CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 20091 of 2023

(Arising out of Order-in-Appeal No.92 & 93/2022 dated 16.3.2022 passed by the Commissioner of Service Tax (Appeals), Bangalore.)

Shankaranarayana Constructions Private Limited
(Formerly SNC Power Corporation (P) Limited)
'SNC House', 4th Floor,
No.7, Residency Road,
Bangalore – 560 025.

Appellant(s)

Versus

The Commissioner of Central Tax
Bangalore East Commissionerate
TTMC, BMTC Bu Stand,
Old Airport Road,
Domlur
Bangalore – 560 071.

Respondent(s)

Appearance:

Mr. N. Anand, Advocate — For the Appellant

Mr. K. Vishwanath, Superintendent (AR) — For the Respondent

CORAM:

HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21103 /2023

Date of Hearing: 29/08/2023
Date of Decision: 13/10/2023

Per : R. BHAGYA DEVI

The appellant, M/s. Shankaranarayana Constructions Private Limited are involved in rendering of 'Construction Services'. During the audit, the Revenue officers noticed that the

appellant was not discharging service tax on mobilisation advance as and when it was received. Hence, they were liable to pay interest on the delayed remittance of Service Tax on the advances received for the period April 2009 to September 2013. The Commissioner referring to Section 67 of the Finance act 1994 and Rule 6 of Service Tax Rules, 1994 read with the provisions of Section 68 of the Finance Act, 1994 held that the appellant is liable to pay interest under Section 75 of the Finance Act, 1994.

2. The learned counsel on behalf of the appellant submitted that there is no dispute with regard to payment of Service Tax on the mobilisation advances received by them from their customers. During the period of dispute, these mobilisation advances were received from BHEL and Jaipur University. It is claimed that the mobilisation advance received from the customers in advance by way of monetary accommodation is nothing but a loan transaction which is fully secured by a bank guarantee. This advance is given as a loan to enable the contractor (appellant) to obtain machinery, equipments and other resources for the purpose of executing the work undertaken for their customers. It is submitted that the money which is received as a loan cannot be considered as an advance as per the definition of 'Service' in Section 65B(44) or as value of taxable service as defined under Section 67 of the Finance Act. He also submits that the matter is no longer *res integra* as the issue is settled in their favour as per the following judicial decisions.

(i) Gammon India Ltd. vs. CST, Mumbai: 2021 (44) GSTL 373 (Tri.-Mum.).
(ii) Thermax Instrumentation Ltd. vs. CCE: 2017 (47) STR 17 (Tri.-Mum.)
(iii) CCE vs. Thermax Engineering Construction Co. Ltd.: 2019 (22) GSTL 80 (Tri.-Mum.)
(iv) Hindustan Shipyard Ltd. vs. CCE: 2019 (21) GSTL 394 (Tri.-Hyd.)
(v) SMS Infrastructure Ltd. vs. CCE: 2017 (47) STR 17 (Tri.-Mum.)
(vi) GB Engineering Enterprises Pvt. Ltd. vs. CCE: 2017 (52) STR 313 (Tri.-Chen.)
(vii) Paharpur Cooling Towers Ltd. vs. CCE: 2015 (37) STR 550 (Tri.-Del.)

2.1. It is further submitted that in the context of Sales Tax Laws, it has been held that the receipt of mobilisation advance is not liable for payment of sales tax or not liable to TDS as per the decisions given below:

(i) Hindustan Construction Company Ltd. vs. State of Haryana: [1998] 109 STC 660 (P&H)
(ii) Delhi Electric Supply Undertaking vs. CST: [2006] 146 STC 72 (All.)
(iii) Smt. B. Narasamma v. Dy. CCT [2016] 146 STC 72 (All.)

3. The Authorised Representative on behalf of the Revenue submits that the advance of mobilisation advances received by them is nothing but an advance, therefore, they were liable to pay Service Tax as and when it was received. Since the Service Tax was paid at a later date, they were liable to pay interest for the delay in payment of Service Tax. He also relied upon the decision in the case of **Siemens Ltd** decided by the Authority for Advance Ruling, GST West Bengal. The authorities at para 5 held that "the applicant is deemed to have supplied works contract service to KM RCL on 1.7.2017 to the extent covered by the lumpsum that stood credited to its account on this date as mobilisation advance and GST is leviable thereon accordingly.

The value of the supply of works contract service in the subsequent invoices as and when we raised should, therefore, be reduced to the extent of the adjusted in such invoices. The GST should therefore be charged on the net amount that remains after such an adjustment".

