IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

CEXA/61/2024
IA NO: GA/1/2024, GA/2/2024
COMMISSIONER OF SERVICE TAX KOLKATA
VS
M/S SIMPLEX INFRASTRUCTURE LIMITED

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATE : January 10, 2025.

Appearance :
Mr. Bhaskar Prosad Banerjee, Adv.
Ms. Ekta Sinha, Adv. …for appellant.
Mr. Rajeev Kumar Agarwal, Adv.
Mr. Sanjoy Dixit, Adv. …for respondent.

The Court :- There is a delay of 166 days in filing the appeal.

We have perused the affidavit filed in support of the application and we find that the reasons assigned for not preferring the appeal have been substantially explained. Hence, we are persuaded to exercise discretion in favour of the appellant/revenue and the delay is condoned. Application is allowed.

This appeal has been filed by the revenue under section 35G of the Central Excise Act, 1944 challenging the final order no.77547 of 2023 dated 22.11.2023 passed by the Customs, Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata [Tribunal]. The revenue has raised the following substantial question of law for consideration.

> "Whether the Learned Tribunal is justified in passing the impugned order on the basis of earlier orders passed by the Learned Tribunal and when such orders of the Learned Tribunal have been challenged by the department and pending consideration of the legal issue by the Hon'ble Supreme Court in the case of [Commissioner v. Lanco Infratech Ltd. – 2016 (43) STR. J 78 (SC) which

has been admitted by the Hon'ble Supreme Court] and tagged with Civil Appeal Diary no.5887/2016 and that the other judgments of the Learned Tribunal have been challenged before the Supreme Court {Ramky Infrastructure Ltd. [2018 (12) G.S. T-L.32 (Tri – Del.)], Indian Hume Pipe Co. Ltd. [2015 (40) ST.R 214 (Mad.)], Jyoti Buildtech (P) [2017 (3) G.S.T.L. 116 (Tri – All.)]} and were admitted by the Hon'ble Supreme Court and tagged with other matters and further the Hon'ble Supreme Court has granted an interim stay order against the judgment passed by the Learned Tribunal in the case of M/s. Shriram EPC Ltd. vs. Commissioner of GST and C. Ex."

We have heard learned Advocates on either side.

The learned advocate appearing for the respondent/assessee has raised a preliminary objection as regards maintainability of this appeal before this court under section 35G of the Act on the ground that the matter relates to the taxability of the services which has been rendered by the assessee to Municipal Corporation. On perusal of the order passed by the learned Tribunal we find the question which arises for consideration before the learned Tribunal was whether service tax is payable under the category of "Works Contract Services" on services rendered by the assessee to the Indore Municipal Corporation for construction of sewerage system including laying of pipes and allied works under JNNURM. Thus, it is evident that the issue pertains to the taxability of the services rendered by the respondent/assessee to the Municipal Corporation.

Sub-section (2) to Section 35L of the Act was inserted with effect from 6.8.2014 by Section 107 of the Finance Act (2) Act, 2014 and that the amendment was clarificatory was accepted by the department. In this regard, the Ministry of Finance, Department of Revenue, Tax Research Unit has issued circular dated 10.7.2014 which refers to the bill introduced in the Lok Sabha by the Hon'ble Finance Minister. It has been clarified by the said circular that section 35L is being amended so as to clarify that determination of disputes relating to taxability or excisable of goods is covered under the term "Determination of any question having a relation to the rate of duty" and, hence, appeal against Tribunal order in which matters would lie before the Hon'ble Supreme Court. This very issue was considered by Hon'ble Division Bench of the Delhi High Court in CST vs. GEAS Services India Ltd., 2015 (39) STR 980 (Delhi). This decision was followed by the Hon'ble Division Bench of the High Court of Punjab and Haryana in the case of Commissioner of Service Tax vs. DLF Golf Resorts Ltd. 2017 (7) GSTL 202 (P & H). In the said decision it has been held that the appeal does not lie before the High Court under Section 35G of the Act but appeal would lie before the Hon'ble Supreme Court under Section 35L of the Act.

In the above circumstances, the appeal is liable to be dismissed on the ground that it is not maintainable under Section 35G of the Act and, accordingly, the same stands dismissed.

Since the appeal has been dismissed on the ground it is not maintainable, the substantial question of law framed for consideration has not been dealt with and it is left open to the revenue to avail the statutory remedy.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

pkd/GH.