

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT BANGALORE
Bench – Division Bench
Court – I

Date of Hearing: 15/03/2012
Date of decision: 14/05/2012

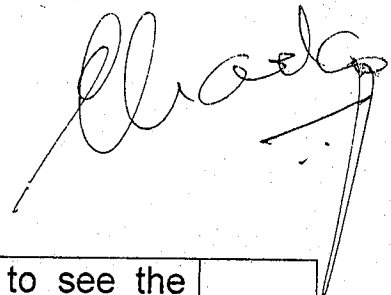
Appeal Nos. ST/476/2009; ST/1589/2010; ST/432/2010

ST/stay/260/10

(Arising out of Order-in-original No. 14/2009-ST dt. 17/2/2009
No. 15/2010-ST dt. 29/3/2010; No. 51/2009-ST dt. 30/11/2009
passed by CC, CE&ST, Hyderabad)

For approval and signature:

Hon'ble Mr. P.G. Chacko, Member(Judicial)
Hon'ble Mr. M. Veeraiyan, Member(Technical)



1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordship wish to see the fair copy of the Order?	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s. Ramky Infrastructure Ltd. – V. SatyaAppellant(s)
Murthy Joint Venture

M/s. Maytas-Nagarjuna Construction
Company Ltd. Joint Venture

Vs.

CST, Hyderabad

.....Respondent(s)

Appearance

Mr. G. Shivadass, Advocate for M/s. Ramky Infrastructure Ltd. – V. Satya Murthy JV.

Mr. G. Natarajan, Advocate for M/s. Maytas-Nagarjuna Construction Co. Ltd. JV.



Mr. P.R.V. Ramanan, Special Consultant and Mr. R.K. Singla,
Commissioner(AR) for the Revenue.

Coram:

Hon'ble Mr. P.G. Chacko, Member(Judicial)

Hon'ble Mr. M. Veeraiyan, Member(Technical)

FINAL ORDER Nos. 299 to 301/2012
Stay order no. 77/2012

[Order per: P.G. Chacko] The appeals, ST/476/2009 and ST/1589/2010, were filed by M/s. Ramky Infrastructure Ltd.- V. Satya Murthy Joint Venture (hereinafter referred to as *Ramky-Murthy JV*) and the third appeal, ST/432/2010, was filed by M/s. Maytas Infra Ltd.-Nagarjuna Construction Company Ltd. Joint Venture (hereinafter referred to as *Maytas-NCC JV*). All the three appeals are directed principally against demands of service tax under the head "Works Contract Service" confirmed against them by the Commissioner in adjudication of the relevant show-cause notices covering various periods as shown below:-

Appeal No.	Date of SCN	Period of dispute	OIO No. & date	S. Tax + Education Cesses	Penalty imposed u/s 76	Penalty imposed u/s 77	Penalty imposed u/s 78
ST/476/2009	24/10/2008	June 2007 to May 2008	No.14/2009-ST dt. 17/2/2009	Rs.2,79,12,913/-	@ 2% of service tax per month	Rs.1000/-	Rs.2.8 crores
ST/1589/2010	25/08/2009	June, 2008 to March, 2009	No.15/2010-ST dt. 29/3/2010	Rs.2,57,97,663/-	@ 2% of service tax per month	Rs.5000/-	----
ST/432/2010	18/06/2009	June, 2007 to Sept, 2008	No.51/2009-ST dt. 30/11/2009	Rs.13,46,28,909/-	@ 2% of service tax per month	Rs.1000/-	Rs.14 crores

2. Facts of appeal No.ST/476/2009

2.1. From the results of investigations into the works undertaken by the appellant in execution of certain contracts awarded by the Irrigation & Command Area Development(CAD) Department, Govt. of Andhra Pradesh, it appeared to the Anti-Evasion Wing of the Commissionerate of Service Tax, Hyderabad-II that the appellant was providing to the Statement Government "works contract service"(WCS) in terms of Section 65(105)(zzzza) of the Finance Act, 1994 during the period from 01/06/2007 to 31/05/2008. It was found that six EPC contracts had been executed by the appellant for the Irrigation & CAD Department of the State Government during the said period. The relevant particulars including the description/scope of the work, as gathered by the service tax authorities, are as stated hereunder:

Name of the contractee: Irrigation & CAD Dept., Government of Andhra Pradesh, represented by the Superintending Engineer concerned:					
Sl.No.	Brief title of contract	Type of project as per the agreement/contract documents	Agreement No.	Date	Contract value (Rs. In crores)
1	SRSP Stage-II Package No.56 – Km 0.00 to 32.00 Tirumalagiri (v&m), Nalgonda Dist.	Turnkey Contract	62/04-05	06/03/2005	72.00
		<u>Description/scope of work:</u> Earth work excavation, forming embankment and distributor system including Distributories, Majors, Minors, Sub-Minors and Field channels from Km 0.00 to 32.00 on DBM (i.e., 1R to 22L) on DBM-71 of SRSP Stage-II, Tirumalagiri (v&m), Nalgonda District.			
2	SRSP Stage-II Package No.57 –	Turnkey Contract	63/04-05	06/03/2005	55.35

	Km. 32.00 to 40.00, Suryapet Mandal, Nalgonda Dist.	<u>Description/scope of work:</u> Earth work excavation, forming embankment and construction of CM & CD works including investigation, designing and estimation of Distributory System including distributories, Majors, Minors, Sub-Minors and Field channels from Km 32.00 to Km 40.00 (i.e. 23R to 37L) on DBM-71 of SRSP - State-II, Suryapet Mandal, Nalgonda District.			
3	HNSS (Handri Neeva Sujala Sravanthi) Phase-II Package No.4 (Km 260.00 to Km 280.00)	EPC Turnkey System	SHE 5 EPC/2006-07	15/12/2006	60.41
		<u>Description/scope of work:</u> Investigation, preparation of Hydraulic particulars, designs, drawings and each work excavation of HNSS main canal reach from Km 260.00 to Km 280.00 and distributor system to feed an ayacut of 2500 acres under Khariff - ID under HNSS Phase-II in Anantapur District, A.P.			
4	HNSS (Handri Neeva Sujala Sravanthi) Phase-II-KM 20.0 to KM 30.0	EPC Turnkey System	SHE 2/ EPC/ 2006-07	23/04/2007	74.70
		<u>Description /scope of work:</u> Investigation, preparation of Hydraulic particulars, designs, drawings and each work excavation of Punganur Branch canal from Km 20.00 to Km 30.00 including formation of Cherlopalli Reservoir, Constructions of CM & CD works and distributor system to feed an ayacut of 5,500 ac. Khareef I.D.			
5	HNSS (Handri Neeva Sujala Sravanthi) Phase-II - KM 30.00 to KM 74.00	EPC Turnkey System	SHE 3 / EPC / 2006-07	23/04/2007	73.99
		<u>Description / scope of work:</u> Investigation, preparation of Hydraulic particulars, designs, drawings and each work excavation of Punganur Branch canal from KM 30.00 to KM 74.00 including construction of CM & CD works and distributor system to feed an ayacut of 19100 acres under Phase II.			
6	GNSS (Galeru Nagari Sujala Sravanthi) Project - Flood Flow Canal from Owk Reservoir to Gandikota Reservoir - Package No.49A	EPC System	4 SE/ 2007-08	11/06/2007	90.495
		<u>Description/scope of work:</u> Additional investigation, design, preparation of Hydraulic particulars, estimates and earthwork excavation of GNSS flood flow canal from Owk Reservoir to Gandikota Reservoir from KM 32.520 / 34.800 to KM 52.184 including construction of CM & CD work enroute the canal for carrying capacity of 20,000 cu. secs(upto start of Tunnel) in Kadapa Dist., AP.			

It was found by the investigators that the appellant had raised Running Account Bills (R.A. Bills) on the contractee-Department and received payments from the latter towards the value of the services provided. But the appropriate service tax had not been paid on the value of the services provided after 01/06/2007 in relation to the



above contracts. The investigators further found that the payments received by the appellant from the contractee did not reflect the actual value of the taxable services, certain deductions having been made, from the gross amount billed by the appellant, by the contractee towards advance recovery, TDS etc. According to the investigators, service tax was liable to be paid by the appellant on the gross amount charged under the R.A. Bills less VAT/Sales Tax in terms of Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax), Rules, 2007. They also found that the appellant had not filed ST-3 return for the half year ending 30/09/2007 and that the ST-3 return filed for the half year ending 31/3/2008 did not disclose the factum of works contract service having been provided to the contractee. On the basis of the results of investigations, the Department issued show-cause notice dt. 24/10/2008, invoking the extended period of limitation prescribed under the proviso to Section 73(1) of the Finance Act, 1994 (a) for recovery of Rs.2,79,12,913/- as service tax and education cesses from the appellant under the head 'works contract service' for the period from June 2007 to May 2008, (b) recovery of interest on the said amount under Section 75 of the Act, and (c) imposition of penalties on the appellant under Sections 76 to 78 of the Act.



