

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.1

Service Tax Appeal No.75471 of 2021

(Arising out of Order-in-Original No.13/COMMR/CGST & CX/KOL/NORTH/2020-21 dated 12.03.2021 passed by the Principal Commissioner of CGST & CX, Kolkata North, Kolkata.)

M/s. Larsen And Toubro Limited

(Godrej Waterside Building, Tower-II, 11th & 12th Floor, Plot-DP-5, Sector-V, Salt Lake City, Kolkata-700091.)

...Appellant

VERSUS

Commissioner of CGST & CX, Kolkata North Commissionerate

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

Shri B.L.Narasimhan & Ms.Udita Saraf, both Advocates for the Appellant (s)

Shri J.Chattopadhyay, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

FINAL ORDER NO. 75950/2023

DATE OF HEARING : 4 July 2023
DATE OF DECISION : 4 July 2023

Per : ASHOK JINDAL :

This appeal is directed against the impugned order confirming the demand of service tax of Rs.18,92,17,896/- for the period 2005-06, 2007-08 on advance receipt pursuant to the work order assigned to them for construction of various turnkey projects.

2. The facts of the case are that the appellant has entered into various contracts with corporate entities. These contracts involved

supply of goods as well as services by the appellant. During the impugned period, the appellant was classifying their activity under Commercial or Industrial Construction Services, Construction of Complex Services or Erection, Commissioning or Installation Services and discharging their service tax accordingly. For execution of the said contracts, the appellant received advances from the service recipient for execution of the work. The revenue is of the view that the appellant were liable to pay service tax at the time of receipt of the advances for execution of their work. Therefore, a show cause notice was issued to the appellant to demand service tax on the advances received by the appellant from their service recipient in pursuant to the execution of the contracts along with interest and to propose equivalent amount of penalty. Further, an interest was also proposed for delay in payment of service tax by the appellant. The matter was adjudicated. The demand of service tax was confirmed. Demand of interest was also confirmed. Against the said order, appellant is before us.

3. Shri B.L.Narasimhan, Ld. Counsel appeared on behalf of the appellant submits that the appellant was engaged in execution of turnkey projects which involves supply of goods as well as services. Therefore, the merit classification for their activity is Works Contract Services whereas they have classified activity under Commercial or Industrial Construction Services, Construction of Complex Services or Erection and Commissioning or Installation Services. But the merit classification is Works Contract Service and no proposal is made by the revenue to demand service tax for the advances received by the appellant for execution of Works Contract Services. In that circumstances they are not liable to pay service tax at all as held by the Hon'ble Apex Court in the case of CCE & C, Kerala v. Larsen & Toubro Ltd. [2015 (39) STR 913 (SC)].

4. On delayed payment of service tax, it is his contention that when appellant is not liable to pay service tax, therefore, question of payment of interest does not arise. Therefore, he prayed that the impugned order is liable to be set aside.

5. On the other hand, the Ld.Authorized Representative for the department supported the impugned order.

6. Heard the parties, considered the submissions.

7. We find that in this case facts are not in dispute that appellant is engaged in an activity of supply of goods as well as services. Therefore, the merit classification of the activity undertaken by the appellant is works contract services and the appellant has obtained advances for execution of the activity of works contract services and the revenue has not classified the activity undertaken by the appellant under works contract services and no demand is made for works contract services.

8. In that circumstances the advances mobilized by the appellant for execution of the said works contract services is not liable to be taxed. Therefore, we hold that the demand of service tax is not payable by the appellant.

9. Further we find that a demand of interest has been made against the appellant for delayed payment of service tax. As no service tax is payable by the appellant, therefore, the question of payment of interest on delayed payment of service tax does not arise as held by this Tribunal in the case of Jai Balaji Industries Limited vs. Commissioner of Central Excise, Bolpur (Final Order No.75779-75790/2023 dated 22.06.2023), wherein this Tribunal has observed as under:-

"12. The moot question arises that as in appeal mentioned at Sl.No.1, whether the appellant was liable to pay duty or not in a case where they are selling goods to their independent buyers as well as to their sister units. The answer is that appellant is not liable to pay duty in terms of Rule 8 of Central Excise Valuation Rules, 2000. As differential duty was not payable in appeal mentioned at Sl.No.1, the question arises whether interest is payable by the appellant or not. We find that similar issue was examined by the Hon'ble Gujarat High Court in the case of CCE & C, Vadodara-II v. Gujarat Narmada Fertilizers Co.Ltd. [2012 (285) ELT 336 (Guj.)], wherein the Hon'ble High Court observed as under :-

"11. In the present case, when the period of limitation had already expired and when the extended period beyond one year was not available to the department as held by the Commissioner himself in his

order-in-original, to our mind the respondent was not liable to pay even the basic duty. But for the respondent voluntarily making payment of such duty short-paid, it was not open for the Department to recover the same under sub-section (1) of Section 11A of the Act. In absence of any such voluntary payment, recovery of the unpaid duty would not have been possible. In that view of the matter, we do not find the case would fall under sub-section (2B) of Section 11A of the Act. Sub-section (2B) of Section 11A of the Act applies in a case where there is voluntary payment of unpaid duty before issuance of show cause notice under sub-section (1) of Section 11A. When the provision refers to show cause notice, it means a show cause notice which could have been validly issued and surely not a notice which had become time-barred. If by efflux of time and in absence of availability of extended period of limitation, such show cause notice itself had become time-barred, any payment made voluntarily by the manufacturer cannot be viewed as one made under sub-section (2B) of Section 11A of the Act.

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13. *Accepting the stand of the Department that even in such a case once the payment of duty is made, interest liability would follow would bring about an incongruent situation. The recovery of the unpaid or short paid duty would become time-barred. If the manufacturer does not pay it voluntarily, it would not be possible for the Department to recover the same. But if he does it voluntarily despite completion of period of limitation, he would, further be saddled with the liability to pay statutory interest. Surely, this was not the intention of the Legislature while sub-section (2B) was introduced in Section 11A of the Act."*

13. *We have already held that as the appellant was not liable to pay duty in terms of Rule 8 of Central Excise Valuation Rules, 2000, therefore, no interest is payable by the appellant in view of the decision of the Hon'ble High Court in the case of CCE & C, Vadodara-II v. Gujarat Narmada Fertilizers Co.Ltd. (supra). Therefore, the impugned order in Appeal No.E/552/2011 is set aside and the appeal is allowed with consequential relief."*

10. Therefore, we hold that that demand of interest is not sustainable.

In view of the above discussion, we set aside the impugned order and allow the appeal with consequential relief to the appellant.

(Operative part of the order was pronounced in the open Court.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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