be included in the value of service contract of Works Contract Service.

7.1 We find that the respondent has also made an alternative submission that the computation of service tax is erroneous. It was submitted that if the

revenue department wants to include the value of material supplied under material supply contract then the respondent should be given option to pay

service tax on erection service contract at full rate without any abatement. Since we have already taken a view that value of Supply contract is not

includible in the gross value of Works Contract Service, We need not to address this issue.

7.2 The respondent also vehemently argued that the extended period of limitation cannot be invoked. In the facts of the present case we have

carefully considered the facts on this point and we find that firstly the issue involved is of pure interpretation of legal provisions of Works Contract

Service (Composition scheme for payment of service tax) Rules, 2007 particularly read with amended provision became effective from 07.07.2009.

On the same issue there are number of litigation as can be seen in the above judgments and the tribunal has decided in favour of the assessee

therefore, it cannot be said that the respondent had any mala fide intentions and have suppressed any fact with intention to evade payment of service

tax. It is also on record that the respondent have represented the matter before Chief Commissioner and also before the CBEC in letter 21.10.2010

has clearly mentioned that the amendment in Works Contract Service

(Composition scheme for payment of service tax) Rules, 2007 effective from 07.07.2009 would have prospective effect and in the respondent case it will not apply. This clearly shows that there is no suppression or wilful misstatement on the part of the respondent. The Learned Commissioner in the impugned order also observed that the respondent has filed periodical ST-3 return regularly and disclosed all the necessary details as may be required. The respondent also provided contract wise/ invoices wise details along with ST-3 return filed before the Jurisdictional Authority. In this circumstances charge of suppression or wilful misstatement do not survive against the respondent.

8. On the basis of the above fact, we are of the clear view that extended period of limitation is also not invocable therefore, the Learned Commissioner has rightly dropped the demand on the ground of limitation also. Besides giving our above observation, on carefully going through the impugned order we do not find any infirmity therein. Therefore, the impugned order is clearly sustainable.

9. As per our above discussion and findings the revenue's appeal has no substance hence, the appeal is dismissed and impugned order is upheld.

(Pronounced in the open court on 18.03.2021)