

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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75327 of 2016

(Arising out of Order-in-Original No. 33/COMMR/ST/BOL/15 dated 22.12.2015 passed by the Commissioner of Central Excise, Bolpur, Adjudication Cell, Sian, Bolpur, Birbhum, West Bengal – 713 204)

M/s.Eastern India Enterprise

: Appellant

Andua, Jangipur, P.O.: Beniagram,
Farakka Barrage, District: Murshidabad (W.B.)

VERSUS

Commissioner of Central Excise

: Respondent

Bolpur Commissionerate,
Nanoor Chandidas Road, Sian, Bolpur (W.B.)

AND

Service Tax Appeal No. 75401 of 2016

Service Tax Cross Objection No. 75357 of 2016

(Arising out of Order-in-Original No. 33/COMMR/ST/BOL/15 dated 22.12.2015 passed by the Commissioner of Central Excise, Bolpur, Adjudication Cell, Sian, Bolpur, Birbhum, West Bengal – 713 204)

Commissioner of Central Excise

: Appellant

Bolpur Commissionerate,
Nanoor Chandidas Road, Sian, Bolpur (W.B.)

VERSUS

M/s. Eastern India Enterprise

: Respondent

Andua, Jangipur, P.O.: Beniagram,
Farakka Barrage, District: Murshidabad (W.B.)

APPEARANCE:

Shri S.P. Siddhanta, Consultant, for the Assessee/Cross-Applicant

Shri S. Dey, Authorized Representative, for the Revenue

CORAM:

HON'BLE SHRIASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs. 76675-76676 / 2025

DATE OF HEARING: 18.06.2025

DATE OF DECISION: 03.07.2025

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& Cross Objection No.: ST/CO/75357/2016

ORDER: [PER SHRI K. ANPAZHAKAN]

Service Tax Appeal No. 75327 of 2016 has been filed by M/s. Eastern India Enterprise (hereinafter referred as the "assessee") against the Order-in-Original No. 33/COMMR/ST/BOL/15 dated 22.12.2015 passed by the Commissioner of Central Excise, Bolpur.

1.1. Service Tax Appeal No. 75401 of 2016 has been filed by the Revenue with respect to the Order-in-Original No. 33/COMMR/ST/BOL/15 dated 22.12.2015 passed by the Commissioner of Central Excise, Bolpur. A Cross Objection bearing Service Tax Cross Objection No. 75357 of 2016 has also been filed by M/s. Eastern India Enterprise against the grounds taken by the Revenue in their appeal.

1.2. As both these appeals and the cross objection relates to the same Order-in-Original, all are taken up together for decision by a common order.

2.The facts of the case are that M/s. Eastern India Enterprise, Andua, Jangipur, P.O. Beniagram, Farakka Barrage, District: Murshidabad (W.B.), is a registered Service Tax assessee, having Service Tax Registration No. ASEPS1540FST001. They have taken registration for providing maintenance and repair service, as defined under Section 65(105)(zzg) of the Finance Act, 1994.

2.1. During the course of scrutiny of the records and documents of the assessee for the period 2009-10 to 2012-13, it was seen that there was alleged short payment of Service Tax by the said assessee during the material period. Accordingly, Service Tax liability was ascertained from their balance sheets, profit & loss a/c and ST-3 returns while the Service Tax payment made was determined from the ST-3

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returns, GAR-7 challans as well as NSDL database. It was noticed that there was a short payment of Service Tax to the tune of Rs.1,34,36,058/- (including Cess) during the material period. It was also observed, while scrutinizing ST-3 returns, GAR-7 submitted to the Department vis-à-vis balance sheet and profit & loss a/c, that the assessee had not reflected their actual value of taxable service and the actual amounts received in their statutory returns though the same were available in their profit & loss accounts.

2.2. Accordingly, a Show cause Notice was issued to the assessee on 23.09.2014, proposing the demand of Service Tax of Rs. 1,34,36,058/-(inclusive of cess), covering the period from 2009-10 to 2012-13, along with interest and penalties.

