2010-TIOL-646-CESTAT-DEL-LB

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK NO.11, R K PURAM, NEW DELHI-110066
LARGER BENCH

Service Tax Miscellaneous Application No.405 of 2009
Service Tax Appeal No.100 of 2005

Arising out of Order-in-Appeal No.28/RPR-II/2005 Dated: 28.4.2005
Passed by the Commissioner of Central Excise, Raipur-II

M/s ALSTOM PROJECTS INDIA LTD - intervener

Service Tax Miscellaneous Application No.74
Service Tax Appeal No.100 of 2005

Arising out of Order-in-Appeal No.28/RPR-II/2005 Dated: 28.4.2005
Passed by the Commissioner of Central Excise, Raipur-II

M/s LARSEN & TOUBRO LTD - - intervener

Service Tax Miscellaneous Application No.115 of 2009
Service Tax Appeal No.100 of 2005

Arising out of Order-in-Appeal No.28/RPR-II/2005 Dated: 28.4.2005
Passed by the Commissioner of Central Excise, Raipur-II

M/s SEPCO ELECTRIC POWER CONSTRUCTION CORPORATION - intervener

Service Tax Appeal No.100 of 2005

Arising out of Order-in-Appeal No.28/RPR-II/2005 Dated : 28.4 2005
Passed by the Commissioner of Central Excise, Raipur-II

Date of Decision : 6.5.2010

CCE, RAIPUR

Vs

M/s BSBK PVT LTD

Appellants Rep by: Shri S K Panda, Joint CDR & Shri Sunil Kumar, DR
Respondent Rep by: Shri Sanjay Grover, Adv.
Intervener: Shri P K Sahu & Shri Prashant Shukla, Adv.

CORAM : R M S Khandeparkar, President
M Veeraiyan, Member(T), D N Panda, Member(J)

Service Tax – Composite Contracts - Turnkey contracts can be vivisected – Daelim – (*2003-TIOL-110-CESTAT-DEL*) overruled – it can irresistibly be concluded that a contract whether composite or Turnkey may involve an activity or cluster of

activities in the nature of services and such services may be provided in the course of execution of such contracts while incorporating goods into the contract concerned. Such discernible services may be advice, consultancy or technical assistance and depending upon the nature of the activity, they may be classifiable under appropriate category of taxable service under section 65 A of the Finance Act, 1994. When Article 366(29-A)(b) to the Constitution has made indivisible contracts of the aforesaid nature divisible to find out goods component and value thereof, it can be unambiguously be stated that the remnant part of the contract may be attributable to the scope of service tax under the Provisions of Finance Act, 1994.

The plea that because decision of Daelim's case has been followed in the past by different Benches of the Tribunal, that holds the field does not get sanction of law when different aspects of a commercial transaction are liable to tax under different legislations according to the fields of taxation assigned to States and Government of India.

Case Law Referred:

1. All India Fedn. of Tax of Tax Practitioners versus Union of India - ***2007-TIOL-149-SC-ST****. ...... followed*

2. Bharat Sanchar Nigam Ltd. (BSNL) vs. Union of India - ***2006-TIOL-15-SC-CT-LB****. .... followed*

3. BSBK Pvt.Ltd.- ***2006-TIOL-1538-CESTAT-DEL*** *............ referred*

4. Builders Association of India V. Union of India - - ***2002-TIOL-602-SC-CT*** *........... referred*

5. Commr. Of C, Ex & Customs, Vadodara V. Larsen & Toubro Ltd. - ***2006-TIOL-490-CESTAT-MUM****.......... referred*

6. Daelim Industrial Co.Ltd. vs. CCE, Vadodara - ***2003-TIOL-110-CESTAT-DEL*** *.................... Over ruled*

7. Gannon & Dunkerley & Co. V. State of Rajasthan- - ***2002-TIOL-103-SC-CT*** *................. referred*

8. Gujarat Ambuja Cements Ltd. Vs. Union of India - ***2005-TIOL-53-SC-ST*** *........... referred*

9. Imagic Creative Pvt. Ltd. vs. Commissioner of Commercial Taxes- ***2008-TIOL-04-SC-VAT*** *............. followed*

10. Jyoti Limited vs. CCE, Vadodara - ***2007-TIOL- 2337-CESTAT-AHM*** *............... referred*

11. Larsen & Toubro Ltd - ***2006-TIOL-490-CESTAT-MUM*** *........... referred*

12. Larsen & Toubro Ltd. V. CCE, Cochin - ***2003-TIOL-298-CESTAT-MUM****. ....referred*

13. Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad - ***2002-TIOL-***

24-SC-CX .... referred

*14. State of Madras V, Gannon Dunkerley & Co (Madras) Ltd . - **2002-TIOL-493-SC-CT-LB**, ... referred*

*15. State of Punjab vs. Associated Hotels India Ltd., - **2002-TIOL-65-SC-CT**. .... referred*

*16. Tamil Nadu Hotels Association V. Union of India - **2003-TIOL-130-HC-MAD-ST** .... referred*

*17. Tamil Nadu Mandap Keeper Association case - **2003-TIOL-130-HC-MAD-ST** .... referred*

*18. Ujagar Prints (II) Vs. Union of India - **2002-TIOL-02-SC-CX** .... referred*

MISC ORDER NO.ST/41/10

Per: D N Panda:

1. Following question was referred by the Division Bench by order dated 24.10.2008 to Larger Bench for answer observing that the conclusion in *Daelim's case - 2003 (153) ELT 457 (T): (2007) 7 STT 184 (New Delhi - CESTAT): 2006(3) STR 124 (T) =* ***(2003-TIOL-110-CESTAT-DEL)*** was not in accordance with law and required reconsideration:

"Whether service by way of "advice, consultancy or technical assistance" in the case of turnkey contract will attract service tax will have to be determined on the facts of the case".

The moot question was "whether turnkey contract can be vivisected".

It may be stated that the Tribunal in *Daelim Industrial Co.Ltd. vs. CCE, Vadodara - 2003 (155) ELT 457 (T) =* ***(2003-TIOL-110-CESTAT-DEL)*** held as under:

"Thus, a perusal of the clauses of the contract leaves no doubt that the appellant contract with IOC was a work contract on turnkey basis and not a consultancy contract, it is well settled that a work contract cannot be vivisected and part of it subjected to tax. The impugned orders have proceeded to do precisely that. Therefore, they are required to be set aside" [emphasis supplied}.

To come to the above conclusion, the Bench deciding Daelim's case (supra) had noticed the decision of Apex Court in *State of Punjab vs. Associated Hotels India Ltd ., (1972) 1 Supreme Court Cases 472 =* ***(2002-TIOL-65-SC-CT)***.

1.1. The referring Bench was of the view that in the case before it, the divisibility of contract was not in issue - either in law or even on facts. Conceptually, after the 46th Amendment in terms clause (29-A) in Article 366 of the Constitution, a works contract can be dissected for the purpose of levy of sales tax and service tax. As a matter of fact, in the case before the Division Bench, various works to be done by the Respondent were specified and separately valued in the contract document itself. The contract as such was one single contract involving handing over of the plant in 'running condition to the principal, after completing various works including designing and engineering, civil works steel structures, erection, testing and

commissioning of the plant etc. According to the Respondent, the divisibility of the contract - valued work wise- therefore, cannot be a relevant consideration for holding that service part of the contract relating to "consulting engineer" or "design engineer", should be dissected from rest of the contract and on value thereof, service tax levied. The respondent relied on the 'dominant nature' test for determining the type of the contract.

1.2. The referring Bench noticed that there is no dispute that, theoretically, service tax can be levied on service part and, at the same time, sales tax can be levied on the sale part of the contract and no doubt that service tax can be levied only if the service is a 'taxable service' within the meaning of Finance Act, 1994. In the case of 'turnkey contract', if they are not split only on the ground that the contract is only turnkey project basis, a question may arise as to whether the entire contract will be sale contract. The answer apparently would be in the negative. Only that part of the contract which falls under clause (b) of Article 366 (29-A) - amounting to 'deemed sale' will constitute sale contract on which sales tax can be levied. What will happen to the rest of the contract? Whether it will go out of the net of the service tax? Answer again, will be in the negative. No doubt, as observed above, and it goes without saying, the 'service' will have to qualify as taxable service. The case of the respondent is that the service by way of 'advice, consultancy or technical assistance' is provided by MECON as the consultant and they are merely recipient of the service from them.

1.3. The referring Bench was prima facie, of the view that decision in Daelim (supra) is not in accord with the decision of the Supreme Court in *Bharat Sanchar Nigam Ltd. (BSNL) vs. Union of India , (2006) 3 Supreme Court Cases 1 =* ***(2006-TIOL-15-SC-CT-LB)***. After referring to different sub-clauses of Clause (29-A) inserted in Article 366 of the Constitution of India by the 46th amendment, a three Judge Bench of the Apex Court in BSNL's case held:

"41. Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale. Sub-clause (b) covers cases relating to works contracts. This was the particular fact situation which the Court was faced with in Gannon Dunkerley and which the Court had he/~ was not a sale. The effect in law of a transfer of property in the goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in Gannon Dunkerley was directly overcome. Sub-clause (c) deals with hire purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under sub-clause (d) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to A. V.Meiyappan's decision a lease of negative print of a picture would be a sale. Sub-clause (e) covers cezes which in law may not be have amounted to sale because the member of an incorporated association would be a in a sense begun both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contract which had been held not t amount to sale in State of Punjab v. M/s. Associated Hotels of India Itd. (Supra). That decision has by this clause been effectively legislatively invalidated.

42. All the sub-clauses of Article 366 (29-A) serve to bring transactions where one or more of the essential ingredients of the sele as defined in the Safe of Goods Act 1930 are absent, within the ambit of purchases an sales for the purposes of levy of sales tax. To this extent only is the principle enunciated in Gannon Dunkerley Limited (sic modified). The amendment especially allows specific composite contract viz. works contract [sub-clause (b)); hire purchase contracts [sub-clause (c)], catering contracts [sub-clause (e)] by legal fiction to be divisible contracts

where the sale element could be isolated and be subjected to sales tax.

44. Of all different kinds of composite transactions the drafters of the forty-sixth Amendment chose three specific situations, a work contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in sub-clauses (b) and (f) of Clause (29A) of the Art.366, there is no other service which has been permitted to be so split. For example, the sub-clauses of Art.366 (29A) do not cover hospital services. Therefore, if during the treatment of al patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

45. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley' case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366 (29A), unless the transaction in truth represents two distinct and separate contacts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366 (29A) continues to be: Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even If the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is "the substance of the contract". We will, for the want of a better phrase, call this the dominant nature test. [emphasis supplied]

1.4. The referring Bench further observed that decision in Associated Hotels India Ltd. (Supra) was held to be effectively "legislatively invalidated" (by the 46th amendment), and the "dominant nature" test or "substance" test was held to be applicable only in cases not falling under any of the clauses of Article 366(29-A). It would thus follow that the dominant nature test cannot be applied in the case of works contract falling under clause (b) of Article 366 (29-A), and therefore it cannot be pressed into service for treating turnkey works contract on different footing. If 'works contract' can be split into sale contract and service contract, a different treatment may not be given to the so-called turnkey contract simply because the contract is on a turnkey basis - although basically a work contract. Accordingly/he Bench was prima facie of the view that Daelim's case was not correctly decided and the finding that the turnkey works contract cannot be vivisected requires consideration.

1.5. The referring Bench expressing its respectful disagreement with the decision in Daelim's case was conscious of the fact that decision in Daelim's case was challenged by the Revenue in the Supreme Court. But its appeal was dismissed *vide order dated 02.08.2004 reported in 2004 (165) ELT A181 =* ***(2004-TIOL-66-SC-ST)***. According to the Bench, summary rejection of the SLP or appeal cannot be construed as affirmation of the judgement (under challenge) on merits; it only means that the Supreme Court declined to interfere with the judgment. The dismissal of the appeal, therefore, will not operate as a bar for reconsideration of

the decision by the Tribunal.

Thus the present reference.

2. Learned DR appearing on behalf of Revenue submitted that Finance Act, 1994 in terms of its various clauses under section 65 (105) prescribes certain activities to be "taxable services" and classifying such activities under appropriate class under section 65A of the said Act, value thereof is determined and service tax is levied. When a particular nature of activity prescribed by section 65 (105) is involved in a contract whether composite, indivisible or Turnkey and service elements involved therein is discerned or conceivable, that becomes "taxable service" and liable to service tax. Event of levy arises when "taxable service" is provided. "Taxable service", provided independently or in combination with other activities for execution of Turnkey contract does not bring any difference under law to tax the service components involved therein if the service involved therein is "taxable service". "Taxable services" involved in Turnkey projects make the project executable for which such services have value and taxable. Failure to tax the service elements so involved shall defeat the intent and spirit of law when service contracts simple and plain are taxed under the provisions of Finance Act, 1994.

