HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

(1). D.B. Civil Writ Petition No. 17744/2019

M/s. Hazi A.p. Bava And Company, Plot No. 8, Road No. 3, Jain Colony, New Bhupalpura, Udaipur (Raj.), Through Its Power Of Attorney Holder Shri Aftab Hussain Siddiki S/o Shri Nisar Ahmed Siddiki, Aged About 37 Years, Resident Of 08, Road No. 3, Jain Colony, New Bhupalpura, Udaipur.

----Petitioner

Versus

1. Commissioner, Central Excise And Goods And Service Tax, Commissionerate, 142-B, Sector-11, Hiran Magri, Udaipur.
2. Joint Commissioner, Central Excise And Goods And Service Tax, 142-B, Sector-11, Hiran Magri, Udaipur.

----Respondents

Connected With

(2). D.B. Civil Writ Petition No. 17668/2019

M/s. Hazi A.p. Bava And Company, Plot No. 8, Road No. 3, Jain Colony, New Bhupalpura, Udaipur (Raj.), Through Its Power Of Attorney Holder Shri Aftab Hussain Siddiki S/o Shri Nisar Ahmed Siddiki, Aged About 37 Years, Resident Of 08, Road No. 3, Jain Colony, New Bhupalpura, Udaipur.

----Petitioner

Versus

1. Commissioner, Central Excise And Goods And Service Tax, Commissionerate, 142-B, Sector-11, Hiran Magri, Udaipur.
2. Joint Commissioner, Central Excise And Goods And Service Tax, 142-B, Sector-11, Hiran Magri, Udaipur.

----Respondents

(3). D.B. Civil Writ Petition No. 17675/2019

M/s. Hazi A.p. Bava And Company, Plot No. 8, Road No. 3, Jain Colony, New Bhupalpura, Udaipur (Raj.), Through Its Power Of Attorney Holder Shri Aftab Hussain Siddiki S/o Shri Nisar Ahmed Siddiki, Aged About 37 Years, Resident Of 08, Road No. 3, Jain Colony, New Bhupalpura, Udaipur.

----Petitioner

Versus

1. Commissioner, Central Excise And Goods And Service Tax, Commissionerate, 142-B, Sector-11, Hiran Magri, Udaipur.
2. Joint Commissioner, Central Excise And Goods And Service Tax, 142-B, Sector-11, Hiran Magri, Udaipur.

----Respondents

For Petitioner(s)	:	Mr. Lokesh Mathur Mr. Prakash Kumar
For Respondent(s)	:	Mr. Kuldeep Vaishnav Mr. Arpit Yoganandi

HON'BLE MR. JUSTICE ARUN MONGA
HON'BLE MR. JUSTICE YOGENDRA KUMAR PUROHIT
Order

Reportable

05/02/2026

Per: Arun Monga, J

1. Above titled three writ petitions are being decided vide instant common order since a common assessment order dated 24.10.2019 passed by the Joint Commissioner, Central Excise and Goods and Service Tax qua three financial years i.e. 2007-2008, 2009-2010 and 2010-2011, whereby the additional demand of sum of Rs. 81,46,056/-, Rs. 1,04,97,017/-, and Rs. 1,03,44,427/- respectively have been raised, is under challenge therein.

2. Succinctly speaking, the relevant facts of the case, shorn of unnecessary detail, are as follows:

FACTS

2.1 The petitioner is a proprietorship concern engaged in the fabrication and erection of structures at the sites of principal employers using materials supplied by them and is registered under the Service Tax laws. Pursuant to work orders dated 31.01.2007 issued by M/s Aditya Cement Limited and 06.01.2009 issued by M/s Prism Cement Limited, the petitioner carried out fabrication and erection works at their respective sites.

2.2 For the period April 2008 to March 2009, a show cause notice dated 01.10.2009 was issued alleging short payment of service

tax amounting to Rs. 42,60,123/- on the premise that fabrication formed part of "erection, commissioning or installation" and was a service under Section 65(39a) of the Finance Act, 1994.The petitioner disputed the said demand.

2.3. While the final decision on the earlier show cause notice dated 01.10.2009 was still pending, another show cause notice dated 30.04.2010, for the period April 2007 to March 2008, was issued alleging short payment of service tax amounting to Rs. 81,46,056/- on the same premise that fabrication formed part of "erection, commissioning or installation" and thus a service under Section 65(39a) of the Finance Act, 1994, invoking the extended period under Section 73(1) and proposing penalties.