2.3. The said notice was adjudicated by the Ld. Commissioner of Central Excise, Bolpur Commissionerate, who vide the Order-in-Original dated 22.12.2015, has confirmed the following demands: -

- (1) Demand of Service Tax to the tune of Rs.13,19,071/- including Education Cess and Secondary & Higher Education Cess (Rs.10,53,786/- for 2009-10 and Rs.2,65,285/- for 2012-13), has been determined and confirmed in terms of Section 73(2) of the Finance Act, 1994,
- (2) Appropriation of aforesaid confirmed amount against excess payment of Service Tax of Rs.35,56,405/- has been ordered, holding rest of the amount on the ground that no refund was ever claimed by the noticee;

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- (3) Equal penalty of Rs. 13,19,071/- has been imposed under Section 78 of the Finance Act, 1994;
- (4) Recovery of interest on Service Tax of Rs. 10,53,786/-, short-paid in 2009-10, has been ordered under Section 75 of the Finance Act, 1994 till the said excess payment of Rs.24,45,768/- was made in 2010-11. Recovery of interest on the amount as Service Tax liability for 2012-13, has however not been ordered as excess Service Tax had been paid by the noticee during 2010-11 and 2011-12.
- (5) Penalty of Rs.10,000/- has been imposed upon the noticee under Section 77(1)(b) of the Finance Act, 1994 on the ground of non-maintenance of statutory records relating to their services.

2.4. Aggrieved by the confirmation of the demands of Service Tax, along with interest and penalties and non-sanction of refund of the excess amount paid by them, the assessee has filed the appeal bearing Service Tax Appeal No. 75327 of 2016.

2.5. Revenue has filed the appeal bearing Service Tax Appeal No. 75401 of 2016 against decision of the Id. adjudicating authority in the impugned order wherein he has allowed "exclusion of Bill amount of Rs. 1,78,79,098/- pertaining to 2009-10, Rs. 1,69,57,052/- pertaining to 2011-12 and Rs.1,42,52,358/- pertaining to 2012-13 from the taxable value accepting the assessee's claim of the said amounts being towards provision of 'Road Construction Services' under CSR Scheme. The assessee has filed a cross-objection against the grounds taken by the Revenue in the said appeal.

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3. The Ld. Counsel appearing on behalf of the assessee submits that they have made excess payment of service tax, which has been accepted by the Commissioner in the 'Discussion and Findings' portion of the impugned order. However, he submits that the Id. adjudicating authority has adjusted part of the excess paid amount against their service tax liability and failed to adjust the remaining amount paid in excess against the balance liability confirmed in the impugned order.

3.1. In this regard, the assessee referred to the specific findings of the Id. adjudicating authority and submitted that in the impugned order, the Ld. adjudicating authority has made the following observations:

- short payment of service tax to the tune of Rs. 10,53,786/- during 2009-2010 [Ref. para 6.1(b) (i)]
- excess payment of service tax of Rs. 11,10,637/ during 2011-2012[Ref. para 6.1(b) (ii)]
- short payment of service tax to the tune of Rs. 2,65,285/ during 2012-13 [Ref. para 6.1(b) (iii)]
- excess payment of service tax to the tune of Rs. 24,45,768/ during 2010-11 [Ref. para 6.2]

3.2. It is also submitted by the Ld. Counsel for the assessee that the Ld. Commissioner ordered for appropriation of Rs. 10,53,786/- short paid in 2009-10 from the excess paid service tax of Rs. 24,45,768/ in 2010-11 and held that the rest amount cannot be adjusted since no refund has been claimed; also the Ld. Commissioner adjusted short payment of service

tax to the tune of Rs. 2,65,285/- during 2012-13 from the excess paid service tax during 2010-11 and 2011-12, but he has not passed any order for adjustment of rest amount of service tax for the remaining liability. In actuality, the assessee contends, there remained excess paid service tax of Rs.22,37,334/[(Rs. 24,45,768/ + Rs. 11,10,637/-) – (Rs. 10,53,786/ + Rs. 2,65,285/)] at the end of 2012-13. It is thus the assessee's contention that the Ld. Commissioner should have allowed the above excess service tax of Rs. 22,37,334/ for adjustment against future liability and refunded the same to the assessee. Accordingly, the assessee prayed for adjustment of the above said excess service tax of Rs. 22,37,334/ for adjustment against future liability and refunding the balance to the assessee.

3.3. In support of their claim that excess amount paid can be adjusted against subsequent liabilities, the assessee has relied on the following decisions:-

- (i) *GENERAL MANAGER (CMTS) VERSUS COMMISSIONER OF C. EX., CHANDIGARH [2014 (36) S.T.R. 1084 (Tri. - Del.)]*
- (ii) *BUREAU OF INDIAN STANDARDS Versus COMMISSIONER OF C. EX. & S.T., JAIPUR-I [2020 (33) G.S.T.L. 403 (Tri. - Del.)]*
- (iii) *GENERAL MANAGER, TELECOM, BSNL Versus CCE, RAIPUR [2015 (38) S.T.R. 1182 (Tri. - Del.)]*
- (iv) *CHERRY HILL INTERIORS LTD. Versus COMMISSIONER OF SERVICE TAX, DELHI [2016 (42) S.T.R. 74 (Tri. - Del.)]*
- (v) *GARIMA ASSOCIATES Versus COMMISSIONER OF CUS. & C. EX., CHANDRAPUR [2015 (40) S.T.R. 247 (Tri. - Mumbai)]*

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3.4. It is further submitted by the assessee that the Ld. Commissioner has confirmed the service tax of Rs.10,53,786/- for the year 2009-10 and appropriated the same from excess deposit of service tax in 2010-11 and has also ordered for payment of interest by the assessee on the above amount to be determined by the divisional Assistant Commissioner of Service Tax. The assessee submits in this regard that the Show Cause Notice covering the demand for the periods 2009-10 and 2010-11 was issued on 23.09.2014, by invoking the extended period of limitation; that it is on record that the assessee has been registered with the department, paying service tax and filed returns regularly. Thus, it is their plea that short levy if any, needs to be raised within the normal period of limitation. Accordingly, it is the contention of the assessee that the demands confirmed by invoking the extended period of limitation is not sustainable and hence the demands confirmed in the impugned order for the year 2009-10 is liable to be set aside. In view of this submission, it is also stated by the assessee that the question of adjustment of the demand for this period along with interest, does not arise.

3.4.1. Regarding the demand of Rs. 2,65,285/- confirmed for the 2012-13, the assessee submitted that same may be adjusted from the excess payments made during the period 2010-11; that even after this adjustment, an excess payment still remains and thus the assessee has prayed for refund of the excess amount paid during the period 2010-11 and 2011-12.

3.5. Regarding the adjustment made, the assessee submits that the Ld. Assistant Commissioner has presumed the 'entire liability for the quarter ending June, 2009'; the assessee is a proprietorship concern and so, he determined the due date for payment on 05.07.2009 and calculated interest up to 04.03.2011, which is wrong and requires recalculation.

3.6. It is their further submission that the Ld. Commissioner though found excess payment in 2010-11 and appropriated the short payment for the year 2009-10, did not consider Section 80 of the said Act(valid up to 13.05.2015) to waive penalty under section 78 of the said Act. in view of the fact that the tax was paid well before issue of the impugned notice and legal position that during the said period the penalty under Section 78 of the said Act was not mandatory, the assessee has prayed for setting aside the penalty imposed by invoking the provisions of section 80 of the Finance Act, 1994.

3.6.1. Further, it is submitted by the assessee that for the short payment and confirmation of service tax of Rs. 2,65,285/ for the year 2012-13, the Ld. Commissioner found excess payment of service tax in 2010-11 and 2011-12 and thus, he did not order for payment of any interest on the above amount of service tax. Therefore, the assessee points out that he should not have imposed any penalty equal to Rs. 2,65,285/. Accordingly, the assessee has prayed for setting aside the said penalty imposed.