2.1. Learned JCDR submitted that plea to keep away Turnkey contracts from the ambit of Finance Act, 1994 is not tenable because after 46th Constitutional amendment to the Constitution, every contract whether indivisible, composite or Turnkey involving goods and services are made divisible and States are empowered to tax the value of goods involved in such contracts, leaving service components involved therein for taxation by Government of India under the provisions of Finance Act, 1994. Thus fields of taxation are well defined by Constitution. Accordingly contracts plain and simple and Turnkey contract involving service elements are brought in par for levy of service tax without discrimination under Finance Act, 1994.

2.2. According to Revenue, if turnkey works contract is left out from the scope of service tax that shall be discriminatory and shall grant undue advantage to the Turnkey contractors who by a form of agreement combine goods and services and attempt to escape service tax liability. Had the Legislature intended to exempt turnkey contracts from service tax they would have certainly excluded such contracts by express provision of law. Rather Rules have been made to determine value of services involved in works contract by service tax (Determination of Value) Rules, 2006 and composition scheme of taxation for works contractor has also been introduced by works contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

2.3. Learned JCDR submitted that section 65A (amended w.e.f. 4.5.2003) of the Finance Act, 1994 has made law for classification of "taxable service" and that brings into its fold different nature of services to the appropriate class. Section 67 of the Finance Act, 1994 prescribes procedure to determine value of taxable service and Rules aforesaid framed deal valuation of complex cases. Therefore works contracts by whatever name that is called by parties, if involves "taxable services", such discernible services are classified and valued on case to case basis and taxed under Finance Act, 1994. Therefore the question framed by referral order may be answered in favour of Revenue.

2.4. Relying on the relevant paragraphs of the Judgment of Apex Court in BSNL's case - 2006 (2) STR 161 (SC) extracted in the referral order, it was submitted on behalf of Revenue that the decision of the Tribunal in Daelim's case did not consider consequences of 46th Constitutional amendment which intended

indivisible, composite and turnkey contracts to be made divisible separating the goods component from service components for taxation allocating the same for taxation by State and Union respectively. Sales Tax law of the State taxes goods involved in works contract and service elements therein are taxed by Finance Act, 1994 by Govt. of India. There were following 5 (five) issues as appearing in para 30 of the judgement before Apex Court in the case of BSNL - (2) STR 161 (SC) for consideration:

"30. These broadly speaking are the respective contentions in our opinion, the issues which are for consideration in these matters are:-

(A) What are ""goods" in telecommunication for the purpose of Article 366 (29-A)(d)?

(B) Is there any transfer of any right to use any goods by providing access or telephone connection by the telephone - service provider to a subscriber?

(C) Is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the States to tax the sale element?

(D) If the providing of a telephone connection involves sale is such sale an Interstate one?

(E) Would the "aspect theory" be applicable to the transaction enabling to States to levy sales tax on the same transaction in respect of which the Union Government levies service tax?

All the 5 questions were answered by Hon'ble Court in Para 85 of the judgment as under:

"85. For the reasons aforesaid, we answer the questions formulated by us earlier in the following manner:

(A). Goods do not include electromagnetic waves or radio frequencies for the purpose of Article 366 (29-A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the Assessing Authorities.

(B). There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

(C). The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

(D). The issue is left unanswered.

(E). The aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of the goods in the value of the service".[emphasis supplied]

2.5. Revenue's further argument was that Hon'ble Supreme Court clearly laid down

the law to the effect that indivisible, composite and Turnkey contracts involve both sale and service. After 46th Constitutional Amendment it has become possible for the State to tax value of the goods involved in these contracts as sale. The aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of the goods in the value of the service. This clearly shows that indivisible, composite and Turnkey contracts are made divisible and service element involved therein are taxable under the Provisions of Finance Act, 1994.

2.6. It was further submitted by Revenue that when Turnkey contracts are executed, irrespective of percentage of service element involved, such element shall be taxable by the provisions of Finance Act, 1994. In the case of *Imagic Creative Pvt. Ltd. vs. Commissioner of Commercial Taxes -2008 (9) STR 337 (SC) =* ***(2008-TIOL-04-SC-VAT)***, Apex Court held that while interpreting a statute, the Courts must bear in mind that the legislature was supposed to know the law and the legislation enacted is reasonable one. They must also bear in mind that where application of a Parliamentary and a Legislative Act comes up for consideration, endeavours shall be made to see that provisions of both the Acts are made applicable (in Para 27 of the judgment). In Para 28 of the judgment, it was held that payment of service tax as also the VAT are mutually exclusive. Therefore they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in the composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for "attracting different nature of levy. The judgment in Imagic Creative Pvt Ltd was delivered by the Apex Court on 9.1.2008. The principles laid down in that judgment was not before the Division Bench while Daelim's case reported in 2003 (153) ELT 457 (T) was decided on 5.6.2003.

2.7. According to Revenue, the development in law of service tax has been rapidly made and the incidence of tax has been made applicable to even Turnkey contracts. A contract by whatever name called if involves service element, such element is liable to tax. In the judgment of Hon'ble Supreme Court in the case of BSNL vs. Union of India -2006 (2) STR-2006 (2) STR 161 (SC), in Para 42 it has been held that the works contract involved a kind of service and sale at the same time. In such case, splitting of the service and supply has been constitutionally permitted. In Para 43 of the judgment, it has been held that if there is an instrument of contract which may be composite in form in any case and if the transaction in truth represents two distinct and separate contracts and is discernible as such, in that case it has become permissible to separate agreement to sale from the agreement to render service. Accordingly the test for deciding whether contract falls into one category or the other is to what is the substance of the contract. In view of settled principle in this judgment of the Apex Court, there is nothing left for denying the Revenue to levy service tax on the service element involved in a Turnkey contract.

