

Complete text of the judgment on the aforesaid issue argued by APRA & Associates LLP is reproduced below: -

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI

PRINCIPAL BENCH COURT NO. I

Service Tax Appeal No. 50097 Of 2022

[Arising out of Order-in-Original No. 36/AP/Commr/2021 dated 13.10.2021 passed by the Commissioner, Central GST, (East) Delhi]

M/s. Jyoti Sarup Mittal ... Appellant

28-29 Link Road, Lajpat Nagar-III New Delhi 110024

Versus

Commissioner of Central Tax, GST, Delhi-East ...Respondent

CR Building, I P Estate, New Delhi-110002

With Service Tax Appeal No. 52211 Of 2016

[Arising out of Order-in-Original No. DLISVTAX 001COM 0261516 dated 29.02.2016 passed by the Pr. Commissioner of Service Tax, New Delhi]

M/s. Jyoti Sarup Mittal ...Appellant

28-29 Link Road, Lajpat Nagar-III New Delhi 110024

Versus

Principal Commissioner of Service Tax, Delhi-I ...Respondent

17-B, IAEA House I P Estate, M G Marg New Delhi 110002

With Service Tax Appeal No. 52133 Of 2022

[Arising out of Order-in-Original No. 93-95/Commr/Delhi East/AP/2022 dated
22.06.2022 passed by the Commissioner, Central GST, (East) Delhi]

M/s. Jyoti Sarup Mittal ...Appellant

28-29 Link Road, Lajpat Nagar-III New Delhi 110024

Versus

Commissioner of Service Tax Delhi East ...Respondent

CR Building, I P Estate, New Delhi-110002

With Service Tax Appeal No. 52134 Of 2022

[Arising out of Order-in-Original No. 93-95/Commr/Delhi East/AP/2022 dated
22.06.2022 passed by the Commissioner, Central GST, (East) Delhi]

M/s. Jyoti Sarup Mittal ...Appellant

28-29 Link Road, Lajpat Nagar-III New Delhi 110024

Versus

Commissioner of CGST, Delhi-East ...Respondent

C R Building, I P Estate, New Delhi-110002

Service Tax Appeal No. 52135 Of 2022

(Arising out of Order-in-Original No. 93-95/Commr/Delhi East/AP/2022 dated
22.06.2022 passed by the Commissioner, Central GST, (East) Delhi)

M/s. Jyoti Sarup Mittal ...Appellant

28-29 Link Road, Lajpat Nagar-III New Delhi 110024

Versus

Commissioner of CGST, Delhi East ...Respondent

CR Building, I P Estate, New Delhi-110002

APPEARANCE:

Shri Atul Gupta, Chartered Accountant Assisted by Shri Varun Gaba, Advocate and Ms. Anmol Gupta, Chartered Accountant for the Appellant

Shri Harsh Vardhan and Shri S K Meena, Authorized Representatives for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V.SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: November 6, 2023

Date of Decision: January 03, 2024

FINAL ORDER NOS. 50004-50008 /2024**P.V. SUBBA RAO:**

M/s. Jyoti Sarup Mittal, Lajpat Nagar filed these five appeals to assail the orders passed by the Commissioner. All these appeals deal with the same issues and hence they have been heard and are being disposed of together. The details are as follows:

Service Tax Appeal no. 50097 of 2022

	SCN Date	Period	Service Tax (in Rs.)
Show Cause Notice	21.04.2011	2005-06 to 2010-11	10,38,86,085/-
1 st Order-in-Original	12/S.Tax/D-I/2012 dated 30.10.2012 (Confirmed demand of Rs. 4,75,52,235/- and imposed penalty of Rs.4,75,52,235/- under section 78 & Rs. 10,000/- under section 77)		
CESTAT Final Order	09.02.2017 disposed the Appeals filed by the Department and the assessee. Department's Appeal was dismissed and appeal filed by the assessee was allowed by way of remand.		
2 nd Order-in-Original	36/AP/Commr/2021 dated 12.10.2021		
Period of Dispute	2005-06 to 2010-11		
Service tax (Amount in Rs.) confirmed vide 2 nd O-I-O	3,67,98,828/-		
Interest	As applicable under Section 75 of the Act		

Penalty	Rs. 3,67,98,828/- under section 78 & Rs. 10,000/- under Section 77 of the Finance Act, 1994
Issue	Non-payment of service tax on “construction Services

Service Tax Appeal No. 52211 of 2016

Show Cause Notice	Sr.No.	SCN Date	period	Service Tax(in Rs.)
	I	23.10.2012	2011-12	3,57,56,467/-
	II	21.05.2014	2012-13	2,40,39,604/-
	III	17.04.2015	2013-14	63,11,706/-
Order-in-Original		DLISVTAX001COM0261516 dated 29.02.2016		
Period of Dispute		2011-12 to 2013-14		
Service tax (Amount in Rs.) confirmed vide O-I-O		2,10,81,546/- (9529425+7595626+3956495)		
Interest		As applicable under Section 75 of the Act		
Penalty		Rs. 21,18,156/-(952943+759563+395650) under section 76 & Rs. 10,000/- under Section 77 for SCN-III		

Service tax Appeals No. 52133,52134 & 52135 of 2022

Statement of demand	Sr. No.	SCN Date	Period	Service Tax (in Rs.)
	I	18.04.2016	2014-15	66,42,978/-
	II	05.04.2018	2015-16	2,52,80,070/-
	III	12.04.2019	2016-17 & 2017-18 (upto June 2017)	7,11,62,890/-
Order-in-Original		93-95/Commr/Delhi East/AP/2022 dated 22.06.2022		
Service tax (Amount in Rs.) confirmed vide O-I- O		4,12,39,879/- (4,57,040+90,51,634+3,17,31,205)		
Period of Dispute		2014-15 to June-2017		
Amount of service tax for disputed period		4,12,39,879/-		
Interest		As applicable under Section 75 of the Act		
Penalty for disputed period		Rs. 41,23,987/- under section 76 & {Rs. 10,000/- under Section 77(1)(a) and Rs. 10,000/- under section 77(2)of the Finance Act, 1994 for each of the Statement of Demand}		
Issue		Non-payment of service tax on “construction Services”		

2. The appellant was registered with the Service Tax Department and was providing 'Construction Services' leviable to service tax under section 65 of the Finance Act, 1994. Receiving intelligence that the appellant provided some services on which it had not paid the service tax, investigations were initiated by the Department and it came to the conclusion that the appellant had rendered Construction of Complex Services as defined in section 65(30a) of the Act and chargeable to service tax as per clause (zzzh) of section 65(105) of the Act, Commercial or industrial construction service as defined in section 65 (25b) and chargeable to service tax under clause (zzq) of section 65(105) of the Act and Management, Maintenance and Repair Service as defined in Section 65 (64) of the Act and chargeable to service tax under clause (zzg) of section 65(105) of the Act. A Show Cause Notice³ dated 21.4.2011 covering the period 2005-06 to 2010-11 was issued. The demands proposed in this SCN were confirmed by Order in original dated 30.10.2012. Both the Revenue and the assessee appealed against this order. By Final Order date 9.2.2017, this Tribunal, rejected the Revenue's appeal and remanded the matter to the original authority in the assessee's appeal. The Commissioner passed de-novo adjudication order dated 12.10.2021 confirming service tax of Rs. 3,67,98,828 under section 73 along with interest and imposing penalties under section 77 & 78. **Service Tax Appeal no. 50097 of 2022** is filed assailing this de-novo order.

3. After the SCN dated 21.4.2011, six periodical SCNs were issued. Three of these SCNs dated 23.10.2012, 21.5.2014 and 17.4.2015 were decided by the Commissioner by Order in Original dated 29.2.2016 which is assailed in **Service Tax Appeal no. 52211 of 2016**.

4. Three more SCNs dated 18.4.2016, 5.4.2018 and 12.4.2019 were decided by the Commissioner by Order in Original dated 22.6.2022 which is assailed in **Service Tax Appeals no. 52133, 52134 and 52135 of 2022**.

5. We have heard Shri Atul Gupta, Chartered Accountant assisted by Shri Varun Gaba, Advocate and Ms. Anmol Gupta, Chartered Accountant learned authorized representatives of the appellant and Shri Harsh Vardhan and Shri S K Meena learned authorized representatives for the Revenue and perused the records.

6. The undisputed fact of the contracts involved in all these appeals is that they were composite works contracts involving rendering the service and also a transfer or a deemed transfer of property in the material used in executing the works

contracts. From 1994 up to 2012, service tax could be levied only on such services as were covered under various clauses of section 65(105).

7. Initially, under Chapter V of the Finance Act, 1994, few services were taxable and the list expanded from time to time. Whenever rendering the service also involved use of goods resulting in transfer or deemed transfer of property in the goods, abatement towards the cost of the material was provided through various notifications. From 1.6.2007, a separate clause section 65(105) (zzzza) was introduced in the Act to tax 'works contract services'. The Supreme Court held in the case of **Commissioner vs Larsen & Toubro** 2015 (324) ELT 646 (SC) that composite works contracts involving transfer or deemed transfer of property of goods and rendering the services were a separate specie of contracts known to commerce and there was no charge of service tax on such contracts prior to 1.6.2007. Therefore, all demands on composite works contracts in these appeals up to 1.6.2007 cannot be sustained and need to be set aside.

8. For the period from 1.6.2007 to 1.7.2012, if the SCN is issued to charge service tax under Works Contract Service and if the services in question fell under clause section 65(105)(zzzza), they are chargeable to service tax. In the SCNs which are the subject matter of these appeals, there was no demand under section 65(105)(zzzza) and since the appellant has not been put to notice under this clause, demand cannot be sustained under this clause. If the composite works contracts were charged to service tax under various other clauses for the period 1.6.2007 to 1.7.2012, they cannot be sustained and need to be set aside.

9. From 2012, all services were made taxable except those which are listed in the negative list. What needs to be seen is under what provisions of the law the demands were made and if they can be sustained. We now proceed to examine the submissions with respect to the contracts covered in each of the SCNs of each of the appeals.

