

2012(1) ECS (127) (Tri-Ban)

**CUSTOM, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH FKCCI-WTC BUILDING K.G ROAD
BANGALORE-560009
Bench-Division Bench
Court-I**

M/S Ramkey Infrastructure Ltd.-

Versus

CST, Hyderabad

Date of Hearing: 15/03/2012

Date Of decision: 14./05.2012

Appeal Nos. ST/476/2009, ST1589/2010, ST/432/2010 ST/Stay 260/2010

(Arising out of Order –in Original No. 14/20089 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)

**M/S Ramky Infrastructure Ltd.-V. Satya Appellant
Murthy Joint Venture
M/s Maytas- Nagarjuna Construction
Company Ltd. Joint Venture
Vs.**

CST, HyderabadRespondent

Appearance

Mr. G. Shivadass Advocate for M/s Ramky Infrastructure Ltd-V

Satya Murthy JV

Mr. G. Natarjan advocates 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 Me. P.G. Chacko, Member (Judicial)

Hon'ble Me. M. verraiyan, Member (Technical)

FINAL ORDER No. 299 to 301/2012

STAY ORDER NO. 771/2012

(Order per; P.G. Chacko)

1. The appeals, ST/476/2009 and ST/1589/2010m, were filed by M/s Ramky Infrastructure Ltd-V. Satya Murthy joint Venture (herein after referred to as ramky- Murthy JV) and the third appeals, ST /432/2010 was filed by M/s, Maytas Infra Ltd. - Nagarjuna Construction Company Ltd. Joint Venture (herewith after 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	24/102008	June 2007to May 2008	No. 14/2009-ST dt 17/2/2009	Rs. 2,79,12,913/-	@ 2%of service tax per month	Rs. 1000/-	Rs.2.8Crores
ST1589/2010	25/082009	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 Sept,2008	No.51/2009-ST dt. 30/11/2001	Rs. 13,46,28,909/-	@ 2%of service tax per month	Rs. 1000/-	Rs 14 crores

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

- 2.1 From the results of investigation into the works undertaken by the appellant in execution of certain contracts awarded by the Irrigation & Command areas 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 services (WCS) in terms of Section 65(105) (zzzza) of the Finance Act,1994 during the

period from 01/06/2007 to 31/05/20080. 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 works 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 Tirmalagiri (v&m) Nalgonda Dist.	Turnkey Contract	62/04/-05	06/03/2005	72.00
		Description/scope of work: Earth work excavation, forming embankment and distributor system including Distribution Majors, Minors, Sub Minors and Field channels from km0.00 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 Packages NO. 57 Km 32.00 to 40.00 Suryapet Mandal Nalgonda Dist.	Turnkey Contract	63/04-05	06/03/2005	55.35
		Description/scope of work: Earth work excavation forming embankment and construction of CM&CD works, including investigation designing and estimation of distributor system including distribution major's minors, sub Minors and Field channels from Km 32.00 to Km. 40.00 (i.e. 23 R to 37I) on DBM-71 of SRSP- state II Suryapet Mandal Nalgoda District.			
3.	HNSS (Handri Neeva Sujala Sravanthi) Phase-II Packages No. 4(Km 260.00 to Km. 280.00)	EPC Turnkey System	SHE 5/EPC/2006/07	15/12/2006	60.41
		Description/scope of work: Investigation, preparation of Hydraulic particulars design drawing and each work excavation of HNNS main canal reach from KM. 260.00 to Km. 280.0 an 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 30.00	EPC Turnkey System	SHE 5/EPC/2006/07	23/04/2007	74.70
		Description/scope of work: Investigation, preparation of Hydraulic particulars design drawing and each work excavation of Panganur Branch Canal from Km 20.00 to Km. 30.0 including formations of cherlopii Reservoir, Construction of CM & CD Works and distributor system to feed and ayacut of 5500 ac kahareef I.D .			
5.	HNSS (Handri Neeva Sujala Sravanthi) Phase- II Km 30.0 to Km 74.00	EPC Turnkey System	SHE 2/EPC/2006/07	23/04/2007	73.99
		Description/scope of work: Investigation, preparation of Hydraulic particulars design drawing and each work excavation of Panganur Branch Canal from Km 30.00 to Km. 74.00 including Construction of CM & CD Works and distributor system to feed and ayacut of 19100 ac under phase-II.			
6.	GNSS (Galeru Nagari Sujala Sravanthi Project - *Flood Flow Canal from Owk Reservoir to Gandikota Reservoir- Packages No. 49A	EPC System	4 SE / 2007-08	11/06/2007	90.495
		Description/scope of work: Additional investigation, design, preparation of Hydraulic particulars estimates and earthwork excavation of GNSS flood flow canal from OWK Reservoir to gandikota Reservoir fro 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 investigator that the appellant has raised Running Account Bills on the contractee-Department and received payments from the latter towards the value of the service provided. But the appropriate service tax had not been paid on the value of the service provided after 01/06/2007 in relation to be above contract. The investigation further found that the payment received by the appellant from the contractee did not reflect the actual value of the taxable services, certain deduction 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 Rules 3(1) if

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 ST-3 return for the half year ending 31/03/2008 did not disclose the factum of works contract service having been provided to the contractee. On the basis of the results of investigation the Departments issued show-cause notice dt 24/10/2008 involving 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 section 75 of the Act and (c) imposition of penalties on the appellant under section 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 decision of the Supreme Court. The qualification 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 assessed 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 section 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 on similar ground 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, yet 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 to 77 of the Act. The present appeal is against this order of the Commissioner and is on asset of grounds similar to those raised in the first appeal.

4. **Facts of the appeal No. St 432/2010**

4.1 Investigation 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, Gov.t of Andhra Pradesh during the period from 01/06/2007 to 30/09/2008, (d) 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 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 turn over as exempted turn over 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 investigation that the appellant was evading payment of service tax investigation that the appellant was evading payment of service tax on WCS, which was livable 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 cessses 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 contract 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 Project 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 Nagri Sujala Sravanthi Packages 29	<u>Description/Scope of Works:</u> Packages No. 29/2006 – Investigation, Design and excavation of GNSS Flood Flow Canal (gorkallu Reservoir to OWK Reservoir) for the reach from 46,00 Km to 57,000 including construction of CM & CD works rout to Kurnool Dist, on EPC Turnkey contract.			
2	SRBC Nandyal project packages No. 26/2006	EPC Contract	1/Se/2006-07	06.12.07	257.85
		<u>Description/ Scope of Work:</u> Packages 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 structure/improvement and alternations to CM & CD works including all other allied works on EPC category-I			

3	Flood Flow Canal Project From SRSP	EPC/ Turn Key contract	17/FFC/2004-05	23-03-05	210.06
		<u>Description /Scope of works:</u> Earthwork Exaction, forming embankment and construction canal from Km 86000 to Km 103.00 in Balwanthpur (v) Mallai (M) of Karimangar District			
4.	Indira Sagar (Polavaram project Packages -3)	On EPC/Turnkey system	73/2004-05	18.03.05	212.94
		<u>Description/scope of works:</u> Conducting detained investigation preparation of Hydraulic particulars, design and engineering, preparation of estimates and excavation of main canal, formation of banks including canal lining and construction of CM & CD works from 51.60 to Km 69.145 of Left Main Canal of Indira Sagar Project(Polavaram Project) (Packages-3) on EPC Turnkey system			
5.	Thotapalli barrage project	Turnkey Contract	5/2004/-05	25-10-04	<u>170.92</u>
		<u>Description /Scope of works:</u> Earth excavation, forming embankment and construction of CM a CD works including investigation, design and estimation of Right Main Canal from 52.450 to Km. 107.00 and its Distributor system and field channels of Thotapalli Barrage project near Thotapalli(V) Garugubilli (M) of Viziangaram District.			
6.	Lingala (Chiitravathi balancing Reservoir Right Canal Project)	Turnkey Contract	3 Sc /2004-05	25-10-04	148.05
		<u>Description /Scope Of Works:</u> Investigation, design, preparation of hudraulic 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 including investigation, design and estimation of Right Main Canal from Km 52.450 to Km. 107.00 and its Distributor system and field channels of Thotapalli Barrge project near Thotapalli (V) Garugubilli (m) of Viziangram District.			
7.	GNSS Phase II Packages 10/06	EPC Turnkey Contract	9 SE/2007-08	29.06.07	195.12
		<u>Description /scope of works:-</u> Package No. 10/06- Investigation design and formation of Mallema dugu reservoir and earth work excavation of kailassagiri canal from Km 0.000 to 65.500 including construction of CM & C D works and distributor system including field channel to feed an ayacut of 55,000 acres under GNSS in Chittoor District packages No. 10/06			