2.8. Ld. Joint CDR further argued that when the matter of *BSBK Pvt.Ltd .- 2007 (5) STR 124 (Tr.-Del.) =* ***(2006-TIOL-1538-CESTAT-DEL)*** was first before the Tribunal for its decision on 27.9.2006 in *Service Tax Appeal No.100 of 2005 and its decision reported in 2007 (5) STR 124 (T) =* ***(2006-TIOL-1538-CESTAT-DEL)*** , it was held by Tribunal in Para 6 of its decision as under and even after remand of the matter from Apex Court in SLP (C) 871 of 2007 in terms of order dated 30.11.2007 reported in 2008 (9) STR J 29 (SC) there is no change of fact of involvement of "taxable services" in the Turnkey project executed by the said appellant:

"6. After hearing the learned authorised representative and pursuing the record, it becomes clear that the respondent had been rendering the taxable service of

consulting engineer for the following reason:-

6.1 A perusal of invoice dated 21.6.1997 indicates separate description in respect of "designing and engineering" showing the exact amount of charged for the services rendered by the respondent. In the same manner invoices dated 25.4.1997, 23.6.1997 and 1.7.1997 all indicate the specific charges for the said services.

6.2 The letter dated 7.2.1996 from Bhilai Steel Address to the respondent accepting the tender for design, engineering etc. show if clear cut break-up in respect of the total contract price and the services rendered by the respondents in respect of design, engineering, drawings and documentations. Thus, a contract price of Rs.23,17,000/- out of the total contract price of Rs.3,66,82,000- has been worked out and spelt out in no unclear terms. In the same letter, it has also been stipulated that the total price was inclusive of "all taxes and duties of divisible contract basis as per agreed terms and conditions."

6.3 Referring to the Black's Law Dictionary, the term "divisible contract" whose synonym is "severable contract" is defined as under:

"Service contract - A contract that includes two or more promises each of which can be enforced separately, so that failure to perform one of the promises does not necessarily put the promisor in breach of the entire contract. Also termed divisible contract; severable contract."

6.4 It is also noted that the services such as pre-designed services/project report, basis design engineering and detailed design engineering all covered under the category of "taxable service" rendered by the consulting engineers vide Commissioner of Central Excise, New Delhi Trade Notice No.54-CE (Service Tax)/97, dated 4.7.1997. It has also been clarified in the said trade notice that in the case the services are rendered to the prime consultant, the levy of service tax does not fall on the sub-consultant. Further, the intention to include the "designing and drawing work" as services in turnkey project is also evident from CBEC Circular dated 18.12.2002.

6.5. The turnkey project contract entered into by the respondent is "divisible" as stated in the very letter of acceptable of tender dated 7.2.1996. In the impugned order the learned Commissioner (Appeals) has made the following observations:-

"As held by CESTAT in the case of M/s.Daelim Industrial Co.Ltd. (supra) and also in the case of M/s. L&T (supra) the work contract cannot be vivisected to select those activities which comprise taxable services."

In the subject case the contract itself is "divisible" and no surgery to isolate the Siamese twin of services/goods. has taken place. Further the expression "Vivisect" used profusely by both the sides has turned out quizzical, as Concise oxford Dictionary defines the term "vivisect" to mean "to perform vivisection on" and the word "vivisection" turns out to mean "dissection or other painful treatment of living animals for the purpose of scientific research and unduly detailed or ruthless criticism". We revive here what Oliver Wendell Holmes once said about a word such as "Vivisect":

"A word is not a crystal, transparent and unchanged, it is the skin of the living thought and may vary greatly in colour and content, according to the circumstances and the time in which it is used". Therefore, even considering the

word "vivisect" to mean "dissect", we find the 'divisible' nature of the contract in the appellant's case has prevented any more "dissection" possibility, thus distinguishable from the Daelim situation." [emphasis supplied]

3. Learned Counsel Sri P. K. Sahu appearing for the Intervener submitted that exparte decision was made by the Tribunal on 27.09.2006 in Appeal case No.ST/100 of 2005 against BSBK Pvt. Ltd - 2007 (5) STR 124 (Tri.-Del.) for which BSBK Pvt. Ltd went in SLP (Civil) No.871 of 2007 before the Hon'ble Supreme Court. That order was set aside by the Apex Court and the matter was remanded to the Tribunal for fresh disposal. While disposing the matter afresh, *Tribunal by order No.ST/118/08 dated 24.10.2008* made present reference - *2009 (13) STR 26 (Tri.-Del.) =* ***(2008-TIOL-1880-CESTAT-DEL)*** to the Larger Bench. Therefore entire finding of the exparte order being baseless, shall not govern the present reference and Revenue cannot take advantage of those findings.

3.1. Interveners submitted that composite contract has been defined by para 33 of the Apex Court judgment in *BSNL case-2006 (9) STR 161 (SC)*. Where there is no separate agreement relating to labour and work involved in the execution of work and erection of building and for sale of material used in the building such contract is composite one. In Para 42 of the judgment, it has been explained that splitting of works contract is permitted if such contract falls under Clauses (b) and (g) of Clause 29A of Article 366 of the Constitution. There are several types of contracts like composite contract, multiple contracts and turnkey contract and independent contract.

A turnkey contract is a contract which is indivisible and cannot be vivisected to determine the service tax liability since there is no intention of the parties in such contract to merely supply goods or to provide service but a combination of both is done to perform the contract as a whole without being performed in piecemeal and there is no permissibility of dissection of such contract under the Constitutional provisions.

3.2. It was submitted on behalf of interveners that with effect from 1.6.2007, clause (zzzza) was introduced in Section 65 (105) of the Finance Act, 1994 to tax value of services involved in works contracts. Accordingly prior to that date works contracts were immune from service tax. The clause (zzzza) of section 65 (105) of the above Act while defining scope of taxation of works contract recognised Turnkey project including engineering procurement and construction or commissioning w.e.f 1.6.2007. Tribunal in the case of *Jyoti Limited vs. CCE, Vadodara -2008 (9) STR 373 (Tri.-Ahmd)* **= (*2007-TIOL- 2337-CESTAT-AHM*)** has held that service contract is liable to tax from June 2007 and not being prior to that, turnkey contract cannot be divided to determine the value of service if separate consideration is not paid for such service.