2.2. Ramky-Murthy JV, in an elaborate reply to the show-cause notice, contested the demand of service tax and allied proposals on numerous grounds. They claimed that they were not liable to pay service tax under the head 'WCS'. In this connection, they claimed support from certain circulars of CBEC, certain decisions etc. They also contested the demand on the ground of limitation. According to them, the extended period of limitation was not invocable in their case. In this connection also, reliance was placed on certain decisions of the Supreme Court. The quantification of tax was also objected to on a few grounds. The proposal for imposing penalties was also contested on certain grounds. The benefit of Section 80 of the Finance Act, 1994 was claimed in this connection. After hearing the party, the learned Commissioner passed the impugned order, (a) confirming the demand of service tax against the assessee under Section 73(2) of the Finance Act, 1994 with interest thereon under Section 75 of the Act and (b) imposing penalties on them under Sections 76, 77 and 78 of the Act. This order of the Commissioner is under challenge in the above appeal filed by Ramky-Murthy JV.

3. Facts of appeal No.ST/1589/2010

3.1. A show-cause noticed dt. 25/08/2009 was issued to Ramky-Murthy JV on similar grounds demanding service tax (with



education cesses) under Section 73(1) of the Finance Act, 1994 for the period from June, 2008 to March, 2009, with interest thereon under Section 75 of the Act, and for imposing penalties under Sections 76 and 77 of the Act. This demand was also contested by the party on the same grounds as in the earlier case. In adjudication of the dispute, the Commissioner passed the impugned order (a) confirming the demand of service tax and education cesses against the appellant for the above period under Section 73(2) of the Act with interest thereon under Section 75 of the Act and (b) imposing penalties on them under Sections 76 and 77 of the Act. The present appeal is against this order of the Commissioner and is on a set of grounds similar to those raised in the first appeal.

4. Facts of the appeal No.ST/432/2010

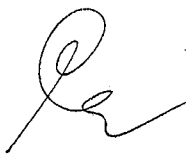
[This appeal was taken up for hearing with the other appeals after waiving pre-deposit.]

4.1. Investigations conducted by the officers of Anti-Evasion Wing of the Commissionerate of Service Tax disclosed (a) that Maytas-NCC JV had executed EPC contracts awarded by Irrigation & CAD Department, Govt. of Andhra Pradesh during the period from 01/06/2007 to 30/09/2008, (b) that they raised R.A. Bills on the contractee periodically and received payments, (c) that they did not take service tax registration for 'WCS' till April, 2008, (d) that they did not file any ST-3 return for 'WCS' for the half years ending



30/09/2007 and 31/03/2008, (e) that, in the ST-3 return filed by them for the half year ending 30/09/2008, they misdeclared the taxable turnover as 'exempted' turnover and (f) that they did not pay the appropriate amount of service tax, under the head 'WCS', on the gross amount billed to the contractee for the period of dispute. It appeared to the investigators that the appellant was evading payment of service tax on WCS, which was leviable in terms of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. Therefore a show-cause notice was issued to Maytas-NCC JV on 18/06/2009 (a) demanding an amount of over Rs.13.46 crores as service tax and education cesses on 'WCS' provided by them to the contractee during the period of dispute, (b) demanding interest thereon under Section 75 and (c) proposing penalties under Sections 76, 77 and 78 of the Finance Act, 1994. The demand of service tax was in respect of EPC contracts executed by the appellant for the contractee. The essential particulars of these contracts, including the description/scope of works, were also stated in the show-cause notice, as follows:-

Name of the contractee: Irrigation & CAD Dept., Government of Andhra Pradesh; represented by the Superintending Engineer, concerned:					
Sl. No.	Brief Title of contract	Type of Project as per the Agreement/Contract documents	Agreement No.	Date	Contract value (Rs. in crores)
1	GNSS	EPC Contract	5SE/2006-07	06.03.07	171.63

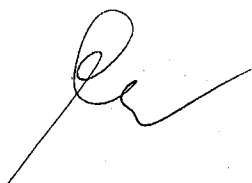


	(Galeru Nagari Sujala Sravanthi) Package 29	<u>Description/Scope of Work:</u> Package No.29/2006-Investigation, Design and excavation of GNSS Flood flow Canal (Gorakallu Reservoir to Owk Reservoir) for the reach from 46.000 KM to 57.700 including Construction of CM & CD works en route to Kurnool Dist., on EPC Turnkey contract.			
2	SRBC Nandyal project Package No.26/2006	EPC Contract	1SE/2006-07	06-12-07	257.85
		<u>Description/Scope of Work:</u> Package No.26/2006 – Investigation, Design and execution of widening of SRBC Main Canal from Km 25.067 to Km 56.775 and Construction of additional structures/improvements and alternations to CM & CD Works including all other allied works on EPC Category-I			
3	Flood Flow Canal Project from SRSP	EPC/ Turnkey contract	17/FFC/2004-05	23-03-05	210.06
		<u>Description/Scope of Work:</u> Earthwork Excavation, forming embankment and construction canal from Km 86.000 to Km 103.00 in Balwanthpur (V), Mallai (M) of Karimnagar District.			
4	Indira Sagar (Polavaram) Project Package-3	On EPC/Turnkey system	73/2004-05	18-03-05	212.94
		<u>Description/Scope of Work:</u> Conducting detailed investigation, preparation of Hydraulic particulars, designs and engineering, preparation of estimates and excavation of main canal, formation of banks including canal lining and construction of CM and CD works from Km 51.60 to Km 69.145 of Left Main Canal of Indira Sagar Project (Polavaram Project) (Package-3) on EPC-Turnkey system.			
5.	Thotapalli barrage project	Turnkey contract	5/2004-05	25-10-04	170.02
		<u>Description/Scope of work:</u> Earthwork excavation, forming embankment and construction of CM & CD works including investigation, design and estimation of Right Main Canal from Km 52.450 to Km 107.00 and its Distributory system and field channels of Thotapalli Barge project near Thotapalli (V) Garugubilli (M) of Vizianagaram District.			
6.	Lingala (Chitravati Balancing Reservoir Right Canal) Project	Turnkey Contract	3 SC /2004-05	25-10-04	148.05
		<u>Description / Scope of work:</u> Investigation, design, preparation of hydraulic particulars, estimates and execution of works of Chitravathi balancing reservoir Right Canal (Lingala Canal) from Km.0/0 to Km 53/0 and its distributories including construction of CM & CD work earthwork excavation, forming embankment and construction of CM & CD works etc., complete to irrigate an ayacut of 25000 acres (approx.) including construction of link canal to P.B.C. cross regulator and head regulator and lift irrigation system, supply and fabrication of Hydro Mechanical components and erection of vertical gates, stop log gates and its accessories of Lingala Irrigation scheme in Cuddapah District.			
7	GNSS Phase II Package 10/06	EPC Turnkey Contract	9 SE/2007-08	29-06-07	195.12
		<u>Description / Scope of work:</u> Package No.10/06 – Investigation, design and formation of Malleamadugu reservoir and earthwork excavation of kailasagiri canal from Km 0.000 to Km 65.500 including construction of CM & CD works and distributory system including field channels to feed an ayacut of 55,000 acres under GNSS in Chittoor District Package No.10/06.			

8	Gundlakamma Reservoir Project Package No.G1	EPC Turnkey system	4 VGP / 2004-05	10-11-2004	212.49
		<u>Description / Scope of work:</u> Formation of Right Earth bund and closing of Gorge portion by earthen bund, excavation of left and right canals, construction of right head sluice of Gundlakamma Reservoir project including CM & CD works and distributory system for an ayacut of 80,060 ac. On EPC Turnkey system.			
9	Pranahitha Chevella LIS project	EPC Turnkey system	LS AB No.03/ 2008-09	26-05-08	215.47
		<u>Description / Scope of work:</u> PCLIS – Detailed investigation and preparation of designs, drawings, estimates, land plan schedules and excavation of gravity canal including forming embankment, construction of sluices, cross masonry and cross drainage works lining etc., complete for the reach from Km 15.000 to Km 28.500 (Karjalli to Suragapally) which is taking off from the right flank of the proposed barrage across river Pranahitha near Tummidetti (v), Koutala (M), Adilabad Dist. – Package No.II.			

The show-cause notice invoked the proviso to Section 73(1) of the Finance Act on the alleged ground of “wilful misstatement and suppression of material facts” and “contravention of the provisions of the Finance Act, 1994 and the Rules thereunder” “with intent to evade payment of service tax”.