8	Gundalkamma Reservoir Project Package No. G1	EPC Turnkey system	4 VGP 2004-05	10-11-2004	212.49
Description / Scope of work:- Formation of Right Earth bund and closing of gorge portion by earthen bund, excavation of left and right canals, including CM & CD works and distributor system for an ayacut of 80,060 ac. On EPC Turnkey system.					
9.	Pranahitha Chevella LIS project	EPC Turn Key system	LS AB No.03/2008-09	26.05.08	215.47
Description / Scope of works: PCLIS - Detailed investigation and preparation of design, drawing, estimates land plan schedule and excavation of gravity canal construction of right head sluice of Gundlakamma Reservoir project 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 Turnmidi hetti (v) Koutala (M), Adllabad Dist. –Packages No. II.					

The Show-cause notice invoked the proviso section 73(1) of the Finance Act on the alleged ground of “willful misstatement and suppression of material facts” and “contravention” of the provision of Finance Act, 1994 and the Rules the under “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 Section 76 to 78 of the Act.

5. The legal provision

5.1 The adjudicating authority has brought the appellants services within the ambit of “turnkey projects including engineering procurement and construction or commissioning (EPC) project” 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 activates 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 provision of Section 65(105) (zzzza) of the Finance Act 1994 read as under:

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

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

(zzzza) to any person by any other person in relation to the execution of as work contract, excluding works contract, excluding works contract in respect of roads, airport, railway, transport terminals, bridges tunnels and dams.

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

- I. Transfer of property in goods involved in the execution of such contract is liable to tax as sale goods and
- II. Such contract for the purposes of carrying out;-
 - (a) Erection, commissioning or installation of plant machinery equipment or structure, whether prefabricated or otherwise installation of electrical and electronic devices, plumbing, drain laying or other installation for transportation of fluids, heating, ventilation or air-conditioning including related pipe work, duct work sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, free escape staircase or elevator; or
 - (b) Construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purpose 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 project including engineering procurement and construction or commissioning (EPC) projects.

5.2 In the course of their argument before the adjudicating authority, the appellant also relied on Section 65A (2)(a) & (b) apparently the adjudicating has followed Section 65A(1) These provision read as under:

Section 65 A Classification of taxable service-(1) for the purpose of this chapter, classification of taxable services shall be determined according to the terms of the sub-clause (105) of Section 65;

(2) When for any reason a taxable service is, prima facie classified under two or more sub-clause (105) of Section 65 classification shall be effected as follows:-

(a) The sub-clause which provided the most specific description shall be preferred to sub-clause providing a more general description;

(b) Composite services consisting of a combination of different services cannot be in the manner specified in clause (a) shall be classified as if they consisted of a service which gives them their essential character 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 structure, pipeline and conduits” falling within the taxable category of commercial or industrial construction services” only and would not fall within the scope of “WCS”. Section 65 (25b) provided the definition of “commercial or industrial construction services 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 service 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 in relation to commercial or industrial construction services”.

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

“taxable service” means any services 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 classified 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” include’-

- (i) Drilling boring and core extraction services for construction, geophysical, geological or similar purpose 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 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 submission for Ramky-Murthy JV

- 6.1 The contract 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 activities of construction of canal system may be classified 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 construction for non-commercial purpose would not be taxable. Even construction for the use of organization would be taxable. Even construction or the use of organization or institution established solely for educational, religious, charitable, health, sanitation or philanthropic purpose and not for the purpose of making profit are not taxable being non-commercial in nature (Circular No. 80/10/2004-STdt 17/09/2004 relied on). As the canal system was built under Government projects for non-commercial/non-industrial purpose, the activity is not chargeable to service tax. Only when a canal system is developed as a revenue generating measure, service tax can be Charge 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. Operation

like blasting and removal of rock, excavation etc. carried out by the appellant during the course of execution of the contract 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 or services” and well (Board 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 vs. 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 through, 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 (fallings under Section 65 (105) (zzzza) of the Act) in respect of canals constructed for non commercial/nonindustrial purpose 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) ELT112 (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. All Path Lab Pvt Ltd {2007 (8) STR 337(P&H).
- CCE Ludhiana vs. Patient Services 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) SATR 279 (Tri Bang.)}.

On the same principal, 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 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 the 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 Garden 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 contracted, 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 property in goods used in the execution of the contract. For the 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 Project Ltd.

7.2 The learned counsel relied on M Rama Krishna Reddy vs. CCE (2009) (13) STR 6621(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 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 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 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 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 Ramku-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 there of have understood the contract to be so. The scope of the works under the contracts encompassed a wide range of activities including investigation, soil survey preparation of design/drawing and hydraulic particulars, excavations procurements/ supply of the required components/materials, provisions 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 contractor. The eligibility, to sale 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 appellant under the EPC contracts are to be classified only as “WCS’ covered by clause (e) of the definition of “works contracts” 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 purpose 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 or 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 classified as “commercial or industrial construction” for the period prior to 01/06/2007 and hence not applicable present case. All the EPC contracts in the 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 service which were already subject to service tax. It was introduced as a new and distinct service. There are clear points or destination between WCS and preexisting 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 services covers requirements of WCS clearly indicate that service covers execution of composite and indivisible contracts involving supply of goods and provision of service. These feature 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 definition 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 equestion were recognized by the parties thereto as turnkey/EPC and hence appellants are estopped from calming that the execution so such contract will not be covered by WCS. In the context of explaining the distinct features of works contract{ Sections 65(105)(zzzza)} and certain pre-existing taxable services the learned Special Consult Para (6.1) of Alstom Projects India Ltd vs., CST (2011(23)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 legislati8ve intent(i) to exclude only construction of non-commercial and non-industrial building /structure from WCs and (ii) it 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 provision and definition.
- 8.6 There is no meant in the arguments that clause (b) of the definition of “works contract” under section 65(105) (zzzza) of the Finance Act, 1994 is more specific then 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” mention 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 contracts have also been clearly stated viz roads, airports, railways, tunnels, bridges and dams. Therefore, there is no room for applying any principles of interpretation. Reliance is place 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 service 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 assesses 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 nit that of works contract in the same circular there is also a reference top construction of dams etc,. Through EPC mode. In this context the circular says that such construction activity even if done through turnkey/EPC mode exempt from payment of service tax on account of the specific exclusion of dams, roads, and airports etc, incorporated in the definition of works contracts. The circular in no way deals with irrigation projects and therefore nothing contained therein beneficial to the appellant. For this reason, the reliance placed by them on the Supreme Court’s decisions in *Suchitra Components case (supra)* is not apposite.
- 8.10 Notifications No. 41/2009 is not clarificatory. It is an exemption notification simplicter, which was issued in respect of a specified service for the first time. It does not 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 grossed amounts charged ids the VAT paid on the material used in the execution of the contracts and no other deduction is envisaged. Therefore the appellants claim the 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 payments of service tax notwithstanding the provision 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 circumstance which indicate that the appellants willfully suppressed, mis declared material facts and contrived the provisions of the Finance Act, 1994 with intent evade payments of service tax. They did not pay the appropriate service tax even though they had discharged VAT liability on the work contracts. In the case of Ramky-Muirthy JV, the leading partner (Ramky) had classified similar contracts as works contracts and accordingly paid service tax thereon. They did not pay 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 work 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 its leading partner, Ramky, These facts clearly indicate that the JV was fully aware of their service tax liability in respect of the contract it's in question. Hence the plea of bonafide belief raised by them is liable to be rejected. The allegation of willful suppression/misdeclaration of facts and contravention of legal provisions with intent to evade payments of service tax is well founded and the extended period has been rightly invoked.

