# IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## ORDINARY ORIGINAL CIVIL JURISDICTION

## CENTRAL EXCISE APPEAL NO.44 OF 2021

The Commissioner, CGST & C. Ex.,
Belapur Commissionerate .. Appellant
v/s.
Wartsila India Ltd. .. Respondent

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Ms. Maya Majumdar, for the Appellant.

Mr. Gopal Mundhra, a/w. Ms. Virangana Wadhwan, Ms. Bhargavi Shukla, Mr. Raghav Khandelwal, i/b. Economic Laws Practice, for the Respondent.

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CORAM: G.S. KULKARNI &
JITENDRA JAIN, JJ.

DATE : 23rd JUNE 2023

P.C:-

This appeal is filed by the Revenue against the order of Customs, Excise & Service Tax Appellate Tribunal ("CESTAT") dated 29th November 2019.

2. The reframed substantial questions of law are as under:-

(a) Whether, under the facts and circumstances of the case, the Respondent Assessee is liable to pay tax under the head

"Business Auxiliary Service" on the commission / remuneration received by the Respondent Assessee from its parent Company ?

(b) Whether, under the facts and circumstances of the case, the Respondent Assessee is liable to pay tax for the period prior to 2008 under the entry "Online Information and Database Access or Retrieval Services" on payment of Annual License fee to its parent Company ?

3. Inso far as question (a) is concerned, both the parties agree that the issue is covered by the decision of this Court in the case of Respondent Assessee itself by the judgment reported in 2019(24) G.S.T.L. 547 Bom, wherein this Court has held that services of procuring orders and passing it to its overseas principal and receiving payments for the same in foreign exchange is an activity of export of services covered by the Export of Services Rules, 2005. This Court has refused to entertain the substantial question of law, since the issue was covered by various decisions of this Court, which are referred to in para 8 of the said decision. The Appellant Revenue has brought to our attention that the abovereferred decision was challenged before the Hon'ble Supreme Court and the same is admitted along with the other matters. However, the Appellant Revenue has not brought to our attention that the decision of this Court, referred to hereinabove, is stayed. In view thereof and the parties having agreed that the issue

raised in question (a) is covered by the decision of this Court, no substantial question of law arises for consideration.

4. Insofar as question no.(b) is concerned, the issue arises as to whether annual license fee charged by Wartsila Corporation, England, for certain software licenses is covered by the entry "Information Technology Software Services", which was taxable from 16th of May 2008 or whether same falls within the entry "Online Information and Database Access or Retrieval Services" as contended by the Revenue. The Tribunal has given a finding of fact in para 10 of its order that the Respondent Assessee has dischargted its tax liability by treating license fee paid to overseas entity under reverse charge mechanism under the entry "Information Technology Software Service" since 16th May 2008. The Appellant Revenue has accepted the classification of the said service under the head "Information Technology Software Service" post 2008. In our view, if the Appellant Revenue has accepted the classification of entry under the head "Information Technology Software Service" for the period post 2008, then it cannot be contended by the Appellant Revenue that pre 2008 that very service falls under the entry "Online Information and Database Access or Retrieval Services". The Tribunal in its order has given a finding of fact that the reasoning of the original authority is bereft of any examination of the taxable entry connected with the definition and bereft of even alluding to the activities of the overseas

entity for ascertainment of delivery of service to the Assessee. It is settled position, by the ratio of decisions of the Apex Court in the case of *Balaji Enterprises vs. CCE,* 1997(2) E.L.T. 3 and decision of this Court in the case of *Indian National Shipowners Association*, 2009 (14) STR 289, that an introduction of a fresh entry from a particular date pre-supposes that the said services were not covered by the earlier entries. It is not the contention of the Appellant Revenue that the 2008 insertion of entry "Information Technology Software Services" is retrospective. In view thereof and on these admitted fact, in our view, no substantial question of law arises with respect to question (b).

5. Appeal of the Revenue is dismissed in terms of the above.

(JITENDRA JAIN, J.) (G.S. KULKARNI, J.)