4.2. The demand of service tax and the connected proposals were contested by the appellant on numerous grounds by and large similar to the grounds raised by Ramky-Murthy JV. In adjudication of the dispute, the learned Commissioner passed the impugned order (a) confirming the demand of service tax and education cesses under “WCS” under Section 73(2) of the Finance Act, 1994, (b) demanding interest thereon under Section 75 of the Act and (c) imposing penalties under Sections 76 to 78 of the Act.



5. The legal provisions

5.1. The adjudicating authority has brought the appellants' services within the ambit of "turnkey projects including engineering, procurement and construction or commissioning (EPC) projects" specified under clause (e) of the definition of "works contract" under Section 65(105)(zzzza) of the Finance Act, 1994. The appellants argued, inter alia, before the adjudicating authority that their activities were more specifically covered by "construction of a new building or a civil structure or a part thereof, or of a pipeline or a conduit" mentioned in clause (b) of the definition of "works contract" and that, as the construction was not for any commercial or industrial purpose, it remained outside the scope of the full text of clause (b) and consequently outside the scope of "works contract". The provisions of Section 65(105)(zzzza) of the Finance Act, 1994 read as under:

Section 65: In this chapter, unless the context otherwise requires

(105) - Taxable service means any service provided or to be provided -

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

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

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out, -

(a) erection, commissioning of installation of plant, machinery, equipment or structures, whether prefabricated 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, free 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;

[underlining added]

5.2. In the course of their arguments before the adjudicating authority, the appellants also relied on Section 65A(2)(a) & (b); apparently the adjudicating authority has followed Section 65A(1).

These provisions read as under:

Section 65A. Classification of taxable services – (1) For the purpose of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of Section 65;

(2) When for any reason, a taxable service is, *prima facie*, classifiable under two or more sub-clauses of clause (105) of Section 65, 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;

5.3. Before the adjudicating authority, it was also argued that the subject projects consisted essentially of "construction of civil structures, pipelines and conduits" falling within the taxable category of "commercial or industrial construction service" only and would not fall within the scope of "WCS". Section 65(25b) provides the definition of "commercial or industrial construction service" as under:-

Section 65(25b) "Commercial or industrial construction service" means

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

(b) construction of pipeline or conduit; or

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

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

which is –

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

(ii) occupied, or to be occupied, primarily with; or (iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;

The corresponding definition of "taxable service" appears under Section 65(105)(zzq) and the same reads as follows:-

"taxable service" means any service provided or to be provided to any person by any other person in relation to commercial or industrial construction service.

The corresponding definition of "taxable service" appears under Section 65(105)(zzza) and the same reads as follows:-

"taxable service" means any service provided or to be provided to any person by any other person in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities.

5.4. Before the adjudicating authority, Ramky-Murthy JV also argued that their activities were alternatively classifiable under "site formation and clearance, excavation and earth moving, and demolition" defined under Section 65(97a) of the Finance Act, 1994. This definition, which took effect from 16/6/2005, reads as follows:-

Section 65(97a) "site formation and clearance, excavation and earth moving and demolition" includes,--

- (i) drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or
- (ii) soil stabilization; or
- (iii) horizontal drilling for the passage of cables or drain pipes; or
- (iv) land reclamation work; or



(v) contaminated top soil stripping work; or

(vi) demolition and wrecking of building, structure or road,

but does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies.

6. The submissions for Ramky-Murthy JV

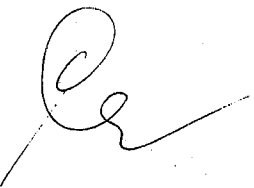
6.1. The contracts in question were entered into with the Irrigation & CAD Department of the Govt. of Andhra Pradesh essentially for construction of canals for supply of water for irrigation purpose. The activity of construction of canal system may be classifiable as "commercial or industrial construction" under Section 65(25b) of the Finance Act, 1994, but since the construction undertaken by the appellant was not intended for commerce or industry, it is not exigible to service tax. Normally, Government constructions for non-commercial purposes would not be taxable. Even constructions for the use of organizations or institutions established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purpose of making profit are not taxable, being non-commercial in nature [Circular No.80/10/2004-ST dt. 17/09/2004 relied on]. As the canal system was built under Government projects for non-commercial/non-industrial purposes, the activity is not chargeable to service tax. Only when a canal system is developed as a revenue generating measure, service tax can be



charged on the construction activity [Circular No.116/10/2009-ST dt. 15/09/2009 relied on].

6.2. Alternatively, the activities of the appellant could be classified under the head "site formation and clearance, excavation and earthmoving, and demolition" defined under Section 65(97a) of the Finance Act, 1994. The activities specified in the inclusive definition of "site formation and clearance, excavation and earthmoving, and demolition" are only illustrative and not exhaustive. Operations like blasting and removal of rock, excavation etc. carried out by the appellant during the course of execution of the contracts are also covered by the inclusive definition. Indeed, more than 70% of the total contract value was spent for excavation work alone, which factor would determine the essential character of the service provided by the appellant. Thus, the entire work undertaken by the appellant would fall within the range of activities comprised and envisaged in the inclusive definition under Section 65(97a). But then, as the work was done in relation to irrigation, it is not taxable by virtue of the exclusion clause of the said definition. [Board's Circular No.B1/6/2005 TRU dt. 27/07/2005 and Notification No.17/2005-ST dt. 07/06/2005 relied on.]

6.3. A "works contract" as defined under Section 65(105)(zzzza) of the Finance Act, 1994, must be a contract for



construction or a new building or civil structure or a part thereof or for construction of a pipeline or conduit, primarily for the purposes of commerce or industry. Impliedly, such construction activities undertaken for non-commercial/non-industrial purposes would not be taxable as "works contract". Just as non-commercial activities cannot enter into the ambit of "commercial or industrial construction service", they would remain outside the scope of "works contract service" as well. [Board's Circular No.123/5/2010 dt. 24/05/2010 relied on.]

Case law cited-

- *Indian Hume Pipes Co. Ltd. vs. CCE, Trichy* [2008(12) STR 363 (Tri. Chennai)]
- *Nagarjuna Construction Co. Ltd. vs. CCE* [2010(19) STR 259 (Tri. Bang.)]
- *Larsen & Toubro Ltd. v CST* [2011(22) STR 459 (Tri. Ahmd.)]
- *Dinesh Chandra Agarwal Infracon Pvt. Ltd. vs. CCE* [2011(21) STR 41 (Tri. Ahmd.)]

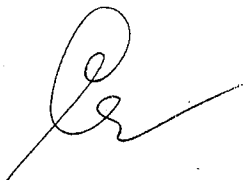
6.4. In any case, within the definition of "works contract", clause (b) is more specific than clause (e) and, therefore, in terms of Section 65A(2) of the Finance Act, 1994, clause (b) should be the preferable classification for the activity in question even though, on account of its non-commercial/non-industrial nature, the activity may go out of the purview of clause (b). [Budget Circular No.334/1/2008-TRU dt. 29/02/2008 relied on.]



6.5. Notification No.41/2009-ST dt. 23/10/2009 was issued to exempt works contracts (falling under Section 65(105)(zzzza) of the Act) in respect of canals constructed for non-commercial/non-industrial purposes, from payment of service tax. The circular issued by the Board on 15/09/2009, prior to the Notification, also clarified the non-taxability of canals constructed for non-commercial purposes. Hence the intention of the Government was always to exclude construction of such canals from levy of service tax. It is not in dispute that the activity was not taxable as WCS prior to 01/06/2007. It is not taxable from 23/10/2009 by virtue of the above exemption Notification. In view of the clarification issued by the Board prior to the issue of the Notification by the Government, the Notification should be given retrospective effect. Whether the activity should be chargeable to service tax for the 'intervening period' i.e., from 01/06/2007 to 22/10/2009, may also be considered in the light of the following decisions:

- *WPIL Ltd. Vs. CCE* [2005(181) ELT 359 (SC)]
- *Sujana Metal Industries Ltd. Vs. CCE* [2011(273) ELT 112 (Tri. Bang.)]

6.6. Where the activity in question stands excluded from levy of tax under two categories of service viz. "commercial or industrial construction", and "site formation and clearance, excavation and earthmoving, and



demolition", it cannot be taxed under a third category, in view of the following decisions:

- *Dr. Lal Path Labs Pvt. Ltd. vs. CCE, Ludhiana* [2006(4) STR 527 (Tri. Del.)] affirmed by the High Court in *CCE, Ludhiana vs. Dr. Lal Path Lab Pvt. Ltd.* [2007(8) STR 337 (P&H)]
- *CCE, Ludhiana vs. Patient Service Centre* [2008(9) STR 229 (P&H)]
- *Federal Bank Ltd. vs. CCE, Calicut* [2008(10) STR 320 (Tri. Bang.)]
- *Federal Bank Ltd. vs. CCE(Appeals), Cochin* [2009(15) STR 279 (Tri. Bang.)]

On the same principle, where the activity in question stands outside the scope of clause (b) of the definition of "works contract" by reason of its non-commercial/non-industrial nature, it cannot be brought within the ambit of another clause [clause (e)] of the said definition for the purpose of levy of service tax.

6.7. (Without prejudice to the denial of tax liability) The taxable value ought to have been determined by deducting the retention money from the gross amount billed to the State Government.

6.8. (Without prejudice to the denial of tax liability) The amount received from the State Government ought to have been taken as cum-tax value and the tax element excluded from it for



arriving at the taxable value in view of Section 67(2) of the Finance Act, 1994 and the following decisions:

- *Sri Chakra Tyres Ltd. vs. CCE, Madras* [1999(108) ELT 361 (Tri. LB)]
- *CC vs. Maruti Udyog Ltd.* [2002(141) ELT 3 (SC)]

6.9. No penalty can be imposed under Section 76, 77 or 78 of the Finance Act, 1994 on the appellant who has no liability to pay the service tax demanded. In any case, the appellant can legitimately claim the benefit of Section 80 of the Act in view of the following decisions:

- *Hindustan Steel Ltd. vs. The State of Orissa* [AIR 1970 (SC) 253]
- *ETA Engineering Ltd. vs. CCE, Chennai* [2004(174) ELT 19 (Tri. LB)]
- *Sajjan Kumar Kariwala vs. CCE* [2003(159) ELT 1131 (Tri. Del.)]
- *Ashok Rastogi vs. CCE* [1998(104) ELT 480 (Tri.)]
- *Catalyst Capital Services Pvt. Ltd. vs. CCE, Mumbai* [2005(184) ELT 34 (Tri. Mum.)]
- *CCE, Rajkot vs. Air Express Courier Services* [2005(182) ELT 409 (Tri. Mum.)]

6.10. In any case, penalties cannot be imposed under both the Sections 76 and 78 at the same time in view of the following decisions:-

- *CCE, Ludhiana vs. Pannu Property Dealers & Ors.* [2008-TIOL-1750-CESTAT-DEL]



- *CCE, Ludhiana vs. Silver Oak Gardens Resort* [2008(9) STR 481 (Tri. Del.)]
- *The Financers vs. CCE, Jaipur* [2007(8) STR 7 (Tri. Del.)]

7. The submissions for Maytas-NCC JV

7.1. The learned counsel for the appellant adopted all the above arguments. He raised an additional contention to the effect that there was no transfer of property from the appellant to the contractee, that the transfer of property was from the sub-contractor to the contractee and that the transaction between the appellant and the contractee (Government of Andhra Pradesh) did not satisfy the first condition pertaining to transfer of property in goods used in the execution of the contract. For this very reason, the appellant cannot be held to have provided 'WCS' to the contractee. In this connection, the counsel referred to a sub-contract agreement executed between the appellant and one M/s. Ratna Infrastructure Projects Ltd.

7.2. The learned counsel relied on *M Ramakrishna Reddy vs. CCE* [2009(13) STR 661 (Tri. Bang.)] and also on a few stay orders passed by this Bench in cases involving 'WCS'.

7.3. He also contended that there was no valid ground for invoking the extended period of limitation in this case. The appellant had declared, in the revised returns for the half years ended



31/03/2008 and 31/03/2009, that the project turnover was exempt under clause (b) of *Explanation* to Section 65(105)(zzzza) of the Finance Act, 1994 and therefore they cannot be said to have suppressed any information to warrant invocation of the extended period of limitation. The appellant was under the *bona fide* belief that the services provided by them, being non-commercial and non-industrial, were outside the scope of the definition of 'works contract'. The appellant was regularly filing ST-3 returns under Section 70 of the Finance Act, 1994. Moreover, the question whether the services rendered by the appellant would fall under clause (b) or clause (e) of the definition of 'works contract' is a question for interpretation. For all these reasons, the invocation of the proviso to Section 73(1) of the Finance Act, 1994 in this case cannot be sustained. The following case law was cited in this connection:

- *Padmini Products Ltd. vs. CCE*
[1989(43) ELT 195 (SC)]
- *CCE vs. Chemphar Drugs & Liniments*
[1989(40) ELT 276 (SC)]
- *Continental Foundation JV vs. CCE*
[2007(216) ELT 177 (SC)]

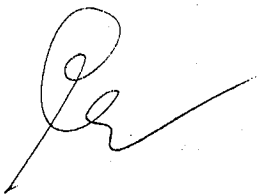
8. The submissions for the Revenue

The learned Special Consultant for the Revenue made the following submissions/arguments in the appeals of *Ramky-Murthy*



JV (which were adopted by the learned Commissioner(AR) in the appeal of *Maytas-NCC JV*):

8.1. All the contracts in question are EPC/Turnkey contracts and the parties thereto have understood the contracts to be so. The scope of work under the contracts encompassed a wide range of activities including investigation, soil survey, preparation of designs/drawings and hydraulic particulars, excavation, procurement/supply of the required components/materials, provision of labour, construction, testing and commissioning etc. Each contract was for a lump sum indicating its indivisible and composite nature. The JVs were registered with the VAT department of the Government of Andhra Pradesh and were paying VAT applicable to 'works contract' at appropriate rate in respect of the goods used in execution of the contracts and deemed to be sold to the contractee. The exigibility, to sales tax, of the goods used in execution of a contract is also an essential requirement for treating the activity as taxable service of "works contract". For all these reasons, the activities undertaken by the appellants under the EPC contracts are to be classified only as 'WCS' covered by clause (e) of the definition of "works contract" under Section 65(105)(zzzza) of the Finance Act, 1994.



8.2. Neither "commercial or industrial construction service" nor "site formation and clearance services" prescribed the requirement of transfer of property in goods. On the contrary, turnkey/EPC contracts involved transfer of property. The activities in question were much beyond the scope of "commercial or industrial construction service" defined under clause (25b) or "site formation and clearance services" defined under clause (97a) of Section 65 of the Act and the same squarely fell within the purview of "WCS" defined under Section 65(105)(zzzza) of the Act. The activities are taxable under clause (e) of Section 65(105)(zzzza) of the Act, irrespective of whether they were for the purposes of commerce or industry.

8.3. Board's Circular No.80/10/2004-ST dt. 17/09/2004 was issued in the context of introduction of "commercial or industrial construction service" as a taxable service and the same is not relevant to the context of interpretation of "WCS". In the statutory definition of "WCS" relating to EPC contracts, there is no stipulation or restriction regarding the status of the service recipient, such as commercial or non-commercial, industrial or non-industrial, or Government department or agency.

8.4. Board's Circular dt. 04/01/2008 is applicable only where the service is classifiable as "commercial or industrial construction"

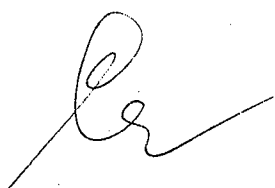


for the period prior to 01/06/2007 and hence not applicable to the present case. All the EPC contracts in the present case were executed subsequent to 01/06/2007, by which time "WCS" was specifically brought within the scope of levy of service tax. The new taxable service was not created by bifurcation of any pre-existing entry under Section 65 of the Finance Act, 1994, nor by amalgamation of any services which were already subject to service tax. It was introduced as a new and distinct service. There are clear points of distinction between WCS and pre-existing services. Firstly, the existence of a contract is a requirement under WCS. Secondly, there must be transfer of property in goods involved in the execution of the contract and the same should be exigible to tax as sale of goods. These two crucial requirements of WCS clearly indicate that the service covers execution of composite and indivisible contracts involving supply of goods and provision of service. These features are conspicuously absent in "commercial or industrial construction service" and "site formation and clearance services". More significantly, turnkey/EPC contracts were introduced for the first time w.e.f. 01/06/2007 for levy of service tax and the same did not find a place in any of the pre-existing entries or definitions under Section 65 of the Finance Act, 1994. In other words, turnkey/EPC contracts *per se* were not chargeable to service tax prior to 01/06/2007. The contracts in question were recognized by the parties thereto as



turnkey/EPC contracts and hence the appellants are estopped from claiming that the execution of such contracts will not be covered by "WCS". In the context of explaining the distinct features of works contract [Section 65(105)(zzzza)] and certain pre-existing taxable services, the learned Special Consultant referred to para (6.1.) of *Alstom Projects India Ltd. vs. CST* [2011(23) STR 489 (Tri. Del.)].

