CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Miscellaneous Application No. 85768 of 2023

and

Service Tax Appeal No. 87480 of 2016

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-089-16-17 dated 18.07.2016 passed by the Commissioner (Appeals), Central Excise, Pune-I, Pune)

Thermax Engineering Construction Co. Ltd. **.... Appellants**
Energy House, Plot 38 & 39, D-II Block,
M.I.D.C. Area, Chinchwad, Pune – 411 019.

Versus

Commissioner of Central Excise, **.... Respondent**
Pune-I Commissionerate
ICE House, 41/A, Sasoon Road, Opp. Wadia College
Pune – 411 001.

Appearance:

Shri Jay Chedha, a/w Shri Aniket Barve, Advocates for the Appellants

Shri Aditya Parihar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85702/2025

Date of Hearing: 25.10.2024
Date of Decision: 16.04.2025

Per: M.M. PARTHIBAN

This appeal has been filed by M/s Thermax Engineering Construction Company Limited, Pune (herein after, referred to as "the appellants", for short) assailing the Order-in-Appeal No. PUN-EXCUS-001-APP-089-16-17 dated 18.07.2016 (herein after, referred to as "the impugned order") passed by the Commissioner(Appeals), Central Excise, Pune-I, Pune.

2. The appellants have filed this miscellaneous application bearing No.85768 of 2023, submitting additional grounds seeking permission of the Tribunal for consideration of the same with respect to the main appeal. The prayer made by the appellants is considered and accordingly, the additional grounds submitted are also taken as part of the appeal papers for the purpose of hearing and disposal of the appeal.

3.1 Denial of the facility for adjusting Service Tax paid towards amount received as 'mobilization advance' and subsequent adjustment of service tax paid by them under Rule 6(3) of the Service Tax Rules, 1994 towards cancelled mobilization advance, on account of the customer having refused to pay the advance is the subject matter of present dispute. During EA-2000 audit conducted by the department in January 2012, they had examined the records maintained by the appellants, on the basis of which adjustment of service tax was done by them and the same was reflected in the periodical ST-3 returns. The department had objected to such credit adjustment of service tax paid on the amount received from customer, which subsequently was converted into 'advance' on account of re-negotiation, as the same do not appear to be admissible under Rule 6(3) of the Service Tax Rules, 1994 (referred to as 'Rules of 1994', for short).

3.2 Accordingly, show cause proceedings were initiated for recovery of service tax alleged to have been adjusted irregularly for an amount of Rs.22,69,605/- along with interest under 73(1) of the Finance Act, 1994 and for imposition of consequent penalty under Sections 76, 77, 78 ibid vide Show Cause Notice (SCN) dated 01.04.2013, in continuation of earlier SCN dated 20.10.2011. In adjudication of the SCN dated 01.04.2013, learned Additional Commissioner of Central Excise had confirmed the entire credit demanded of Rs.22,69,608/-, and further imposed equal amount of penalty under Section 78 ibid and penalty of Rs.10,000/- under Section 77(2) ibid. Being not satisfied with the impugned order dated 26.03.2014, the appellants filed an appeal before the Commissioner (Appeals), who in deciding the case had rejected the appeal by upholding the order passed by the original authority in the Order-in-Appeal dated 18.07.2016. Feeling aggrieved with the impugned order, the appellants had preferred this appeal before the Tribunal.

4.1 Learned Advocate appearing for the appellants had submitted that the appellants are engaged in providing the taxable services of erection, commissioning and installation service; consulting engineering service; business auxiliary service; transport of goods by road, supply of tangible goods for use services and for compliance with the service tax statute, as well as for payment of service tax, they are registered with jurisdictional Pune-I service tax authorities holding service tax registration ST code no.AABCT0243QST001.

4.2 In terms of the standard contractual arrangements of the appellants, the customer is required to pay 10% of the contract price as an 'Advance' within 7 days of signing the contract with the appellants. Thereafter, the appellants furnishes a bank guarantee of equivalent amount to the customer as a security for performance of contract and advance payment. Further, 10% of the contract price is to be paid by the customer at the time of mobilization of the boilers at the site. 10% of the total contract price is 'Retention amount' by the customer and is paid to the appellants after the completion of the contract and operation of the boilers. The balance 70% of the contract amount is to be paid by the customer on pro-rata monthly basis as per the stages of completion against the invoices raised by the appellants periodically.