2.4. Thereafter, another show cause notice dated 14.09.2010, for the period April 2009 to March 2010, was issued alleging short payment of service tax amounting to Rs. 1,04,97,017/- on identical grounds.

2.5. The show case notice dated 01.10.2009 qua FY 2008-09 was adjudicated and confirmed vide Order-in-Original dated 15.01.2011 passed by the Adjudicating Authority/Additional Commissioner of Central Excise.

2.6. Aggrieved thereby, the petitioner preferred an appeal against the said Order-in-Original dated 15.01.2011 before the Appellate Authority of the revenue. However, the same was dismissed vide Order-in-Appeal dated 20.01.2011 and the Order-in-Original passed by the Addl. Commissioner of Central Excise (Appeals) was upheld.

2.7. The petitioner then filed an appeal before the learned CESTAT, New Delhi against the adjudication and confirmation of the demand by the revenue.

2.8. While CESTAT appeal filed by the petitioner was pending, yet another further show cause notice dated 20.09.2011 for the period April 2010 to March 2011 was issued demanding service tax of Rs. 1,03,44,427/-.

2.9. Meanwhile, by an order dated 27.12.2011 passed by CESTAT, the petitioner's appeal against similar demand for the FY April 2008 to March 2009 was allowed. The learned CESTAT categorically held that fabrication does not fall within the taxable entry of "erection, commissioning or installation."

2.10. Notwithstanding, the Department did not proceed to adjudicate the pending show cause notices for the FY 2007-08, 2009-10 and 20010-11 in light of the CESTAT order dated 27.12.2011.

2.11. Instead, on 07.03.2012, the three pending notices for the periods 2007–08, 2009–10 and 2010–11 were transferred to the Call Book, effectively keeping the proceedings in abeyance for an indefinite period.

2.12. The Department chose to challenge the Tribunal's order by filing D.B. Central Excise Appeal No. 13/2012 before the Rajasthan High Court on 03.08.2012.

2.13. Even during the pendency of the said High Court appeal, no steps were taken to progress the adjudication of the pending notices, resulting in prolonged dormancy attributable solely to the Department.

2.14. Ultimately, in view of the Government's litigation policy and the Board's Circular dated 11.07.2018 prescribing monetary limits, the Department withdrew the appeal from this Court vide an order dated 06.09.2018.

2.15. As a bolt from the blue, the Department later took the pending three show cause notices out of the Call Book and proceeded with adjudication. The Joint Commissioner, Central Excise & GST, Udaipur, passed the common impugned Order-in-Original dated 24.10.2019, qua all three notices, holding that since the Department's appeal against the Tribunal's order had been withdrawn on the ground of monetary limits, the Tribunal's order and findings rendered therein carried no precedential value. On this premise, the authority confirmed the demands along with interest and penalties.

3. The adjudicating authority (Joint Commissioner) proceeded to raise the disputed demand as below:-

Sr. No.	PERIOD	DEMAND
1.	April 2007 – March 2008	Demand of Rs. 81,46,056/- by imposing penalty under Sections 76 and 78
2.	April 2009 – March 2010	Demand of Rs. 1,04,97,017/- with penalty under Section 76
3.	April 2010 – March 2011	Demand of Rs. 1,03,44,427/- with penalty under Section 76

4. Hence the instant writ petition impugning the aforesaid order dated 24.10.2019 passed by the Joint Commissioner/Adjudicating Authority.

5. In the aforesaid backdrop, we have heard the rival contentions and perused the case file as well as assessment order under challenge herein.

SUBMISSIONS ON BEHALF OF THE PETITIONER

6. Learned counsel for the petitioner submits that the issue of tax liability of fabrication stood conclusively settled by the order of the Tribunal dated 27.12.2011, wherein it was categorically held that fabrication does not fall within the ambit of "erection, commissioning or installation" as defined under Section 65(39a) of the Finance Act, 1994. The said finding, rendered on the very same work orders, was never set aside and, therefore, continued to bind the Adjudicating Authority.

6.1. It is further submitted the High Court's order dated 06.09.2018 permitting withdrawal of appeal against Tribunal order, imparted finality to the Tribunal's decision. In these circumstances, any attempt to reopen or re-agitate the settled issue was wholly impermissible in law.