4. Heard both sides. Let us examine the relevant sections of the Finance Act. 1994.

> **SECTION 67: Valuation of taxable services for charging service tax.** — (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;
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> (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;
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> (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.
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> (2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.
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> (3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.
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> (4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.
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> Explanation. — For the purposes of this section, — (a)"consideration" includes —
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> (i) any amount that is payable for the taxable services provided or to be provided;
> (ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;
> (iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the

face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.

(b) [* * * *]

(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.

SECTION 68: Payment of service tax. — (1) Every person providing taxable service to any person shall pay service tax at the rate specified in Section [66B] in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of [such taxable services as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section [66B] and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.

4.1 There is no dispute that the appellant had discharged the Service Tax on the gross amount received as per the above Sections. The only dispute is that the Service Tax on the mobilisation advances should have been paid from the due date of the advances received instead of paying at the time of completion of the project. The dispute is only on the delayed payment of tax on which interest is being demanded. The crux of this allegation is based on "The Point of Taxation Rules" (relevant clause extracted below) where it states "*For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the*

date of receipt of each such advance". Hence the demand of interest.

The Point of Taxation Rules, 2011

(Incorporating changes made till issuance of notification no 24/2016-Service Tax dated 13-4- 2016) In exercise of the powers conferred under[sub-section

(2) of section 67A and](Inserted vide Notification 10/2016-Service Tax to be in effect from the date of enforcement of Finance act ,2016)clause (a) and clause (hhh) of subsection (2) of section 94 of the Finance Act, 1994, the Central Government hereby makes the following rules for the purpose of collection of service tax and determination of rate of service tax, namely,- ----------

3.Determination of point of taxation.- For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be,-
(a) the time when the invoice for the service provided or agreed to be provided is issued: Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules,1994, the point of taxation shall be the date of completion of provision of the service.

(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment. Provided that for the purposes of clauses (a) and (b),-

(i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;

(ii) wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a).

Explanation .- For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance.

4.2 The demand of interest is for two projects undertaken by the appellant. One of them is BHEL and from the work order of this unit at Clause 12.1 mobilisation

advance is shown as "interest-bearing mobilisation advance of 5% of the contract price in stages is admissible in the following manner. Rate of interest shall be 2% above PLR of State Bank of India applicable at the time of drawing the advance (compound interest rate of SBI PLR plus 2% shall be calculated as per monthly rest)." The appellant has also produced the balance sheet reports to show that the mobilisation advances received from BHEL and NBCCL are accounted as secured loans and the notes below the balance sheet clearly shows that mobilisation advances received from BHEL and NBCCL are fully secured by bank guarantees and personal guarantees of three Directors of the Company. Records are also produced to show that these mobilisation advances are shown as liabilities in their financial records. Therefore, the question of paying Service Tax at the time of receipt of these advances does not arise since they are only to be taken as loans and it became part of the consideration as and when the invoices were raised.

4.3 In the case of **Commissioner of Central Excise, Pune-I Versus Thermax Engineering Construction Co. Ltd.: 2019 (22) G.S.T.L. 80 (Tri. - Mumbai) dated 13-11-2017** in similar set of facts held that **:**

> **"7.** ------ 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 assessee 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-TlOL-2736-CESTAT-MUM 2016 (42) S.T.R. 19 (Tri.-Mumbai) the Tribunal held that advance cannot be considered 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".

4.4 In the case of **Gammon India Ltd vs. Commissioner of Service Tax, Mumbai: 2021 (44) GSTL 373** (**Mumbai),** the Tribunal held that :

"9. The several contracts provide for the payment to be made at different, pre-determined stages of performance and are, generally, subject to evaluation of the work undertaken. It is also seen that such appraisal, as a prelude to making payments, is not undertaken until after the execution of the work in relation to the taxable service has commenced and that all the contracts, while linking such measurable stages, provide for payment of only 90% of contracted amount for the entirety of the work. The 'mobilization advance' is adjusted against the final payment due and is not linked to the work but as a pledge of the contract between the appellant and principal. It is also subject to furnishing of prescribed 'bank guarantee'; there is no connection with the performance of the contract. It is not in dispute that the 'mobilization advance', carrying interest, is granted to enable the contractor to prepare for undertaking the contracted work. The subsequent adjustment with the final payment due does not suffice to construe this as an advance payment for the work to be done merely because the recipient and payee happened to be the provider of service. The payment of 'mobilisation advance' is but a separate financial transaction within the contract for providing of service and, within the limits laid down by the Hon'ble Supreme Court in *re Intercontinental Consultants and Technocrats Ltd.,* is not permitted to be included in the 'gross amount' envisaged in Section 67 of Finance Act, 1994.

10. For the above reason, and in view of absence of allegation that any part of the contracted value has not been levied to tax, we hold that the demand is not consistent with law and deserves to be set-aside".

5. The reliance placed on by the AR in this case **SIEMENS LTD.** (Appeal Case No. 11/WBAAAR/APPEAL/2019, dated 16-12-2019): **2020 (32) G.S.T.L. 790 (App. A.A.R. - GST - W.B.)** of is misplaced. In this case, it was held that :

> **"10.** .....In the instant case, the appellant's submission is that they are required to pay GST on the amount of Rs. 13,80,74,549/- as and when they utilize the lumpsum amount for providing the service contracted for. They have also submitted orally that they have already paid the GST against bills raised by them in respect of the entire amount of Rs. 13,80,74,549/-. However, in view of the discussion in paragraph 10 above and the proviso to Section 2(31) of the GST Act, as quoted above, the unutilized part of the lumpsum amount held by the appellant as on 1-7-2017 cannot be considered as a deposit and hence the appellant is not entitled to pay GST on the gross amount as and when they utilize the amount towards provision of goods and services.
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> **11.** The appellants relied upon the decisions of the Tribunal in the case of ***Thermax Instrumentation Ltd.*** **v.** ***Commissioner of C. Ex., Pune-I*** **[2016 (42) S.T.R. 19 (Tri. - Mumbai)]** and ***GB Engineering Enterprises Pvt. Ltd.*** **v.** ***C.C.E., Tiruchirapalli*** **[2017 (52) S.T.R. 313 (Tri. - Chennai)]**, wherein the CESTAT had observed that the mobilization advance is like earnest money and argued that this nature has not changed after implementation of GST and hence it will be covered under the express proviso to Section 2(31) of the GST Act which excludes deposits from the definition of 'Consideration' unless it is adjusted against supplies. It is observed that the advance was received in the year 2011 and a considerable part of the advance remained unadjusted as on 30-6-2017. The present case originated due to introduction of GST with effect from 1-7-2017. However, the observations of the Tribunals in the cases relied upon by the appellant were clearly within the ambit of the legal provisions of Service Tax which was prevalent, when the decisions were proclaimed. In the present case, the question relates to whether the unadjusted part of the advance received by the appellant can be considered for taxation under the GST Act on 1-7-2017 itself. Hence, even by the wildest imagination also, the observations made by Tribunals in the pre-GST regime cannot be made applicable in this case. Moreover, in the transitional provisions of the GST Act, no such provision has been included whereby, the advance outstanding as on 1-7-2017 can be allowed to be subjected to GST only as and when the bills are raised against supply of goods and services. Hence, the decisions on which the Appellants arguments were relied upon do not squarely apply in the present case.
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> **12.** The appellant argued that the lump sum amount was received by them on 24-6-2011 and they have determined the applicability of taxes on the same as per the extant provisions under the GST Act. They have also submitted that the provision of Section 13(2) of the GST Act regarding time of supply of services is applicable only for the considerations received post introduction of GST. **The moot question in this case is whether the part of the mobilisation advance remaining unadjusted on 1-7-2017 will be chargeable under the GST Act. Immediately upon**

> **introduction of GST Act, that is with effect from the 1st day of July, 2017, the erstwhile Finance Act, 1994 and the notifications issued there under ceased to exist. In the instant matter the only applicable law is the GST Act, 2017. Accordingly, the time of supply of services is to be guided by Section 13(2) of the GST Act. Hence, the remaining unadjusted amount of Rs. 13,80,74,549/- as on 1-7-2017 has to be construed as if it was credited into the account of the appellant on the date of 1-7-2017 only, which will attract GST on such amount on that date itself.** Hence, we find no force in the argument of the appellant that Section 13(2) of the GST Act, 2017 will not be applicable in the instant case.
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> **13.** In respect of the goods and services provided by the appellant to KMRCL post introduction of GST, the amount of Rs. 13,80,74,549/- can only be considered as advance paid as on 1-7-2017, and in the absence of any exemption of mobilization advance from tax under GST regime, the entire amount of Rs. 13,80,74,549/- becomes taxable on the said date."

6. The question here was whether the unadjusted amount received as mobilization advance during the Service Tax regime was liable to GST after the introduction of GST. In the present case, the liability of tax on mobilization advance is not in dispute, the only dispute is the time of payment of tax. Even as per "The Point of Taxation Rules", the liability to pay taxes in the projects undertaken by the appellant arises as per clause b (i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, **the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;**

7. In the instant case, the appellant has paid the tax on completion of the service on the invoice value which includes the mobilisation advances received by him. It is not the case of the

department that invoices were raised in piecemeal without payment of tax as and when the advances were received. Therefore, based on the above decisions and the observations made therein I find no merit in demanding interest assuming that the date of payment of tax arose based on the advances received.

8. The impugned order is set aside and the appeal is allowed.

*(Order is pronounced in Open Court on **13/10/2023**.)*

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

rv