3.3. The interveners further submitted that while making reference, Division Bench has not extracted para 43 of the Judgment in BSNL's case in its order to appreciate the reason why services involved in a Turnkey contract cannot be vivisected. The said Para reads as under:

"43. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley's case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and

impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366 (29A) continues to be - did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be diSintegrated. The test for deciding whether a contract falls into one category or the other is to as what is the substance of the contract. We will, for the want of a better phrase, call this the dominant nature test." [Emphasis supplied]

According to the Interveners, that following the ratio laid down by Apex Court in BSNL's case it is not practical for the Govt. of India to severe Turnkey contract into supply contract and service contract to levy tax on minor portion of services involved which is not dominant object to perform the contract when Article 366(29-A) of the Constitution does not intend to divide composite works contract to tax service portion thereof.

3.4. Sri Sahu, learned Counsel for interveners further submitted that the back ground of Forty-sixth Constitutional amendment was suggestion of Law Commission as has been noticed by Apex Court in Para 39 of BSNL's Judgment (supra). Definition of sale was amended in Article 366 of the Constitution. But no suggestion of Law Commission was for bringing services into tax net by amendment of definition of the term "sale" in Article 366 of the Constitution as per Law Commission's suggestion. Accordingly Daelim's case holds the field to exclude services involved in works contract from the ambit of service tax. He invited attention to Para 103 of the BSNL's judgment to submit that the Statement of Objects and Reasons of Forty-Sixth Constitutional amendment does not even speak of taxing service by division of Turnkey works contract. But such contracts may be divisible to tax the goods involved therein under Sales Tax law of the States. Similarly relying on Para 105 of the Judgment, Sri Sahu submitted that fiction of law in Article 366 (29-A) of the Constitution is application to sale of goods only but not applicable to service elements involved in a composite contract. So also he relied on Paras 106 and 107 to strengthen his argument.

3.5. Placing Para 145 of the Apex Judgment in *Southern Petrochemical Industries Co. Ltd. V. Electricity Inspector & RTIO - (2007) 5 SCC 447*, Sri Sahu pleaded that a taxing statute must be made in consonance with Article 265 of the Constitution of India. Constitution itself has envisaged an expanded meaning of the term "sale" for the purpose of Entry 54 of List II of the Seventh Schedule of the Constitution of India but for no other purpose. Therefore Article 366 (29-A) cannot be misread to tax services involved in a turnkey contract. To support his argument he also took shelter of judgment of Hon'ble Supreme Court in the case of Geo Miller & Co (P) Ltd. And Another V. State of M. P. And Others - (2004) 5 SCC 209. He further relied on the Judgment of Hon'ble High Court of Delhi in the case of *Federation of Hotels and Restaurant Association of India V. UOI - AIR 2007 Delhi 137* to submit that when supply of articles of mineral water/soft drink in hotel/restaurant do not constitute sale or transfer of commodity, being a service, taxation of service element in Turnkey contract is inconceivable. So also he relied on the judgment of Hon'ble High Court of Madras in the case of *Tamil Nadu Hotels Association V. Union of India - 2006 (2) STR 513 (Mad)* = ***(2003-TIOL-130-HC-MAD-ST)*** to submit that aspect of service involved in a Turnkey contract does not fall under Entry 54 of the List II of Seventh Schedule for taxation by dissection. Relying on the Apex Court judgement in Sentinel Rolling & Engineering Co. vs. CST - 1978 4 SCC 260, Sri Sahu submitted that execution of Turnkey contract is not complete until an assessee carries out its entire obligation imposed upon it under such contract.

3.6. Learned Counsel for the interveners further submitted that the ratio laid down by Tribunal in Daelim's case holds the field consequent upon dismissal of SLP (Civil)

No. 24294 of 2003 by Hon'ble Supreme Court filed by Revenue. Such decision has been consistently followed by Tribunal in several cases like *Commr. Of C, Ex & Customs, Vadodara V. Larsen & Toubro Ltd. - 2006 (4) STR 63 (Tri Mumbai)=* ***(2006-TIOL-490-CESTAT-MUM)***. Therefore when majority of judgments are in favour of assessee, such majority decision should prevail and referral order should be answered in favour of the Assessee following the ratio laid down in *Puri (PC) CIT - (1985) 151 ITYR 584 (Del)*.

3.7. Sri Sahu, placing Circular No. 334/4/2006 - TRU dated 28.2.2006 further submitted that Board has clarified that when a composite service, even if it consists of more than one service, should be treated as a single service based on the main or principal service and accordingly classified. Therefore it is impracticable to classify various services involved in Turnkey contract. Accordingly predominant test does not bring services of Turnkey contract into tax net. Another Circular No. 334/1/2006 - TRU dated 29.2.2006 issued by Board clarified by para 3.2 states for the purpose of classification of a service covering number of separate services, a view has to be taken as to whether an individual service is merely a component of the overall supply or is itself a distinct and independent supply i.e, whether the component is merely ancillary to the principal supply or the component can be considered as separate taxable service in its own right. A service, which does not constitute for a customer an aim in itself but a means of better enjoying the principal supply ancillary to the principal supply. Similarly, it was argued on behalf of Interveners that abatement Notification in relation to works contract has recognised deemed definition of sale excluding services.

3.8. Learned Counsels appearing for Respondent and some of the interveners while adopting entire argument of Sri Sahu, they submitted that while delivering decision in the case of *Larsen & Toubro Ltd - 2006 (4) STR 63 (Tri - Mumbai)=* ***(2006-TIOL-490-CESTAT-MUM)*** all judgments on the subject of deemed sale including BSNL judgment were considered by Tribunal and ratio laid down in Daelim's case was upheld. But Tribunal while referring the question aforesaid did not look into decision in Larsen Toubro (supra) for which the same is per incuriam and rendering of Engineering and designing service involved in a Turnkey contract does not come under Consultancy Engineering service following decision of Tribunal in the case of *Larsen & Toubro Ltd. V. CCE, Cochin - 2004 (174) ELT 322 (Tri - Del) =* ***(2003-TIOL-298-CESTAT-MUM)***. It was submitted that in view of arguments advanced by the Respondent and interveners, reference was unwarranted,

4. Heard both sides and perused the record as well as gone through the citations placed by both sides.

4.1 At the outset we make it clear that Tribunal being a creature of Statute, we are conscious of our limitations. The issues of constitutionality raised by the parties in the course of hearing received our consideration only on the basis of law laid down by various judgments of Apex Court as hereinafter discussed.

5. Constitutional validity of imposition of service tax under Article 246(1) read with Entry 97 of List I of the Seventh Schedule to the Constitution has been upheld in *Gujarat Ambuja Cements Ltd. Vs. Union of India reported in 2006 (3) STR 608 (SC) =* ***(2005-TIOL-53-SC-ST)*** and *Tamil Nadu Mandap Keeper Association case - (2004) 167 ELT 3 (SC) =* ***(2003-TIOL-130-HC-MAD-ST)*** as well as in the case of *All India Fedn. of Tax of Tax Practitioners versus Union of India reported in 2007 (7)STR 625 (SC) =* ***(2007-TIOL-149-SC-ST)***. According to Article 246 of the Constitution, Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution referred to as the "Union List". In terms of Article 268A Taxes on services became leviable by the Government of

India. With the enactment of Finance Act, 1994 (hereinafter referred to as "The Act"), the Central Government derived its authority from the residuary Entry 97 of the Union List for levying tax on services. The legal backup was further provided by the introduction of Article 268A in the Constitution vide Constitution (Eighty-eighth Amendment) Act, 2003 which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new Entry 92C was also introduced in the Union List for the levy of service tax.

5.1 Hon'ble Supreme Court while deciding the case of *All India Federation of Tax Practicing 2007 (7) STR 625 (SC) =* ***(2007-TIOL-149-SC-ST)*** stated the reasons of imposition of service tax. According to the Hon'ble Court, service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, association, firms, body of individuals etc. Economics hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs. The word "goods" has to be understood in contradistinction to the word "services", It is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business or commerce. Service tax is on value addition by rendition of services. Broadly "services" fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc. Performance based services are services provided by service providers like stock-brokers, practising chartered accountants, practising cost accountants, security agencies, tour operators, event managers, travel agents etc. In cases where value of taxable service could, not be decided then the cost of providing the service constituted the basis of the assessable value of taxable service. What was the economic concept, namely, that there is no distinction between consumption of goods and consumption of services is translated into a legal principle of taxation by the Finance Acts of 1994 and 1998.

5.2 Chapter V of the Finance Act, 1994 deals with Service Tax. It is clarified in the said Act that words and expressions not defined in Chapter V but used therein shall bear the same meaning as given in the Central Excise Act, 1944. Section 67 dealt with valuation of taxable services. Principle of equivalence, emanated from the judgment in *Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad - 1995 (76) ELT 241 (S.C.) =* ***(2002-TIOL-24-SC-CX)*** was made applicable to Service Tax jurisprudence by Apex Court in All India Federation of Tax Practitioners. It has been held that there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is in-built into the concept of service tax, which has received legal support in the form of Finance Act, 1994

6. Nomenclature of a levy is not conclusive for deciding its true character and nature. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the Court looks into the pith and substance of the legislation. Thus entries in the legislative list are construed according to pith and substance. Different entries appear in three different lists of Seventh Schedule to the Constitution. Field of legislation is prescribed by Article 246 of the Constitution. Parliament and State Legislatures are assigned different fields of legislation by that Article and empowered to make law within their competence on the subject relating to the Entry appearing the respective list. Levy of Service tax which was imposed by Parliament in terms Article 246 under its residuary powers under Entry 97 of List I of Seventh Schedule was more clearly brought under Entry

92C of the said List under that Schedule by constitution (Eighty-eight) Amendment Act, 2003 in accordance with Article 268A of the Constitution incorporated by the said Amendment Act. It is observed by the Hon'ble Supreme Court in *Ujagar Prints (II) Vs. Union of India AIR 1989 SC 516 : (1989) 3 SCC 488: (1989) 179 ITR 317: (1,989) 74 STC 401 =* ***(2002-TIOL-02-SC-CX)*** in paragraph 23 as under :-

"Entries in legislative lists, it may be recalled, are not sources of legislative power, but are merely topics or fields of legislation and must receive a Liberal construction inspired by a broad and generous spirit and not in a narrow or pedantic sense. The expression with respect to article 246 brings in the doctrine of pith and substance in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised, the list is whether the legislation looked at as a whole is substantially with respect of the particular topic of legislation. If the legislation has a substantial and flat merely a remote connection with the entry I the matter may well be taken to be legislation on the topic. 11

6.1 Liability to service tax arises when taxable event occurs. Various classes of taxable service as defined by various clauses of Section 65 (105) of Finance Act, 1994 when provided, taxable event occurs and liability thereunder arises. A commercial transaction may have different aspects as held in Federation of Hotel and Restaurant Association of India V. Union of India [1989] 3 SCC 634, 652-653; [1989] 178 ITR 97 (at pages 115 and 116) of the case. In the case, It was held that "............... subjects which in one aspect and for one purpose fall within the power of a particular Legislature may, in another aspect and for another purpose, fall within another legislative power indeed, the law 'with respect to' a subject might incidentally 'affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspect. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects.' (emphasis supplied). Finance Act, 1994 in pith and substance does not levy tax on transfer of property in goods involved in execution of a Turnkey contract. Series of Activities in the nature of service involved in such contract, demonstrating their role, foster execution thereof and offer themselves to the ambit of Finance Act, 1994 if such activities are "taxable service". It is open to a Legislature or more than one Legislature to impose a tax on that particular "aspect" of the transaction which is within its legislative competence. Doing so is perfectly permissible. In execution of Turn key contract, while goods (property of which is transferred) incorporated into such contract are taxable by State, services involved to translate such goods into work to give rise to a structure or any other form, inevitably contribute for execution of such contract and becomes taxable under Finance Act, 1994 by Government of India provided those are "taxable services" as defined by law. In Federation of Hotel and Restaurant Association of India V. Union of India [1989] 178 ITR 97; 74 STC 102 (SC); [1989) 3 SCC 634 elaborating the theory of "aspects legislation", Hon'ble Supreme Court observed (pages 115 to 118 of 178 ITR) that:

"In Lefroy's Canada's Federal System, the learned author, referring to the 'aspects of legislation' under sections 91 and 92 of the Canadian Constitution, i.e., the British North America Act, 1867, observes that one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of legislative power is that subjects which in one aspect and for one purpose fall within the power of a particular Legislature may in another aspect and for another purpose, fall within another legislative power. Learned author says ' ...that by "aspect" must be understood the aspect or point of view of the legislator in legislating the object, purpose, and scope of the legislation that the word is used subjectively of the legislator, rather than objectively of the matter

legislated upon'. (Emphasis supplied).