3.6.2. With regard to the imposition of penalty of Rs. 10,000/- under section 77(1)(b) of the said Act by the Ld. Commissioner for not keeping, maintaining or retaining books of accounts and other documents

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regarding service it provided, it is contended by the assessee that the same is contrary to his own findings wherein he found that the demand arose from scrutiny of books of accounts including balance sheets and so books of accounts were maintained by the Assessee. Moreover, the appellant pleaded that the penalty under Section 77(1)(b) of the said Act is not mandatory and the Ld. commissioner should have considered that the assessee paid excess service tax, barring short payment in 2009-10 but made good in 2010-11.

3.6.3. Thus, the assessee prayed for waiver of all penalties imposed on them, by invoking the provisions of Section 80 of the Finance Act, 1994, applicable during the relevant period.

4. Regarding the appeal filed by the assessee, the Ld. Authorized Representative of the Revenue reiterated the respective findings of the adjudicating authority in the impugned order.

4.1. With regard to the appeal filed by the Revenue, the Ld. Authorized Representative of the Revenue reiterated the points raised by the Revenue in their Grounds of Appeal, which are as follows: -

a. While in the SCN it was alleged by the department that the assessee had provided Maintenance & Repair Service during the period 2009-10 to 2012-13, the assessee pleaded in their defence that besides 'Maintenance & Repair Service' they had also provided 'Construction/Works Contract Service' during the said period and a portion of which is not taxable and thus, non excludable in their taxable value. Accordingly, the Adjudicating

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Authority allowed exclusion of Bill amount of Rs. 1,78,79.098/- pertaining to 2009-10, Rs. 1,69,57.052/- pertaining to 2011-12 & Rs.1,42,52,358/- pertaining to 2012-13 from the taxable value, accepting the assessee's prayer of the said amounts being amounts received by the assessee for providing 'Road Construction Services under CSR Scheme, However, the adjudicating authority did not mention anything whatsoever in the instant Order-in-Original as to whether the relevant work orders/agreements were examined during the adjudication proceedings for proper classification of the service in order to exclude the same from taxable value of the assessee. Therefore, the Order-In-Original appears to be not properly reasoned and speaking

b. It has also been observed that while issuing SCN the department arrived at the Service Tax liability of the assessee on the basis of taxable value available in their Balance sheet and profit & loss a/c, whereas the assessee in their submission contended that the balance sheets taken into consideration by the investigating authority was prepared by them for Income Tax purpose and taxable value available there happened to be the combined value of two companies viz. (1) M/s. Eastern India Enterprise, the noticee in the instant SCN, and (ii) M/s. Bengal Enterprise under ownership of one Asraful Sk. While adjudicating the case the authority was found to have considered the Balance Sheet and Profit & Loss a/c of said Asraful Sk. separately containing figures of M/s.

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Eastern India Enterprise and M/s. Bengal Enterprise and determined much lower liability of M/s. Eastern India Enterprise by excluding the figures of M/s. Bengal Enterprise. It appears that the methodology adopted by the adjudicating authority while determining the tax liability is improper/irregular/unfounded, as preparation of separate balance sheets for Income Tax department and other departments/agencies is not permissible by laws in force. Moreover, such exclusion of the figures of M/s. Bengal Enterprise is not properly discussed and reasoned in the order-in-original.

c. It has further been observed that contrary to the quantification made in the SCN that the total taxable values provided by the assessee for the years 2011-12 & 2012-13 were Rs.12,56,13,910/- & Rs. 7,95,93,521 respectively, the Adjudicating Authority has accepted the submission of the assessee that the taxable values for the said financial years were Rs. 6,00,85,295/- & Rs.4,52,33,879/- respectively, on the ground that there was no corroborative evidence in the SCN in support of said Rs.12,56,13,910/- & Rs. 7,95,93,521/- tabulated in Annexure-1 to the SCN. It appears that while determining the tax liability of the assessee, the Adjudicating Authority has excluded the value of service, claimed to be related to 'Road Construction Services, on the basis of Chartered Accountant's Certificate submitted by them. There is no discussion in the order that the Adjudicating Authority has examined base records i.e., relevant work

orders/agreements of said 'Road Construction Services', in order to make sure that the said amounts were truly related to exempted Road Construction Service or not. It thus, appears that the instant order is not properly reasoned.

d. Besides above, the adjudicating authority determined the tax liability of the assessee for the financial year of 2012-13 to be Rs 55,35,736/- in the order-in-original, whereas as per NSDL database the assessee paid Rs.58.01.021/-. This shows that the assessee made an excess payment of Rs. 2,65,285/-, though the said amount has erroneously been determined at paragraph (iii) of page 17 and at para 6.2 of page 18 of the order as 'short payment. Further, the adjudicating authority appears to have taken contradictory decision of not adjusting the excess payment with the tax liability and refraining from recovery of interest on the amount short paid in 2012-13 (erroneously shown as Rs.5,44,390/- in lieu of Rs.2,65,285/-) on the ground that tax was paid in excess in 2010-11 and 2011-12.

e. The adjudicating authority is found to have ordered appropriation of confirmed amount of tax against excess paid tax and decided to hold the remaining part of the excess tax on the ground that the excess tax could not be refunded as the assessee has not filed any refund application ever. Such decision too appears to be inappropriate.

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5. Heard both sides and perused the appeal records.

6. From the impugned order, we observe that there is a short payment of service by the assessee in the Financial Year 2009-10 and 2012-13 and excess payment in the years 2010-11 and 2011-12. The short payments in the years 2009-10 and 2012-13 have been admitted by the assessee and the excess payment by the assessee in the said years have also been admitted by the Revenue and recorded in the findings by the Ld. adjudicating authority.

7. For the sake of ready reference, the relevant observations made by the Id. adjudicating authority in paragraphs 6.1 and 6.2 of the impugned order are reproduced below: -

"6.1 I have carefully gone through the case records which include the SCN, the said Noticee's reply dated 21.12.20105, his oral submission at the time of personal hearing on 21.12.2015 through his consultants, the certificate and other relevant documents.

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(a) Point no. 1:- It is evident from Annexure - I to the SCN that the taxable amount was arrived at from the Balance Sheet. But there is no categorical mentioning of the relevant Balance Sheet. As such, I am taking into considering the Balance Sheet and Profit & Loss Account in the name of Sri Asraful Sk. separately showing the Trading and Profit & Loss Account of Eastern India Enterprise and Bengal Enterprise as enclosed marking Annexure-III with the reply dated 21.12.2015. Since Eastern India Enterprise is the said Noticee in the instant SCN, I am ignoring the figures of Bengal Enterprise.

(b) Point nos. 2,3,4,5,6&7:- the said Noticee has not quantified the amount of taxable service for 2009-2010, but has claimed that the taxable amount for 2011-2012 and 2012-2013 should be Rs.6,00,05,295/- and Rs. 4,52.33,879/- respectively contradicting the amount of Rs,

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13,85,52,142/-and Rs. 8,94,31,281/- as mentioned in the SCN.

I am now discussing the taxable amount year-wise:-

(i) 2009-2010:- Though the taxable amount for the year has not been quantified in the reply dated 21.12.2015 of the said Noticee, the Chartered Accountant in his certificate dated 28.12.2015 has shown the break-up of Rs. 3,55,39,746/- which implies that this amount has been accepted by the said Noticee for 2009-2010. After carefully considering the Balance Sheet and the certificate, I hold that during 2009-2010, the following amounts are excludible while computing the taxable amount for the year - (A) bill amount of Rs. 32,80,000/- towards refund of Security Deposit since no service is involved in relation to this amount, rather deposit of security and refund of the same is a traditional official procedure for any contractor, (B) bill amount of Rs. 1,78,79,098/- as road was constructed under Corporate Social Responsibility (CSR) Scheme since construction of road is excluded from work contract service and hence not taxable in view of definition of taxable service under section 65(105) (zzzza) of the said Act (to quote) (zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams" (unquote). Thus the total excludible amount comes to Rs. 2,11,59,098/- But the amount of Rs. 1,18,16,127/- cannot be excluded from the taxable amount though as per the certificate, the said amount was incurred towards road construction because there are contradictory claims by the said Noticee all along such as in the Balance Sheet and Profit & Loss Account of Eastern India Enterprise The said amount has been shown exclusively as 'Construction Work, then in the written reply dated 21.12.2015 the above amount was claimed to include hiring of one no. A.C. Ambulance, transportation of stone, civil work, unloading of coal etc. but in the subsequent certificate of the Chartered Accountant, the entire amount was shown as 'Construction of road. This divergent stance renders the amount includible in the taxable amount. I, therefore, hold that during 2009-2010, the bill amount to be considered for the instant SCN is Rs. 1,34,54,728/- and after deducting the service tax element @10.30% from the said amount of Rs. 1,34,54,728/-, the taxable amount comes to Rs. 1,21,98,303/- As the said Noticee is silent regarding cost of materials and other expenses towards such bill amounts, I do not allow any abatement from the said taxable amount of Rs.

