

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.11.2016

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.11046 of 2014 and

M.P.No.1 of 2014

Siva Industries and Holdings Limited
(formerly known as Siva Projects Engineering
and earlier known as Sterling Projects Engineering
and Enterprises Limited)
rep.by its Authorised Signatory
Perumahanty Bhujanga Prasad
Sterling Towers, 327
Annasalai, Teynampet
Chennai 600 006

.... Petitioner

Vs.

The Commissioner of Service Tax
Office of the Commissioner of Service Tax
Newry Towers, 2054-1, II Avenue
Annanagar, Chennai 600 040

... Respondent

Writ Petition has been filed under Article 226 of the
Constitution of India to issue Writ of Certiorari calling for
the records in C.No.IV/9/282/ 2011-STC Adj dated 22.1.2014 in
Order in Original No.CHN-SVTAX-000-COM-042 & 043-13-14 dated
22.1.2014 issued by the respondent to quash the same as
arbitrary and illegal.

For Petitioner : Mr.Joseph Prabakar

For Respondent :Mr.S.R.Sundar

O R D E R

In this Writ Petition, the petitioner has challenged an order passed by the respondent in order-in-original dated 22.1.2014. The matter arises under the Finance Act, 1994. The petitioner was originally known as Sterling Projects Engineering and Enterprises Limited and after which, the name was changed as Siva Projects Engineering and Enterprises Limited. The petitioner is engaged in Erection, Installation and Commissioning of Telecommunication Towers during the period from April 2009 to September 2011. The petitioner obtained Service Tax Registration from the Service Tax Commissionerate, Chennai for the following services:

(i) Business Auxiliary Service, (ii) Business Support Service, (iii) Management Consultant Service and (iv) Works Contract Service.

The respondent issued two show cause notices, dated 10.10.2011 and 11.4.2012 for the period from April 2009 to July 2010 and August 2010 to September 2011 respectively demanding service tax, after which a personal hearing was conducted on 12.12.2012. After a period of one year and one month, the respondent issued the impugned order, confirming the demand of service tax made in the show cause notices. This order is questioned in this writ petition.

2. Though the petitioner has an effective alternative remedy against the impugned order by way of an appeal to the CESTAT, the petitioner has challenged the impugned order by way of this writ petition primarily on two grounds. Firstly, by contending that the respondent has relied on the decision of the Tribunal in the case of Suzlon Infrastructure vs. Commissioner of Central Excise, Pune, reported in (2012) 27 STR 243, which has been overruled by the High Court of Bombay in the case of Synefra Engineering and Construction Limited vs. Commissioner of Central Excise, Pune reported in (2012) 28 STR 568 (Bombay). This appeal was filed by the assessee therein, which was initially known as Suzlon Infrastructure and subsequently, the name has been changed as Synefra Engineering and Construction Limited.

3. The second ground raised by the petitioner for challenging the impugned order is that the delay in passing the final order, that too after a period of one year and one month after conclusion of the personal hearing, has put the petitioner to prejudice and on that ground, the impugned order is liable to be set aside. In this regard, a Circular issued by the Central Board of Excise and Customs (CBEC) IN Circular No.732/48/2003-CX dated 5.8.2003 has been relied on, wherein the Board has taken a

serious view of the matter and directed that in all cases of adjudication, where personal hearing has been concluded, it is necessary to communicate the decision immediately or within a reasonable time of five days and where for certain reasons the time limit cannot be adhered to in a particular case, an order should be issued within 15 days or at most one month from the date of conclusion of personal hearing. Therefore, it is submitted that since the Circular issued by CBEC is binding on the respondent and the same has not been adhered to, the impugned order is liable to be set aside.

4. Learned senior panel counsel appearing for the respondent would submit that though it may be true that the decision of the Tribunal in the case of Suzlon Infrastructure (supra) has been set aside by the High Court of Bombay, the matter has been remanded to the Department for fresh consideration. With regard to delay in passing the order, the learned counsel placed reliance on a decision of this Court in the case of Academy of Maritime Education and Training Trust vs. the Commissioner of Service Tax, Chennai in W.P.No.13615 of 2014 dated 3.7.2014 and submitted that the court held that the delay by itself cannot be a ground to set aside the order and the Court had relied upon a decision of the Hon'ble Supreme Court in Telestar Travels Private Limited vs. Special Director of Enforcement, reported in 2013(289) ELT 3 (SC).

5. Heard Mr. Joseph Prabakar, learned counsel for the petitioner and Mr. S.R. Sundar, learned Senior Panel Counsel for the respondent.

6. The respondent while passing the impugned order has taken note of and relied upon the decision in the case of Suzlon Infrastructure and finding has been rendered in paragraphs Nos. 7 and 8 and by referring to the said judgment to conclude that the activity of supply of materials, services of civil and electrical and commissioning and installation are part and parcel of and incidental to the turnkey project of design, supply, erection, commissioning and installation of telecommunication tower project undertaken by them and consequently the value of materials which were consumed/used for providing the service is includible in the taxable value of service.

7. The Bombay High Court in Synerfa Engineering (supra), while considering the correctness of the said decision of the Tribunal in the case of Suzlon Infrastructure, has set aside the judgment of the Tribunal on the ground of delay. Since the order was passed by the CESTAT, after six months from the date of concluding the hearing of the appeal and the Tribunal did not specifically deal with vital issues, which

have been pointed out by the appellant before the Bombay High Court and as well the directions given by the High Court in the earlier round of litigation, the said judgment was set aside and the matter was remanded to the CESTAT for fresh consideration. Thus, the basis of the finding rendered by the respondent by relying upon a decision of the Tribunal in Suzlon Infrastructure has been effaced by the order of the High Court. Therefore, the decision in the case of Suzlon Infrastructure, based on which the impugned order was passed, was no longer available for the respondent to rely upon, as the Bombay High Court, as early as on 5.9.2012 has set aside the judgment. Thus, to rely upon an order of the Tribunal, which has been set aside much earlier, undoubtedly it is an error apparent on the face of the order passed by the respondent. This is sufficient to hold that the impugned order is unsustainable.

8. The second aspect is with regard to delay. The respondent is bound by the Circular issued by CBECE. In the impugned order, there is no finding recorded by the respondent as to why the Circular was not adhered to and why the order was not passed within at least one month after the conclusion of the personal hearing. It may be true that the delay by itself cannot be a ground to set aside the order, but if the assessee is put to prejudice on account of the delay, then it is a good ground to interfere with the order passed by the lower authority. However, in this case, this Court is not inclined to test the correctness of the order on the ground of delay, since this Court is satisfied that the impugned order is not sustainable, for the other reason, namely by relying upon an order of the Tribunal, which has been set aside, it is sufficient to hold that the impugned order is unsustainable and the matter requires fresh consideration.

9. For the above reasons, the writ petition is allowed and the impugned order is set aside and the matter is remanded to the respondent for fresh consideration and the respondent is directed to afford an opportunity of personal hearing and decide the matter afresh and uninfluenced by any observation made in the impugned order. No costs.

Sd/-
Assistant Registrar (CS II)

//True Copy//

Sub Assistant Registrar

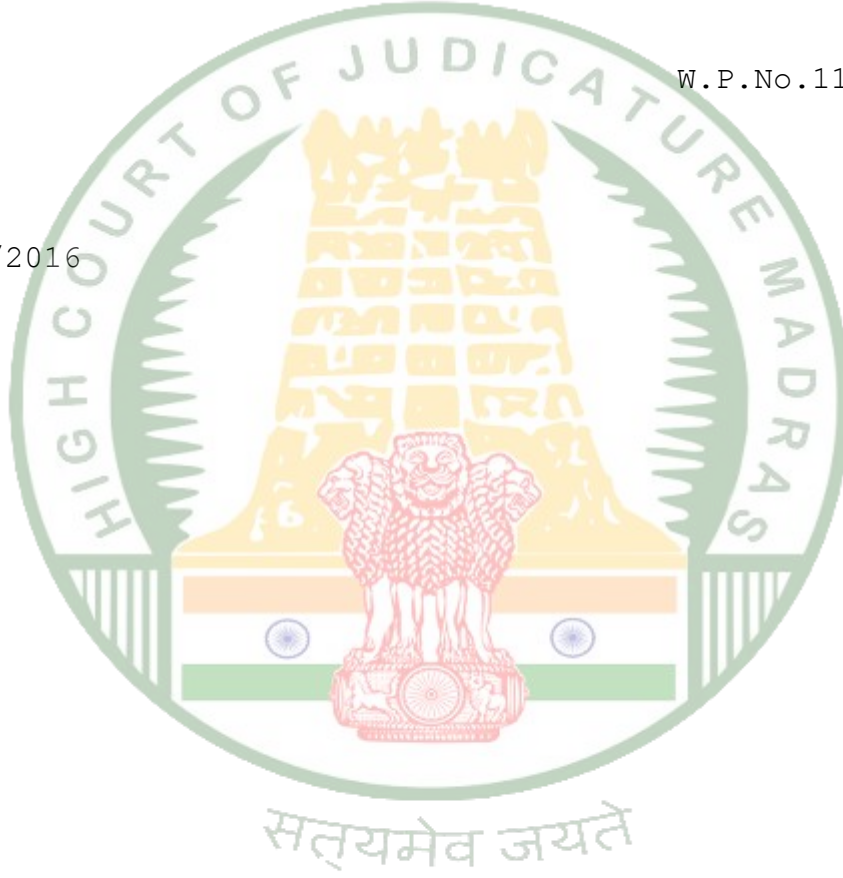
To

The Commissioner of Service Tax
Office of the Commissioner of Service Tax
Newry Towers, 2054-1, II Avenue
Annanagar, Chennai 600 040.

+1cc to Mr.Joseph Prabakar, Advocate Sr.64543
+1cc to Mr.S.R.Sundar, Advocate SR.64071

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