6.2 Indeed, the law 'with respect to' a subject might incidentally 'affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Siamonds in Governor-General in Council V. Province of Madras [1945] 1 STC 135 (PC) at page 141; (1945) FCR 179 (PC) at page 193; AIR 1945 PC 98, in the context of concepts of duties of excise and tax on sale of goods said: '..... The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the fist time upon the occasion of its sale.. (emphasis supplied).

6.3 Referring to the' aspect' doctrine, Laskin's 'Canadian Constitution Law' states: 'The "aspect" doctrine bears some resemblance to those just noted but, unlike them, deals not with what the "matter" is but with what it "comes within" ... It applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its "matter"); are a kind most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fishscaler, nailfile, etc., a description of it must mention everything but in characterizing it the particular use proposed to be made of it determines what it is. " ...... I pause to comment on certain correlations of operative incompatibility and the "aspect" doctrine. Both grapple with the issues arising from the composite nature of a statute, one as regards the preclusory impact of federal law on provincial measures bearing on constituents of federality regulated conduct, the other to identify what parts of the whole making up a 'matter' bring it within a class of subjects .. .. ' (emphasis supplied)

7. Article 366 lays down the definition of certain expressions. Unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that Article. Clause (29-A) of Article 366 defines the expression: 'tax on the sale or purchase of goods'. Sub-clause (b) appearing under this clause, deals with the tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. Accordingly such transfer shall be deemed to be a sale of those goods by the person making the transfer, and a purchase of those goods by the person to whom such transfer is made. Such a provision in Constitution was made to overcome the effect of the decision of Apex Court in the case of *State of Madras V, Gannon Dunkerley & Co (Madras) Ltd . (1998) 9 STC 353: (1959) SCR 379 =* ***(*****2002-TIOL-493-SC-CT-LB*****)***, Parliament amended Article 366 by introducing sub-clause (b) of clause (29- A). However, even after the decision of Apex Court in the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd . (1958) 9 STC 353; (1959)SCR 379 it was quite possible that where a contract entered into in connection with the construction of a building consisted of two parts, namely, one part relating to the sale of materials used in the construction of the building by the contractor to the person who had assigned the contract and another part dealing with the supply of labour and services, sales tax was leviable on the goods which were agreed to be sold under the first part. But sales tax could not be levied when the contract in question was a single and indivisible works contract. After 46th Amendment, It has become possible for the States to levy sales tax on the value of goods involved in a

works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above. Such Imposition was held constitutional by Hon'ble Supreme Court in *Builders Association of India V. Union of India - 73 STC 370 (SC) =* ***(2002-TIOL-602-SC-CT)***

7.1 In *Gannon & Dunkerley & Co. V. State of Rajasthan- 88 STC 204 (SC) =* ***(2002-TIOL-103-SC-CT)*** Apex Court held that as a result of the Forty-sixth Amendment, the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and other for supply of labour and services and as a result, such a contract which was single and indivisible has been brought at par with a contract containing two separate agreements. Value of the goods involved In the execution of a works contract became measure of levy of sales tax contemplated by article 366 (29-A) (b). Taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works.

7.2 In order to determine the value of goods which are involved in the execution of a works contract for the purpose of levying sales tax referred to in the Article 366 (29-A) (b), it became permissible for the States to take the value of the works contract as the basis and the value of the goods involved in the execution of the works contract is determinable by deducting expenses incurred by the contractor for providing labour and other services from the value of works contract. The charges for labour and services which are required to be deducted from the value of the works contract would cover (i) labour charges for execution of the works,(ii) amount paid to a sub-contractor for labour and services, (iii) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract, (iv) charges for planning, designing and architect's fees, and (v) cost of consumables used in the execution of the works contract, (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services, (vii) other similar expenses related to supply of labour and services, and (viii) profit earned by the contractor to the extent it is relatable to supply of labour and services.

7.3 It was held by Apex Court in Gannon Dunkerley's case 1988 STC 204 (SC) that to deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the assessing authority the legislature may prescribe a formula for deduction of cost of labour and services on the basis of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of woks contract. It became permissible for the Legislature to, prescribe varying scales for deduction on account of cost of labour and services for various types of works contract ..

7.4 In the case of Gannon Dunkerley & Co. Vs. State of Rajasthan (1992) 88 STC 204 (SC) it is held that since a composite works contract involves supply of materials as well as supply of labour and services, the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services. The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in

the execution of the works contract only can be included in the value of the goods. Similar apportionment will have to be made in respect of profits expected on such contract. The profits which are relatable to the supply of materials can be included in the value of the goods and the profits which are relatable to supply of labour and services will have to be excluded. This means the cost of establishment i.e. [overhead expenses of the head office and branch office including rents, salary, electricity, telephone charges, etc., and interest charges to banks and financial institutions] of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be excluded. The amounts so deductible would have to be determined in the light of the facts of a particular, case on the basis of the material produced by the contractor. Thus the value of goods involved in the execution of a works contract is determined after making these deductions and exclusions from the value of the works contract. It may accordingly be stated that once value of goods involved in composite or turnkey contracts is determinable applying the ratio of Gannon & Dunkerley case - (1992) 88 STC 204 (SC), the remnant part of such contract is attributable to the service element leaving scope for levy of service tax on such element subject to the provisions of Chapter V of Finance Act, 1994.

7.5 Aforesaid principles of law laid down in Gannon & Dunkerley's case (1992) 88 STC 204 was incorporated into Rule 2A of Service Tax (Determination of Value) Rules, 2006 to precisely value service elements involved in contracts involving goods and services and such Rule came into force w.e.f. 1.6.2007. The said Rule reads as under and demonstrates that law has prescribed measure of levy of service tax be determinable without any arbitrariness.