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1,21,98,303/- Service tax on this amount comes to Rs. 12,19,830/-, Education Cess of Rs. 24,397/- and Secondary and Higher Education Cess of Rs. 12,198/- totaling Rs. 12,56,425/- Since the said Noticee paid Rs. 1,36,170/- towards service tax as per NSDL Database, there was short payment of to the tune of Rs. 10,53,786/- during 2009-2010.

(ii) 2011-2012- For this year, as per SCN, out of the total bill amount of Rs. 13,85,52,142/-, the taxable amount is Rs. 12,56,13,910/- on which service tax comes to Rs. 1,29,38,232/- out of which Rs. 67,21,504/- was paid as service tax and thus there was short payment of Rs. 62,16,728/- But the said Noticee claimed, the bill amount should be Rs. 6,00,85,295/- out of which service tax is payable on Rs. 5,44,74,428/- on which service tax comes to Rs. 56,10,866/- Since Rs. 67,21,504/- was paid as service tax, there was excess payment of Rs. 11,10,638/-. In the absence of any corroborative evidence in support of Annexure - I to the SCN, I am relying on the Balance Sheet and Profit & Loss Account of M/s. Eastern India Enterprise (the said Noticee) as well as the certificate. As per Balance Sheet and Profit & Loss Account, the gross bill received during the year 2011-2012 is Rs. 7,74,11,692/- The Chartered Accountant has certified that among others this amount includes (A) refund of Earnest Money of Rs. 3,69,345/-, (B) bill for road construction under CSR Scheme amounting to Rs. 1,69,57,052/- I hold that no service tax is leviable on this amount since no service is involved in relation to this amount, rather deposit of earnest money and refund of the same is a traditional official procedure. Similarly, the bill amount of Rs. 1,69,57,052/- is also excludible since road was constructed under CSR Scheme and construction of road is not taxable for the reason stated supra. I, therefore, hold that during 2011-2012, the bill amount to be considered for the instant SCN is Rs. 7,74,11,692/ (Rs. 3,69,345/- Rs. 1,69,57,052/-) = Rs. 6,00,85,295/-. After deducting the service tax element @ 10.30% from Rs. 6,00,85,295/-, I opine that during this year the said Noticee is liable to pay service tax on the bill amount of Rs. 5,44,74,429/- Service tax on this amount comes to Rs. 54,47,443/-, E.Cess of Rs. 1,08,949/- and S. & H. E. Cess of Rs. 54,475/- totaling Rs. 56,10,867/-. As per NSDL Database, the said Noticee paid Rs. 67,21,504/- towards service tax during the material period. In view of this situation. I agree with the said Noticee's claim that there was an excess payment of service tax of Rs. 11,10,637/- during 2011-2012.

