

2010-TIOL-403-HC-AP-ST

[\(Also see analysis of the Order \)](#)

IN THE HIGH COURT OF ANDHRA PRADESH

Writ Petition No. 6558 OF 2008

M/s NAGARJUNA CONSTRUCTION COMPANY LTD

Vs

**GOVERNMENT OF INDIA,
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE
NORTH BLOCK, NEW DELHI**

Godaraghuram and Noushad Ali, JJ

Dated: June 7, 2010

Appellant Rep by: Mr S R Ashok, Sr. Counsel Mr. S Chakrapani, Counsel

Respondent Rep by: Mr. A Rajasekhara Reddy, Standing Counsel

Service Tax – Works Contract – Benefit of composition scheme not available prior to 01.06.2007:
a service provider who paid service tax prior to 01.06.2007 for the taxable services such as erection, commission or installing services, commercial or industrial construction services or construction of complex services, as the case may be, is not entitled to avail the composition scheme under the 2007 Rules.

JUDGEMENT

Per: Sri Justice Noushad Ali:

1. The Circular No. 98/1/2008-ST dated 01-01-2008 issued by the 1 st respondent is in challenge.

2. The petitioner is a dealer on the rolls of the Commercial Tax Officer, Srinagar Colony Circle, Hyderabad as well as the service provider, an assessee on the file of the Commissioner of Customs and Central Excise, Hyderabad-II Commissionerate. It carries on the business of execution of civil works including construction of buildings (residential and commercial), roads, bridges, dams, electrical installations etc., throughout the country. The petitioner has been undertaking various civil works 'as a works contract'. It asserts that the works pursued by it fall within the purview of 'works contract' under the respective State enactments dealing with Sales Tax or Value Added Tax, as the case may be and further claims to be paying the taxes under the State Legislations on the material component, in accordance with the State Taxes Legislations including in Andhra Pradesh.

3. The impugned circular issued by the Government of India, Ministry of Finance (the 1st respondent), to the extent of the clarification item, relevant and material for the purposes of the case (Reference Code No. 097.03, dated 04.01.2008), reads:

"To

Chief Commissioners of Central Excise (All)
Chief Commissioners of Central Excise & Customs (All)
Directors General (All)
Commissioners of Service Tax (All)
Commissioners of Central Excise (All)
Commissioners of Central Excise & Customs (All)

Sub: Amendment to Circular No. 96/7/2007-ST dated the 23rd August, 2007 – Clarification in respect of renting of immovable property service and works contract service – Regarding.

In the circular No. 96/7/2007-ST dated the 23rd August, 2007:

(i) after Reference Code 086.05/23.08.07, the following Reference Code and corresponding issue and clarification shall be inserted, namely:-

<i>ReferenceCode</i>	<i>Issue</i>	<i>Clarification</i>
(1)	(2)	(3)
096.01/ 04.01.08

(ii) after Reference Code 097.01/23.08.07, the following Reference Code and corresponding issues and clarification shall be inserted, namely:-

097.02/ 04.01.08	--	--
097.03/04.01.08	<p>Services provided in relation to execution of works contract is leviable to service tax w.e.f. 01.06.07 [section 65(105)(zzzza)].</p> <p>Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 provides option to pay service tax @ 2% of the gross amount charged for the works contract. However, the service provider opting for composition scheme for payment of service tax should exercise the option</p>	<p>Prior to 01.06.07, service provider classified the taxable service under erection, commissioning or installation service [section 65(105)(zzd)], commercial or industrial construction service [section 65(105)(zzq)] or construction of complex service [section 65(105)(zzzh)], as the case may be, and paid service tax accordingly. The contract for the service was a single composite contract. Part of service tax liability corresponding to payment received was</p>

	<p>prior to payment of service tax.</p> <p>The issue pertains to,-</p> <p>(i) contracts entered into prior to 01.06.07 for providing erection, commissioning or installation and commercial or residential construction service, and</p> <p>(ii) service tax has already been paid for part of the payment received under the respective taxable service.</p> <p>Whether in such cases, the service provider can revise the classification to works contract service from the respective classification and pay service tax for the amount received on or after 01.06.07 under the Composition Scheme?</p>	<p>discharged and the balance amount of service tax is required to be paid on or after 01.06.07 depending upon receipt of payment.</p> <p>Classification of a taxable service is determined based on the nature of service provided whereas liability to pay service tax is related to receipt of consideration. Vivisecting a single composite service and classifying the same under two different taxable services depending upon the time of receipt of the consideration is not legally sustainable.</p> <p>In view of the above, a service provider who paid service tax prior to 01.06.07 for the taxable service, namely, erection, commissioning or</p>
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		<i>installation service, commercial or industrial construction service or construction of complex service, as the case may be, is not entitled to change the classification of the single composite service for the purpose of payment of service tax on or after 01.06.07 and hence, is not entitled to avail the Composition</i>
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2. Trade and field formations may be informed accordingly.

(G.G.Pai)

Under Secretary (TRU)"

4. The petitioner is an assessee for service tax, on the rolls of the 2 nd respondent. It obtained centralized sales tax registration for the several taxable services rendered by it under the category consulting engineering, construction service in respect of commercial or industrial buildings and civil structure, erection, commissioning and installation, construction of residential complexes, maintenance or repair services, site preparation and clearance and transport of goods by road.

5. The grievance of the petitioner is that in relation to the ongoing works being executed and in respect of which it had paid service tax prior to 01.06.2007, the petitioner is denied benefits under the composition scheme, under the Works Contract (Composition Scheme for Payment of Service Tax) Rules 2007 ('2007 Rules'). The challenge is on the ground that the impugned

circular is irrational, discriminatory, ultra vires Sec. 65(105)(zzzza) of the Finance Act 1994 ('the Act') and inconsistent with the objects of Rule 3(3) of the 2007 Rules.

6. On a true and fair construction of the clarification contained in the impugned circular (by way of amendment to the earlier circular dated 23.08.2007), a service provider who paid service tax prior to 01.06.2007 for the taxable services such as erection, commission or installing services, commercial or industrial construction services or construction of complex services, as the case may be, is not entitled to avail the composition scheme under the 2007 Rules.

7. Before we proceed to consider the merits of petitioner's claims and contentions, we briefly set out the legislative and statutory changes, in whose context the impugned circular has been issued.

The relevant Legislative and Statutory dynamics:

8. Service tax was introduced through the Finance Act 1994, inter alia by incorporation of Chapters V and VA therein. The number of services brought within the ambit of this tax net, extended through the years. Sec. 64(3) of the Act enacts that the provisions of Chapter V shall apply to taxable services provided on or after 01.07.1994 (being the date on which Chapter V of the Act was notified to come into force). Section 65 (also in Chp.V) sets out the definitions: sub-section (105) therein defines "taxable services" to mean any service provided or to be provided, as are enumerated in the several clauses of sub-section (105) of Sec. 65.

9. Clauses (zzd), (zzq) and (zzzh) – first of these two clauses having been notified on 20.06.2003 w.e.f. 01.07.2003 and the 3 rd clause notified on 07.06.2005 w.e.f. 16.06.2005 include as a taxable service any service provided or to be provided :

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

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

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

10. Sub-Secs. 39(a), 25(b) and 30(a) of Sec. 65 of the Act define certain activities relevant to the case as under:

[39(a)] “erection, commissioning or installation” means any service provided by a commissioning and installation agency, in relation to,--

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

(ii) installation of—

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

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

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

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

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

(f) such other similar services;

11. This definition with reference to the taxable service is dealt with by Clause (zzd).

12. The taxable services covered by Clause (zzq) (commercial or industrial construction services) is defined in sub-section [25(b)] which reads as under:

(25b) “commercial or industrial construction service” means-

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

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing, plastering, painting, floor or wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

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

which is-

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

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

(iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;

13. The taxable services covered by Clause (zzzh) (construction of complex) is defined in sub-sec. [30(a)] of Sec. 65 of the Act, which reads as under:

[30(a)] “construction of complex” means –

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

(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

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

14. With effect from 01.06.2007, vide a notification dated 22.05.2007 sub-section (105) of Section 65 was amended and Clause (zzzza) introduced. This clause reads:

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

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

(i) transfer of property in goods involved in the execution of such contract is liable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out, --

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

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

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

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

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

15. Sec.65A of the Act enacts that the classification of taxable services shall be determined according to the terms of the sub-clauses of Clause (105) and that where for any reason a taxable service is, prima facie , classifiable under two or more sub-clauses of Clause (105), the classification shall be effected as follows:

(A) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;

(c) when a service cannot be classified in the manner specified in clause (a) or clause 9b) it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.

16. Sec.66 enjoins the levy of service tax at twelve percent of the value of the taxable service referred to in sub-clauses (of Sec.65 of the Act), as are enumerated in Sec.66. Among the sub-clauses of Sec.65, enumerated in Sec.66 are sub-clauses (zzd), (zzq), (zzzh) and (zzzza).

17. Sec. 67 sets out provisions relating to valuation of taxable services for charging service tax.

18. The 2007 Rules were issued by the Central Government in exercise of powers conferred by Sections 93 and 94 of the Act. Rule 2(c) defines “works contract service” as meaning services provided in relation to the execution of a works contract referred to in sub-clause (zzzza) of clause (105) of section 65 of the Act; Rule 3 being relevant is extracted below:

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 four per cent of the gross amount charged for the works contract.