6.2. Counsel contends that the Adjudicating Authority committed a manifest breach of judicial discipline by disregarding the binding Tribunal decision on the specious ground that the Department's appeal before the High Court had been withdrawn on account of monetary limits. Such withdrawal, it is urged, in no manner dilutes or effaces the precedential or binding value of the Tribunal's order.

6.3. Learned counsel further submits that the resurrection of the show cause notices dated 30.04.2010, 14.10.2010 and 20.09.2011 after an unexplained lapse of nearly nine years, notwithstanding the Tribunal's decision and the High Court's

withdrawal order, is arbitrary, oppressive, and vitiated by malice in law.

6.4. On merits, he argues that fabrication and erection are distinct and severable activities i.e. fabrication amounting to manufacture and erection constituting installation. Said position is expressly clarified by Circular No. 80/10/2004-ST, dated 17.09.2004. The mere use of the expression "whether pre-fabricated or otherwise" does not, by itself, render the activity of fabrication taxable.

6.5. It is further submitted that the imposition of penalty under Section 76 of the Finance Act, 1994 is wholly unsustainable in the absence of any suppression of facts or intent to evade tax, the controversy being one of bona fide interpretation of the statutory provisions.

6.6. Finally, learned counsel submits that the impugned Order-in-Original dated 24.10.2019 is ex facie without jurisdiction, being grossly time-barred under Section 73(4B) of the Finance Act, 1994, inasmuch as a show cause notice issued on 14.09.2010 could not, in law, have been adjudicated nearly nine years thereafter.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

7. Learned counsel for the respondents would argue that:-

7.1. The contention of the appellant is not tenable inasmuch as C.E.S.T.A.T Final Order dated 27.12.2011 was never accepted by the Department on merits. It was duly appealed against before Rajasthan High Court. The said appeal was withdrawn from this Court only due the Board's Circular issued under the Government's

litigation policy bearing F. No.90/Misc/116/2017-JC dated 11.07.2018, since the demand raised was less than Rs.50 lakhs.

7.2. Appeals withdrawn on monetary grounds do not signify acquiescence qua findings rendered in the orders under challenge, nor do such orders carry precedent value. This position is fortified by CBIC Instructions F. No. 390/Misc/116/2017-JC dated 11.07.2018 issued under Section 35R of the Central Excise Act, 1944, made applicable to Service Tax matters by virtue of Section 83 of the Finance Act, 1994, which expressly provides that non-filing or withdrawal of appeals on monetary limits does not preclude the Department from contesting the same or similar issues in other cases.

7.3. The show cause notices specifically alleged that the appellant was engaged in providing "Erection, Commissioning and Installation Services" under contracts with M/s Prism Cement Ltd. and M/s Aditya Cement Ltd. The scope of work included fabrication of structural components such as steel silos, cyclones, bins, ducts, chutes, hoppers, stacks, supports, sheds, trestles, galleries, platforms, hand railings, and town guards, followed by erection and installation of plant and equipment, whether bought out or fabricated.

7.4. The appellant undertook fabrication of plate work and structural components and thereafter erected or installed the same at designated sites. Such composite activities squarely fall within the ambit of taxable services, and therefore, the appellant was liable to pay service tax on the amounts so charged.

DISCUSSION AND ANALYSIS

8. Having heard, as above, first and foremost, it so transpires that qua the argument of limitation addressed by learned counsel for the petitioner, once it is a conceded position that three show cause notices were issued on 30.04.2010 (F.Y. 2007-2008), 14.09.2010 (F.Y. No.2009-2010) and 20.09.2011 (F.Y. 2010-2011), whereas the common assessment order having been passed on 24.20.2019 i.e. after 9 years, on that ground alone the writ petition deserves to be allowed. Let us see how.

9. First and foremost, reference may be had to Section 73 (4B) of the Finance (No.2) Act, 2014 was introduced w.e.f. 06.08.2014, for ready reference, the relevant portion thereof is reproduced herein under:-

> ***"Section 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded-***
> *(4B) The Central Excise Officer shall determine the amount of service tax due under sub-section (2)-(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under in sub-section (1);*
> *(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A).*"

10. a perusal of the above reveals that Section 73(4B) of the Finance Act, 1994 prescribes a time discipline for adjudication of show cause notices relating to recovery of service tax. It provides that the Central Excise Officer 'shall' determine the tax liability within six months from the date of notice in normal cases under Section 73(1), and within one year where the extended period is invoked under the proviso to Section 73(1) or in cases covered by the proviso to Section 73(4A), 'where it is possible to do so'.

