IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 41500 of 2019

(Arising out of Order-in-Appeal No. 111/2019-TRY(ST) dated 28.05.2019 passed by the Commissioner of G.S.T. and Central Excise (Appeals), Coimbatore, Circuit Office: No. 1, Williams Road, Cantonment, Tiruchirappalli – 620 001)

M/s. Bharat Heavy Electricals Limited : Appellant
Power Plant Piping Unit, 848/1,
BH 210, 71, Thirumayam,
Pudukottai – 622 507

VERSUS

The Commissioner of G.S.T and Central Excise : Respondent
Tiruchirappalli Commissionerate
No. 1, Williams Road, Cantonment, Tiruchirappalli – 620 001

APPEARANCE:

Shri G. Natarajan, Advocate for the Appellant

Smt. Anandalakshmi Ganeshram, Superintendent for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No. 40311 / 2023

DATE OF HEARING: 20.04.2023

DATE OF DECISION: 26.04.2023

Order : [Per Hon'ble Mr. P. Dinesha]

This appeal is filed by the assessee against the Order-in-Appeal No. 111/2019-TRY(ST) dated 28.05.2019 passed by the Commissioner of G.S.T. and Central Excise (Appeals), Tiruchirappalli.

2.1 Brief undisputed facts, as could be gathered from the Show Cause Notice, Order-in-Original as well as the impugned Order-in-Appeal are that the appellant is a public

sector undertaking engaged in the manufacture of heavy engineering equipment such as piping systems and pressure vessels for power generation systems and process industries and is also engaged in the service of erection / commissioning of power plants / projects. The appellant has thus got itself registered under the Finance Act, 1994 since its project implementing activities appeared to be categorized as 'service'. It appears that during the course of discharging of contractual obligations towards the customer relating to supply, erection, commissioning and installation activities, the appellant entered into agreements / contracts with vendors and/or sub-contractors for supply of various equipment / materials for erection, commissioning and installation thereof and time being the essence of contract, it is the duty of the appellant to complete the agreed projects within the prescribed time as per the terms agreed to in the contracts with its customers.

2.2 Entertaining a doubt, based on specific intelligence that the appellant is charging and recovering Liquidated Damages for delay in supply and service contract as per the written agreements between them but did not pay the Service Tax on it, it appears that there was an enquiry against the appellant by the Directorate General of Goods and Service Tax Intelligence (DGGI). As a follow-up action, Revenue appears to have recorded statements and thereafter, a Show Cause Notice dated 05.04.2018 came to be issued proposing, *inter alia*, to demand Service Tax on the Liquidated Damages recovered during the period from July 2012 to June 2017, along with appropriate interest and penalties.

2.3 The appellant appears to have filed a detailed reply to the Show Cause Notice, but however, not satisfied with the reply, the Adjudicating Authority proceeded to confirm the demands proposed in the Show Cause Notice vide Order-in-Original No. 39/2018-ST dated 06.12.2018. In the Order-in-Original, the Commissioner has observed,

inter alia, that the term "service" as defined under Section 65B (44) of the Finance Act, 1994 would *inter alia* include "declared service", as listed in Section 66E (e) of the Act to be "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;*" and hence, agreeing to the obligation or to tolerate an act or situation would be a "declared service" for the purposes of the Act. He has thus held that the appellant had received Liquidated Damages from their suppliers of materials and providers of service where there had been some deficiency in such supply / provision, which was in breach of the contract, which was for tolerating the deficiencies. It is that 'toleration', according to the Commissioner, that was covered under Section 66E (e) *ibid.,* which would partake the character of "declared service".

3. Feeling aggrieved, the appellant preferred first appeal before the Commissioner of G.S.T. and Central Excise (Appeals), Tiruchirappalli, who vide impugned Order-in-Appeal No. 111/2019-TRY(ST) dated 28.05.2019 having rejected the same, the present appeal has been filed by the appellant before this forum.

4. Heard Shri G. Natarajan, Learned Advocate for the appellant and Smt. Anandalakshmi Ganeshram, Learned Superintendent for the respondent.

5. After hearing both sides, we find that the only issue that is to be decided by us is: whether the Liquidated Damages received by the appellant for tolerating the delay would amount to "declared service" within the meaning of Section 66E (e) of the Act *ibid.*, and consequently, whether the appellant would be liable to Service Tax on the same in terms of Section 66B *ibid.*?

6.1 The Learned Advocate for the appellant would submit, at the outset, that the issue involved in the case on hand is no more *res integra* as the same has been settled by the orders of various Benches of the CESTAT, namely: -

(i) *South Eastern Coalfields Ltd. v. Commissioner of Central Excise and Service Tax, Raipur [2020 (12) TMI 912 – CESTAT, New Delhi];*

(ii) *M.P. Poorva Kshetra Vidyut Vitran Co. Ltd. v. Principal Commr., CGST & C.Ex., Bhopal [2021 (46) G.S.T.L. 409 (Tri. – Delhi)];*

(iii) *Neyveli Lignite Corporation Ltd. v. Commissioner of Cus., C.Ex. & S.T., Chennai [2021 (53) G.S.T.L. 401 (Tri. – Chennai)];*

(iv) *Steel Authority of India Ltd. v. Commissioner of G.S.T. & Central Excise, Salem [2021 (7) TMI 1092 – CESTAT, Chennai]*

(v) *MNH Shakti Ltd. v. Commissioner, C.G.S.T. & C.Ex., Rourkela [2021 (11) TMI 427 – CESTAT, Kolkata];*