4.3 During the period under dispute, the appellants received a work order from one of their customer M/s Jai Prakash Associates Limited, Churk P.O., Dist. Sonebhadra, Uttar Pradesh ('customer') for erection and commissioning of four boilers. The appellants had entered into a contract with the said customer dated 02.09.2009; later, the same was renegotiated vide letter dated 03.08.2010 for erection and commissioning of three boilers, by cancelling the purchase of one of the boilers. As per the contractual terms, the appellants has received 10% advance towards the contract on which the appellants did not discharge any service tax. Since the amount of advance is adjustable against the contract price to be received in future, no service tax was required to be discharged on the said advance, in terms of the decision given by the Tribunal in their own case under the same service tax jurisdiction. In this regard, he submitted that the Tribunal in the case *Commissioner of Central Excise, Pune-I vs. Thermax Engineering Construction Co. Ltd., 2019 (22) G.S.T.L. 80 (Tri. - Mumbai),* have categorically held that advance received by the appellants was not liable to service tax and service tax is payable only upon raising of the invoices for value of services rendered. Therefore, they claimed that such advance amount received is not subject matter of dispute.

4.4 Further, as per the contractual terms, the appellants raised three invoices dated 26.03.2010, 17.05.2010 and 15.06.2010 one for each boiler, for mobilization activity. The invoice raised was 10% of the contract price. The said invoice also included the service tax paid thereon. The appellants collected the Mobilization advance from customer and also paid service tax to the government. Since, on re-negotiating the terms of the contract, the appellants have treated this 'Mobilization Advance' payment also as a Normal Advance towards the entire contract price, they raised a credit note dated 31.7.2010, for the amount equivalent to three invoices and reversed the advance received towards the mobilization advance along with service tax. The amount retained as advance was subsequently adjusted by the appellants against the invoices raised for the remaining part of the contract. Thus, treating Mobilisation advance as Normal advance resulted in the increasing the rate of advance to 20% for the invoices raised in the subsequent period. The learned advocate also submitted that the appellants had informed the Audit team of the department about the factual position of the appeal pending on issue of payment of service tax on advance amounts received, in earlier period up to 31.03.2010 and 31.03.2011 for which SCNs have been issued and order of the Commissioner dated 26.09.2011 issued confirming the adjudged demands have been appealed against the department by filing appeal before CESTAT, Mumbai. Further, in the present case, such advance amounts received on which service tax paid was also duly adjusted during the month of July, 2010. In view of the order passed by the Tribunal in the appellant's own case for the earlier period, the learned Advocate plead that the allegations levelled against by the Department that the appellants have adjusted the excess service tax paid violating the conditions (i) and (iv) of Rule 6(4B) of the Service Tax Rules, 1994 is not maintainable. Therefore, he prayed that their appeals be allowed.

5. Learned Authorised Representative (AR) appearing for the department, on the other hand, reiterated the findings in the impugned order and claimed that the appellants shall not be permitted to make adjustment under Rule 6(3) of the Rules of 1994, since the amendment providing for issue of credit note for the value of service not so provided was introduced in the Service Tax Rules, 1994 by issue of Notification No.3/2011-S.T. dated 01.03.2011, brought into effect from 01.04.2011. Therefore, he

submitted that the impugned order is sustainable, and appeal filed by the appellants cannot be entertained.

6. Heard both sides and perused the records of the case. We have also examined written submissions, additional grounds, made in the form of paper books submitted in this case.

7. The issue involved in this appeal is to determine whether the appellants are eligible for adjusting of the service tax paid in respect of cancelled 'site mobilization advance' against the service contract for erection and commissioning of boilers, which were converted into 'advance', by re-negotiation; and subsequent adjustment of service tax paid by them under Rule 6(3) of Rules of 1994, is legally sustainable or not?.

8.1 In order to address the above issue of admissibility of adjustment of the service tax paid, by taking recourse to the Rules of 1994, we would like to refer the relevant legal provisions contained in Chapter V of the Finance Act, 1994 and the Service Tax Rules, 1994, as it existed during the disputed period. The disputed period is from April, 2010 to March, 2011.