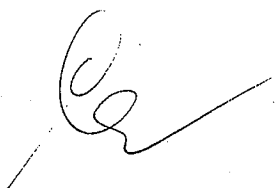
8.5. In respect of turnkey/EPC contracts, no generalized exclusion is provided for non-commercial or non-industrial nature of the end product/facility. Such exclusion, however, continues to be provided for construction services. Thus there is clear legislative intent (i) to exclude only construction of non-commercial and non-industrial buildings/structures from WCS and (ii) to include all turnkey/EPC contracts within the purview of levy of service tax under WCS excepting the specifically excluded items such as roads, airports etc. If, indeed, it was the intention to exclude all works relating to irrigation projects from the purview of WCS, the legislature would have mentioned "irrigation projects" among the excluded items under the definition of WCS. The exclusion is only for the specified items which do not include "irrigation projects". The intent of taxing all other EPC/turnkey contracts (irrespective of whether or not for commercial or industrial purpose) is clearly and unambiguously reflected in the statutory provisions and definitions.



8.6. There is no merit in the argument that clause (b) of the definition of "works contract" under Section 65(105)(zzzza) of the Finance Act, 1994 is more specific than clause (e). Indeed, it is the other way round. Construction of civil structure or conduit is only a part of a composite project, whereas "turnkey/EPC project" mentioned in clause (e) of Section 65(105)(zzzza) of the Act is a very specific description of the work awarded to a contractor by a contractee.

8.7. The words used in clause (e) of the definition of "works contract" are plain and clear, and the legislative intention is clearly conveyed without any ambiguity. The exclusions from taxable works contract have also been clearly stated viz. roads, airports, railways, tunnels, bridges and dams. Therefore, there is no room for applying any principle of interpretation. Reliance is placed on *Grasim Industries Ltd. vs. CC* [2002(141) ELT 593(SC)]. In the light of the ratio of this decision, it can be safely held that the services in question are squarely covered by clause (e) of the definition of "works contract" under Section 65(105)(zzzza) of the Finance Act, 1994.

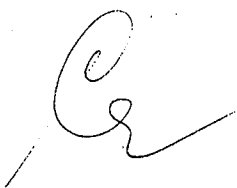
8.8. As the execution of a turnkey/EPC contract is squarely covered by clause (e) *ibid* and there is no scope for classifying it



under other headings, the argument of the appellants that, if the execution of the contract could be classified under two headings, the classification which is beneficial to the assessee is to be adopted has no relevance and the decisions contextually cited by them are not applicable.

8.9. In the Circular dt. 15/09/2009, there is a reference to 'canal system' but this is in the context of examining the definition of 'commercial or industrial construction' and not that of 'works contract'. In the same circular, there is also a reference to construction of dams, etc. through EPC mode. In this context, the circular says that such construction activity, even if done through turnkey/EPC mode, is exempt from payment of service tax on account of the specific exclusion of dams, roads, airports etc. incorporated in the definition of "works contract". The circular, in no way, deals with "irrigation projects" and therefore nothing contained therein is beneficial to the appellants. For this reason, the reliance placed by them on the Supreme Court's decision in *Suchitra Components* case (supra) is not apposite.

8.10. Notification No.41/2009 is not clarificatory. It is an exemption notification simpliciter, which was issued in respect of a specified service for the first time. It does not contain anything to



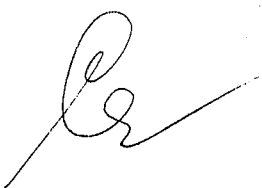
indicate that it purported to operate retrospectively. Reliance placed on *CC vs. Spice Telecom* [2006(203) ELT 538 (SC)].

8.11. As the demand of service tax in this case is under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, the appellants are not eligible for CENVAT credit on inputs/materials.

8.12. Under the above Rules, the only permissible deduction from the gross amount charged is the VAT paid on the materials used in the execution of the contracts, and no other deduction is envisaged. Therefore, the appellants' claim for abatement of retention money from the gross amount is not admissible.

8.13. As Rule 3(1) of the above Rules stipulates that the gross amount charged for the works contract shall be the value for payment of service tax notwithstanding the provisions of Section 67, the benefit of cum-tax treatment of gross value under Section 67 cannot be claimed by the appellants. This is so particularly as the contract value in these cases does not include any service tax element.

8.14. The relevant show-cause notices clearly brought out the facts and circumstances which indicate that the appellants wilfully

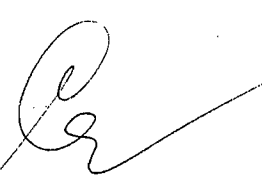


suppressed/ misdeclared material facts and contravened the provisions of the Finance Act, 1994 with intent to evade payment of service tax. They did not pay the appropriate service tax even though they had discharged VAT liability on the works contracts. In the case of Ramky-Murthy JV, the leading partner (Ramky) had classified similar contracts as "works contracts" and accordingly paid service tax thereon. They had done so after obtaining the requisite registration under WCS and by filing ST-3 returns. The projects executed by the JV are very similar in scope and content to those executed by its leading partner, Ramky. These facts clearly indicate that the JV was fully aware of their service tax liability in respect of the contracts in question. Hence the plea of *bona fide* belief raised by them is liable to be rejected. The allegation of wilful suppression/misdeclaration of facts and contravention of legal provisions with intent to evade payment of service tax is well-founded and the extended period of limitation has been rightly invoked.

9. The issues

Broadly, the following issues arise for consideration:

- 1) Whether, on the facts of the case, the service provided by the appellants to the Irrigation & CAD Department of Government of Andhra Pradesh during the relevant periods are classifiable under



the head "works contract service" in terms of Section 65(105)(zzzza) of the Finance Act, 1994;

2) Whether the deductions (claimed by the appellants) from the gross amounts billed to the contractee can be allowed in the determination of the taxable value of the service for payment of service tax under the above head;

3) Whether the extended period of limitation prescribed under the proviso to Section 73(1) of the Finance Act, 1994 is invocable in these cases;

4) Whether, in the facts and circumstances of these cases, the penalties imposed on the appellants under Sections 76, 77 and 78 of the Finance Act, 1994, are sustainable.

10. Our findings on Issue No.1

10.1. Whether, in the case of each of the two JVs, the service provided to the Government of Andhra Pradesh is classifiable as "WCS" has to be determined from the nature of the relevant contracts as understood by the parties thereto as also from the scope of the

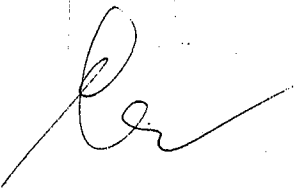


works executed under the contracts. Of course, this exercise has to be undertaken with reference to the definition of 'works contract' embodied in *Explanation* to Section 65(105)(zzzza) of the Finance Act, 1994.

10.2. The particulars of the contracts awarded to Ramky-Murthy JV by the State Government and executed by the former have been stated in para (2.1.) of this order. Similarly, the particulars of the contracts awarded to Maytas-NCC JV by the State Government and executed by the former have been stated in para (4.1.) of this order. We find that the contracts were described and understood by the parties as "Turnkey/EPC contracts".

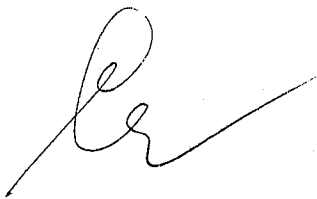
10.3. We have also examined the "scope of work" stated in the specimen contract documents filed by the two JVs. The contract awarded to Ramky-Murthy JV by the State Government in respect of SRSP STAGE-II is indicated as shown below:-

- Surveying, investigation, sub-soil exploration, fixing alignment, designing and engineering of Dam and appurtenant works, canal sections of Main canals, Branch canals, Distributaries, Minors, Sub-Minors and Field Channels, Drains etc., preparation of ayacut registers, command area plans exploration of foundations, design of earth dam sections, overflow and non-overflow sections of dams including foundations, design of grouting requirements etc. as per investigation and design criteria of Irrigation Department, relevant I.S. Codes, CWC Manuals, Departmental Cods, Circulars issued by department from time to time etc.

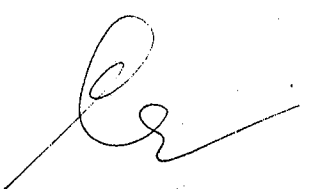


- Preparing item wise cost analysis for the entire work on the basis of approved alignment and designs, clubbing items for the basis of intermediate payments.
- Surveying, investigation, site surveys foundation soil exploration, finalization of location, designing and engineering of structures on canal system as per investigation and design criteria of Irrigation Department, relevant I.S. Codes, IRC Publications, CWC Manuals and circulars issued by the department from time to time etc.
- Preparing temporary land acquisition cases for barrrow area required if any, land acquisition cases on the basis of approved alignment (private land, Govt., land, forest land if any) property cases if any such as wells, trees, houses, etc., submitting to the department, pursuing the same with LAO and getting approval /award from competent authority.
- Construction and of Dam/Barrage and appurtenant works, whole canal unlined/lined as per approved design-drawings, specifications of the department, relevant I.S. Codes, CWC Manuals, Circulars issued from time to time.
- Construction of all structures of whole canal systems as per approved design-drawings, specifications of the department, relevant I.S. Codes, IRC Publications, CWC Manuals, Circulars issued by department from time to time.
- Formation of inspection path/service road and plantation of shade trees along the banks of earth dams/canals.
- Commissioning and trial of the constructed Dam/ barrage and appurtenant canal system-maintenance during the defect liability period of 24 months from the date of completion certificate.
- Beautification of dam sites and canal structure sites.