(iii) 2012-2013:- For this year, as per SCN, out of the total bill amount of Rs. 8,94,31,281/-, the taxable amount is Rs. 7,95,93,521/- on which

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service tax comes to Rs. 98,37,760/- out of which Rs 58,01,021/- was paid as service tax and thus there was short payment of Rs. 40,36,739/-. The said Noticee claimed, the bill amount should be Rs. 4,52,33,879/- out of which service tax is payable on Rs 4,02,57,991/- on which service tax comes to Rs. 49,75,888/-. Since Rs. 58,01,021/- was paid as service tax, there was excess payment of Rs. 8,25,133/-. In the absence of any Corroborative evidence in support of Annexure I to the SCN, I am once again relying upon the Balance Sheet and Profit & Loss Account of M/s. Eastern India Enterprise (the said Noticee) as well as the certificate. As per Balance Sheet and Profit & Loss Account, the gross bill received during the year is Rs. 6,16,50,870/- The Chartered Accountant has certified that among others, this amount includes bill for road construction under CSR Scheme amounting to Rs. 1,42,52,358/- Ignoring the subsequent amount reflected in the certificate, I am excluding the amount of Rs. 1,13,27,623/- as shown in the Balance Sheet and Profit & Loss Account of the said Noticee since road was constructed under CSR Scheme and construction of road is not taxable for the reason stated supra in the discussion for the year 2011-12. I, therefore, hold that during 2012-2013, the bill amount to be considered for the instant SCN is Rs. 5,03,23,247/- (Rs. 6,16,50,870/- Rs 1,13,27,623/-). After deducting the service tax element @ 12.36% from Rs. 5,03,23,247/-, I opine that during this year the said Noticee is liable to pay service tax on the bill amount of Rs 4,47,87,511/- Service Tax on this amount comes to Rs. 53,74,501/-, E Cess of Rs. 1,07,490/- and S. & HE. Cess of Rs. 53,745/- totaling Rs. 55,35,736/-. As per NSDL Database, the said Noticee paid Rs. 58,01,021/- towards service tax during the material period. In view of this situation, I find that there was short-payment of service tax to the tune of Rs. 2,65,285/- during 2012-2013.

(c) Point No. 8:- As regards invocation of extended period of limitation for raising the demand under section 73(1) of the said Act, I hold that the said Noticee never provided the actual facts and figures in their statutory documents. Had the fact not been detected by the department through audit and further investigations, the said assessee would have continued to evade payment of service tax in such manner. This substantiates that there was suppression of facts on the part of the said Noticee with the intent to evade payment of service tax as actual amount of taxable service was not provided to the department in due course So, section 73(1) of the said Act has been rightly invoked in the instant SCN

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(d) Point No. 9:- As regards penal action under sections 77 and 78 of the said Act. I find that "these have been proposed correctly as discussed in point number (c) above.

6.2 I also find from Annexure-I of the reply submitted by the said Noticee that in course of scrutiny of records and documents by the Central Excise Officers from Hd Qr. Audit, Bolpur Commissionerate conducted audit of the records including Balance Sheets and Profit and Loss Account for the financial years 2009-10 to 2011-12 on 30.09.2013 to 01.10.2013 and raised objection of short payment of service tax of Rs. 4,61,952/ including cesses for the period 2009-10, 2011-12 and 2012-13. From the said Annexure-I, it also reveals that Rs. 36,67,794/ was paid as service tax in place of the payable amount of Rs. 12,22,026/ against the bill amount of Rs. 1,30,86,362/- out of which service tax is payable on Rs 1,18,64,336/- Thus, Rs 24,45,768/- was paid in excess during 2010-2011. Thus there have been short payments of service tax of Rs. 10,53,786/- during 2009-2010 and Rs. 2,65,285/- during 2012-2013 and excess payments of service tax of Rs. 24,45,768/- during 2010-2011 and Rs. 11,10,637/- during 2011-2012 But the said Noticee did not file any refund request for excess payment of service tax in proper proforma in prescribed time, I find that the service tax, such excess-paid cannot be held refundable nor adjustable against such short payments."

7.1. We also find that in the impugned order, the Service Tax liability of Rs.13,19,071/- (Rs.10,53,786/- + Rs.2,65,285/-) has been appropriated against the excess paid Service Tax of Rs.35,56,405/- (Rs.24,45,768/- + Rs.11,10,637/-). For better appreciation of the facts, the relevant portion of the adjudication order is reproduced below:-

"1. I determine and confirm the demand of service tax to the tune of Rs. 13,19,071/- [Rupees Thirteen Lakh Nineteen Thousand and Seventy One only) (Rs. 10,53,786/- + Rs.2,65,285/-) including cesses under section 73(2) of the said Act.

2. I order appropriation of the above confirmed amount against excess paid service tax of Rs.

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*35,56,405/- (Rs. 24,45,768/- + Rs. 11,10,637/-)
and the rest amount is held since no refund has been
claimed by the said Noticee;"*

7.2. Thus, from the above, it is seen that there were short payments of Rs.10,53,786/- for 2009-10 and Rs.2,65,285/- for 2012-13, which have been adjusted against the excess payment made by the appellant. However, after adjusting the service tax liability of Rs.10,53,786/- for 2009-10 and Rs.2,65,285/- for 2012-13, there still remains an excess payment of Rs. Rs.22,37,334/- (Rs. 24,45,768/- + Rs. 11,10,637/-) – (Rs. 10,53,786/ + Rs. 2,65,285/)] at the end of 2012-13, as submitted by the assessee. Thus, we are of the opinion that the Id. adjudicating authority was required to refund the excess amount paid by the assessee, after adjustment of the tax liabilities, after examining the issue of unjust enrichment.

7.3. Accordingly, we hold that the Service Tax of Rs.13,19,071/- (Rs.10,53,786/- + Rs.2,65,285/-), being the short payments made by the appellant/assessee for the periods 2009-10 and 2012-13, is payable by the appellant, along with applicable interest, which is required to be adjusted against the excess payment made by them as above.

7.4. However, with regard to the assessee's claim for refund of the excess payment made by them, we are of the opinion that the issue needs to be remanded back to the adjudicating authority to verify the unjust enrichment angle as well as the correctness of the claim made by the assessee regarding excess payment, before refund of the excess amount, after adjustments of their Service Tax liability as observed in the preceding paragraphs.

8. Regarding, the penalties imposed on the assessee, we observe that there were short payments and excess payments, but, overall, there was an excess payment by the assessee. Hence, we hold that no penalty is imposable on them. Accordingly, we set aside all the penalties imposed on the assessee in the impugned order.

9. Regarding the appeal filed by the Revenue, we observe that the appeal filed by the Revenue is mainly against the decision of the Id. adjudicating authority in the impugned order wherein he has allowed exclusion of bill amounts pertaining to the years 2009-10, 2011-12 and 2012-13 from the taxable value and accepted the assessee's prayer that the said amounts were received by the assessee for providing 'Road Construction Services' under CSR Scheme. In this regard, we have perused the findings of the Id. adjudicating authority in the impugned order, as reproduced supra. From the categorical observations of the Id. adjudicating authority, it is seen that the Id. adjudicating authority has verified all the work orders and other relevant documents filed by the assessee in entirety and being satisfied that the assessee has received the said amounts for providing Road Construction Services under the CSR Scheme, extended the benefit of exclusion of the said amounts while arriving at the taxable value of the assessee for the respective periods. Therefore, we do not find any reason to disagree with the same. Accordingly, we hold that there is no infirmity in the findings of the adjudicating authority while dropping part of the demands in the impugned order. Consequently, we do not find any merit in the appeal filed by the Revenue and hence the same is rejected.

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10. In view of the above, we pass the following order:

- (i) The Service Tax liability of the assessee confirmed in the impugned order for the periods 2009-10 and 2012-13, along with interest, are required to be adjusted from the excess payment made by the assessee.
- (ii) After adjustment of Service Tax and interest, the excess payment remaining, if any, shall be liable to be refunded to the assessee, subject to verification of the issue of unjust enrichment. For this purpose, the matter is remanded back to the adjudicating authority to verify the unjust enrichment angle as well as the correctness of the claim made by the assessee regarding excess payment, before sanctioning refund of the excess amount paid by the assessee in this regard.
- (iii) No penalty is imposable on the assessee. Accordingly, all the penalties imposed are set aside.
- (iv) The Revenue's appeal, being devoid of merit, is rejected.

11. In these terms, the appeals are disposed of. The cross-objection filed by the assessee also stands disposed of accordingly.

(Order pronounced in the open court on **03.07.2025**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

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