10.1. The provision reflects a legislative intent to ensure expeditious adjudication and to prevent proceedings from remaining pending indefinitely. At the same time, the phrase "where it is possible to do so" indicates that the timelines are directory rather than mandatory. Nevertheless, the Department is expected to act within a reasonable period and cannot justify inordinate or unexplained delays in concluding proceedings.

10.2. In essence, Section 73(4B) operates as a statutory reminder that recovery proceedings must be pursued with diligence, and prolonged dormancy or revival after long gaps may be hit with the vice of arbitrariness, prejudice, and violation of the scheme of limitation embedded in Section 73, *ibid*.

11. In light of the aforesaid position of law, learned counsel for the respondents would submit that assessment order dated 24.10.2019 could not be passed within one year as the show cause notices were kept pending in the call book category of the department, awaiting the finality of C.E.S.T.A.T/High Court proceedings qua previous financial years, wherein similar show cause notice assailed by the petitioner was under challenge.

12. To test the aforesaid argument, let us see the chronology of events which is self revealing. Same is as below:-

Sr. Nos.	Dates	Events
1.	30.04.2010	Show cause notice for financial year 2007-2008
2.	14.09.2010	Show cause notice for financial year 2009-2010
3.	20.09.2011	Show cause notice for financial year 2010-2011
4.	27.12.2011	C.E.S.T.A.T passes order in favour of the petitioner allowing the appeal against common assessment order.
5.	07.03.2012	Case placed was under the call book category by department.

6.	03.08.2012	Appeal filed before the High Court against C.E.S.T.A.T order.
7.	06.09.2018	The appeal against C.E.S.T.A.T order was withdrawn from High Court by the revenue.
8.	24.10.2019	Assessment orders were passed.

13. From the aforesaid chronology, it is borne out that the assessment orders were passed beyond period of one year after placing the case of the petitioner in the call book, awaiting the outcome of the High Court and/or C.E.S.T.A.T proceedings.

13.1. It is clear that while for the assessment years 2007-2008 and 2009-2010, show cause notices dated 30.04.2010 and 14.09.2010 were kept pending without sending the matter to call book category until 07.03.2012. Therefore, the revenue cannot take advantage of the period of limitation as the period of limitation had already expired before they were put in the 'call book' category for the first two financial year.

13.2. Qua the third financial year i.e. 2010-2011, the show cause notice was issued on 20.09.2011. C.E.S.T.A.T passed order dated 27.12.2011 in favour of the petitioner allowing the appeal against common assessment order. The proceedings before the High Court were withdrawn on 06.09.2018. Accordingly, the assessment orders ought to have been passed within 1 year from the said date even if the explanation given by the revenue is to be taken as reasonable ground for keeping the case pending. However, impugned assessment order qua the said financial year was passed on 24.10.2019 which is once again beyond the one year period in terms of Section 73 (4B), *ibid.*

14. The sequence of events demonstrates that after issuance of notices between 2010 and 2011, the Department allowed the matters to remain pending for more than 9 years by placing them in the Call Book and by failing to take timely steps even after withdrawal of its appeal from High Court in 2018. The delay is entirely attributable to administrative inaction, resulting in revival of proceedings after an inordinate lapse of time, thereby causing serious prejudice to the petitioner and rendering the continuation of proceedings contrary to the principles of certainty, fairness, and reasonable exercise of statutory power.

15. In somewhat similar circumstances, High Court of Delhi in the matter of **MS L.R. Sharma & Co. vs. Union of India,**[1] observed as under:

> *"29. This Court is of the view that Section 73(4B) was framed and introduced in the Finance Act to ensure effective administration of taxation. While there cannot be denying that the taxation forms the backbone of a nation's economy, any inordinate delay by the Revenue itself in prosecuting its own cases cannot be construed in their favour by stretching the period of limitation to nine years especially when the provision requires the proceedings to be concluded within six months / one year.*
>
> *30. De hors the aforesaid findings, even if one accepts that the time period of six months/one year as mentioned in Section 73(4B) of the Finance Act is only suggestive, it would be unreasonable to hold that the same can be extended till a period of nine years in the given facts and circumstances of the case. The Revenue has failed to explain as to how such a delay in re-initiating the proceedings in respect of the impugned show cause notice issued in the year 2015 is justified, when under similar facts and circumstances, the proceedings initiated against the petitioner pursuant to two show causes notices dated 15.10.2010 and 14.10.2011 itself were dropped in the year 2012 vide Order-in-Original dated 26.04.2012 and even the appeal against the same, preferred by the Revenue, had been dismissed by the learned CESTAT in the year 2022 – about two years prior to the issuance of impugned hearing notice. Further, it is the case of Revenue itself that the proceedings in the present case had been kept in abeyance due to pendency of the appeal before the learned CESTAT. The decision of the learned CESTAT, concededly, has been accepted and not challenged by the Revenue.*

1 WP(C)13689/2024, decided on 20.12.2024

31. The Revenue"s contention that it was justified in keeping the proceedings in this case, in abeyance because an appeal pertaining to similar issue was pending before the learned CESTAT, is unmerited. The filing of an appeal in another case qua the petitioner, though on identical issue, and its pendency before the learned CESTAT cannot be held as a valid reason for not conducting the proceedings in the present case, after a show cause notice has already been issued, within the time frame as laid down in Section 73(4B) of the Finance Act. Even if the said appeal was pending, the proceedings in this case could have continued and order(s) could have been passed, and if aggrieved, the Revenue could have again approached the learned CESTAT by way of an appeal. However, strangely, the Revenue did not proceed with the case, awaiting the outcome in the appeal pending before the learned CESTAT, and in the meanwhile, the petitioner was left under the impression that since he had not received any adverse communication/order from the Revenue, the proceedings and show cause notice had been closed.

32. Therefore, in view of the foregoing discussion, we do not find any reason for the delay caused in the present case in not concluding the hearing qua the impugned show cause notice dated 21.04.2015 within the stipulated time period, and for issuing the impugned hearing notice dated 18.09.2024 after a period of nine years."

(emphasis is ours)

We are in respectful agreement with the aforesaid view taken by Delhi High Court.

16. Once a show cause notice is issued, the statute contemplates that adjudication should be completed within a reasonable and proximate timeframe. The prescription of six months or one year, as the case may be, in section 73(4B), ibid, reflects a clear legislative expectation of procedural timelines to be followed. Allowing the Revenue to revive proceedings after nine years defeats the very purpose thereof. Even if the timeline is treated as directory rather than mandatory, the law does not permit authorities to act after an inordinate and unexplained delay. The power vested under the section has to be exercised within a reasonable period, failing which the action becomes arbitrary and liable to be set aside.

17. Where the authority sleeps over the matter for years and provides no satisfactory explanation, any attempt to resurrect the proceedings amounts to arbitrary exercise of power. Moreover, during this long period of silence, the petitioner/assessee was entitled to proceed on the reasonable belief that the matter had attained finality, and reopening it after nearly a decade frustrates legitimate expectations.

CONCLUSION

18. The Revenue cannot justify its inaction by relying on the pendency of proceedings in another matter involving similar issues before either the C.E.S.T.A.T on High Court, as the case may be. Each show cause notice is an independent proceeding, and nothing prevented the department from continuing adjudication and passing an order, subject to appellate remedies if necessary. By choosing to keep the matter in abeyance without any statutory basis, the department effectively failed in its duty to decide, and such self-created delay cannot operate to the detriment of the taxpayer.

RELIEF

19. As an upshot, the writ petitions are allowed. Impugned order dated 24.10.2019 passed by the Joint Commissioner, Central Excise and Goods and Service Tax is set aside with consequences to follow. The issue raised by the revenue in the withdrawn appeal from High Court i.e. whether fabrication falls within the ambit of "erection, commissioning or installation" as defined under Section 65(39a) of the Finance Act, 1994 is left open to be decided on merits in some appropriate proceedings in future.

20. In the parting, we may hasten to add that reliance placed by learned counsel for the respondents on judgment passed by this Court in the case of **P.G. Foils Limited vs. The Assistant Commissioner**[2]is misplaced. Reading thereof clearly reflects that the opinion rendered by the Division Bench there is also in terms of the view expressed by the Delhi High Court, *ibid.* Merely because certain observations have been made that Section 73 (4B) envisages that tax is to be determined within the time prescribed "where it is possible to do so", are of no significance. As already noted, we do not find the explanation rendered by the revenue to be reasonable in the present case, since the assessment orders have been passed effectively more than 9 years of issuance of show cause notice.

21. All pending application(s) including stay petitions stand disposed of.

(YOGENDRA KUMAR PUROHIT),J **(ARUN MONGA),J**

115-117-raksha/-

2 D.B. Civil Writ Petition No.14492/2021, Rajasthan High Court