9. **The issue**

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 classified under the head 'works contracts services" in terms of Section 65(105) (zzzza) of the Finance Act 1994.
- (2) Whether the deduction (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 in invocable cases.
- (4) Whether in the facts and circumstance of these cases, the penalties imposed on the appellants under section 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 work 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 work stated in the specimen contract documents filed by the two JVs. The contracts 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 Codes, Circulars issued by department from time to time etc.
- Preparing item wise cost analysis for 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 barrow 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-drawing, specification of the department, relevant I.S code, CWCX Manuals , Circulars issued from time to time.

- Construction of all structure of whole canal system as per approved design-drawing, specification of the department relevant I.S codes, IRC Publication, 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 24 months from the date of completion certificate.
- Beautification of dam sites and canals 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 distributaries, minors, sub-minors, field channels, drains etc. (c) preparation of Ayacut register, command area planes etc, as per the criteria of irrigation Department relevant IS code , CWC Manuals Departmental Codes, Circulars issued by Departments from time to time etc. (d) cost analysis item wise for the entire work on the basic 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 drawing , specification of the Department , relevant Is code , CWC , Manuals , Circulars etc.(g) formation of inspection path/servicer 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 canals system,(i) maintenance during the defect liability period 24 months from the date of completion certificate and (j) beautification of earth dam site and canals structure sites,. It clear from the scope of works that what was, indeed , executed by Ramky-Murthy JV was a turnkey project in general and an engineering /procurement /construction /commission (EPC) project in particular, which was squarely covered by clause (e) of the definition of 'work contract' under Explanation to Section 65(105)(zzzza) of the finance Act, 1994

10.4 On a perusal of the specimen contract documents 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 service under this contract includes (a) survey and investigation (Section-I) (b) Design and Engineering (Section-II)(c) Civil Work (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 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 beatification of Dam.
- Monitoring of program me and progress (computer aided).
- Operation & maintenance of system.

CANALS:

- Distribution to cater the needs of specified ayacut (Branch canals, major, Minor, Sub-Minors).
- Structure on Distributaries.
- Field Channels (Micro Networks to service up to 1 Ha. Holding) including structures.
- Inspection path of 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 “work contract” under section 65(105)(zzzza)_ of the Finance Act , 1994.

- 10.5 It is not 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 applicoable to works contract as per the relevant provisions of the A.P State Act governing sale tax /VAT) on the sale of goods involved in the execution of the contracts.
- 10.6 The only items of work contracts specifically excluded from levy of service tax under Section 65(105) (zzzza) of the finance Act, 1994 are road, airport, railway, transport terminals, bridges, tunnel and dams. Irrigation canals do not find a place hereto. The mention of “dams” in the excluded category is of no aid to the appellants case either in as much as these “dams”-not a word defined or explained any where under the Finance Act 1994/Rules there under---- have to be under stood according to the common parlance. These are gigantic RCC structure 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 "dams" 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 your view is limited to the construction of dams and cannot include construction of canal channels, etc, in outlying site. We have not come across, in the present case, any EPC project for construction of dam alone. The EPC project executed by the appellant have not been shown to fall in the excluded category of works contract.

