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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75884 of 2014

(Arising out of Order-in-Original No. 77/Comm/ST/KOL/2013-14 dated 18.03.2014 passed by the Commissioner of Service Tax, Service Tax Commissionerate, Kolkata, Kendriya Utpad Shulk Bhawan, 3rd Floor, 180, Shantipally, Rajdanga Main Road, Kolkata – 700 107)

M/s. Eldyne Electro Systems Private Limited : Appellant
P-21, Old Ballygunge Road,
Kolkata - 700 019

VERSUS

Commissioner of Service Tax : Respondent
Service Tax Commissionerate, Kolkata,
Kendriya Utpad Shulk Bhawan, 3rd Floor,
180, Shantipally, Rajdanga Main Road, Kolkata – 700 107

APPEARANCE:

Shri S.P. Majumdar, Advocate for the Appellant

Shri Prasenjit Das, Authorized Representative for the Respondent

CORAM:

**HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)**

FINAL ORDER NO. 77713 / 2024

DATE OF HEARING: 18.11.2024

DATE OF DECISION: 04.12.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

M/s. Eldyne Electro Systems Private Limited, Kolkata (hereinafter referred to as "Appellant") are engaged in erection, commissioning and installation service, maintenance and repair service, transportation of goods by road service, business auxiliary service, consulting engineer's service and commercial training or coaching service and registered with Service Tax Department.

2. A Show Cause Notice dated 17.12.2012 was issued to the Appellant alleging that they have not paid Service Tax to the tune of Rs.3,68,35,466/- on various services for the period from 2007-08 to 2011-12. Out of the above demand, Rs.3,38,87,724/- pertains to 'consulting engineer's service', Rs.24,38,975/- pertains to Business Auxiliary Services and Rs.4,23,586/- pertains to Commercial Training Service,Rs.25,793/- pertains to 'Erection, Commissioning or Installation Service' and Rs.59,289/- pertains to 'GTA Service'.

2.1. The demand in respect of 'Consultancy Engineer's Service' has been raised on the ground that the Appellant had paid technical consultancy service/licence fee to M/s. Thales Stuttgart, Germany, the Original Equipment Manufacturer (OEM) of M/s. Eldyne Electro Systems Pvt. Ltd., Kolkata (Appellant) for Digital Axle Counter (DAC) business, for the advice they receive for DAC business as and when the exigency arose. Thus, it was alleged that appellant was liable to pay service tax under the category of 'Consultancy Engineer's Service' on the charges paid to the foreign principal, on reverse charge basis, as they did not have any office in India.

2.2. The demand of Rs.24,38,975/- has been raised on the ground that the Appellant failed to charge service tax, as per the provisions of Section 66 of the said Act, for rendering taxable services viz. 'Business Auxiliary Services' in India for an entity M/s Thales which is having its establishment outside India.

2.3. The demand of Rs.4,23,586/- has been raised on the ground that the Appellant failed to pay service tax, as per the provisions of Sections 66A(1) & 68 of the said Act, for receiving taxable services viz. 'Commercial Training or Coaching Services' from a place where the service provider is having its establishment outside India and received by a person who has his permanent address or usual place of residence, in India.

2.4. Service Tax amounting to Rs.25,793/- under the category of ‘erection, commissioning or installation service’ and Rs.59,289/- under the category of ‘GTA Service’ (transportation of goods by road) has also been demanded.

3. The said Notice was adjudicated by the Ld. Commissioner of Service Tax, Kolkata vide Order-in-Original No. 77/Comm/ST/KOL/2013-14 dated 18.03.2014 wherein the Ld. Commissioner has confirmed the demand of Service Tax, along with interest. Penalty equivalent to the amount of tax confirmed was imposed under Section 78 of the Finance Act, 1994, besides imposition of penalties under Section 77(1)(a) and Section 77(2) of the Act. The amount of Rs.3,05,85,082/- [Rs.3,05,00,000/- + Rs.25,793/- + Rs.59,289/-] paid by the Appellant was appropriated in the impugned order.

4. Aggrieved against the confirmation of demands of service tax along with interest and imposition of penalties, the Appellant has filed this appeal.

5. During the course of hearing, the Appellant submitted that they are not contesting the demands of Service Tax confirmed in the impugned order under the category of 'Consulting Engineer's Service', ‘Erection, Commissioning or Installation Service’ and ‘GTA Service’ and contesting the demand of service tax under the category of 'Business Auxiliary Service'

and 'Commercial Training or Coaching Services'. They are also contesting the demand of interest and imposition of penalties in the impugned order.

5.1 Regarding the demand of Rs.3,38,87,724/- under 'Consulting Engineer's Service', the Appellant submitted that initially, they were not aware of their liability for payment of Service Tax under reverse charge basis; on being pointed out, they paid Service Tax of Rs.3,38,87,824/- under the category of 'consulting engineer's service'. Initially, they paid Rs. 3,05,00,000/- and balance Rs. 33,87,824/- was paid subsequently in instalments; however, in the impugned order, the adjudicating authority has appropriated only Rs.3,05,00,000/-. Thus, they requested for the appropriation of the remaining amount of service tax paid.

5.2. The Appellant submitted that they have also paid Service Tax of Rs.25,793/- under the category of 'erection, commissioning or installation service' and service tax of Rs.59,289/- under the category of 'GTA Service' (transportation of goods by road) before issue of the Notice. However, they have not paid interest on such delayed payments made. The appellant submits that as they have paid entire service tax payable under the category before issue of the Notice, no interest or penalty payable by them.

5.3. Regarding the demand of Rs.24,38,975/- under the category of 'Business Auxiliary Services, the Appellant submitted that they have rendered service to M/s. Thales who are having their establishment outside India. In this regard, they contend that they are not liable to pay service tax as the services rendered by them namely, business auxiliary service, falls under Rule 3(1)(iii) of Export of Services Rules, 2005. As per the clarification issued by Board Circular 111/05/2009-ST dated 24.02.2009, the relevant factor that decides whether the service rendered is 'export of service' is the location of the service receiver and not the place of performance of the service; in this case, the training has been received abroad and hence they submitted that the services rendered are received abroad; thus, the services rendered fall within the ambit of 'export of service' and no service tax is payable by them on such services.

5.4. Regarding the demand of Rs.4,23,586/- under the category of 'Commercial Training or Coaching Services', the appellant submitted that they have sent their personnel abroad for training and the expenditure in foreign currency was incurred for training their personnel abroad. Accordingly, they submitted that there is no liability of service tax on such services as the services were rendered and received outside India.

5.5. The Appellant also submitted that there is no suppression of facts established in this case; the entire demand has been raised on the basis of the information available in their Balance Sheet and Profit and Loss Account. In such circumstances, they contend that the extended period of limitation not invokable. In support of this contention, the appellant relied upon the following decisions.

i. *Commissioner of Service Tax, New Delhi Vs Kamal Lalwani [2017(49) STR 552 (Tri.-Del.)]*

ii. *Pappu Crane Services Vs Commissioner of C.Ex and Service Tax, [Final Order No. 71246/2019, dated 02.07.2019]*

iii. *Suraj Impex India Pvt Ltd. v. Commissioner of C.Ex. [2016-TIOL-3331-CESTAT-Del]*

5.6. Regarding the interest liability, the Appellant contends that they are not liable to pay service tax for the extended period of limitation; however, they have paid service tax as soon as the liability was pointed out to them. It is contended that just because they paid the service tax including the extended period of limitation, the interest also cannot be demanded for the service tax voluntarily paid by them for the extended period, which is otherwise not payable. Thus, the appellant submits that no interest payable by them. In support of this contention they relied upon the decision in the case of *Bharat Roll Industries Pvt. Ltd. v. Commissioner of Central Excise [2024-TIOL-411-CESTAT-KOL]* wherein this Tribunal has granted waiver of interest and penalty.

5.7. The Appellant submitted that there is no *mens rea* on their part to evade the payment of Service Tax in the instant case; they were initially unaware of their liability and immediately upon being pointed out by the Department, they paid the Service Tax. Accordingly, the Appellant submits that there is no suppression of fact with intention to evade payment of tax existing in this case and thus, the penalty equal to the Service Tax imposed under Section 78 of the Finance Act, 1994 is liable to be set aside. They also submit that the penalties imposed under Section 77 of the Finance Act also not sustainable.

6. The Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

6.1. He submitted that the Appellant had not paid appropriate Service Tax on their own, within the due date specified. Accordingly, he submitted that the Appellant is liable to pay interest under Section 75 of the Finance Act, 1994, for the delay in payment of service tax. He refers to the following table [ref. paragraph 2.6, page 13 of the Order-in-Original dated 18.03.2014] to contend that the payment of Rs.33,87,824/- was done much later and this payment was not verified:

Date of Payment	Mode	Amount (Rs.)
01.06.2012	E-payment	50,00,000.00
20.06.2012	-do-	50,00,000.00
20.07.2012	-do-	50,00,000.00
25.08.2012	-do-	75,00,000.00
27.09.2012	-do-	80,00,000.00
14.01.2013	-do-	17,00,000.00
16.01.2013	-do-	16,87,824.00
	TOTAL	3,38,87,824.00

6.2. He also submits that the Service Tax was paid after the same was pointed out by the Department and hence, he justified the imposition of the penalty under Sections 77 and 78 of the Act on the Appellant.

7. Heard both sides and perused the appeal records.

8. We observe that the Appellant has claimed that they have paid Service Tax amounting to Rs.3,39,72,906/- [Rs.3,38,87,824/- + Rs/25,793/- + Rs.59,289/-] in respect of the services namely, 'Consulting Engineer's Service', ‘Erection,

Commissioning or Installation Service' and 'GTA Service' respectively. The appellant submitted that they are not contesting the demand of Service Tax on these services. The Appellant submitted that they are contesting the demands of service tax under the category of 'Business Auxiliary Service' and 'Commercial Training or Coaching Services'. They are also requesting for waiver of interest and penalty imposed under Section 78 of the Finance Act, 1994 in the impugned order. However, from the impugned order, we observe that the adjudicating authority has appropriated only Rs.3,05,00,000/-. The Appellant submitted that initially, they have paid Rs. 3,05,00,000/- and balance Rs. 33,87,824/- was paid subsequently in instalments. Thus, they requested for the appropriation of the remaining amount of service tax paid. In this regard, we observe that the Ld. Adjudicating authority has recorded in para 3.2.2 of the impugned order, wherein he observed that initially the appellant has paid Rs.3,05,00,000/- and subsequently they have paid Rs.33,87,824/- after issue of the Notice. Thus we observe that the entire payment amounting to Rs.3,39,72,906/-stands paid and the same is acknowledged by the adjudicating authority in the impugned order. Since the entire payment of Rs. Rs.3,39,72,906/- has already been paid, the same is appropriated against their liability under the category of 'Consulting Engineer's Service, 'Erection, Commissioning or Installation Service' and 'GTA Service'.

8.1. Regarding the demand of service tax of Rs.24,38,975/- under the category of 'Business Auxiliary Services, we observe that the Appellant has rendered service to M/s. Thales, which is having its establishment outside India. We observe that the services rendered by them, namely, business auxiliary service, falls under Rule 3(1)(iii) of Export of Services Rules, 2005. As per the clarification issued by Board Circular 111/05/2009-ST dated 24.02.2009, the relevant factor that decides whether the service rendered is 'export of service' is the location of the service receiver and not the place of performance of the service. In this case, we observe that the training has been received abroad and hence the services rendered are received abroad. Thus, we find that the services rendered fall within the ambit of 'export of service' and accordingly, we hold that no service tax is payable by them on such services.

8.2. Regarding the demand of service tax of Rs.4,23,586/- under the category of 'Commercial Training or Coaching Services' we observe that the appellant has sent their personnel abroad for training and the expenditure in foreign currency was incurred for training their personnel abroad. Thus, we observe that the service was received by the appellant in a foreign country which is not liable for service tax in India. Accordingly, we hold that the demand of service tax under the category of 'Commercial Training or Coaching Services' is not sustainable.

9. Regarding the demand of interest, we observe that there is no suppression of facts with intention to evade the tax established in this case. The entire demand has been raised on the basis of the information available in their Balance Sheet and Profit and Loss Account. In such circumstances, we hold that extended period of limitation not invokable. However, the appellant has paid the service tax demanded for

the extended period also. The Appellant submitted that they will not claim any refund of the service tax already paid for the extended period and prayed for waiver of interest. We observe that, just because the appellant has paid service tax including the extended period of limitation, the interest also cannot be demanded for the service tax voluntarily paid by them for the extended period, which is otherwise not payable. We find that this view has been held by this Tribunal decision in the case of *Bharat Roll Industries Pvt. Ltd. v. Commissioner of Central Excise [2024-TIOL-411-CESTAT-KOL]* wherein waiver of interest has been granted under similar facts and circumstances. The relevant part of the said decision is reproduced below:

> *"5. We find that it is correct that whatever duty was paid by Unit-II is entitled as CENVAT Credit by Unit- I of the appellant themselves. In these circumstances, it is a situation of revenue neutrality. Therefore, as held by the Hon'ble Apex Court in M/s. Nirlon Ltd. (supra), we hold that the extended period of limitation is not invokable. Consequently, the demand of interest and penalty against the appellant are not sustainable."*

We find that it is correct that whatever duty was paid by Unit-II is entitled as CENVAT Credit by Unit- I of the Appellant themselves. In these circumstances, it is a situation of revenue neutrality. Therefore, as held by the Hon'ble Apex Court in *M/s. Nirlon Ltd. v. Commissioner of Central Excise, Mumbai [2015 (320) E.L.T. 22 (S.C.)]*, we hold that the extended period of limitation is not invokable. Consequently, the demand of interest and penalty against the Appellant for the extended period of limitation are not sustainable.

9.1. Accordingly, we hold that the Appellant is not liable to pay interest for the service tax paid by them for the extended period of limitation.

9.2. However, we hold that the Appellant is liable to pay interest under Section 75 of the Finance Act, 1994, for the delay in payment of service tax in respect of the normal period. We find that the Appellant have submitted, vide letter dated 13.11.2024, that they have paid interest amounting to Rs.21,32,542/- for the delay in payment of service tax for the normal period of limitation. They have enclosed copy of the e-Receipt Challan [bearing CTIN No. 2409692124] pertaining to the above payment in support of their claim. Accordingly, we appropriate the interest of Rs.21,32,542/- paid by them towards their interest liability.

10. Regarding, the imposition of penalty under Section 78 of the Act, we observe that initially the Appellant has not paid the Service Tax under reverse charge mechanism. However, when the liability was pointed out, the Appellant accepted their liability and discharged Service Tax thereof. Thus, we find that there is no suppression of facts with intent to evade payment of Service Tax existing in this case. In this regard, we refer to the decision of the Hon'ble Apex Court in the case of *Nirlon Ltd. v. Commissioner of Central Excise, Mumbai [2015 (320) E.L.T. 22 (S.C.)]*, wherein the Hon'ble Apex Court has set aside the penalty imposed on the appellant on the ground that there was no mala fide intent on the part of the appellant. The relevant portion of the said judgement reads as under: -

> *"10. Therefore, it was not permissible for the respondent to invoke the proviso to Section 11A(1) of the Act and apply the extended period of limitation. In view thereof, we confirm the demand insofar as it pertains to show cause notice dated 25-2-2000. However, as far as show cause notice dated 3-3-2001 is concerned, the demand from February, 1996 till February, 2000 would be beyond limitation and that part of the demand is hereby set aside. Once we have found that there was no mala fide intention on the part of the appellant, we set aside the penalty as well."*

10.1. In view of the above discussion and by relying on the decision cited supra, we set aside the penalty imposed on the Appellant under Section 78 of the Finance Act, 1994.

11. We observe that penalties under Section 77(1)(a) and Section 77(2) of the Act are imposed for non-registration and non-filing of ST-3 returns. We observe that these penalties have been rightly imposed and we have no reason to interfere with these penalties imposed. Accordingly, the same are upheld.

12. Consequently, we pass the following order: -

(i) We uphold the demand of Service Tax amounting to Rs.3,39,72,906/- [Rs.3,38,87,824/- + Rs/25,793/- + Rs.59,289/] in respect of the services namely, 'Consulting Engineer's Service', 'Erection, Commissioning or Installation Service' and 'GTA Service' respectively. Since the appellant has already paid the entire amount of Rs. Rs.3,39,72,906/-, the same is appropriated against their liability under the category of 'Consulting Engineer's Service, 'Erection, Commissioning or Installation Service' and 'GTA Service'.

(ii) We set aside the demand of service tax of Rs.24,38,975/- under the category of 'Business Auxiliary Services.

(iii) We set aside the demand of service tax of Rs.4,23,586/- under the category of 'Commercial Training or Coaching Services'.

(iv) We set aside the demand of interest for the extended period of limitation. However, we hold that the appellant is liable to pay interest under Section 75 of the Finance Act, 1994, for the delay in payment of service tax for the normal period. We appropriate the interest of Rs.21,32,542/- already paid by the appellant towards their interest liability.

(v) We set aside the penalty imposed on the Appellant under Section 78 of the Finance Act, 1994.

(vi) We uphold the penalties imposed on the Appellant under Section 77(1)(a) and Section 77(2) of the Finance Act, 1994.

13. The appeal filed by the Appellant is disposed of on the above terms.

(Order pronounced in the open court on **04.12.2024**)

Sd/-
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd