

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Tax Case No. 5 of 2014**

M/s. Engineers India Technical Services, 221, 2nd Floor Crystal Tower Lodhipara
Shankar Nagar Road, Raipur, Chhattisgarh.

---- Appellant**Versus**

Commissioner of Central Excise & Service Tax, Raipur, Central Excise Building,
Dhamtari Road, Tikrapara Raipur, Chhattisgarh.

---- Respondent

For Appellant/Assessee	: Shri Siddharth Dubey, Advocate.
For Respondent/Revenue	: Shri Vinay Pandey, Advocate.

Hon'ble Shri Thottathil B. Radhakrishnan, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

Judgment on Board**Per Thottathil B. Radhakrishnan, Chief Justice****20/06/2017**

1. This appeal under Section 35-G of the Central Excise Act, 1944 stands admitted on the following substantial questions of law:

“(C-1) Whether in view of Article 366 (29A) (b) of the Constitution of India read with Section 66 of the Finance Act 1994 (Prior to 01.07.2012) and Rule 2A(b) of the Service Tax Valuation Rules 2006 both the main contractor and the sub contractor engaged by him are liable to pay service tax on the same service?

(C-2) Whether invocation of extended period of limitation under Section 73 of the Finance Act 1994 is justifiable in the facts and circumstances of the case without recording any finding regarding collusion and suppression with an intention to evade payment of duty?

2. We have heard learned counsel for the Appellant/Assessee and the learned counsel for the Respondent-Department. The matter relates to service tax under the Finance Act, 1994. The years of assessment are 2005-2006, 2006-2007 and 2007-2008.

3. Going through the different proceedings commencing from the show cause notice up to the order of the Tribunal, we see that different submissions were made and varied stands were taken by the Assessee as well as by the Department before the different authorities. This could have been because of the fluid state of understanding the correct legal proposition that governed the levy of service tax on works contract which may contain an element of service that could be taxable as service independently. We say this because the decisions in the different levels and the pleadings of the Appellant, who had in fact not filed any written objections to the show cause notice, would show that submissions were made at different levels more on the basis of what might or would have arisen on consideration of different contentions which were shot at random.

4. The fact of the matter remains that the Appellant-Assessee is a sub-contractor of a principal contractor who was involved in construction activity and that for the relevant period i.e. 2005-2006, 2006-2007 and 2007-2008, show cause notice was issued also proposing further action in terms of Section 73 of the Finance Act, 1994 as it stood at that point of time. Going by the decisions rendered by the Apex Court in *Commissioner, Central Excise and Customs, Kerala v. Larsen & Tuboro Limited* {(2016) 1 SCC 170}, it is now settled that service tax could not be imposed on indivisible works contract and such service tax could not have been leviable prior to the introduction on 01.06.2007, of the Finance Act, 2007. Thus, only with effect from 01.06.2007, i.e. the date of effect of the 2007 amendment to the Finance Act 1994 levy of service tax became possible on works contract; which by itself is a separate species of contract distinct from contract of service simplicitor, as recognized by the world of commerce and the law as such, and had always been taxed

separately until then. Applying the ratio of that precedent, the proceedings leading to the impugned order insofar as they are for the period till 31.05.2007 have to be taken to be one without the sanction of law. Therefore, such notice and consequential orders have to go. We therefore vacate the impugned decisions and proceedings to that extent.

5. Insofar as the period from 01.06.2007 to 31.03.2008 is concerned, the matter revolves around the proper application of Section 73 of the Finance Act, 1994. That provision opens up by prescribing a period of 18 months to carry out the process which is authorised thereby. This is part of the fundamental contents of sub-section (1) of Section 73 of the Finance Act, 1994. A survey of the different components of Section 73(1) would clearly show that action could follow within the limit of time prescribed under that sub-section only on the existence of the vitiating elements which are enumerated therein. No such ground has been found by the authorities below and the power to invoke Section 73 has not been done within the time prescribed in sub-section (1) thereof which was the only provision which governed the parties at that relevant point of time i.e. to say till the end of the financial year 2007-2008. In this view of the matter, the Appellant is entitled to succeed on this ground as well.
6. Since reference was made during submissions to sub-section 2-A of Section 73 of the Finance Act, 1994, we may note that what is attempted to be resurrected through that provision is what could have loss otherwise to the Revenue if action proceeded under Section 73(1) would fail before the appellate authority or Tribunal or Court on a ground that the notice issued under sub-section (1) is not sustainable for the reason that the different vitiating elements enumerated therein are not established.

7. The provisions contained in sub-section 2-A of Section 73 of the Finance Act, 1994 was introduced only w.e.f 10.05.2013 on the insertion of that provision as per the Finance Act, 2013. That was long after the relevant period for the case in hand. Therefore, sub-section 2-A of Section 73 of the Finance Act, 1994 is of no consequence to the case in hand.
8. Before parting, we may also note that even if we were to take a view that the second among the above issues could have prompted us to make an order of remand, we see that the resultant burden would be much less than the amount covered by different departmental notifications for demand, adjudication and litigation under the fiscal laws, as would govern.
9. For the aforesaid reasons, we answer the questions formulated above in favour of the Assessee and against the Department. The impugned order of the CESTAT and the decisions which have been merged therein are hereby set aside and the proceedings initiated as per show cause notice dated 10.12.2008 will accordingly stand discharged.

Sd/-

(Thottathil B. Radhakrishnan)
CHIEF JUSTICE

Sd/-

(P. Sam Koshy)
JUDGE