- 10.7 It follows from the above finding that the services provided by the appellants to the Governments of Andhra Pradesh satisfy the statutory requirement of "work contract" defined under Section 65(105) (zzzza) of the Finance Act 1994 in as much 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 Governments 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 governments to them were assigned to sub-contractors and that transfer of property in goods used in the execution of such contract was from the sub-contractors to the government and not from the appellant to the Government and therefore the execution of such contract would not be covered by the definition of "work 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 submission filed before the adjudicating authority. Therefore this plea cannot be entertained at this stage, Secondly the definition of "work contract" does not stipulated that where the contracts were executed by the contractor through a sub- contractors, there should be transfer of property from the contractor directly to the contractor (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 eligible to sale tax as is the case under consideration.
- 10.9 As rightly submitted by the learned Special Consultant 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 in as much as the activity described in clause (b) (construction of new building, Civil Structure pipeline or conduit) cannot emphasize the entire gamut of any of the contracts awarded by the Governments and gamut of any of the contracts awarded by the Government and executed by the appellants and any such activity for non-commercial/non-industrial purpose is not envisaged under clause (b) Therefore, with in the

definition of works contract , the project executed by the appellants can fit in clause (e) only.

10.10 It has also been argued on behalf of the appellant that their activated under the subject contracts could, alternatively , be classified under other entries like “commercial to industrial construction[clause (25b) of Section 65]\ or “site formation clearance, excavation , earth moving and demolition (clause (97a) of Section 65]. These strenuous arguments have also been awarded to the untenable it also in dispute that Andhra Pradesh were executed by them for irrigation purpose of the Governments. These purposes are undisputedly and disputably, non-commercial and non industrial. If that be so no question of classifying the works under the head “commercial or industrial construction service “ in as much as the statutory definition of this services 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 provided a correct clarification on the point raised by the counsel. This Circular says thus “Site formation and clearance, excavation earth moving demolition services are attached only when the service providers provide the services independently and not attracted only when the service providers the service independently and not as part of complete works such as lying of cables under the road”. In the present case, any site formation, clearance, excavation, earthmoving, 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 appellant to the Government. For this very reason, nothing turns in favor of the appellant on the legal position that such services as these 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 services. 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 under taken in relation to irrigation. The appellants on the facts of this case, cannot asset up such a claim because they were executing EPC, project in relation to irrigation and not mere drilling, boring, soil stripping, demolition of building and the like. What emerges from this discussion is that scope of the services defined under section 65(25b) and Section 65(97a) is limited one way or another, whereas the definition of “works contracts” under Section 65(105) (zzzza) has much wider scope. It is also significant to note that any transfer of property in goods exigible to sale tax is not involved in the rendering of the service defined under clause (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 appellant to the state government is classifiable as “works contracts” 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 lay down certain principles to govern classifications of as 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 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 their amount with reference to different items of work. These facts also clearly indicate the composite, indivisible nature of the contracts. Such composite contacts/projects encompassing a wide spectrum of activities ranging from survey & encompassing a wide spectrum of activities ranging from survey & investigation to beautification of the finished facility are appropriately called 'turnkey contracts/projects. An EPC projects 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 turn key projects. Both the appellants were executing EPC projects for the Sate Government thereby providing the taxable services of "works contracts' to the government.
- 10.12 The definition of "commercial or industrial construction service" excluded 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 "work contract" service as well. There is no warrant for deeming so in as much as every taxable entry needs understood with reference to the language used in such entry accordingly a given services 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 contracts. With regard to 'dams", we have already expressed our view In para (10.6) of this oOrder. 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 statue are pains and clear there is no room for applying any of the principle of interpretation,. In this context, the reliance placed by The Special Consultant on the decision of the apex court in *Grasim Industries case found to be apposite*.
- 10.13 Clause (e) of the definition of works contracts-turnkey projects including emngine3rring, procurement and construction or commissioning (EPC) projects clearly convey the legislative intent underlying the definition of "works contracts" in relation to turnkey projects,. It does not excluded EPC projects for irrigation , nor does not discriminate between EPC projects for commercial/industrial purposes and those for non-commercial/non-industrial purpose, nor between EPC projects of Governments 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 17/09/2004, 27/07/2005, 04/01/2008, 15/09/2009, 24/05/2010 etc. the first two circular were issued prior to 01/06/2007, the date w.e.f which works contracts service was introduced as taxable services 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 06/06/2007 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 services 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 refer to the circular dt 24/05/2010 in an earlier context, where we noted that the Boards clarification in regard to the taxable services of “site formation and clearance, excavation and earth moving and demolition was rather unfavorable to the appellants. In any case in the context of discussing the scope of “works contracts”, it is not prudent to rely on circulars dealing with other taxable services.
- 10.15 It was argued for the appellants that the projects 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 services provided or to be provided by one person to another the date of award of contract by the Governments to the appellants is not the decisive factor. What matters is the facts that the contracts were executed by the appellants and payments received by them after 01/06/2007 and therefore 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 or industrial purposes from the whole of the service tax livable thereon. This notification appears to be the first of its kind issued after introduced of works contract service as a taxable service, and did not provided for retrospective operation. Therefore the arguments advanced by the learned counsel, Claiming support from a judgment of the apex court [2005(181) ELT359] and praying for exemption under the said notification cannot be accepted. The facts of the case⁴ considered by the apex court has disclosed the facts of the cases considered by the apex court had disclosed the consistent of 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 incorporation therein the provisions of a large number of old notification, PD pumps were shown as an exempted item, but parts of such pumps were shown as an exempted items, but parts of such pumps were not shown as an exempted items, but parts of such pumps were not so show through 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 favor of the assessee by the court holding that Notification No. 95. /94 being clarifiatory was retrospective in operation. Such or similar circumstances do not exist in the present case. Therefore the appellants cannot claim the befit of exemption under Notification No. 41/2009-ST ibid.

10.17 Certain other decision were also cited by the learned counsel, some in the context discussing non commercial/non industrial purpose of certain water scheme and some other decision 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 view in similar contexts, which are against the appellants. Therefore the cited decision are not applicable. The decision in M. Ramakrishna Reddy's case cited by the learned counsel for Maytas –NCC JV is also not of ant aid to them as the dispute in that case pertained to a period prior to 1/6/207 when 'WCS' was not a taxable service.

10.18 In the issue No.1 is held in favor of the Department and, accordingly the a 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 basic of Rule 3(1) of the Work Contracts (Composition Scheme for payment of Service Tax) Rule, 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 amounts and value of taxable service under Section 67 vide clause of sub-section (2) of Section 94 of the Act Rule 3(1) of the works contracts (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 work 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 work contract.

Explanation; for the purposes of this sub-rule gross amounts charged for the works contracts shall be the sum,

- (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 service that are required to be provided for the execution of the works contract;
- (b) Excluding---
- (i) The value added tax or sale 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 contracts except for the charges obtaining them on the hire;

PROVIDED that nothing contained in this Explanation shall apply to 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 relation to the said contract on or before the 7th day 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 before 07/07/2009 or where any payment (except by way 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 charge" for the works contracts 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 service tax @ 2 % up to 28/02/2008 and @4% thereafter on the 'gross amount charged' so determined for each works contracts. The question before is what should be "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 assesses 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 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 assesses.

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

genuine 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 contain 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 willful 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 assesses 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 assessee. 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 ceases;
- (iv) The penalties imposed on the appellants under Section 77 of the Finance Act, 1994 are sustained. The section 76 panalty challenged in appeal No. ST/1589/2010 are 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 assesses and, if so, to what extent;
- (v.) The appellants are liable to pay interest under Section 75 fo 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)