(vi) *K.N. Food Industries Pvt. Ltd. v. Commissioner of C.G.S.T. & C.Ex., Kanpur [2020 (38) G.S.T.L. 60 (Tri. – Allahabad)];*

(vii) *Khaira and Associates v. Commr. of Cus., C.Ex. & S.T., Bhopal [2020 (34) G.S.T.L. 224 (Tri. – Delhi)];*

(viii) *M/s. Amit Metaliks Ltd. v. Commissioner of C.G.S.T., Bolpur [2019 (11) TMI 183 – CESTAT, Kolkata].*

6.2 He would invite our attention to the order of the Delhi Bench of the Tribunal in the case of *M/s. South Eastern Coalfields Ltd. (supra)* and in particular, to the following observations: -

> *"26. Thus, a service conceived in an agreement where one person, for a consideration, agrees to an obligation to refrain from an act, would be a 'declared service' under section 66E(e) read with section 65B (44) and would be taxable under section 68 at the rate specified in section 66B. Likewise, there can be services conceived in agreements in relation to the other two activities referred to in section 66E(e).*
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> *27. It is trite that an agreement has to be read as a whole so as to gather the intention of the parties. The intention*

of the appellant and the parties was for supply of coal; for supply of ST/50567/2019 goods; and for availing various types of services. The consideration contemplated under the agreements was for such supply of coal, materials or for availing various types of services. The intention of the parties certainly was not for flouting the terms of the agreement so that the penal clauses get attracted. The penal clauses are in the nature of providing a safeguard to the commercial interest of the appellant and it cannot, by any stretch of imagination, be said that recovering any sum by invoking the penalty clauses is the reason behind the execution of the contract for an agreed consideration. It is not the intention of the appellant to impose any penalty upon the other party nor is it the intention of the other party to get penalized.

28. It also needs to be noted that section 65B(44) defines "service" to mean any activity carried out by a person for another for consideration. Explanation (a) to section 67 provides that "consideration" includes any amount that is payable for the taxable services provided or to be provided. The recovery of liquidated damages/penalty from other party cannot be said to be towards any service per se, since neither the appellant is carrying on any activity to receive compensation nor can there be any intention of the other party to breach or violate the contract and suffer a loss. The purpose of imposing compensation or penalty is to ensure that the defaulting act is not undertaken or repeated and the same cannot be said to be towards toleration of the defaulting party. The expectation of the appellant is that the ST/50567/2019 other party complies with the terms of the contract and a penalty is imposed only if there is non-compliance.

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30. The activities, therefore, that are contemplated under section 66E (e), when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.

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40. It is in this context and in the context of section 74 of the Contract Act, that the Supreme Court observed:

> *20. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of parties pre- determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract for predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated.*

41. The Supreme Court also noticed that section 74 of the Contract Act merely dispenses with the proof of "actual loss or damages". It does not justify the award of compensation, when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good the loss or damage which actually arose or which the parties knew when they made the contract 'to be likely to result from the breach'. The Supreme Court also found that there was no evidence that any loss was suffered by the plaintiff in consequences of the default by the defendant, save as to the loss suffered by being kept out of possession of the property. The Supreme Court, therefore, held that plaintiff would be entitled to ST/50567/2019 retain only an amount of Rs. 1000/- that was received as earnest, out of amount of Rs. 25,000/-.

42. The conclusion drawn by the learned authorized representatives of the Department from the aforesaid decision of the Supreme Court that compensation received is 'synonymous' with 'tolerating' or that the Supreme Court acknowledged that in a breach of contract, one party tolerates an act or situation is not correct.

43. It is, therefore, not possible to sustain the view taken by the Principal Commissioner that penalty amount, forfeiture of earnest money deposit and liquidated damages have been received by the appellant towards "consideration" for "tolerating an act" leviable to service tax under section 66E(e) of the Finance Act."

7. *Per contra*, the Learned Superintendent for the respondent (A.R.) would rely on the findings of the lower authorities.

8. We have heard both sides and we have perused the orders of the lower authorities; we have also gone through the orders of various CESTAT Benches relied upon during the course of arguments.

9. We find the assertion of the Learned Advocate for the appellant to be correct since a more or less similar issue has been considered and settled in favour of the assessee. In the order in the case of *M/s. South Eastern Coalfields Ltd. (supra),* we find that the Learned Delhi Bench has analysed the scope and ambit of Sections 65B (44), 66E (e) and 67 (1) of the Act and they have also analysed and applied various decisions of the Hon'ble Apex Court [*Commissioner of Service Tax v. M/s. Bhayana Builders* reported in *2018 (10) G.S.T.L. 118 (S.C.), Union of India v. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd.* reported in *2018 (10) G.S.T.L 401 (S.C.) and Fateh Chand v. Balkishan Das* reported in *AIR 1963 SC 1405*] and thereafter, has concluded that the view of the Principal Commissioner therein that the penalty amount, forfeiture of earnest money deposit and liquidated damages received by the appellant therein towards "consideration" for "tolerating an act" as being amenable to Service Tax under Section 66E (e) of the Finance Act, was not sustainable.

10. We find that the said view has been followed in the other orders of CESTAT Benches which are relied upon by the Learned Advocate.

11. In view of the above, therefore, we are also of the clear view that the issue is required to be answered in favour of the assessee, for which reason the impugned order cannot sustain.

12. Consequently, the impugned order is set aside and the appeal is allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on **26.04.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd