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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 27th March, 2025

+ **CEAC 3/2024**
THE COMMISSIONER OF CENTRAL TAX, CGST DELHI
EASTPetitioner

Through: Mr. Shubham Tyagi, Adv.
versus

M/S SIMPLEX INFRASTRUCTURE LIMITEDRespondent
Through: Mr. Rajeev Kumar, Adv.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE RAJNEESH KUMAR GUPTA

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present appeal has been filed by the Appellant- The Commissioner of Central Tax, CGST Delhi East under Section 35G of the Central Excise Act, 1944, as made applicable under the Finance Act, 1994 read with Section 174 of the Central Goods and Service Tax Act, 2017. The said appeal *inter alia* challenges the impugned order bearing no.FO/ST/A/51474/2023-ST[DB] dated 26th October, 2023 passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter, ‘CESTAT’).
3. The question that has been raised in the present appeal is whether under Section 73(1) of the Finance Act, 1994, the Department could have invoked the extended period of limitation of five years for raising a demand on the Respondent. The said provision reads as under:

“SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.



1. Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of -

- (a) fraud, or*
- (b) collusion; or*
- (c) wilful mis-statement; or*
- (d) suppression of facts; or*
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if for the words "thirty months", the words "five years" had been substituted."*

4. Another question which is raised in the present appeal is whether the Respondent as a sub-contractor was liable to pay service tax or not. The said issue was clarified *vide* Circular No. 96/7/2007-ST issued by the Department of Revenue dated 23rd August, 2007. The said circular stated that even sub-contractors were required to pay service tax. The relevant portion of the said circular reads as under:

"A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-



contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor.

Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.”

5. However, during that entire period *i.e.* 2004 to 2007, there was an uncertainty as to whether service tax would be liable to be paid or not. In view thereof, it appears that the Respondent did not pay the service tax.
6. Ld. Counsel appearing on behalf of the Department submits that this non-payment constitutes suppression, wilful mis-statement and fraud and hence, invokes the extended period of limitation.
7. The CESTAT has held to the contrary and is of the opinion that there was a *bona fide* belief of the sub-contractor *i.e.* Respondent. The relevant portion of the said order is set out below:

“4. Considered. We find that in the aforesaid decision para 10, 11 and 12 are relevant and reproduced below:

10. It cannot be disputed that prior to the issuance of the show cause notice and the Master Circular dated 23.08.2007, sub-contractors were not discharging their service tax liability because of decisions of the Tribunal and this fact has also been noticed by the Larger Bench while referring to the decision of this Tribunal in Urvi Construction vs. Commissioner of Customs⁴. The



Larger Bench also referred to a number of decisions which had taken view that a sub-contractor was not required to discharge service tax liability if main contractor had discharged the liability.

11. Such being the position, it is clearly a case where the sub-contractor was under a bona fide belief that he was not required to discharge service tax liability. In view of the decision of the Tribunal in Vinoth Shipping Services, it is clear that in such a situation the extended period of limitation could not have been invoked.

12. Though we are not inclined to uphold the order passed by the Commissioner on merits discharging the notice dated 22.10.2010 for the work performed by the sub-contractor pursuant to the contract, but for the reason that, the extended period of limitation could not have been invoked in the present case, we hold that the service tax demand for the aforesaid work performed by the sub-contractor, could not have been confirmed for the extended period of limitation. The appeal filed by the Department, therefore, deserves to be dismissed and is dismissed.

5. Therefore, the Bench taking note of controversy which was prevailing and plethora of case law by which sub-agent was not required to discharge service tax liability held that a bona fide belief cannot be ruled out on the part of the party, and, therefore, extended period of limitation cannot be invoked.”

8. Further, it is to be noted that the show cause notice dated 23rd October 2010 issued by the Commissioner of Service Tax, New Delhi is a composite show cause for the entire five years period *i.e.* 2004 to 2009.

9. This Court is of the opinion that no substantial question of law arises in the present appeal. The only issue that the Appellant presses is in respect



of the period subsequent to the master circular dated 23rd August, 2007.

10. Since there was no wilful misstatement or fraud and the CESTAT holds the same to be a *bona fide* belief of the Respondent, interference with the impugned order is not warranted in the present appeal.

11. The appeal is dismissed in these terms. All pending applications, if any, are disposed of.

PRATHIBA M. SINGH
JUDGE

RAJNEESH KUMAR GUPTA
JUDGE

MARCH 27, 2025

Rahul/ck