From the scope of work, it appears that the contract executed by the JV encompassed a wide range of activities including (a) survey,



investigation and sub-soil exploration, (b) designing and engineering of barrage and appurtenant works, main canals, branch canals, distributories, minors, sub-minors, field channels, drains etc., (c) preparation of Ayacut registers, command area plans etc. as per the criteria of Irrigation Department, relevant IS Codes, CWC Manuals, Departmental Codes, Circulars issued by Department from time to time etc., (d) cost analysis itemwise for the entire work on the basis of approved alignment and design etc., (e) preparation of temporary land acquisition cases and pursuing the same with LAO and getting approval/award from the competent authority, (f) construction of barrage and appurtenant works and whole canal system as per the approved design-drawings, specifications of the Department, relevant IS Codes, CWC Manuals, Circulars etc., (g) formation of inspection path/service road and plantation of shade trees along the banks of earth dams/canals, (h) commissioning and trial of the constructed dam/barrage and appurtenant works and the canal system, (i) maintenance during the defect liability period of 24 months from the date of completion certificate and (j) beautification of earth dam site and canal structure sites. It is clear from the scope of work that what was, indeed, executed by Ramky-Murthy JV was a turnkey project in general and an engineering/procurement/construction/commissioning (EPC) project in particular, which was squarely covered by clause (e) of the definition of "works contract"



under *Explanation* to Section 65(105)(zzzza) of the Finance Act, 1994.

10.4. On a perusal of the specimen contract document produced by Maytas-NCC JV, we find that this document pertains to "Flood Flow Canal Project from SRSP", a contract awarded to the JV by the Government of Andhra Pradesh/Irrigation & CAD Department. This contract was also described and understood by the parties as "EPC/Turnkey Contract". The scope of services under this contract includes (a) Surveys and Investigation (Section-I), (b) Design and Engineering (Section-II), (c) Civil Works (Section -III), (d) Gates and Embedded Metal parts (Section-IV) and (e) Maintenance during Defect Liability Period (Section-V). We have seen a wide range of activities under each Section. The "civil works" mentioned in Section-III are the following:

HEAD WORKS:

- Construction of earth Dam
- Construction of spillway regulator and surplus arrangements
- Construction of head Sluices
- Fabrication, supply and erection of gates etc.
- Electrification and Plantation and beautification of Dam
- Monitoring of programme and progress (computer aided)
- Operation & Maintenance of system

CANALS:

- Distributories to cater the needs of specified ayacut (Branch canals, Majors, Minors, sub-Minors)
- Structures on Distributories
- Field Channels (Micro Network to service upto 1 Ha. Holding) including structures

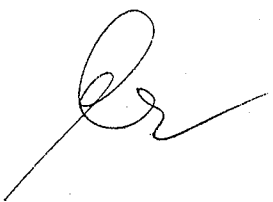


- Inspection path on the canals
- Plantation along with canals
- Monitoring of programme and progress (computer aided)
- Operation & Maintenance of system

It appears from the description and scope of the contract that what was executed by Maytas-NCC JV for the benefit of the State Government was an EPC project squarely covered by clause (e) of the definition of "works contract" under Section 65(105)(zzzza) of the Finance Act, 1994.

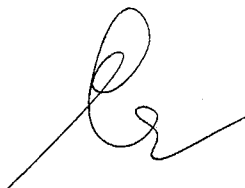
10.5. It is not in dispute that the execution of the contracts by the JVs involved transfer of property in goods and that VAT was paid by the contractors (at the rate applicable to works contract as per the relevant provisions of the A.P. State Act governing sales tax/VAT) on the sale of goods involved in the execution of the contracts.

10.6. The only items of works contracts specifically excluded from levy of service tax under Section 65(105)(zzzza) of the Finance Act, 1994 are roads, airports, railways, transport terminals, bridges, tunnels and dams. Irrigation canals do not find a place here. The mention of "dams" in the excluded category is of no aid to the appellants' case either inasmuch as these "dams" --- not a word defined or explained anywhere under the Finance Act, 1994 / Rules thereunder --- have to be understood according to the common parlance. These are gigantic RCC structures built across rivers and



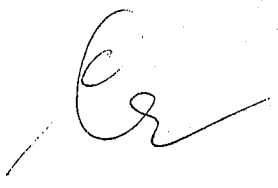
are not to be confused with the earth dams/barrages/constructed by the appellants as part of some of the EPC projects for irrigation. Even according to the appellants, a major share of the cost of execution of each project was on account of excavation works. If real dams were built by the appellants, this would not be the cost profile. In any case, the appellants have not been able to establish that any "dam" was built in execution of any of the EPC contracts awarded by the State Government. This apart, the scope of the expression "works contract in respect of dams" --- used in the exclusion clause of Section 65(105)(zzzza) of the Finance Act, 1994 ---- has to be correctly understood. The scope, in our view, is limited to the construction of dams and cannot include construction of canals, channels etc. in outlying sites. We have not come across, in the present case, any EPC project for construction of dam alone. The EPC projects executed by the appellants have not been shown to fall in the excluded category of works contract.

10.7. It follows from the above findings that the services provided by the appellants to the Government of Andhra Pradesh satisfy the statutory requirements of "works contract" defined under Section 65(105)(zzzza) of the Finance Act, 1994 inasmuch as (i) transfer of property in goods was involved in the transaction and VAT was paid on such goods , (ii) the contracts were for the purpose of



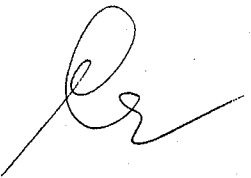
carrying out irrigation projects of the Government through turnkey/EPC mode, and (iii) none of the contracts was in the excluded category of works contracts.

10.8. The learned counsel for the appellant, Maytas-NCC JV argued that the contracts awarded by the Government to them were assigned to sub-contractors and that the transfer of property in goods used in the execution of such contracts was from the sub-contractors to the Government and not from the appellant to the Government and therefore the execution of such contracts would not be covered by the definition of "works contract". This argument is unacceptable for more than one reason. Firstly, this plea was not raised by the appellant in their reply to the show-cause notice or in their subsequent written submissions filed before the adjudicating authority. Therefore this plea cannot be entertained at this stage. Secondly, the definition of "works contract" does not stipulate that, where the contracts were executed by the contractor through a sub-contractor, there should be transfer of property from the contractor directly to the contractee (service recipient). To our mind, it is enough if transfer of property in goods is involved in the execution of the contract and the same is exigible to sales tax as is the case under consideration.

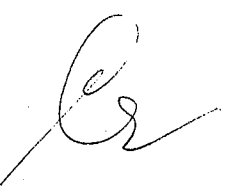


10.9. As rightly submitted by the learned Special Consultant for the Department, the activities undertaken by the appellants are squarely covered by clause (e) of *Explanation* to Section 65(105)(zzzza) of the Finance Act, 1994 and cannot be classified under clause (b) of the *Explanation* inasmuch as the activity described in clause (b) (construction of new building, civil structure, pipeline or conduit) cannot encompass the entire gamut of any of the contracts awarded by the Government and executed by the appellants and any such activity for non-commercial/non-industrial purposes is not envisaged under clause (b). Therefore, within the definition of works contract, the projects executed by the appellants can fit in clause (e) only.

10.10. It has also been argued on behalf of the appellants that their activities under the subject contracts could, alternatively, be classified under other entries like "commercial or industrial construction" [clause (25b) of Section 65] or "site formation and clearance, excavation, earth moving and demolition" [clause (97a) of Section 65]. These strenuous arguments have also been found to be untenable. It is not in dispute that the projects awarded to the appellants by the Government of Andhra Pradesh were executed by them for irrigation purposes of the Government. These purposes are, undisputedly and indisputably, non-commercial and non-industrial. If

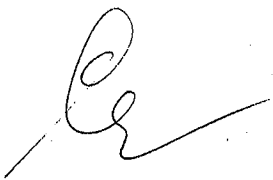


that be so, there is no question of classifying the works under the head 'commercial or industrial construction service' inasmuch as the statutory definition of this service appears to have underlined the commercial/industrial character of the end-use of the constructed structure/facility. As regards "site formation and clearance, excavation and earth moving and demolition", we note that Circular dt. 24/05/2010 provides a correct clarification on the point raised by the counsel. This Circular says thus: "Site formation and clearance, excavation, earth moving and demolition services are attracted only when the service providers provide the services independently and not as part of complete work such as laying of cables under the road". In the present case, any site formation, clearance, excavation, earth moving, demolition carried out by the appellants was only preparatory to the execution of the project and therefore these minor preparatory activities, *per se*, would not determine the classification of the entire service provided by the appellants to the Government. For this very reason, nothing turns in favour of the appellants on the legal position that such services as those specified in the main part of the definition of "site formation and clearance, excavation, earth moving and demolition" are, if provided in relation to irrigation, excluded from the taxable service. This exclusion only means that, if the appellants had undertaken only the activities specified in the main part of the said definition and nothing more than that, they could have claimed non-taxability of such activities on the ground that such activities were undertaken in



relation to irrigation. The appellants, on the facts of this case, cannot set up such a claim because they were executing EPC projects in relation to irrigation and not mere drilling, boring, soil stripping, demolition of building and the like. What emerges from this discussion is that the scope of the services defined under Section 65(25b) and Section 65(97a) is limited one way or another, whereas the definition of "works contract" under Section 65(105)(zzzza) has much wider scope. It is also significant to note that any transfer of property in goods exigible to sales tax is not involved in the rendering of the services defined under clauses (25b) and (97a) of Section 65 whereas such transfer of property in goods is necessarily involved in the execution of "works contract". In this scenario, it has to be held that the service provided by the appellants to the State Government is classifiable as "works contract service" only. There is no other possible entry under Section 65 of the Act to cover the EPC projects executed by the appellants. Therefore, Section 65A(2) of the Act, which lays down certain principles to govern classification of a taxable service which is *prima facie* classifiable under two or more entries under Section 65(105), has no application in this case as rightly submitted by the Special Consultant for the Department.

10.11. It is not in dispute that the subject contracts required the contractee (State Government) to pay lump sum to the appellants



against R.A. Bills raised by them from time to time. Neither the contracts nor the bills provided any break-up of the amount with reference to different items of work. These facts also clearly indicate the composite, indivisible nature of the contracts. Such composite contracts/projects encompassing a wide spectrum of activities ranging from survey & investigation to beautification of the finished facility are appropriately called 'turnkey contracts/projects'. An EPC project is a species, of which turnkey project is the genus. In other words, all turnkey projects cannot be EPC projects but all EPC projects are turnkey projects. Both the appellants were executing EPC projects for the State Government, thereby providing the taxable service of "works contract" to the Government.

10.12. The definition of "commercial or industrial construction service" excludes services provided in respect of certain specified items including "dams". Similarly the definition of "site formation and clearance, excavation and earth moving and demolition" excludes services provided in relation to certain specified items including "irrigation". Therefore, according to the counsel for the appellants, any service provided in relation to "dams" and "irrigation" should be deemed to have been excluded from the purview of "works contract service" as well. There is no warrant for deeming so inasmuch as every taxable entry needs to be understood with reference to the



language used in such entry and, accordingly, a given service has to be classified, which is the mandate of sub-section (1) of Section 65A of the Finance Act, 1994. We have not found anything in the text of the definition of "works contract" to indicate that turnkey/EPC projects for irrigation are excluded from the ambit of taxable service of works contract. With regard to "dams", we have already expressed our views in para (10.6.) of this order. As rightly submitted by the learned Special Consultant for the Department, there is no room for any intendment or assumption or presumption and, where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation. In this context, the reliance placed by the Special Consultant on the decision of the apex court in *Grasim Industries* case is found to be apposite.

10.13. Clause (e) of the definition of works contract --- turnkey projects including engineering, procurement and construction or commissioning (EPC) projects --- clearly conveys the legislative intent underlying the definition of "works contract" in relation to turnkey projects. It does not exclude EPC projects for irrigation, nor does it discriminate between EPC projects for commercial/industrial purposes and those for non-commercial/non-industrial purposes, nor between EPC projects of Government departments/agencies and private entities. What does not figure in the plain language of the entry cannot be read into it by this Tribunal.



10.14. The learned counsel has referred to various circulars issued on 17/9/2004, 27/07/2005, 04/01/2008, 15/09/2009, 24/05/2010 etc. The first two circulars were issued prior to 01/06/2007, the date w.e.f. which works contract service was introduced as a taxable service and, therefore, those circulars cannot have anything to do with works contract service. The circular dt. 04/01/2008 was issued to clarify that a service provider who paid service tax prior to 01/06/2007 for certain taxable services was not entitled to change the classification of those services as a composite service after 01/06/2007 for the purpose of payment of service tax under composition scheme. This clarification is not applicable to the facts of this case. The circular dt. 15/09/2009 was issued to clarify, *inter alia*, that works contracts *in respect of* roads, and "dams" were exempt from payment of service tax if such contracts were executed through EPC mode. But no works contract *in respect of* dams was awarded to the appellants and therefore the benefit of the said circular also cannot be claimed by them. The said circular also did not refer to irrigation projects. We have already referred to the circular dt. 24/05/2010 in an earlier context, where we noted that the Board's clarification in regard to the taxable service of "site formation and clearance, excavation and earth moving and demolition" was rather unfavourable to the appellants. In any case, in the context of



discussing the scope of "works contract", it is not prudent to rely on circulars dealing with other taxable services.


10.15. It was also argued for the appellants that the projects in respect of which the contracts were awarded to the appellants prior to 01/06/2007 could not, in any case, be classified under the head "works contract service". As the levy is on any taxable service 'provided or to be provided' by one person to another, the date of award of contract by the Government to the appellants is not the decisive factor. What matters is the fact that the contracts were executed by the appellants and payments received by them after 01/06/2007 and therefore they are liable to pay service tax on the taxable service.

10.16. As rightly submitted by the learned Special Consultant for the Department, an exemption notification cannot be given retrospective effect unless it expressly provides for retrospective operation. Notification No.41/2009-ST dt. 23/10/2009 exempted a works contract in respect of canals, other than canals primarily used for commercial or industrial purposes, from the whole of the service tax leviable thereon. This notification appears to be the first of its kind issued after introduction of works contract service as a taxable service, and did not provide for retrospective operation. Therefore



the arguments advanced by the learned counsel, claiming support from a judgment of the apex court [2005(181) ELT 359] and praying for exemption under the said notification cannot be accepted. The facts of the case considered by the apex court had disclosed the consistent policy of the Government to grant exemption from payment of duty on parts of power-driven(PD) pumps. When the Central Government issued a consolidated notification viz. Notification No.46/94-CE dt. 01/03/1994 incorporating therein the provisions of a large number of old notifications, PD pumps were shown as an exempted item, but parts of such pumps were not so shown though such parts also had been exempted in the past. The Government corrected this omission when pointed out by the industry, by issuing another Notification No.95/94-CE dt. 25/04/1994 wherein parts of PD pumps were also included as an exempted item. The question before the apex court was whether, on these facts, Notification No.95/94 could be held to be clarificatory in nature. This question was held in favour of the assessee by the court holding that Notification No.95/94 being clarificatory was retrospective in operation. Such or similar circumstances do not exist in the present case. Therefore the appellants cannot claim the benefit of exemption under Notification No.41/2009-ST *ibid*.

10.17. Certain other decisions were also cited by the learned counsel, some in the context of discussing non-commercial/non-



industrial purposes of certain water supply schemes and some other decisions in the context of applying Section 65A provisions of the Finance Act, 1994 to classification of a given activity as taxable service under Section 65(105) of the Act. We have already expressed our views in similar contexts, which are against the appellants. Therefore, the cited decisions are not applicable. The decision in *M. Ramakrishna Reddy's* case cited by the learned counsel for Maytas—NCC JV is also not of any aid to them as the dispute in that case pertained to a period prior to 1/6/2007 when 'WCS' was not a taxable service.

10.18. In the result, issue No.1 is held in favour of the Department and, accordingly, the appellants are held liable to pay service tax under the head 'works contract service' on the turnkey/EPC contracts in question.

11. Our findings on Issue No.2

11.1. The impugned demands of service tax were quantified on the basis of Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. The appellants have not objected to quantification of tax under these rules. These rules were made under Section 94 of the Finance Act, 1994, which authorized the Central Government to make rules, *inter alia*, for the



determination of the amount and value of taxable service under Section 67 vide clause (aa) of sub-section (2) of Section 94 of the Act. Rule 3(1) of the Works Contract (Composition Scheme) Rules, 2007 reads as under:

3.(1) Notwithstanding anything contained in Section 67 of the Act and rule 2A of the Service tax (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service 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 [our percent.] of the gross amount charged for the works contract.

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 all 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:

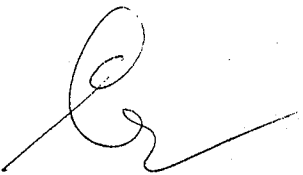
PROVIDED that nothing contained in this *Explanation* shall apply to a works contract, where the execution under the said contract has commenced or where any payment, except by way of credit or debit to any account, has been made in relation to the said contract on or before the 7th day of July, 2009.

The *Explanation* was added w.e.f. 7/7/2009 and the same is not applicable to a works contract, the execution of which commenced on



or before 07/07/2009 or where any payment (except by way of credit or debit to any account) was made in relation to the contract on or before 07/07/2009. The periods of dispute in the present cases are all prior to 07/07/2009. The *Explanation* appears to be inapplicable to these cases. It would follow that the "gross amount charged" for the works contract has to be determined for purposes of Rule 3(1) in accordance with the parent provision viz. Section 67 of the Finance Act. The appellants are liable to pay service tax @ 2% upto 28/02/2008 and @ 4% thereafter on the "gross amount charged" so determined for each works contract. The question before us is what should be the "gross amount charged".

11.2. The adjudicating authority has not accepted the plea for treating the "gross amount charged" as cum-tax value on the premise that Rule 3(1) does not permit abatement of service tax from the "gross amount charged" in the determination of taxable value. In the view we have taken in the foregoing paragraph, the benefit of Section 67(2) is liable to be granted to the assesseees and accordingly the gross amount charged can be treated as cum-tax value and the service tax element can be deducted from it to arrive at the taxable value of works contract service.



11.3. But we have not found any merit in the appellants' plea for deduction of retention money from the gross amount charged. On a perusal of the terms and conditions of the contracts, we have found that the contractee (State Government) was, while making payments to the contractor, retaining a small part of the gross amount billed. However, upon satisfactory execution of the contract, the "retention money" was to be released to the contractor, which fact is not in dispute. In other words, the retention money was only a deferred payment and the appellants were entitled to receive the gross amount charged in the R.A. Bill. If that be so, there can be no valid claim for deduction of the retention money from the gross amount as rightly held by the adjudicating authority.

11.4. The appellants are not entitled to claim CENVAT credit on inputs used in the execution of the subject contracts as this benefit is barred under Rule 3(2) of the Works Contract (Composition Scheme) Rules, 2007. But there appears to be no embargo on taking CENVAT credit on capital goods or input services.

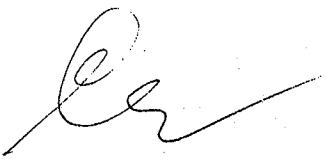
11.5. In the result, the valuation of the taxable service has to be reworked out by the adjudicating authority by granting the aforesaid benefits to the assesseees.

12. Our findings on Issue No.3

12.1. It is not in dispute that Ramky, the leading partner of the Ramky-Murthy JV, was registered with the Department under "WCS",



filing ST-3 returns and paying service tax in respect of similar turnkey/EPC contracts after 01/06/2007. Hence, Ramky-Murthy JV cannot be heard to say that they were not aware of service tax liability under the head "WCS" in respect of the subject contracts. The plea of "*bona fide* belief" that they were not liable to pay service tax under WCS in respect of the subject projects is also not acceptable. The parties to each contract described it as "turnkey/EPC contracts" and also included within its ambit a wide range of activities which constituted a turnkey project. The provisions of each contract also clearly indicated that the project involved engineering, procurement, construction and commissioning, which was enough to bring the entire project within the ambit of clause (e) of the definition of "works contract" in the *Explanation* to Section 65(105)(zzzza) of the Finance Act, 1994. There was no room for doubt about the coverage of EPC contracts within the plain and clear language of clause (e). Therefore the appellants can hardly plead that they did not pay service tax on the works contracts by reason of *bona fide* belief that they were not liable to pay such tax. The material facts related to the EPC projects executed by them were not disclosed to the Department. Registration under "WCS" was taken and ST-3 returns filed only when compelled to do so. Even in some of the ST-3 returns, the material particulars were not disclosed to the department. It was submitted on behalf of Maytas-NCC JV that they had filed certain revised returns disclosing the material facts. But even these revised returns did not disclose reason for the exemption claimed therein. No benefit of any exemption notification or of exclusion from specific taxable service was claimed. The original returns also had not disclosed the relevant facts. Therefore, the allegation of wilful suppression/misdeclaration of relevant facts and contravention of the relevant provisions of the Finance Act with intent to evade payment of service tax is sustainable against both the appellants. The extended



period of limitation under the proviso to Section 73(1) was correctly invoked in these cases. In the circumstances stated above, the decisions cited by counsel are not applicable.

13. Our findings on Issue No.4

13.1. In the aforesaid circumstances, we have not found any reason to grant the benefit of Section 80 of the Act to the assesseees in these cases. Where an assessee proves that there was reasonable cause for his failures (non-filing of returns, non-payment of tax etc.), Section 80 can be invoked to do away with penalties under Sections 76 to 78. But we have already analysed the commissions and omissions of the assesseees. The explanations given by them do not constitute any reasonable cause for non-taking of registration, non-filing of returns, non-disclosure of material facts in the returns filed, non-payment of service tax etc. Hence Section 80 is not applicable to the present cases.

13.2. The legal requirements for invoking the proviso to Section 73(1) of the Finance Act for recovery of service tax dues beyond the normal period of limitation and the legal requirements for invoking Section 78 for imposition of penalty on the tax defaulter are identical and, therefore, there can be no valid ground against Section 78 penalty in these cases. However, as the taxable value and the amount of service tax have to be redetermined by the adjudicating



authority, the penalties imposed on the appellants under Section 78 will be set aside for the purpose of requantification.

13.3. Section 78 underwent an amendment w.e.f. 10/05/2008 and accordingly, where a penalty was payable under the Section, no separate penalty was imposable under Section 76 vide the fifth proviso to Section 78. The appellants have claimed the benefit of this amendment. They have also relied on the Tribunal's orders in the cases of *Pannu Property Dealers (supra)*, *Silver Oak Gardens Resort (supra)* etc. Now that Section 78 penalties are being set aside for requantification, we are of the view that the question whether Section 76 penalties are liable to be imposed on the appellants in ST/476/2009 and ST/432/2010 has also to be examined afresh by the adjudicating authority as the periods of dispute in these two appeals are partly beyond 10/05/2008.

14. On the basis of the findings recorded by us, it is ordered as follows:

- i.) The service provided by the appellants to the Government of Andhra Pradesh under the subject contracts is classifiable as "works contract service" under Section 65(105)(zzzza) of the Finance Act, 1994;



ii.) The appellants are liable to pay service tax on the correct taxable value to be redetermined by the adjudicating authority having regard to the findings recorded in para (11) above;

iii.) The extended period of limitation is invocable in these cases;

iv.) The penalties imposed on the appellants under Section 77 of the Finance Act, 1994 are sustained. The section 76 penalty challenged in appeal No. ST/1589/2010 is also sustained. The penalties imposed under Section 78 of the Act are set aside for requantification. The Section 76 penalties challenged in appeals ST/476/2009 and ST/432/2010 are also set aside for fresh decision as to whether such penalty is liable to be imposed on the assesseees and, if so, to what extent;

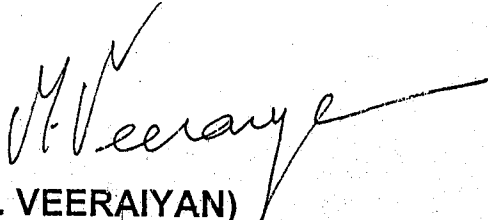
v.) The appellants are liable to pay interest under Section 75 of the Act on the amount of service tax to be requantified by the adjudicating authority;



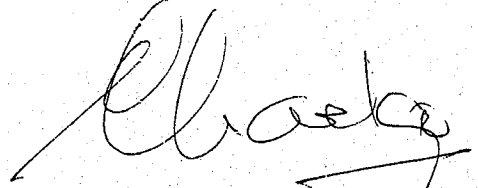
vi.) The appellants shall be given a reasonable opportunity of being heard on the remanded issues.

15. The appeals are disposed of in the above terms. The stay application filed by the appellant in appeal No.ST/1589/2010 also stands disposed of.

(Pronounced on 14/05/2012)



(M. VEERAIYAN)
MEMBER (TECHNICAL)



(P.G. CHACKO)
MEMBER (JUDICIAL)

Fr...

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18/3/15
सहायक पंजीकार / Asst. Registrar
सीमाशुल्क, उत्पादशुल्क और सेवा कर अपील अधिकरण
Customs, Excise & Service Tax Appellate Tribunal
(दक्षिण औद्योगिक बेंच) / (South Zonal Bench)
बंगलूर / Bangalore-9.