"Chapter V of the Finance Act, 1994

> ***Charge of service tax.***
> ***Section 66.*** *There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub-clauses (a)… and (zzzzw) of clause (105) of section 65 and collected in such manner as may be prescribed:*
>
> *Provided that the provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.*
>
> ***Valuation of taxable services for charging service tax.***
> ***Section 67.*** *(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,—*
> *(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;*
> *…*
> *(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise*

<u>Service Tax Rules, 1994</u>

Payment of service tax.
Rule 6. *(1) The service tax shall be paid to the credit of the Central Government,—*

(i) by the 6th day of the month, if the duty is deposited electronically through internet banking; and

(ii) by the 5th day of the month, in any other case,
immediately following the calendar month in which the service is deemed to be provided as per the rules framed in this regard:
…..
(3) Where an assessee has paid to the credit of Central Government service tax in respect of a taxable service, which is not so provided by him either wholly or partially for any reason, the assessee may adjust the excess service tax so paid by him (calculated on a pro rata basis) against his service tax liability for the subsequent period, if the assessee has refunded the value of taxable service and the service tax thereon to the person from whom it was received.

<u>Subsequent to its substitution w.e.f. 01.04.2011, sub-rule (3) read as under :</u>

[1]*(3) Where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a contract], the assessee may take the credit of such excess service tax paid by him, if the assessee,—*

(a) has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or

(b) has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued."

8.2 From plain reading of the above legal provisions, it transpires that service tax is liable to be paid in respect of taxable services provided by one person i.e., service provider to the other person i.e., service receiver. It is not in dispute that the appellants are the service provider and their customer M/s Jai Prakash Associates Limited is the service receiver, in respect of the taxable services. In terms of Section 66 ibid, since the service tax is liable to be paid at the rate of 12% of the value of taxable services, recourse have to be taken to the provision of Section 67 ibid for determining the value of taxable services. As per the said legal provision, the value of services is the 'gross amount' charged by the service provider for such service provided or to be provided by him; and the phrase 'gross amount' includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes

[1] *Substituted by the Service Tax (Amendment) Rules, 2011, w.e.f. 01.04.2011.*

and book adjustment, and any amount credited or debited, as the case may be. In the present case, in terms of the contract entered into between the appellants and their customer, the advance amount has been re-negotiated and the same was adjusted for the initial payment made by the customer towards mobilization advance and subsequently with the total value of the contract. For the purpose of such renegotiated amounts, the mobilization advance paid with service tax was adjusted by the appellants, by issue of credit notes to their customer. We also note that Rule 6(3) of the Rules of 1994, provides for details in making such payment of service tax leviable thereon. In the sub-rule (3) to Rule 6 ibid, option for the appellants to adjust the excess service tax so paid by him was provided during the disputed period. Further, with the substitution of sub-rule (3) w.e.f. 01.04.2011, it was also made explicitly clear that such adjustment provided therein could also be made through issue of credit notes or other refunds made to the service receiver.

8.3 On careful reading of the legal provisions, it could be seen that the essential requirement for invocation of Rule 6(3) ibid, are (i) Assessee should have received or has received any payment, (ii) against a service to be provided, (iii) which is not so provided by him for any reason, and (iv) refunded the payment so received for the service provided to the person from whom it was received. In the present case, the appellants had received the amount from the customer vide invoices dated 26.03.2010, 17.05.2010, 15.06.2010. The said invoices were raised for mobilization advance and the amount was received. Thereafter, the customer requested the appellants to renegotiate the terms and thereby not charging the amount towards site mobilisation and treat the same as Normal Advance against the contract price. On perusal of the contractual terms and conditions, it is seen that the appellants was supposed to charge 10% of the Contract Price as "advance" within 7 days of singing the Contract and 10% of the Contract Price against "mobilisation at site". However, subsequently on renegotiation, both the parties agreed that appellants will convert the 10% Mobilization Advance also as 'Normal Advance' and thereby increasing the rate of advance to effectively 20%. Accordingly, the appellants raised a credit note for the equivalent amount of the invoices raised earlier. The appellants adjusted the invoice value against the invoices raised in subsequent periods and adjusted the excess service tax paid in the subsequent period i.e. July 2010 as per Rule 6(3) ibid. An activity which was not recognised by either of the parties cannot be said to be a 'service provided' by the appellants. Hence, the appellants had paid excess service tax in respect of a service which was not provided by it. Therefore, we are of the prima facie view that the appellants has correctly adjusted the excess service tax paid under Rule 6(3) of Service Tax Rules, 1994.

8.4 Further, since the basic legal provisions under the Finance Act, 1994 provide for charging the service tax only on gross amount, we find that the credit notes issued by the appellants shall be taken into account for the purpose of determining the gross value of the service tax on which levy of service tax can be imposed. Therefore, we find that the impugned order confirming the demand of the service tax is contrary to the above legal position under the parent Act of 1994.

8.5 Furthermore, we had also examined the contract dated 02.09.2009 and renegotiation of the terms and conditions of the contract vide appellant's letter dated 03.08.2010 addressed to their customer and the Credit Note No. CNC/81001113 dated 31.07.2010. The credit note specifically provide for the following: "*Credit of Rs.2,21,01,105/- being 10% site mobilization invoice of Unit I, II & III reversed and treated as site mobilization advance as per contractual terms*". Further, the revised contractual terms also mentioned the following in specific terms:

> "*2. We have raised 3 No. Invoices for Mobilisation as an activity for 3 No. Boilers. The same has been paid to us with the inclusion of the service tax component. During payment of this mobilization invoices JAL has deducted 10% advance (against BG) and 10% retention.*
>
> *3. From our forthcoming invoices also JAL has deducted 10% advance (against BG), + 10% retention and 10% against Mobilization. So Mobilization has been treated as an advance to be deducted at 10% from every RA bill*
>
> *4. As mobilisation is treated as an advance, as per the contractual terms and conditions, the following reversals will have to be done.*
>
> *(a)-- TECC to reverse the invoices showing Mobilisation as an activity and convert it to an advance.*
>
> *(b)-- TECC to pay back the service tax component to JAL which was paid in the mobilisation invoices. This has been resolved by JAL by pro rata deduction of this service tax in the forthcoming invoices….*
>
> *(d)-- As mobilisation is considered as an advance for the full project amount, the mobilisation advance against Boiler No. 4 has also to be paid to TECC. This is ₹ 73.45 lakhs. to be adjusted on prorata basis as done for boiler number 1,2 and 3. ….*"

Thus on the facts of the case, in terms of the contract re-negotiated, it is evident that the advance amount has been taken at 20% of the total contractual value as above.

9.1 Further, from the records placed in the file, we also find that in the said EA-2000 Audit Report No.36/12-13 dated 01.05.2022, on the basis of which the SCN dated 01.04.2013 was issued in this case, it was observed by the Additional Commissioner (Audit) that the Department has already initiated proceedings for non-payment of service tax on advances received by the appellants vide Show cause notice No. V/15-37/ST/Adj/11 dated 20.10.2011. In respect of the said proceedings, the Department had filed an appeal before the Tribunal. In disposal of the said appeal, vide Final Order Nos. A/90726-70728/2017-WZB dated 13.11.2017 in the case of appellants-themselves, it was categorically held by the Tribunal that advance amount received by the appellants was not liable to service tax and service tax is payable only upon raising of the invoices for value of services rendered by relying on the judgement delivered by the Hon'ble Supreme Court in the case of *Shri Hanuman Cotton Mills and Ors. Vs. Tata Aircraft Limited* reported in AIR 1970 SC 1986. The relevant paragraph in the said order of the Tribunal is extracted and given below:

> ***"6****. We have carefully considered the submissions made by both the sides. In case of Advance receipt from the customers we find that amount was received by the assessee as security/guarantee amount. It is obvious that for big contract which spread over years, the service provider needs to have specific performance guarantee from their customer. The assessee in turn of such security amount has issued Bank Guarantee amount to their customer. We find from the contract with Chettinand Cement Corporation Ltd., produced by the Appellant that it provides for Advance cum-security and in turn the assessee is liable for equal amount of performance security Bank Guarantee. Thus the amount is guarantee from both the sides. Such amount cannot be considered as advance receipt since it is normal feature of contracts. Even the Hon'ble Supreme Court in case of Shri Hanuman Cotton Mills and Ors. v. Tata Aircraft Limited, AIR 1970 SC 1986 held that the amount is to be considered as earnest money if following principles are followed :*
>
> > *(i) It must be given at the moment at which the contract is concluded.*
> >
> > *(ii) It represents the guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.*
> >
> > *(iii) It is a part of purchase price when the transaction is carried out.*

(iv) It is forfeited when the transaction fall through by reason of failure of the purchaser.

(v) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

7. *We find that in the appellant's case the above principles are equally applicable and hence there is no doubt to our mind that the advance cum-security bank guarantee to the assessee by the contract awarding party is in the form of earnest money. Thus the same is not liable to tax. It is also found from the certificate issued by the Chartered Accountant that the aseessee has discharged service tax liability on the entire amount of such advances. We thus find no reason to hold that the said amount is liable to be taxed at the time of receipt. It became the part of consideration only when it was proportionately included in the stage-wise completion of work for which invoices were raised and service tax was paid by the assessee. Even if it is assumed that the said amount was not in the form of earnest money but was received as Advance in that case also no service tax could have been demanded at the time of receipt as the same was not taxable. In case of M/s. Thermax Instrumentation Ltd. v. CCE, 2015-TIOL-2736-CESTAT-MUM = 2016 (42) S.T.R. 19 (Tri.-Mumbai) the Tribunal held that advance cannot be considere d as receipt towards taxable service as it is an obligation on the part of the customer of the mutual commitment between the two parties to honour the contract. Similarly in case of CCE, Ludhiana v. J.R. Industries, 2009 (16) S.T.R. 51 (Tri.-Del.) it was held that when service was not provided the advance receipt cannot be taxed. We thus hold that there is no service tax liability on advance received by the assessee and set aside the demands and penalties confirmed against M/s. Thermax."*

9.2 Further, we also find that in the case of the appellant's group entity-Thermax Instrumentation Ltd., the Tribunal in *Thermax Instrumentation Ltd. v. CCE, Pune-I - 2016 (42) S.T.R. 19 (Tri-Mum),* has held that service tax is not payable on receipt of advance, since the same is in the nature of merely Earnest deposit.

"***8.*** *Further, the account books of the appellant indicate that the advance received is shown as current liability and not as income towards sale/provision of service. Therefore, it is not towards value of services provided. The advance is proportionately transferred to sale/consideration of service in the books as and when the appellant raised invoices on the customers. We find that the order of Commissioner is silent in this respect. The advance is only an amount given as kind of earnest money and for which the appellant gives a bank guarantee to the customer of equal amount. It is more in the nature of a deposit. As defined in Borrows, in Words and Phrases, Vol. II*

"An earnest must be a tangible thing... That thing must be given at the moment at which the contract is concluded, because it is something given to

> *bind the contract, and, therefore, it must come into existence at the making or conclusion of the contract. The thing given in that way must be given by the contracting party who gives it, as an earnest or token of good faith, and as a guarantee that he will fulfil his contract, and subject to the terms that if, owing to his default, the contract goes off, it will be forfeited. K, on the other hand, the contract is fulfilled, an earnest may still serve a further purpose and operate by way of part payment".*

In the present case the advance is like earnest money for which a Bank Guarantee is given by the appellant. It is a fact that the customer can invoke the Bank Guarantee at any time and take back the advance. Hence the appellant does not show the advance as an income, not having complete dominion over the amount and therefore, the same cannot be treated as a consideration for any service provided. Therefore, the findings lack appreciation of the complete facts and evidences.

xxx xxx xxx xxx

12. *…... The Commissioner only determined that service tax is payable on the advances. We have already expressed our view that the service tax was not required to be paid on the advances and further when the amounts of advance were adjusted proportionately in the invoices and service tax was paid on the invoice value.*

13. *In view of our findings above, the impugned order is set aside and appeal is allowed with consequential relief if any, in accordance with law."*

10. In view of the foregoing discussions and analysis, and on the basis of the decisions taken by the Co-ordinate Benches of the Tribunal, we are of the considered view that the impugned order dated 18.07.2016 is liable to be set aside, to the extent it had denied adjustment of service tax and had confirmed the adjudged demands and had imposed penalties on the appellants.

11. In the result, the appeal filed by the appellants is allowed by setting aside the impugned order dated 18.07.2016.

(Order pronounced in open court on 16.04.2025)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

SM