IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

THURSDAY, THE 19TH DAY OF FEBRUARY 2015/ 30TH MAGHA, 1936

WP(C).No. 11267 of 2010 (G)

PETITIONER:

FURNACE FABRICA (INDIA) LTD.,
OPP.MILMA DAIRY, KOONAMTHAI,
EDAPPALLY, KOCHI-682 024,
REPRESENTED BY K.E.VELAYUDHAN KUTTY.

BY ADVS.SRI.S.ANIL KUMAR (TRIVANDRUM)
SRI.K.S.HARIHARAN NAIR

RESPONDENT(S):
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1. **JOINT COMMISSIONER,**
   OFFICE OF THE COMMISSIONER OF
   CENTRAL EXCISE, CUSTOMS & SERVICE TAX,
   I.S.PRESS ROAD, KOCHI- 682 018.

2. **SUPERINTENDENT, SERVICE TAX,**
   OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE,
   CUSTOMS & SERVICE TAX, I.S.PRESS ROAD, KOCHI- 682 018.

3. **BHARATH PETROLEUM CORPORATION LTD.,**
   KOCHI REFINERY, DY.GENERAL MANAGER(PROJECTS).

4. **SRI.K.G.JOHNSON, KARUTHEDATHE CONSTRUCTIONS,**
   PUTHENCRUZ, ERNAKULAM-682308.

5. **THE CENTRAL BOARD OF EXCISE & CUSTOMS,**
   MINISTRY OF FINANCE, REVENUE DEPARTMENT, NEW DELHI.

R1 & R2 BY ADV. SRI.TOJAN J.VATHIKULAM,SC
R3 BY SRI.E.K.NANDAKUMAR(SENIOR ADVOCATE)
ADVS. SRI.K.JOHN MATHAI
SRI.P.BENNY THOMAS
SRI.P.GOPINATH
R3 BY SRI.N.N.SUGUNAPALAN, (SENIOR ADVOCATE)
R4 BY ADV. SRI.DAVIS J.CHIRAMMEL
R5 BY SRI.THOMAS MATHEW NELLIMOOTTIL, SC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 19-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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WP(C).No. 11267 of 2010 (G)

<u>APPENDIX</u>

PETITIONER'S EXHIBITS:

EXHIBIT P1 : PHOTOCOPY OF THE LETTER DATED 30.11.2009.

EXHIBIT P2 : PHOTOCOPY OF THE LETTER DATED 30.11.2009 SENT BY THE PETITIONER.

EXHIBIT P3 : PHOTOCOPY OF THE TAX INVOICE DATED 9.3.2010.

EXHIBIT P4 : PHOTOCOPY OF THE FINAL ORDER NO.ST/663/07 WITH CO.NO./31/08/CUST DATED 17.2.2009.

EXHIBIT P5 : PHOTOCOPY OF THE LETTER DATED 18.2.2010.

EXHIBIT P6 : PHOTOCOPY OF THE LETTER C.NO.IV/16/10/2010 ST DATED 11.3.2010.

EXHIBIT P7 : PHOTOCOPY OF THE LETTER DATED 23.3.2010 NO.CISF/FFIL/BPC/S.TAX/2010.

EXHIBIT P8 : PHOTOCOPY OF THE RELEVANT PAGES OF SERVICE TAX CIRCULAR NO.96/7/2007-S.T.(F.NO.354/28/2007-TRU) DATED 23.8.2007.

RESPONDENT'S EXHIBITS: - NIL

/TRUE COPY

P.A. TO JUDGE

mbr/

C.K.ABDUL REHIM, J.

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W.P.(C). No.11267 OF 2010

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Dated this the 19th day of February, 2015

JUDGMENT

The petitioner Company was awarded with a civil contract work by the 3rd respondent, for a total contract amount of Rs.15,79,93,560/-. The petitioner sub contracted the civil and plumbing works under the above said contract to the 4th respondent, for an amount of Rs.13,12,84,710/-. Issue involved herein pertains to levy of service tax. Ext.P3 invoice would indicate that service tax was levied on the bill raised by the petitioner on the 3rd respondent. Therefore the petitioner took a stand that no service tax need be levied on the bill raised by the 4th respondent on the petitioner. The 4th respondent thereupon sought clarification from the 2nd respondent as to whether there will be any service tax liability on the 4th respondent, because the petitioner Company is remitting service tax for the entire contract work. Ext.P6 clarification was issued by the 1st respondent in this regard. Referring to Ext.P8 Master Circular it was clarified that the sub-contractor is providing service in the nature of 'input service' and therefore service tax is leviable on any taxable service provider. It was clarified that service tax is liable to irrespective of whether the services are provided by a persons in his capacity as sub-contractor or not. It is mentioned that taxable services intended for use as ' input service' by another service provider will not alter the liability of service tax with respect to the service provider. The petitioner is challenging Ext.P6 clarifications and seeking appropriate direction restraining respondents 1 and 2 from directing the 4th respondent to charge service tax in respect of the service provided under Ext.P2 sub-contract agreement. Inter alia Ext.P8 is also challenged to the extent to which it insist levy on the sub-contractor, in cases where the principal contractor pays the service tax on the whole amount.

2. Learned counsel had placed reliance on Ext.P4 decision of the Appellate Tribunal (CESTAT), New Delhi. In the said decision the Tribunal had opined that the Central

Board of Excise and Customs had taken the view earlier through its circular dated 7.10.1998 that, a sub contractor should not be brought in the ambit of liability of tax and the liability will be on the principal contractor. But it is noticed that the Board has changed its view through Ext.P8 Master Circular, in view of the credit made available under the Cenvat Credit Rules, 2004. The case decided under Ext.P4 pertains to the Master Circular period prior to 23.8.2007. However, the Tribunal observed that if it is proved from the records on verification that the principal contractor had discharged the tax liability in respect of the contract, cascading affect should be avoided and they are entitled to refund.

3. Contention of the petitioner is that since major portion of the work was sub-contracted to the 4th respondent, the recipient of the service is the 3rd respondent who is the awarder of the work. Therefore no tax liability can be fetched against the 4th respondent is the contention. Per contra, learned Standing Counsel for CBEC contended that service provided by the sub contractor is in the nature

of 'input service', which is specifically defined in the statute. Relying on Ext.P8 Circular it is contended that the Board is authorized to issue circulars prescribing the method of levy of tax. Since the service provided by the sub-contractor is in the nature of 'input service', which is used by the main service provider for completion of the work undertaken by him, the 4th respondent cannot be exonerated from the liability fetched upon him in the capacity as service provider. He is always liable to comply with the requirements of filing returns and for paying tax. Even if the petitioner had discharged the entire liability, only a credit can be claimed under the provisions of the Cenvat Credit Rules, is the contention.

4. This court is of the considered opinion that in view of the specific clarifications regarding 'input service' rendered by the sub-contractor, which is used by the main service provider for completion of the work, it cannot be held that the sub contractor is not liable to pay service tax for the services provided by him. However it is for the adjudicating authority to decide on verification of records

regarding the discharge of liability of 'service tax' and to decide with respect to the credit relating to the 'input service'. The directions issued by the CESTAT in Ext.P4 judgment is also to the affect of issuing similar directions.

5. On the facts of the case at hand, it is evident that this court had issued an interim order staying operation of Exts.P6 and P8 to the extent it relates to the sub- Contract in which case the principal contractor pays service tax on the whole amount of the contract. Learned counsel for the petitioner submitted that with respect to the work in question both the petitioner as well as the 4th respondent had submitted returns within the statutory period. Therefore this court is of the opinion that interest of justice can be achieved by directing the 1st respondent to have an adjudication with respect to the tax liability as well as credit of 'input service' with respect to the work in question awarded on the basis of Ext.P1, taking note of the returns filed by the petitioner as well as by the 4th respondent. Necessary decision has to be taken by the 1st respondent considering the claim for the credit based on remittance of

the entire tax liability by the 1st respondent.

6. Hence this writ petition is disposed of by directing the 1st respondent or the competent authority to conduct an adjudication as mentioned above and to decide the tax liability.

7. In view of the interim order continued during pendency of this writ petition, no demand can be enforced against the 4th respondent for payment of service tax with respect to the contract in question, till the adjudication is finalised. It is further directed that in view of the fact that the matter was pending adjudication before this court, the 4th respondent shall not impose with any penalty or penal consequences.

Sd/-

C.K.ABDUL REHIM, JUDGE

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