"2A. Determination of value of services involved in the execution of a works contract: - (i) 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 in sub-clause (zzzza) of clause (105) of section 65 of the Act, shall be determined by the service provider in the following manner:-

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

Explanation: - for the purposes of this rule,-

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

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

(i) labour charges for execution of the works;

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

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

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

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

works contract;

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

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

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

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

7.6 The Rule 2A of service tax (Determination of Value) Rules, 2006 recognised principle of equivalence as enunciated by Apex Court in All India Federation of Tax Practitioners 2001 (7) STR 625 (SC). This Rule statutorily declared the manner of determination of measure of levy for imposition of service tax In respect of composite or turnkey contracts involving services excluding value of goods from the gross value of such contracts. Accordingly, service elements involved in execution of such contract provide measure of levy under the provisions of Finance Act, 1994 following principles of equivalence irrespective of nature of works contract whether turnkey, indivisible or composite since divisible contract does not pose much difficulties to determine measure of levy. Decision of Tribunal in Daellm's case did not take into, account Apex court ruling in Gannor Dunkerley's case reported in (1993)88 STC 204 & Larsen & Toubro reported in (2000) 117 STC 41 (PAT) nor there was advantage to go through the land mark decision of service tax made by Apex Court in All India Federation of Tax Practitioners - 2007 (7) STR 625 (SC).

8. The term service generally means service of any description which is made available to potential user and includes the provision of facilities. Such term has variety of meanings. It may mean any benefit or any act resulting in promoting or serving interest of the recipient. It may be contractual, professional, public, domestic, legal, and statutory etc. How it should be understood and what it means depends in the context in which it has been used in an enactment. An activity in the nature of service, whether provided individually or integrally and solely, separately or combinedly with other activities, has its Identity. Permutation and combination of activities or services do not change character of the activity or service. It may be possible that while an activity in a cluster of activities may be dominant others may not be prominent. But each activity has its identity, existence and independence and play its role. A plain and simple service contract or a composite contract comprising various activities of different nature of services do not make any difference to discern role of each service involved in a composite or Turnkey contracts. Difficulty may arise only in determination of assessable value of such service involved in such contracts. But Article 366 (29A) (b) read with Article 286A and 246 has obviated such difficulty enabling to determine value of goods segregating the same from different elements of service involved in these contracts. Both the elements being thus segregated, fall into respective fields of taxation under L1st-I and L1st.,II .. of Seventh Schedule of Constitution, Accordingly, the submissions of Interveners and Respondents that without specific amendment to Entry 92C of List I to the Seventh Schedule of the Constitution, segregation of service element involved in a composite contract or Turnkey

contract is not permitted and tax on service elements is not leviable' does not appeal to common sense. Since Article 366 dealing with definitions of the expressions used therein is within the body of the Constitution, Article 268 cannot be read in isolation thereof. Segregation of service element from goods involved in the above nature of contracts is permissible when sale of goods involved in such contract is segregated under the constitutional provisions.

9. For the purpose of interpretation of a taxing statute, the fiscal philosophy, a feel of which is necessary to gather the intent and effect of its different clauses, should be applied. [See K.P. Verghese v. Income Tax Officer, Ernakulam and Another, (1981) 4 SCC 173]. A consideration of public policy may also be relevant in interpreting and applying a taxing Act. [See Maddl Venkatraman & Co. (P) Ltd. v. Commissioner of Income Tax, (1998) 2 SCC 95]. Principle of purposive construction is applied to find out object of the Act and to seek reasonable result but not to be interpreted in a manner to defeat its spirit. That is to be read so as to render justice and construction which leads to confusion must be avoided. [See: Corporation Bank vs Saraswati Abharansala 2009 (233) ELT 0003 (S.C)]. It was held by Hon'ble Supreme Court in R.K. Garg v. Union of India [1981 (4) SCC 675]: (SCC pp. 690-91, para 8) that Laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It is well-known that the one and the only proper test in interpreting a section in a taxing statute would be that the question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits. [See St. Aubyn (LM) and Others' v. Attorney General (No. 2), (1951) 2 All ER 473, p. 485].

10. Submissions of Intervener and Respondent that turnkey contracts cannot be vivisected does not find legal support and entire submission that severability of turnkey contract by 46th Constitutional amendment has only permitted levy of sales tax on goods is misconceived. An entry incorporated to the Statute book w.e.f. 1.6.2007 has nothing to do with the severance of the contract to segregate goods and services involved in turnkey contracts. Leviability of service tax on different elements of services certainly depends on the facts and circumstances of each case and classification of the respective services. The Division Bench while dealing with the appeals shall have advantage to look into each case on its own factual matrix and legal back ground as well as respective pleadings. The circulars relied by the Interveners and Respondent were misplaced since the circulars deal with classification of services covered by cluster of services without dealing with the divisibility aspect of the contract. Reliance placed by interveners and Respondents on different citations made is not profitable for the various reasons described herein before and observations made in this order. The plea that because decision of Daelim's case has been followed in the past by different Benches of the Tribunal, that holds the field does not get sanction of law when different aspects of a commercial transaction are liable to tax under different legislations according to the fields of taxation assigned to States and Government of India.

10.1 Entire thrust of Revenue's submission that Constitution has permitted turnkey contract divisible for levy of sales tax by States has equal application under the Constitution for levy of service tax on the discernible or seggreable service elements of such contracts has force. Severability of composite and turnkey contract permitted by Constitution by Article 366 (29-A)(b) cannot be said to have been for the mere purpose of levy of sales tax. Severance discerns service elements of the contracts and provides measure of levy to impose service tax on taxable services. Such proposition finds support from judgment of Apex Court in the case of All India Federation of Tax Practitioners (supra) as well as judgment of

BSNL (supra) and Imagic Creative Pvt. Ltd (supra).

11. In view of the aforesaid legal and Constitutional provisions it can irresistibly be concluded that a contract whether composite or Turnkey may involve an activity or cluster of activities in the nature of services and such services may be provided in the course of execution of such contracts while incorporating goods into the contract concerned. Such discernible services may be advice, consultancy or technical assistance and depending upon the nature of the activity, they may be classifiable under appropriate category of taxable service under section 65 A of the Finance Act, 1994. When Article 366(29-A)(b) to the Constitution has made indivisible contracts of the aforesaid nature divisible to find out goods component and value thereof, it can be unambiguously be stated that the remnant part of the contract may be attributable to the scope of service tax under the Provisions of Finance Act, 1994.

12. On the aforesaid legal and Constitutional background as well for the reasons stated, the Reference may be answered stating that turnkey contracts can be vivisected and discernible service elements involved therein can be segregated and classifiable as well as valued for levy service tax under Finance Act, 1994 provided such services are taxable services as defined by that Act and depending on the facts and circumstance of each case, services by way of advice, consultancy or technical assistance in the case of turnkey contract shall attract service tax liability.

Registry is directed to place respective appeal cases before the concerned Benches for disposal of the matter.

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