Explanation:- For the purpose of this rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, the case may be, paid on transfer of property in goods involved in the execution of the said works contract.

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

(3) The 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 shall not be withdrawn until the completion of the said works contract.

19. The 2007 Rules were notified on 22.5.2007. As already noticed these Rules were issued by the Central Government in exercise of the powers conferred by Sections 93 and 94 of the Act. Sec.93 of the Act empowers the Central Government, if satisfied that it is necessary in the public interest, to exempt generally or subject to such conditions as may be specified in the notification, taxable service of any specified description from the whole or any part of the service tax leviable thereon. Under this provision the Central Government may also, if satisfied that it is necessary in the public interest, by a special order in each case, exempt any taxable service of any specified description from the payment of the whole or any part of service tax leviable thereon, under circumstances of exceptional nature to be stated in such order.

20. Sec.94 of the Act empowers the Central Government to make rules for carrying out the provisions of Chapter-V including [sub-clause (i)] any other matter which by this Chapter is to be or may be prescribed. Sec. 65(86) defines “prescribed” to mean prescribed by rules made under this Chapter .

21. From the foregoing analysis of the flow of rule making power including the power to exempt inhering in the Central Government, it is apparent that the 2007 Rules are made providing for a composition scheme for payment of service tax. Rule 3(1) (fortified by a non obstante clause qua the provisions of Sec.67 of the Act and Rule 2A of the Service (Determination of Value) Rules 2006), provides a choice to the person liable to pay service tax in relation to works contract service, by exercising an option, to discharge the service tax liability on the works contract service provided or to be provided (instead of at the rate specified in Sec.66 of the Act), by payment of an amount equivalent to four percent of the gross amount charged for the works contract.

22. The rate of tax specified in Rule 3 (under the composition scheme aforesaid) was initially two percent and was amended to four percent by the works contract (Composition Scheme For Payment of Service Tax) (Amendment) Rules 2008, w.e.f. 01.03.2008. The current rate of tax chargeable under the composition scheme is thus four percent. Sub-rule (3) of Rule-3 (extracted supra) clearly enjoins that the provider of taxable service who opts to pay service tax under these Rules (i.e., the composition scheme) shall exercise such option in respect of works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.

23. On a true and fair construction of Rule 3(3) of the 2007 Rules, it is clear that where in respect of a works contract service tax has been paid, no option to pay service tax under the composition scheme could be exercised. There is no ambiguity in this provision. The entitlement to avail the benefits of the composition scheme is only after an option is exercised under Rule 3(3) of the 2007 Rules and this provision specifically enjoins a disqualification for exercise of such option where service tax had been paid in respect of a works contract. To put it succinctly, where service tax has been paid in respect of a works contract, the eligibility to exercise an option to avail the benefits of the composition scheme under the 2007 Rules is excluded.

24. In the case on hand the challenge is confined to the impugned circular issued by the 1st respondent. The provisions of Rule 3(3) of the 2007 Rules are not challenged.

25. On the analysis above and in our considered view the impugned circular (to the extent it is challenged i.e., in relation to reference code 097.03 dated 04.01.2008) is wholly in conformity with the provisions of Rules 3(3) of the 2007 Rules. The fact that the nature of the works executed by the petitioner which hitherto fell within the ambit of the taxable services enumerated in Clauses (zzd), (zzq) and (zzzh), now fall within services classified as a works contract in Clause (zzzza), does not in our considered view have any bearing on the entitlement of the petitioner to the benefits of the composition scheme under the 2007 Rules and in the facts and circumstances of this case. The benefit of the composition scheme under the 2007 Rules is available [subject to the exercise of option and the conditions of eligibility for exercise of such option as spelt out in Rule 3(3)] only in relation to “works contract service”, as defined in Rule 2(c) as meaning service provided in relation to execution of the works contract referred to in sub-clause (zzzza) of Clause 105 of Section 65 of the Act.

26. The impugned circular merely reiterates the eligibility criterion specified in Rule 3(3), as the condition precedent for entitlement to exercise an option for coming within the composition scheme, while impliedly recognizing that certain taxable services earlier falling within Clauses (zzd), (zzq) and (zzzh) of Sec. 65 (105) may now fall within the recently introduced Clause (zzzza) of Sec. 65(105) (amendment w.e.f. 1.6.2007), in the light of the criteria for classification of taxable services spelt out in Section 65A of the Act.

27. There are no merits. The writ petition is dismissed, but in the circumstances without costs.

28. The interim order in this writ petition stands dissolved.

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