CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70525 of 2019

(Arising out of Order-in-Original No.05/Commissioner/GB Nagar/2018-19 dated 19/03/2019 passed by Commissioner of Customs, Central Excise & Service Tax, Noida)

M/s Bharat Heavy Electricals Ltd., **.....Appellant**
(Plot No.7, Tower-A, ADVANT IT Park,
Floor-5, Sector-142, Noida-201301)

VERSUS

Commissioner of Central Excise &

CGST, Noida **....Respondent**

(C-56/42, Renu Tower, Sector-62, Noida)

APPEARANCE:

Shri Z.U. Alvi, Advocate for the Appellant
Shri Sandeep Pandey, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70283/2023

DATE OF HEARING : 12 October, 2023
DATE OF DECISION : 12 October, 2023

SANJIV SRIVASTAVA:

This appeal is directed against order in original No 05/COMMISSIONER/ G B NAGR/2018-19 dated 19.03.2019 of the Commissioner Central Tax, GST & Central Excise Gautam Budh Nagar. By the impugned order following has been held:

ORDER

(i) *I order to demand and recover Service Tax of Rs 3,14,05,595/- (Rs Three Crore Fourteen Lakh Five Thousand Five Hundred and Ninety Five only), under Section 73 (2) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 from M/s Bharat*

Heavy Electricals Ltd. Plot No 7, Tower A, Advan6t IT Park, Floor 5, Sector 142, Noida.

(ii) Interest as leviable on the above amount under Section 75 of the Finance Act, 1994 as amended read with Section 174 of the CGST Act, 2017 from M/s Bharat Heavy Electricals Ltd. Plot No 7, Tower A, Advan6t IT Park, Floor 5, Sector 142, Noida.

(iii) I impose a penalty of Rs 3,14,05,595/- (Rs Three Crore Fourteen Lakh Five Thousand Five Hundred and Ninety Five only) upon M/s Bharat Heavy Electricals Ltd. Plot No 7, Tower A, Advan6t IT Park, Floor 5, Sector 142, Noida under Section 78 of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017 for contravention of the provisions as discussed supra.

In terms of clause (ii) of 2nd proviso to Section 78 (1) supra, if the service tax and interest is paid within a period of thirty days of the date of receipt of this order, the penalty payable by them shall stand reduced to twenty five percent of the Service Tax so determined subject to the condition that the amount of such reduced penalty is also paid within thirty days of the date of receipt of this order."

2.1 We have heard Shri Z U Alvi, advocate for the appellant and Shri Sandeep Pandey, Authorized Representative for the revenue.

2.2 Arguing for the appellant learned counsel submits:

- Appellant is a Public Sector Undertaking, having its units located across India.
- On the basis of investigations conducted, identical show cause notices were issued to their units, demanding service tax on the liquidated damages collected by them during the period 01.07.2012 to 30.06.2017.
- These show cause notices have been adjudicated by the respective jurisdictional Commissioners, confirming the

demand of Service Tax along with interest and alos imposing penalties.

- Appellant have filed appeal against these orders, with CESTAT, and most of these orders have been set aside by the tribunal, as per the orders as detailed in table below:

S No	Authority	Order No	Date	Unit
1	CESTAT, Delhi	50905/2022	20.09.2022	Bhopal
2	CESTAT, Delhi	50879/2022	20.09.2022	Bhopal
3	CESTAT, Delhi	50329/2023	16.02.2023	Haridwar
4	CESTAT, Hyderabad	A/30131-30132/2022	14.09.2022	Hyderabad
5	CESTAT, Chennai	40310/2023	26.04.2023	Trichi
6	CESTAT, Chennai	40311/2023	26.04.2023	PPPU Thirumayam
7	CESTAT, Mumbai	A/85628/2023	26.04.2023	PSWR
8	Addl Commr, Delhi	DLI/SVTax/001/ADC(NR)/ DE/10/2023-24	29.05.2023	Corporate Office, Delhi
9	Commr Chennai	03/2023	08.03.2023	Piping Centre Chennai
10	Jt Commr Hyderabad	10/2023-(ST)	31.07.2023	PSED Hyderabad

- Board has issue Circular No 214/1/2023_ST dated 28.02.2023 clarifying the issue in the favour of the appellant
- Since the issue has been already been settled in favour of the appellant the order in original should be set aside.

2.3 Learned authorized representative re-iterates the findings recorded in the impugned order.

3.1 We have considered the impugned order along with the submissions made in appeal and during the course of the arguments.

3.2 The appellants were issued show cause notice dated 10.04.2018, demanding service tax on liquidated damages for delay in supply contract and service charges as per the written agreement with their suppliers. The relevant paras from the show cause notice are reproduced below:

> *"8.1. In the subject case, M/s. BHEL are collecting the amounts as liquidated damages from the suppliers of goods/services, towards tolerating the act of delayed supply of goods /services beyond due date as per agreements. It appears that with effect from 01.07.2012. amounts received for toleration of such acts attract service tax under Clause (e) of Section 66E of the Finance Act, 1994 read with Section 65B(44), 65B(51), 65B(37), 65B(22) and 66B ibid. M/s. BHEL have recovered liquidated damages penalty while making payment to suppliers/service contractors.*
>
> *8.2. /s. BHEL had shown the amounts recovered as damages from their suppliers/contractors. In respect of all the supplies/contracts wherever there is a delay/slippage of delivery schedule, the damages amounts recovered are recognized and charged on such slippage for the period of delay between the due date of supply of goods / services as per the contractual terms and conditions against the actual date of supply of goods/services. M/s. BHEL has placed purchase orders conscientiously well in advance, and they also knew that if any delay occurs in supply of goods / services liquidated damages have to be paid. These damages are intended as a pre-agreed way to compensate purchaser, who has suffered loss as a result of actions (or in actions) by the supplier. in the instant case, such damages collected/charged from the suppliers/contractors are separately identified as Income under separate nead "Recovery from suppliers/contractors towards penalty damages". So, it cannot be considered as renegotiated price/consideration of goods/service. Hence,*

it appears that the impugned liquidated damages are squarely covered under the Declared Service as per Section 66E(e) of the Finance Act, 1994 and accordingly liable for payment of Service Tax. From the record provided by them it reveals that they have recovered liquidated damages to the tune of Rs. 25,46,99,735/- for the period from 01.07.2012 to 30.06,2017. he Service Tax payable on the amounts/consideration received for rendering such taxable service for the period from 01.07.2012 to 30.06.2017 works out to Rs, 3,58,46,523/- as detailed in the Annexure-A enclosed to this show cause notice. The same appears to be liable for recovery in terms of provisions of Section 73(1) along with interest in terms- of Section 75 of the Finance Act, 1994.

9. In view of the above, Ms. BHEL appears to have contravened the provisions of Finance Act, 1994:

(i) Section 66B of the Finance Act, 1994, as amended, read with Rule 4A of Service Tax Rules, 1994 by not charging the service tax on the value of services provided or to be provided, as discussed supra;

(ii) Section 68 of Finance Act, 1994, as amended ,read with Rule 6 of Service Tax Rules, 1994 by not paying the service tax required to be paid by them on the taxable service provided within the prescribed period at the rates specified in Section 66B ibid; and

(iii) Section 70 of Finance Act, 1994, as amended, read with Rule 7 of Service Tax Rules, 1994 for non-assessment of the taxable value of liquidated damages on which they are required to pay service tax, and failure to declare the value of services rendered in Returns.

10. Grounds for invocation of extended period of demand in terms of proviso to section 73 91) of the Finance Act, 1994 and for imposition of mandatory penalty:-

It is observed that M/s. BHEL is registered with the Department for payment of filing returns on regular basis. Hence, they are fully conversant with Service Tax and are the service tax law and procedures. However, it is observed that they have failed to discharge the appropriate service tax liability on the amounts received towards "Liquidated damages/penalty" and this fact was never brought to the notice of the Department, They have not filed the ST 3 returns correctly by not showing the income from liquidated damages in returns. he statute reposes great faith on the assessee to assess the service tax liability and pay the same on their own. A specific question was posed as to whether service tax was paid on liquidated damages recovered, they have stated that the liquidated damages are one kind of loss to BHEL for non completion of the service / supply contracts and the same being in form of loss / damages, the same does not appears liable to pay service tax. We show the recovery of liquidated damages (LD) as our income under the head of "Recovery from sub contractors / vendors". Thus. it is quite evident that there is additional income generated in the course of provision of services, however the same is not taken into account while calculating their service tax liability under the mistaken belief that it is not taxable, Moreover the liquidated damages falls squarely within the ambit of Declared services.

In the instant case, only on specific intelligence collected by the Departmental Officers the fact of non-payment of service tax, as mentioned supra, has come to light. The non-payment of service tax would have gone unnoticed causing loss to the exchequer but for verification of records which was collected based on intelligence. Thus, it appears that M/s. BHEL have willfully suppressed the facts about the taxable services provided with intention to evade payment of service tax. Their plea of belief that the said amounts of liquidated damages were not chargeable to tax *is an afterthought to cover their willful suppression Therefore, it appears that this is a fit case of invoking proviso to sub- section (1) of Section 73 of the Finance Act, 1994 for demanding Service Tax for extended period of five years along with appropriate interest under Section 75 of the Finance Act, 1994. It also appears that they had suppressed the material facts from the department with intent to evade payment of service tax and also have contravened the various provisions of the Act/ Rules, as mentioned in para supra and therefore, they have rendered themselves liable for penalty under 78 of the Finance Act, 1994*

11. Saving Clause: Even after the enactment of the Central Goods and Services Tax Act, 2017 (CGST ACT, 2017), with effect from 01.07.2017, the provisions of the Finance Act, 1994 pertaining to investigation, inquiry, assessment proceedings, adjudication etc. remain unaffected by virtue of Section 174 (2) of the Central Goods & Services Tax Act 2017 which is reproduced below-

Section 174 of the Central Goods & Services Tax Act 2017

(a) …...

12. And whereas the service tax liability on the Liquidated damages have been worked out on the basis of data/information submitted by M/s. BHEL. Thus_the present notice relates exclusively to the issue of service tax liability of Ms. BHEL on Liguidated damages/Penalty, as per the details provided by them.

13. Therefore, M/s Bharat Heavy Electricals Ltd., Plot No. 7, Tower A, Advant IT Park, Floor-5, Sector- 142, Noida, Gautam Budha Nagar, Uttar Pradesh- 201301 are hereby required to show cause to the Commissioner of Central Goods & Service Tax, Noida, within 30 days of receipt of this notice, as to why;

(i) an amount of Rs. 3,58,46,523/- (consisting of Service Tax, Edu.cess, HE Cess, SBC, KKC) as detailed in Annexure A being the service tax payable on the taxable services rendered by them, during the period from 01.07.2012 to 30.06.2017, should not be demanded from them under proviso to Section 73(1) of the Finance Act, 1994 read with Section 174 of CGST Act, 2017;

(ii) interest should not be paid by them, at the applicable rates, on the amounts demanded at (i) above, in terms of Section 75 of the Finance Act, 1994 read with Section 174 of CGST Act, 2017; and

(iii) penalty should not be imposed on them under Section 76, Section 77 and Section 78 of the Finance Act, 1994 read with Section 174 of CGST Act 2017.

14. M/s. BHEL is also informed that in terms of clause (i) of proviso (2) to Section 78(1) of the Finance Act, 1994 read with Section 174 of CGST Act, 2017, if the amount of Service Tax demanded in the Show Cause Notice is paid along with applicable interest, as prescribed under Section 75 of the Finance Act, 1994 read with Section 174 of CGST Act, 2017, within 30 (thirty) days from the date of communication of the notice, the amount of penalty liable to be paid shall be fifteen percent of the Service Tax demanded, provided that such reduced penalty is also paid within the above period of 30 days from the date of communication of the notice, in which case, all proceedings in respect of the said Service Tax, interest and penalty shall be deemed to be concluded."

3.3 This show cause notice has been adjudicated as per the impugned order referred in para 1 above.

3.4 We find that the same very issue has been considered by the tribunal in the decisions referred to be the counsel for appellant in the case of appellant's different unit, and the matter has been decided in the favour of the appellant, setting aside the demand of service tax. Relevant excerpts from Final Order No 50905/2022 dated 20.09.2022 of the Delhi bench are reproduced below:

2. The issue involved in this appeal is as to whether the charges collected by the respondent towards penalty/late delivery charges can be subjected to service tax under section 66E (e) of the Finance Act, 1994.

3. The respondent is a Central Government Public Sector Undertaking engaged in the manufacture of plant and machinery. According to it, for supply of goods and services to the engineering industry the contractual price representing the price of goods/services is payable by the customer subject to the condition that the delivery of goods/services is effected by the dates specified in the contract failing which the contractual value representing the price of goods/services payable by the buyer stands reduced by a certain amount. This condition of the contract providing for deduction of contractual value is termed as Liquidated Damages Clause.

4. A show cause notice dated 17.04.2018 was issued to the respondent mentioning therein that the respondent was charging and collecting amount in the name of penalty/late delivery charges from the contractors/material supplier on account of delay in supply of goods, delay in execution of work but the respondent was not making payment of the service tax under section 66E (e) of the Finance Act on this amount. The respondent filed a reply denying the allegations made in the show cause notice but the Additional Commissioner, by the order dated 31.03.2019, confirmed the 3 the Finance Act demand of service tax. The respondent filed an appeal before the Commissioner (Appeals) which has been allowed by order dated 19.07.2019.

5. ……

6. Shri Z.U. Alvi, learned counsel appearing for the respondent has submitted that this issue as to whether the *amount collected towards liquidated charges can be subjected to service tax under section 66E (e) of the Finance Act has been decided by a Division Bench of the Tribunal in M/s South Eastern Coal Fields Ltd. Vs. Commissioner of Central Excise And Service Tax, Raipur [2020 (12) TMI 912-CESTAT-NEW DELHI] which was subsequently followed by the Tribunal in M.P. Poorva Kshetra Vidyut Vitran Co. Ltd. Vs. Principal Commissioner, CGST And Central Excise, Bhopal [2021 (2) TMI 821-CESTAT NEW DELHI] .*

7. Learned counsel for the respondent is justified in submitting that the issue stands covered by the Division Bench judgement of the Tribunal in M/s South Eastern Coal Fields Ltd. The Division Bench observed as follows:

"25. It is in the light of what has been stated above that the provisions of Section 66E(e) have to be analyzed. Section 65B(44) defines service to mean any activity carried out by a person for another for consideration and includes a declared service. One of the declared services contemplated under Section 66E is a service contemplated under clause (e) which service is agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. There has, therefore, to be a flow of consideration from one person to another when one person agrees to the obligation to refrain from an act, or to tolerate an act, or a situation, or to do an act. In other words, the agreement should not only specify the activity to be carried out by a person for another person but should specify the : (i) consideration for agreeing to the obligation to refrain from an act; or (ii) consideration for agreeing to tolerate an act or a situation; or (iii) consideration to do an act.

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).

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 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 other party complies with the terms of the contract and a penalty is imposed only if there is non-compliance.

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."

8. The aforesaid decision of the Tribunal in M/s South Eastern Coal Fields Ltd. was followed by a Division Bench of the Tribunal in M.P. Poorva Kshetra Vidyut Vitran Co. Ltd.

9. It, therefore, follows that the liquidated damages collected by the respondent as penalty/late delivery charges cannot be subjected to service tax under section 66E (e) of the Finance Act."

3.5 In view of the above decision and subsequent decisions of the tribunal we do not find any merits in the impugned order demanding service tax on the liquidated damages. As the demand for service tax is set aside so is the demand of interest and penalty imposed.

4.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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