Service Tax Appeal no. 50097 of 2022

10. This appeal pertains to the earliest period (although it is now filed in 2022 in the second round of litigation after the *de novo* order was passed by the Commissioner). The impugned order decided the proposal in the SCN dated 21.4.2011 covering the period 2005-06 to 2010-11 to demand an amount of Rs.10,38,86,085/- of which only Rs.3,67,98,828/- has now been confirmed in the impugned order. Rest of the demand is not in dispute. The contracts under which the demand has been confirmed are as follows:

Appeal No. ST/50097/2022(2005-06 to 2010-11)					
Sr No.	Contract/Project	Period involved	Demand of service Taxin Rs.	Classification as per O-i-O	Composite or not
1	DMRC Shahdara	2005-2006	341501	Commercial or industrial Construction Service	yes
2	MP warehousing &Logistics Corp, Bhopal for construction of Godown	2005-2008	585194	Commercial or industrial Construction Service	yes
3	Karnataka State small Indl. Dev.Corp. Ltd.	2008-2010	4939166	Commercial or industrial Construction Service	yes
4	Nuclear Power Corporation	2006-07	187556	Commercial or industrial Construction Service	yes
5	DDA Shastri park- construction of BaratGhar	2005-2007	85208	Commercial or industrial Construction Service	yes
6	Engineers India Ltd.(IT Building)	2007-2010	10891019	Commercial or industrial Construction Service	yes
7	HPCL-Construction ofDwelling units for HPCL cooperative Group Housing Society, Greater Noida	2005-2008	7638812	Construction of complex Service	yes
8	DDA LIG HousesRohini	2005-06	105532	Construction of complex Service	yes
9	Huda Employees Welfare Organization housing flats Panchkula	2005-2006	115017	Constructionof complex Service	yes
10	IOC – Panipat refinery township- construction of	2005-07	4979709	Commercial or industrial Construction Service	yes

	quarters, hostels & classrooms in DPS				
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11. As may be seen, the entire demand confirmed was under the heads 'Commercial or Industrial Construction Service', Construction of complex service or Management, maintenance and repair service. The charge under these headings applies only to services simplicitor and not to composite works contract services as per **Larsen & Toubro**. Therefore, the entire demand in the impugned order in this Appeal and interest and consequently all penalties need to be set aside and we do so.

Service Tax Appeal no. 52211 of 2016

12. This appeal pertains to the periods 2011-12 to 2013-14 and the impugned order decided three SCNs :

(i) SCN dated 23.10.2012 covering the period 2011-12 demanded an amount of Rs.3,57,56,467/-of which only Rs.95,29,425/- has now been confirmed in the impugned order. Rest of the demand is not in dispute.

(ii) SCN dated 21.05.2014 was issued covering the period 2012-13 and it demanded an amount of Rs.2,40,39,604/-of which only Rs.75,95,626/- has now been confirmed in the impugned order. Rest of the demand is not in dispute.

(iii) SCN dated 17.04.2015 covering the period 2013-14 and it demanded an amount of Rs.63,11,706/-of which only Rs.39,56,495/- has now been confirmed in the impugned order. Rest of the demand is not in dispute.

13. The contracts which pertain to these confirmed demands in the three SCNs covered by this appeal are as follows:

Appeal No. ST/52211/2016(2011-12 to 2013-14)					
A.	SCN 23.10.2012(2011-12)				
	Contract/Project	Period involved	Demand of service Tax	Classification as per O-I-O	Composite or not
1	MCD(improvement of drainage system and roads by ready mix concrete in ward 47& 48 in the west Zone)	2011-12	1094199	Management, Maintenance and repair service	yes

2	NBCC Chankyapuri(External Site Development work at Netaji Nagar & Moti bagh)	2011-12	7107662	Management, Maintenance and repair service	yes
3	NBCC Rohatak(Construction of Mini auditorium at Maharishi Dayanand University Rohatak)	2011-12	1035642	Commercial or industrial Construction Service/Works contract service	yes
4	EIL(Renovation of Ayakar Bhawan Vaishali, ghaziabad)	2011-12	78756	Commercial or industrial Construction Service	yes
5	NTPC/APCPL Jharli(Construction of Security Barracks and 10B-Type quarters at Jharli for IGSTPP)	2011-12	213166	Commercial or industrial Construction Service/Works Contract service	yes
Total 95,29,425					

B.	SCN 21.05.2014(2012-13)						
	Contract/Project	Period involved	Demand of service Tax	Classification as per O-I-O	Composite or not	Exemption claimed by the Appellant	Remark/ Department submission
1	NBCC Chankyapuri (External Site Development work at Netaji Nagar & Moti bagh)	2012-13	3776903	Management , Maintenance and repair service	yes	Sr. No. 12&13 of Notification No. 25/2012	
2	NBCC Rohatak (Construction of Mini auditorium at Maharishi Dayanand University Rohatak)	2012-13	3494547	Commercial or industrial Construction Service/ works Contract service	yes	12(C) &12(a) of 25/2012	The auditorium can be used for extra- curricular activities, educational seminars as well as for commercial purpose.

3	HSIIDC (Construction of flatted factories at Sonapat provided to Haryana State and Infrastructure Development corporation Ltd.)	2012-13	324176	Commercial or industrial Construction Service/ works Contract service	Yes	Service tax was paid by the Service recipient (HSIIDC)	The appellant has not submitted complete details of contract. No proof of payment has been submitted before adjudicating authority.
Total			75,95,626				

C.	SCN 17.04.2015(2013-14)						
	Contract/Project	Period involved	Demand of service Tax	Classification as per O-I-O	Composite or not	Exemption claimed by the Appellant	Remark/ Department submission
1	NBCC Rohatak (Construction of Mini auditorium at Maharishi Dayanand University Rohatak)	2013-14	3263251	Commercial or industrial Construction Service/ works Contract service	yes	12(C) & 12(a) of 25/2012	The auditorium can be used for extra-curricular activities, educational seminars as well as for commercial purpose.
2	EIL(Renovation of Ayakar Bhawan Vaishali, ghaziabad)	2013-14	616225	Commercial or industrial Construction Service	yes	12 of 25/2012	EIL is public sector undertaking and is doing commercial activities in many fields. It is a profit making organization doing

							commercial activities.
3	HSIIDC (Construction of flatted factories at Sonapat provided to Haryana State and Infrastructure Development corporation Ltd.)	2013-14	77019	Commercial or industrial Construction Service	Yes	Service tax was paid by the Service recipient (HSIIDC)	No proof of payment has been submitted before adjudicatin g authority.
	Total 39,56,495						

14. In this appeal, the first SCN dated 23.10.2012 was issued for the period 2011-12, i.e., pre-negative list regime. The demands were on composite works contracts involving supply of goods and rendering of services. Therefore, the demands could have been made only under Works Contract Service. Since the demands were made and confirmed under Commercial or Industrial Construction Service and Management, Maintenance and Repair Service in respect of three of the five contracts, they cannot be sustained. The two contracts under which the demand has been made under the Works Contract Service are:

- A) NBCC Rohatak (Construction of Mini auditorium at Maharishi Dayanand University Rohatak); and
- B) NTPC/APCPL Jharli (Construction of Security Barracks and 10 B-Type quarters at Jharli for IGSTPP).

15. Services of construction of a mini auditorium at the Maharshi Dayanand University (MDU), Rohtak were covered in this SCN as well as the next SCN dated 21.5.2014. This contract was executed during the period 2011-12 to 2013-14 and demands were raised in these two SCNs for different periods.

16. Learned consultant made the following submissions with respect to this contract.

- (i) The appellant constructed a mini auditorium at MDU, Rohtak as a composite works contract. These services were exempted in view of circular No. 80/10/2004 – S.T., dated 17.09.2004 being the services provided to

educational institution, and cannot be considered for commercial purpose as pre-dominantly used for educational purposes.

(ii) The adjudicating authority, however, denied the exemption on the ground that the Circular dated **17.09.2004** was withdrawn by Circular No. 96/7/2007 dated **23.08.2007** and no further circulars were issued validating the previous provisions has been issued in this regard. He also held that the auditorium can be used for extra- curricular activities, educational seminars as well as commercial purposes which is an assumption/ presumption without any basis.

(iii) Service tax under section 65(105) (zzzza) can be charged only if it falls within its scope. The explanation to this clause makes it amply clear that construction of a building or structure would fall under this clause only if it is meant for commercial purposes. This explanation reads as follows:

“Works contract”, for the purposes of section 65(105)(zzzza), 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 or installation of plant, machinery, equipment or structures, whether pre- fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

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

(c) construction of a new residential complex or a part thereof; or (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

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

(iv) Merely because the university may collect fees from the students does not make the auditorium constructed for the university a building for commercial purposes.

(v) For the contracts entered into with educational institutions for the period **2005-06 to 2010-11**, CESTAT vide by order dated **09.02.2017** held that no tax is payable.

(vi) Without prejudice to above, the service of construction of auditorium for MDU, Rohtak has been taxed under the category of Works Contract Service 65 (105) (zzzza) and the abatement has been granted while confirming the demand, however, the abatement has been given wrongly and the demand has been confirmed on the higher amount. It is to be noted that in the subsequent period i.e., 2014-15 to 2017-18 (up to June 2017) for the same contract the department has provided abatement of 60%, but in the present case, it has provided 40% abatement.

(vii) **During the post negative list period**, the construction of structure meant predominantly for use as educational institution is exempt vide entry 12 (C) of Notification No. 25/2012 dated **20.06.2012**.

(viii) **Further**, entry 12 (a) also provides for exemption for the construction services provided to Government, a local authority or a Government Authority. The MDU, Rohtak, initially established as Rohtak University, came into existence by an Act No. 25 of 1975 of the Haryana Legislative Assembly in 1976 and thus, covered under Government Authority.

(ix) Reliance is placed on: -

1. **Vij Construction Pvt. Ltd. Vs. Commissioner of C. Ex., New Delhi – 2018 (11) G.S.T.L. 169 (Tri. - Del.)**
2. **KMV Projects Ltd. Vs. Commissioner of C. Ex. & S.T., Hyderabad – 2019 (27) G.S.T.L. 388 (Tri. – Hyd.)**
3. **SRM Engineering Construction Ltd. Vs. Commissioner of S.T., Chennai – II – 2018 (11) G.S.T.L. 174 (Tri. – Chennai)**
4. **Banna Ram Choudhary Vs. Commissioner of Central Excise, Jaipur – 2017 (3) G.S.T.L. 338**
5. **Commissioner of Service Tax, New Delhi Vs. N.S. Associates Pvt. Ltd. – 2018 (11) G.S.T.L. 332 (Tri.– Del.)**

17. Learned authorised representative for the Revenue reiterated the impugned order.

18. We have considered the submissions on both sides with respect to this part of the demand.

19. For the period from 1.6.2007 up to 2012, works contracts could be taxed only if they fell under clause 65 (105) (zzzza) and only under this clause. The scope of this clause was limited and it did not include all composite works contracts involving supply or deemed supply of goods and rendering services but only some such services. Insofar as the construction of a building or structure is concerned, this clause applies to findings for commercial purposes. We do not agree with the contention of the Revenue that the auditorium constructed in the university should be considered as a commercial structure. Even if the reasoning of the Commissioner, that it can also be used for commercial purposes is accepted, the essential nature of the building is not commercial. Therefore, it does not fall under section 65(105)(zzzza). The charging section of a tax statute must be strictly constructed and in case of any doubt, the benefit of doubt must go in favour of the assessee and against the Revenue.

20. As far as the demand for the period after 2012 (post negative list period) is concerned, as submitted by the learned consultant, inter alia, the following services were exempted by notification no. 25/2012:

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of –

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);

(c) **a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;**

(d) canal, dam or other irrigation works;.....

21. MDU is a university created by an Act of state legislature and is meant to provide education. Hence, we find that the service of construction of the auditorium in MDU is exempted during after 2012 also.

22. Therefore, the demand of service tax on this contract deserves to be set aside.

NTPC/APCPL Jharli (Construction of Security Barracks and 10 B-Type quarters at Jharli for IGSTPP)

23. Learned consultant does not dispute the taxability of the services rendered under this contract but asserts that in the course of rendering the services, materials were also used and therefore, this was a works contract service and therefore, abatement towards the cost of materials must be given to it. He made the following submissions:

- i. The Appellant duly paid the Service Tax after availing the benefit of Notification 1/2006 dated 01.03.2006. The Appellant paid the tax at 33% of the Gross value after availing abatement of 67% in terms of notification 1/2006.
- ii. It has been wrongly held by the adjudicating authority that the Appellant has not provided any document with respect to payment of local taxes i.e., VAT, though, it has not been disputed by the adjudicating authority that the Services provided are Works Contract Service. Further, it is to be noted that there is no such condition in notification 1/2006 to provide documentary proof with respect to payment of VAT or payment of local taxes. The only requirement to avail the benefit of the notification was that 'The gross amount charged shall include the value of goods and materials supplied or provided or used for providing the taxable service by the service provider.'
- iii. The Appendix – I of the agreement entered for this project very specifically shows that the material was used in the execution of the project. Moreover, Schedule – B of the agreement shows the 'Free of Cost Material' provided to the Appellant, which was consumed at the time of provision of construction itself.
- iv. The notification has been wrongly interpreted by the adjudicating authority. Further, the 'Free of Cost Material' is not to be included in the gross value for the purpose of abatement under the notification.
- v. The Appellant has rightly availed the abatement under the notification and paid the tax on 33% of the gross value ascertained on the basis of

valuation of services provided and the material/goods used for the provision of service. There is no such requirement to provide the details of 'Free of Cost of Material' which was provided to the Appellant at the site only and was consumed at the site only, for availing the benefit of the notification.

vi. Further, it is to be noted that there was no obligation or accountability on the part of the Appellant to maintain the records of the material i.e., 'Free of Cost Material', which was provided and consumed in the course of construction itself.

24. Learned authorised representative for the Revenue supports the impugned order.

25. We have considered the submissions with respect to this demand.

26. The undisputed fact is that this contract was a works contract requiring the rendering of service and also transfer or deemed transfer of goods. The demand has also been confirmed under works contract service. Therefore, the appellant will be entitled to abatement towards the materials used in the contract. No service tax can be levied on the value of the goods transferred or deemed transferred while rendering the service because it falls outside the scope of service tax and falls within the scope of the sales tax/VAT levied by the State. It is immaterial whether the VAT was leviable or not, whether it was levied or not and whether it was paid or not. If VAT was payable and not paid, it is for the state authorities to take action. If it was exempted, of course, the appellant does not have to pay it. Under no circumstances can the service tax be levied on the value of the goods transferred. In case of indivisible works contracts where abatement is available towards the value of the goods used, such abatement cannot be denied on the ground that there is no evidence that VAT has been paid. We, therefore, find that the appellant was liable to pay service tax after abatement on the services rendered under this contract.

SCN dated 21.05.2014

27. The second SCN in this appeal dated 21.5.2014 demanded service tax on the services rendered under three contracts as under.

	SCN 21.05.2014(2012-13)					
	Contract/Project	Period involved	Demand of service Tax	Classification as per O-I-O	Composite or not	Exemption claimed by the

						Appellant
1	NBCC Chankyapuri (External Site Development work at Netaji Nagar & Moti bagh)	2012-13	3776903	Management , Maintenance and repair service	yes	Sr. No. 12&13 of Notification No. 25/2012
2	NBCC Rohatak (Construction of Mini auditorium at Maharishi Dayanand University Rohatak)	2012-13	3494547	Commercial or industrial Construction Service/ works Contract service	yes	12(C) &12(a) of 25/2012
3	HSI IDC (Construction of flatted factories at Sonapat provided to Haryana State and Infrastructure Development corporation Ltd.)	2012-13	324176	Commercial or industrial Construction Service/ works Contract service	Yes	Service tax was paid by the Service recipient (HSI IDC)
	Total 75,95,626					

28. Of these, one is the construction of auditorium in the MDU which we have already discussed and held in favour of the appellant for this period also. The remaining two contracts are the contract with NBCC, Chanakyapuri for site development and the contract with HSI IDC for construction on flattened factories. Learned consultant made the following submissions with respect to these two contracts.

N.B.C.C. contract for External Development Work Around Social Infrastructure Area at Kidwai Nagar (East), New Delhi

- a. Under this contract, the Appellant provided the services of construction to NBCC for external development work around social infrastructure area at Kidwai Nagar. Ld. Adjudicating Authority confirmed the demand amounting to Rs. 53,52,219/-for the period April 2015 to June 2017.

- b. The Appellant submits that the said project involves broadly 3 types of work (a) Horticulture, (b) Plumbing Work, involving external water supply system, external sewerage, storm water drainage system, rain water harvesting system, external water supply system, etc. and, (c) Electrical Works, including external light fixtures, supply & laying of LT Cable, etc.
- c. The above said work is exempt vide entries 12(a) or 12A(a), 12(e) & 29(h) of Mega exemption notification no. 25/2012 – ST dated 20 June 2012.
- d. Further, horticulture work stands non-taxable by virtue of Negative List of Services defined under Section 66 D of the Act. The Appellant fulfills all the conditions for availing exemption under entry 12A(a) and 12(e) read with Entry 29(h) of Mega exemption Notification No. 25/2012 – ST dated 20 June 2012. Thus, no tax is liable to be paid by the Appellant in this regard.
- e. The said project was awarded to the Appellant as a sub-contractor by NBCC on behalf of Ministry of Urban Development (MoUD), Government of India (now known as Ministry of Housing and Urban Affairs).

MoUD is the apex authority of Government of India to formulate policies, sponsor and support programme, coordinate the activities of various Central Ministries, state governments and other nodal authorities. Thus, MoUD is aptly covered under the scope of Government as it is a part of central government and headed by a union minister appointed by President. This is also clarified vide CBEC in Taxation of Services: An Education Guide issued on 20 June 2012. The relevant extract of Education Guide is reproduced as under-

4.1.5 What entities are then covered under ‘Government’? ‘Government’ would include various departments and offices of the Central or State Government or the U.T. Administrations which carry out their functions in the name and by order of the President of India or the Governor of a State.
- f. Also, the work done by the Appellant includes horticulture also which is covered under the term ‘Agriculture’ as clarified in CBEC in Taxation of Services: An Education Guide and the same is not taxable under service tax as per Section 66D(d) of the Act. The relevant extract is reproduced verbatim as under -

4.4.2 Are activities like breeding of fish (pisciculture), rearing of silk worms (sericulture), cultivation of ornamental flowers (floriculture) and horticulture, forestry included in the definition of agriculture? Yes. These activities are included in the definition of agriculture.”

29. Learned authorised representative reiterated the findings of the impugned order.

30. We have considered the submissions on both sides.

31. Notification no. 25/2012-ST dated 20 June 2012 reads as follows:

“In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely:-

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of –

(e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal;

12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of –

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

29. Services by the following persons in respective capacities:

(h) sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;

32. It is undisputed that the work was done in connection with the Central Government quarters which were outsourced by the Ministry of Housing and Urban Affairs to National Building Construction Corporation (NBCC) who, in turn, sub-contracted them to the appellant. Since the civil structure and other works in this case were clearly not meant for commerce or industry but to provide accommodation to the Central Government employees and were rendered to the Ministry of Housing

and Urban Affairs, they would be clearly exempted by S.No. 12A (a) of the notification at the hands of the NBCC. The appellant, as a sub-contractor of NBCC will also be exempt by virtue of S.No. 29(h) of the notification. The demand under this contract cannot be sustained and hence needs to be set aside.

33. The last contract in this SCN pertains to the **Construction of Flatted Factories at Sonapat for HSIIDC**. The total demand Confirmed is Rs. 4,01,195/- (Period 2012 – 13 to 2013–14).

34. Learned consultant for the appellant submitted as follows:

- The Appellant entered into a contract with HSIIDC (Haryana State Industrial and Infrastructure Development Corporation) for construction of flatted factories at Sonipat Haryana.
- That the Appellant submits that the said project was taxable under the category of Works Contract Services, however, the Ld. Adjudicating Authority has demanded service tax under the category of Construction of Industrial Construction service which is wrong as the contract involves supply of material as well as service component.
- Moreover, in the said contract, it was mutually agreed between the parties that applicable service tax would be discharged by the Service Recipient i.e., HSIIDC for the contract under dispute.
- Further, the Ld. Adjudicating Authority has held that no documentary evidence has been provided regarding payment of tax. Though, a certificate to affirm that the payment of Service Tax on behalf of the Appellant with respect to contract in question, has been issued to the Appellant by HSIIDC.

35. Learned authorised representative submits that the adjudicating authority confirmed the demand under this head for the reason that the appellant had not produced documentary evidence that HSIIDC had discharged the tax liability. Learned consultant draws attention to the certificate issued by HSIIDC and enclosed at pages 635 to 637 of the appeal.

36. **Since the dispute is only regarding the certificate that HSIIDC had paid the service tax, we find this a fit case to be remanded to the Commissioner to examine the certificates produced by the appellant.**

SCN 17.04.2015(2013-14)

37. This is the last SCN of this appeal and it involved three contracts two of which- Construction of an auditorium in MDU and Construction in the flattened factories of HSIIDC- have already been discussed above. Accordingly, the demand on construction of auditorium in MDU is set aside and the demand on the construction on flattened factories for HSIIDC is remanded to the Commissioner for verification. The third and last contract in this SCN pertains to EIL (Renovation of Ayakar Bhawan Vaishali, Ghaziabad). According to the learned consultant, this contract was given by the Income Tax Department to Engineers India Ltd. who, in turn, sub contracted the work to the appellant. It was a contract including the material and hence was a Works Contract Service and the demand under commercial or industrial construction service and management, maintenance and repair service are not sustainable.

38. He made an alternative submission that the services, being rendered as a sub-contractor to EIL on a government building (Aayakar Bhavan) being a non-commercial building, is exempted by notification no. 25/2012-ST.

39. Learned authorised representative for the Revenue reiterated the impugned order.

40. We have considered the submissions on both sides.

41. We find that notification no. 25/2012-ST (S.No. 12A) exempts services rendered to a governmental authority on civil structures other than those meant for commerce, industry or any other business or profession. The building in this case is Income Tax building and it squarely falls under this definition. Therefore, EIL, as a contractor, will get exemption under S. No. 12A. Further, as per S.No. 29 (h) of the same notification, the appellant as a sub-contractor of EIL will get exempted. Therefore, no demand of service tax can be sustained on the services rendered in this contract.

Service tax Appeal No. 52133 of 2022

42. This appeal assails the following demands made under the statement of demand (SCN) and confirmed by the impugned order:

	ST/52133/2022 SCN 12.04.2019 (2016-17 to 2017-18 (upto June,2017))
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S. No.	Contract/Project	Period involved	Demand of service Tax	Classification as per O-I-O	Exemption claimed by the Appellant
1	NBCC India Kidwai Nagar(External Development work around social infrastructure area at Kidwai Nagar(East))	April, 2016 to June-17	2531412	Commercial or industrial Construction Service/ works Contract service	12A(a) or 12(a), 12(e) & 29(h) of 25/2012
2	NBCC India SEZ Noida(renovation of SDF blocks A,B&C, first floor of service center building provision of a record room, renovation of exterior works of service center and replacement of lift of SDF block)	April, 2016 to June-17	2424437	Commercial or industrial Construction Service/ works Contract service	Section 51 of the act, states that SEZ Act, shall have over-riding effect over any other law. As per Rule 31 of the SEZ Rules,2006, exemption has been granted to a service provider, providing any service to SEZ unit.
3	HSCC India Ltd. (Construction of Auditorium block for proposed Kalpana Chawala Government Medical College, Karnal	April, 2016 to June-17	11504188	Commercial or industrial Construction Service	The Appellant has paid entire service tax in terms of Rule 2A of service Tax(Determination of value) Rules,2006, and in terms of Notification No. 30/2012 as only 50% of the service tax has to be paid by the service provider and the rest has to be paid by the service recipient.

43. Of these three contracts, we have already held that no service tax is payable on the services rendered by the appellant as the sub-contractor of NBCC is India in Kidwai Nagar. The demand to that extent cannot be sustained. As far as the services

rendered in NOIDA SEZ are concerned, no service tax can be levied on such services by virtue of section 7 of SEZ Act. As per Section 51 of the SEZ Act, its provisions prevail over any other laws. These read as follows:

“Section 7. Exemption from taxes, duties or cess. Any goods or services exported out of, or imported into, or procured from the Domestic Tariff Area by,--

- (i) a Unit in a Special Economic Zone; or
- (ii) a Developer,

shall, subject to such terms, conditions and limitations, as may be prescribed, be exempt from the payment of taxes, duties or cess under all enactments specified in the First Schedule.

Section 51. Act to have overriding effect.

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

44. Therefore, the demand of service tax on the services rendered in the NOIDA SEZ cannot be sustained and need to be set aside.

45. The third contract is the construction of an auditorium in the Kalpana Chawla Government Medical College, Karnal on a contract received from HSCC India Ltd. The case of the appellant is that this construction is covered by notification no. 30/2012 issued under section 68 of the Finance Act according to which only 50% of the Service tax has to be paid by the service provider and the remaining 50% has to be provided by the service recipient. The appellant has already paid the service tax to the extent of 50%. Therefore, no demand of service tax needs to be paid. The Commissioner has, in the impugned order, held that Service tax is a value added tax and is leviable on the service provider except under certain circumstances, where the onus to pay service tax has been cast upon the service recipient. In the present case, by virtue of the service being rendered by the Appellant, they were liable to pay service tax in terms of provisions of Section 68. However, he did not record any findings on the question if the appellant's case was covered by notification no. 30/2012-ST and hence only 50% service tax has to be paid or if it is not covered, why. We, therefore, find that this matter also must be remanded to the Commissioner to examine and decide.

46. We, therefore, find that in this appeal, the demands on the contracts for services rendered as sub-contractor to NBCC at Kidwai Nagar and in NOIDA SEZ are liable to be dropped. The demand regarding the contract with HSCC India must be remanded to the Commissioner to examine and record a finding on the claim of the appellant that it was covered by notification no. 30/2012-ST and hence was liable to pay only 50% of the service tax which it had already paid.

Service Tax Appeal No. 52134 of 2022

47. This appeal assails the following demands made under the statement of demand (SCN) and confirmed by the impugned order:

ST/52134/2022			SCN 18.04.2016(2014-15)		
	Contract/Project	Period involved	Demand of service Tax in Rs.	Classification as per O-i-O	Exemption claimed by the Appellant
1	NBCC Rohatak(Construction of Mini auditorium at Maharishi Dayanand University Rohatak)	2014-15	148855	Commercial or industrial Construction Service/ works Contract service	12(C) &12(a)of 25/2012
2	Engineers India Limited(civil works, electrical works, access control& CCTV system& miscellaneous work for renovation of Ayakar Bhawan)	2014-15	308185	Commercial or industrial Construction Service	12(a) of Notification No.25/2012-St
	Total		457040		

48. We have already found that the demand of service tax on the services rendered under these two contracts are not sustainable and hence need to be set aside. This appeal therefore, needs to be allowed and the impugned order insofar as it pertains to this demand set aside and we do so.

Service Tax Appeal No. 52135 of 2022

49. This appeal assails five demands made under the Statement of Demand (SCN) and confirmed by the impugned order. Of these, we have already held that no service

tax is payable on S.No. (1)- work as sub-contractor for NBCC at Kidwai Nagar, New Delhi, and (2)- work as sub-contractor for NBCC in NOIDA SEZ. As far as S.No.(3) services rendered as a sub-contractor of HSCC in Kalpana Chawla Government Medical college is concerned, there is no finding on the appellant's submission that it is covered by notification no. 30/2012-ST and hence as service provider, had to pay only 50% of the service tax which it has already paid. Therefore, this matter also needs to be remanded to the Commissioner. The demand at S.No (4) is on an amount which the appellant claims to have received from CPWD not for any service which it rendered but as an award in an arbitration proceeding. This contention was not accepted by the Commissioner on the ground that the appellant had not produced any evidence. Such a decision is not sustainable because it is for the department to prove that the appellant had received consideration for a service and it is not open to the department to charge service tax on any amount received by the assessee if it cannot establish that the amount was received as a consideration for a service which it had rendered. Therefore, the demand on this ground needs to be set aside. The demand at S.No. (5) is on the basis that as per Form 26AS of the appellant, it had received some amounts. Unless the amounts so received are a consideration for a taxable service rendered, no service tax can be levied. Therefore, the demand needs to be set aside.

50. The demands confirmed in the impugned order insofar as this appeal is concerned therefore, need to be set aside except insofar as the demand on contract with HSSC is concerned, which matter must be remanded.

51. In view of the above, the five appeals are disposed of as below:

- a) **Service Tax Appeal No. 50097/2022** is allowed and the impugned order is set aside.
- b) **Service Tax Appeal No. 52211/2016** is partly allowed and the impugned order is partly set aside and partly remanded as follows.
 - (a) SCN 23.10.2012(2011-12)- Matter remanded to the Commissioner for re-calculation of demand on Construction of Security Barracks and 10 B-Type quarters at Jharli after abatement of the value of the materials used since this was a Works Contract. Rest of the demand is set aside.
 - (b) SCN 21.05.2014(2012-13)- Matter remanded to the Commissioner to examine the certificates issued by HSIIDC showing that it had paid the Service Tax. Rest of the demand is set aside.

- (c) SCN 17.04.2015(2013-14) Matter remanded to the Commissioner to examine the certificates issued by HSIIDC showing that it had paid the Service Tax. Rest of the demand is set aside.
- (d) All penalties are set aside invoking section 80 of the Finance Act.
- c) **Service Tax Appeal No. 52133/2022** is remanded to the Commissioner so far as the contract with HSCC India Ltd. (Construction of Auditorium block for proposed Kalpana Chawala Government Medical College, Karnal is concerned, to examine the appellant's claim that as per notification no. 30/2012, as a service provider it had to pay only 50% of the service tax and it did so. Rest of the the impugned order is set aside. All penalties are set aside invoking section 80 of the Finance Act.
- d) **Service Tax Appeal No. 52134/2022** is allowed and the impugned order is set aside with consequential relief to the appellant.
- e) **Service Tax Appeal No. 52135/2022** is remanded to the Commissioner so far as the contract with HSCC India Ltd. (Construction of Auditorium block for proposed Kalpana Chawala Government Medical College, Karnal is concerned, to examine the appellant's claim that as per notification no. 30/2012, as a service provider it had to pay only 50% of the service tax and it did so. Rest of the the impugned order is set aside. All penalties are set aside invoking section 80 of the Finance Act.
- f) The appellant will be entitled to consequential relief, if any.

[Order pronounced on 03.01.2024]

(JUSTICE DILIP GUPTA) PRESIDENT
