CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 13774 of 2014-DB

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-002-COM-005-14-15 dated 27.08.2014 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

Larsen & Toubro Limited **.... Appellant**

3rd Floor, Radhadaya Complex,
Old Padra Road, VADODARA, GUJARAT-390015

VERSUS

Commissioner of Central Excise & ST, Vadodara **.... Respondent**

1st Floor, Central Excise Building, Race Course Circle,
Vadodara, Gujarat-390007

WITH

SERVICE TAX Appeal No. 13833 of 2014-DB

CROSS Application No.:-**ST/CROSS/10204/2015**

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-002-COM-005-14-15 dated 27.08.2014 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

Commissioner of Central Excise & ST, Vadodara **.... Appellant**

1st Floor, Central Excise Building, Race Course Circle,
Vadodara, Gujarat-390007

VERSUS

Larsen & Toubro Limited **.... Respondent**

3rd Floor, Radhadaya Complex,
Old Padra Road, VADODARA, GUJARAT-390015

APPEARANCE :

Shri Jigar Shah, Shri Ambrish Pandey, Shri Amber Kumbrawat, Advocates and Shri Anindya Bikash Mandal, DGM (Taxation) for the Appellant-Assessee

Shri Tara Prakash, Deputy Commissioner (AR) for the Respondent-Revenue

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 28.02.2023
DATE OF DECISION: 08.06.2023

FINAL ORDER NO. A/11204-11205/2023

C.L. MAHAR :

The appellant is inter-alia engaged in providing various taxable services viz. Consulting Engineer's Service, Construction Service, Erection,

Commissioning or Installation Service, GTA Service, Business Support Service, Renting of Immovable Property Service, Works Contract Service etc. and had obtained Centralized Service Tax Registration. The Appellants were granted a power project by M/S Visa Power Limited (in short "VISA "). As per Letter of Award (in short LOA), the 'Total Contract Price' for the complete scope of work was finalized to be Rs. 1610.01 Crores, 5% (Rs. 80.50 Crores) of which was agreed to be paid in advance. The contract involved supply of materials as well as erection and installation and civil work. As per the terms of LOA, the Appellants raised the invoice for collection of 1st Installment of advance payment of Rs. 40.25 Crores on 23.09.2010. For the purpose of discharging applicable taxes on the advance received the Appellants self-perceived 60% of amount to be attributable towards the -Supply Portion' and balance 40% of amount be attributable towards 'Service Portion' and thus discharged the Service Tax of Rs. 1.65,83,000/- vide challan dated 04.11.2010. The Appellants raised another invoice for collection of 2nd installment of advance payment of Rs. 40.25 Crores on 21.01.2011. While working out the portion of advance attributable towards 'Service Portion' of the contract, the Appellants re-estimated that service portion constitutes only at 25% of the total contract value of Rs. 1610.01 Crore. The Appellants re-calculated the Service Tax liability considering 25% of the entire advance amount which came to Rs. 20.125 Crores (inclusive of service tax) to be attributable towards 'Service Portion'. The service tax worked out to be Rs. 1,87,93,065/- on this value of Rs.20.125 crore. After They paid the balance Service Tax of Rs. 22, 10,065/- after adjusting tax paid of Rs. 1,65,83,000/-vide challan dated 31.03.2011. Though there was no initial work sheet or detail plan towards different components of the work contract in the letter of award but finally the total contract of Rs. 1610.01 crore was divided into following components by

entering into different contracts dated 7.12.2011 by M/s. VISA with the appellant:

