

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD**

REGIONAL BENCH - COURT NO. II

Service Tax Appeal No. 30964 of 2018

(Arising out of Order-in-Appeal No. GUN-EXCUS-000-APP-061-19-20 dated 09.09.2019 passed by the Commissioner of Central Tax & Customs (Appeals), Guntur.).

M/s Bharat Dynamics Ltd

3rd Floor, Kalpataru Inspire,
Off, W E Highway, Santacruz (East)
Mumbai, Maharashtra-400055

Appellant

VERSUS

**Commissioner of Central Tax,
Hyderabad**

C.R. Buildings,
Kannvarithota
Guntur, Andhar Pradesh-522004

Respondent

APPEARANCE:

Shri C. Sumanth, Advocate for the appellant

Shri A. Rangadham, Authorised Representative for the respondent

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30130/2022

DATE OF HEARING: 14.09.2022

DATE OF DECISION: 14.09.2022

ANIL CHOUDHARY:

The issue in this appeal is whether the demand of service tax has been rightly confirmed on liquidated damages/penalties recovered by the Appellant from its contractors under section 66E (e) of the Finance Act, 1994.

2. The Brief facts are that the appellant is involved in manufacture of "Defence Equipment" and are registered under the provisions of Central Excise for manufacture of various products including Milan 2T, Konkurs M, invar, Akash, etc. They are also registered with the service tax

department for providing/receiving various taxable services such as Maintenance and Repair, Technical Inspection, Erection Commissioning and Installation Service, etc. The Appellant is a PSU under the administrative control of Ministry of Defence. In the course of its business, the Appellant entered into various agreements with suppliers by inviting tenders. The tender notice contains a penalty clause to the effect that the supplier will be liable to pay penalty, at rates specified per week, for any delay caused by the supplier. Accordingly, under the terms of contract, the Appellant have been recovering penalty/liquidated damages from the supplier as and where applicable and have been declaring these amounts under the head of other income. Some amount is also received as notice period paid recovered from the employee and miscellaneous recoveries under the bond period from 'management trainees'.

3. It appeared to revenue that the amount so collected by the Appellant falls under the category of declared services under Section 66E (e) of the Finance Act, 1994. A show cause notice dated 27.02.2017 was issued for the period July 2012 to March 2015, invoking the extended period of limitation, on the ground that the penalty/liquidated damages recovered from the suppliers etc. is a declared service as per Section 65B (22) of the Finance Act, 1994 and therefore, falls under the scope of "tolerate an act or a situation" under section 66E(e) of the Act. Further alleged that the said amount would attract service tax, since these are penalties received from contractors/suppliers as income under separate head and cannot be considered as price or consideration of goods or services. Further alleged that these facts came to light on verification of records and

hence extended period of limitation is invokable on the ground of wilful suppression of the facts.

4. The Appellant contested the show cause notice by filing reply dated 15.05.2017 inter alia contending that the receipts by way of liquidated damages/penalties does not fall under the purview of declared services, as the expression "agreeing to tolerate an act" cannot be construed to include the amount which is charged as penalty for breach of terms and conditions of the contract, as mutually agreed. It was also contended that notice pay recovery is within the purview of employment agreement and does not attract service tax. Further contended that the Appellant have maintained proper books of accounts, and admittedly all these transactions are recorded in the books of accounts maintained in the ordinary course of business. Thus, there is no case of any wilful suppression etc. and hence the extended period of limitation is not invokable.

5. The SCN was adjudicated on contest vide Order-in-Original dated 14.05.2018 whereby the demand of Rs. 11,78,75,893/- was confirmed (Rs. 11,77,75,270) for liquidated damages and Rs. 1,00,623/- towards notice pay and bond recovery alongwith interest and further equal penalty of Rs. 11,78,75,893/- was imposed under Section 78 of the Finance Act.

6. Being aggrieved the Appellant is in appeal before this Tribunal.

7. Learned Counsel for the Appellant urges that the issue is no longer *res integra* and under similar facts and circumstances, this Tribunal in the case of **Steel Authority of India Ltd, Salem vs Commissioner of GST & Central Excise, 2021(7) TMI 1092, Chennai**, held that no service tax is payable on the amount collected

towards liquidated damages, following the ruling of the Tribunal in **South Eastern Coalfields Ltd vs Commissioner of Central Excise & Service Tax 2020 (12) TMI (912)**. In SECL, this Tribunal observed that such amounts collected by way of penalty/liquidated damages for non-compliance of contract, cannot be considered as consideration for tolerating an act and hence, not leviable to service tax under section 66E (e) of the Finance Act. The contracts nowhere provided obligation on the assessee to refrain from an act or tolerate an act or a situation and flow of consideration thereof. Such liquidated damages/penalty cannot be considered as receipts towards any service per say, since neither assessee is carrying on any activity to receive compensation nor there can be an intention of other party to breach or violate the contract and suffer a loss. This Tribunal relied on the ruling of Hon'ble Supreme Court in **Tara Chand vs Balkishan AIR 1963 SC 1405**.

8. Opposing the appeal, learned AR for revenue relies on the impugned order.

9. Having considered the rival contentions, we find that the issue herein is squarely covered in favour of the Appellant-assessee by the precedent order of this Tribunal in South Easter Coal Field Ltd vs CCE and ST (supra). Accordingly, we allow the appeal and set aside the impugned order. The appellant shall be entitled to consequential benefits, in accordance with law.

(operative part pronounced in the open Court)

(Anil Choudhary)
Member (Judicial)

(P.V. Subba Rao)
Member (Technical)