1. Towards supply of Plant & Equipment:

2. For installation, commissioning, testing etc.:

3. For civil structural and Architectural work:

4. For supply of civil input materials like cement steel etc. Rs. 515 crore.

Now, as the value of services towards service portion which was contained in contracts at Sr. No. 2 & 3 of Rs. 130 Crore & Rs. 315 Crore respectively was finally determined, the appellant raised two invoices dated 05.01.2012 towards advance of Rs. 6,50,05,000/- and 15,75,000/- respectively @ 5% of the contract value and the service tax of Rs. 66,95,515/- and 1,62,22,500/- was charged thereon totaling Rs. 2,29,18,015/-. Subsequent to formation of contracts, M/s. VISA informed the Appellants vide Letter dated 15.12.2011 that the entire advance amounting to Rs. 80,50,00,000/- (Eight Crores Fifty Lacs Only) remitted to the Appellants in two installments of Rs. 40.25 crore each discussed above should be appropriated towards value of supplies only and no part thereof was towards providing of any services. The appellants considering that the payments of service tax amounting to Rs. 1,87,93,065/- already paid vide challan dated 04.11.2010 of Rs. 1,65,83,000/- challan dated 31.03.2011 of Rs. 22.10.065/- was inadvertently paid as no part of the initial advance payment of two installments of Rs. 40.25 crore each was against the service portion, they suo-moto adjusted the earlier payment of service tax of Rs. 1,87,93,065/- towards payment of service tax of Rs. 2,29,18,015/- in terms Rule 6(4A) and 6(4B) of the Service Tax Rules, 1994 and paid the balance service tax of Rs. 41,24,951 from their Cenvat Credit account on 06.02.2012.

2. In an enquiry made by the Revenue, they considered the said adjustment of Rs. 1,87,93,063 to be inadmissible under the Rules and a show cause notice dated 19.02.2013, proposing demand against such irregular adjustment of Rs. 1,87,93,063/- and further considering whole of IInd instalment of Rs. 40.25 crore discussed above towards supply of services and demanding service tax of Rs. 4,14,57,500/- @10.3% on the same instead of Rs. 22,10,065/- paid by the assessee. In adjudication proceedings, the Ld. Commissioner set aside the demand of Rs. 4,14,57,500/- stated above but confirmed the demand of Rs. 1,87,93,063/-, besides imposing penalty and demanding interest thereon, holding that the contention of the assessee that whole of the advance payment of Rs. 80.50 Crores was towards supply of material and goods only could not be accepted which was only an afterthought and they had rightly discharged the service tax of Rs. 1,87,93,063/- and shown in their returns. He further held that the adjustment was even impermissible under Rule 6(4A) of the Service Tax Rules, as in terms of the said Rule, any adjustment if it is made had to be made in the "succeeding month or quarter as the case may be thus such adjustment could be made in the month of Nov. 2010 and April 2011 and the adjustment made in Jan 2012 was out of the purview of the realms of Rule 4A, and hence unacceptable. Therefore, no adjustment was permitted to be made for the same. The appellant is in appeal before us against the confirmation of demand of Rs. 1,87,93,063/.

3. During the course of hearing Ld. Counsel appearing on behalf of the appellant has assailed the impugned order on various alternative grounds and following arguments have been advanced:-

(i) that as far as the liability of service tax is concerned, the taxable event is actual rendition of service. It is not receipt of payment which

is the taxable event. In the absence of Point of Taxation Rules, 2011, there is no deeming fiction for rendition of service and thus, the receipt of advance cannot be considered as taxable event. In support of the above submissions, he relied upon the judgment in the case of Vistar Construction P Ltd. vs. Union of India & Ors., 2013 (2) T MI 52-Delhi High Court, wherein it was observed that taxable event as per Finance Act, 1994 is the rendition of taxable services.

(ii) that the advances which were received from the customer and are later adjusted against the bills received on completion of stages of contract is in the nature of earnest money and not liable to tax at the time of receipt. In support of the above submissions, he relied upon the judgment in the case of CCE vs. Thermax Engineering Construction Co. Ltd., 2017 (12) TMI 1191-CESTAT Mumbai.

(iii) In the present case, the Appellants had also received an advance of 5 % of the Contract Value in terms of provisions of LOA and Contract. Subsequently, as per the understanding of the Appellants and M/S Visa Power Ltd., the advances received were considered towards supply of goods and not towards composite supply of goods and services. In this regard, the Appellants state that by resorting to interpret the understanding of the parties, the Respondent Department is trying to re-write the terms of contract between the parties, which is impermissible under the law.

(iv) The services provided by the Appellants are in relation to setting up of power plant, which would be for transmission and distribution of electricity, which is exempted vide Notification No. 45/2010 S.T. In the present case, the Appellants were awarded the contract by M/S Visa Power Ltd. for executing Works Contract order for their power project in Chhattisgarh. At the relevant time, M/S Visa Power Limited was engaged in providing generation and distribution of electricity.

(v) that the issue regarding eligibility of the Appellants to adjust the excess paid service tax towards the liability payable in subsequent months in terms of Rule 6 (4A) read with (4B) of Service Tax Rules, 1944 has already been settled by the Hon'ble CESTAT Delhi in the case

of General Manager (CMTS) v. CCE, 2014 (8) TMI 589 which was subsequently followed by coordinate benches in many decisions wherein it was held that if excess payment of tax in a month is not on account of reasons involving interpretation of law, taxability, classification, valuation or applicability of exemption notification and is purely on account of inability of the assessee to exactly determine the total amount collected during the month against the bills raised as a result of which he had determined his tax liability on estimation basis, the excess amount of tax paid during the month can be adjusted against his tax liability during other months and in this regard, there cannot be any monetary limit. the Appellants submits that the adjustment of excess tax paid by it towards the tax liability arising in subsequent months in terms of Rule 6(4A) of the Service Tax Rules has been rightly carried out and, on this ground, alone the impugned order to the extent it denies the adjustment of service tax as carried out by the Appellants becomes liable to be set aside.

(vi) The Appellant submits that in terms of Rule 6(3) of Service Tax Rules, 1994 in case where assessee issues an invoices and receives payment as against the services to be provided and duly discharges the service tax on such advance received, however such services could not be provided for any reason, the assessee in such case may take credit of such excess service tax paid, provided the condition mentioned therein are satisfied. The Appellant submits that in the present case as well, where the Appellant had raised invoices and received advance from M/s. VISA against services to be provided, however later on the contract between the parties was terminated and the performance bank guarantees of amount equivalent to advance received as furnished by the Appellant, had been encashed by M/s. VISA on account of non-performance of the contract. Thus, effectively the entire amount received by the Appellants from VISA towards the services, stands refunded back to VISA. Therefore, the Appellant submits that it becomes entitled to credit/refund of excess service tax paid.

(vii) That the present show cause notice is dated 13.02.2013, whereas the disputed period is from 2010-2012. That, the extended period of

limitation under proviso to Section 73(1) on the ground that the Appellants have intentionally and wilfully suppressed the facts was not invokable as there was suppression and non-disclosure of information is completely baseless.

4. On the other hand, the Ld. Authorised representative on behalf of the Revenue has vehemently argued that the demand has correctly been confirmed against the appellant as the tax was duly payable on the advances and provisions of adjustment under Rule 6(4A) of the Rules were not applicable in the present case as the conditions therein had not been satisfied.

5. We have carefully gone through the facts of the case and the arguments made by the Ld. Counsel of the Appellant and Ld. Authorised Representative on behalf of the Revenue. We have perused invoice dated 23.09.2010 and 21.01.2011. There is no apportionment of advance in the invoice itself towards the cost of materials or service portion and no tax has been determined. Therefore, the contention of the appellant that the mistakenly appropriated a part of the advance towards service portion can not be faulted as it is not on record that the same was approved by M/s. VISA or they had any information that the appellant had appropriated part of the advance towards service portion. Therefore, if VISA had informed the appellant at a later stage that the whole of the advance was to be appropriated towards cost of material, the same cannot be disputed without any evidence to the contrary. It is a settled law that the terms of the contract between the parties are to be accepted so far as those do not infringe the law.

6. Further, It is not disputed that the for all the time tax amount of Rs. 1,87,93,063/- paid by the appellant on 4.11.2010/31.03.2011 was always

remained with the Revenue till its adjustment made in Jan, 2011. It is also not disputed that the advance comprised only 5% of the project value of Rs. 1610.01 crore out of which 445 Crore (130+415) comprised of the service portion as per agreement between the appellant and VISA. This final value of service portion is also not disputed. Final taxable invoices for advance against the service portion were issued on 05.01.2012 involving service tax of Rs. 2,29,18,015/- on a taxable value of Rs. 22.25 Crore of which Rs. 1,87,93,063/- was suo-moto adjusted on the ground that the tax was erroneously paid in the past which was not required to be paid as same does not pertain to the taxable value of service. We find that in the present case, the appellant has claimed to have annulled the earlier taxable value on the ground that the value (Rs. 20.125 Crore inclusive of tax) was not taxable being finally appropriated towards cost of materials and therefore utilized the tax already paid on that value for payment of finally determined taxable value of Rs. 22.25 Crore. The revenue has claimed that the appellant could not have annulled the earlier taxable value of Rs. 20.125 crore as the same was correctly apportioned for service portion and tax duly discharged. We find that even if the appellant did not have annulled the gross taxable value of Rs. 20.125 inclusive of tax (net taxable value Rs. 18.22 Crore) crore but computed this value as already received and reduced from the final taxable value of Rs. 22.25 crore, it would have made no difference on the tax liability of the appellant. Even if the contention of the department is accepted, then also this value of Rs. 18.22 crore already received as advance needed to be reduced from the finally computed total advance of Rs. 22.25 crore and the net taxable value would have been 22.25 crore (-) 18.245 Crore = Rs. 4.005 crore. The tax on the differential value required to be paid @10.3 % would have been 41.25 crore which is actually discharged by the appellant. It is not disputed in the impugned order that the total

advance received by the appellant was not 22.25 crore. Thus, there was in reality no short payment by the appellant. We further find that the findings of the Ld. Commissioner, that the appellant could not have adjusted the excess tax paid on 4.11.2010/31.03.2011 beyond the month of Nov 2010/April 2011 is also not sustainable in view of the Tribunal's decision in the matter of General Manager (CMTS) v. CCE, 2014 (8) TMI 589 wherein it has been held as under :-

> **"7.1** Sub-rule (2) of Rule 6 prescribes the manner of payment of service tax, which according to this sub-rule is to be paid with the banks notified by the C.B.E. & C. for this purpose in TR-6 form or, in any other manner as prescribed by the C.B.E. & C. Sub-rule (3) of Rule 6 covers a situation where an assessee had received payment for certain services to be provided and had paid the service tax on it, but for some reasons, he could not provide the services wholly or partly and according to this rule, the assessee can adjust the excess payment of service tax calculated on pro rata basis against his service tax liability for subsequent period if he has refunded the value of taxable service along with service tax to the person from whom it was received. Thus, the sub-rule (3) provides for limited facility of adjustment in the cases where the amount has already been received by an assessee for the service to be provided and tax leviable thereon had been paid, but subsequently, due to some reasons, the service was not provided either in full or in part. Sub-rule (4) of the Rule 6 provides for provisional assessment, in the case where the assessee for any reason is unable to correctly estimate on the date of deposit, the actual amount payable for a particular month or a quarter, as the case may be, and according to this rule, he may request the jurisdictional Asstt./Dy. Commissioner for payment of service tax on provisional basis. Sub-rule (4A) provides that notwithstanding anything contained in sub-rule (4), where the assessee has paid to the credit of Central Government any amount in excess of the amount liable to be paid towards the service tax liability in the month/quarter as the case may be, the assessee may adjust such excess amount paid by him against his service tax liability in subsequent month/quarter and sub-rule (48) lays down the conditions for such adjustment. The main condition is that the excess payment is not on account of any reasons involving interpretation of law, taxability, classification, valuation or applicability of any exemption notification. The other conditions are that an assessee with centralized registration under Rule 4(2) can adjust excess payment in one month against this tax liability in other months without any limit, for other assessee, there is a monetary limit of Rs one lakh for such adjustment. In our view harmonious construction of Rules 6(4),

6(4A) and 6(4B) would be that Rule 6(4) applies to a case where due to reasons involving interpretation of law, taxability, classification, valuation or applicability of exemption notification, the assessee is unable to correctly determine his service tax liability for a particular month/period and Rule 6(4A) read with Rule 6(48) would apply when tax liability cannot be determined for a particular month due to other reasons. Thus sub-rule (4A) read with Rule (48) would apply to a situation where an assessee on account of his inability to correctly determine the amount received during a particular month for the service provided, has paid service tax on the basis of his estimation and subsequently, when the exact amount received during the month, has been determined, the amount of service tax paid on the estimation basis is found to be in excess of his actual tax liability. In fact, in such a situation the excess amount paid by him is like advance payment of service tax during the month in excess of the actual service tax liability and which can always be adjusted against his service tax liability for other months as there is no unjust enrichment angle involved. For example, if against actual payments of Rs. 4 crore received by an assessee in a particular month against services provided, on which his service liability @ 10% adv. is Rs. 40 lakhs, he has paid tax of Rs. 50 lakhs on the basis of his estimated receipt of rupees five crores during the month, the excess tax payment of Rs. 10 lakh paid is like an advance payment of tax whose incidence has not been passed on to his customers. In fact, with effect from 01-03-2008, sub- rule (1A) of Rule 6 has been introduced by Notification No. 4/2008-S.T., dated 01-03-2008 which also provides that without prejudice to the provisions of sub-rule (1) of Rule 6, every person liable to pay service tax may, on his own, pay an amount as service tax in advance to the credit of Central Government and adjust the amount so paid against service tax liability, which he is liable to pay in subsequent period, subject to the condition that he intimates the details of the amount paid in advance to the Jurisdictional Superintendent of Central Excise. The excess payment referred to in sub-rule (4A), read with sub-rule (4B), is like advance payment under sub-rule (1A) of Rule 6. There is no condition in Rule 6(4A) read with Rule 6(4B) providing that for availing of the adjustment facility, the assessee must have opted for centralized registration under Rule 4(2). Moreover, when an assessee during certain months, for reasons other than interpretation of law, taxability. classification, valuation or applicability of exemption, has paid service tax in excess of his actual tax liability, the Government cannot retain the excess tax paid by the assessee by refusing its adjustment against his tax liability during other months and refusing adjustment of such excess tax payment during a month against tax liability during other months and appropriation and retention of the same would amount to collection of tax without the authority of law which is contrary for the provisions of Art. 265 of the Constitution of India. As held by the Apex Court in case of

Ispat Industries Ltd. v. CC, Mumbai reported in 2006 (202) ELT. 561 (S.C.) (paras 26 to 29) whenever there is conflict between a norm in a higher layer in the hierarchy of the laws in the legal system of the country and a norm in a lower layer in the hierarchy, the norm in the higher layer in the hierarchy will prevail. Therefore, if excess payment of tax in a month is not on account of reasons involving interpretation of law, taxability, classification, valuation or applicability of exemption notification and is purely on account of inability of the assessee to exactly determine the total amount collected during the month against the bills raised as a result of which he had determined his tax liability on estimation basis, the excess amount of tax paid during the month can be adjusted against his tax liability during other months and in this regard, there cannot be any monetary limit**."**

7. In view of the above discussions, we hold that the demand of Rs. 1,87,93,063/- is not sustainable against the appellant and the same is hereby quashed with consequential relief to the appellant, if any.

Departmental Appeal

8. In view of the above discussions, we hold that that there is no rationale in contention of the department that the whole of 2nd installment of Rs. 40.25 crore should be considered towards service portion and is liable to service tax @10.3%. Demand is merely presumptive with no corroborative evidence and cannot be sustained. Therefore, appeal filed by the department is dismissed. Cross objection also get disposed of.

(Pronounced in the open court on 08.06.2023*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL