CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70063 of 2020

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-1087-19-20 dated 07/11/2019 passed by Commissioner (Appeals) Central Goods & Service Tax, Noida)

Commissioner of Central Excise &

CGST, Noida **.....Appellant**
(C-56/42, Sector-62, Noida)

VERSUS

M/s Bharat Heavy Electricals Ltd., **....Respondent**

(PPEI Building, Plot No.25, Sector 16A, Noida-201301)

APPEARANCE:

Shri Santosh Kumar, Authorised Representative for the Appellant
Ms Ushmeet Kaur Monga, Advocate for the Respondent

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

FINAL ORDER NO.70562/2024

DATE OF HEARING : 07 August, 2024
DATE OF DECISION : 07 August, 2024

SANJIV SRIVASTAVA:

This appeal filed by the revenue is directed against Order-in-Appeal No.NOI-EXCUS-001-APP-1087-19-20 dated 07/11/2019 passed by Commissioner (Appeals) Central Goods & Service Tax, Noida. By the impugned order, Commissioner (Appeals) has held as follows:-

"Section 65B(44) of the Act which specifically provides that it does not include transactions only in money or actionable claim.
6.3 In coming to the conclusion, I find that the following circulars issued by the CBEC and also the following

decisions of various Courts Tribunals on the issue of service tax on recovery of damages, penal charges etc. are relevant here :-

(a) Vide Circular No. 121/2/2010-S.T., dated 26/04/2010 (F. No. 332/29/2009- TRU), the CBEC has clarified that container detention charges not liable to Service Tax;

(b) Vide Master Circular No. 96/7/2007-S.T., dated 23/08/2007 (F. No. 354/28/2007-TRU), the CBEC has clarified that amount collected for delayed payment of a telephone bill does not form part of the value of taxable service;

(c) Vide Instruction F. No. 137/25/2011-S.T., dated 03/08/2011, the CBEC has clarified that delayed payment charges received by the stock brokers are not includible in taxable value;

(d) The Hon'ble CESTAT, Principal Bench, New Delhi, in the case of Religare Securities Ltd. vs. CST, Delhi [2014 (36) S.T.R. 937 (Tri. Del.)] has held that 'Delayed Payment Charge' collected only in case of overdue payments, as penal interest for compensation of assessee, was not in the nature of commission/brokerage and so, there is no justification for its inclusion in the value of services;

(e) The Hon'ble CESTAT, South Zonal Bench, Bangalore, in the case of Waltair Club vs. CCE&ST, Hyderabad-1 [2014 (35) S.T.R. 402 (Tri. Bang.)] has, prima facie, observed that demand of service tax on penal interest collected from members of club for default in payment is not sustainable;

7. Relating to imposition of late fine of Rs. 40,000/- under Section 70 of the Finance Act 1994 read-with Rule 7C of the Service Tax Rules 1994, I find that ST-3 for the period July 2012 to September 2012 was filed by the appellant online on 10/04/2013, i.e., well before the extended last date of 30/04/2013 and ST-3 for the period October 2012 to March 2013 was filed on 16/08/2013, ie., well before the extended last date of 31/08/2013, which are clearly *indicated in the first pages of the copies of ST-3s submitted by the appellant for verification and therefore, question of imposition of any late fine under Section 70 of the Finance Act 1994 read-with Rule 7C of the Service Tax Rules 1994 does not arise.*

8. Accordingly, I hold that the appellant is not required to pay service tax on 'penalties/liquidated damages' recovered by him and therefore, the demand of service tax with interest on this score and imposition of fine/penalties under sections 70, 77 and 78 of the Finance Act 1944 are not sustainable and the impugned order is liable to be set aside.

9. In view of the above discussions and findings, the impugned Order-in-Original Nos. 07/Addl.Comm./Appeal/Noida/2018-19 dated 20/04/2018 is set aside and the appeal bearing no. 761/ST/Noida/APPL/NOI/2018-19 dated 17/07/2018 filed by M/s. Bharat Heavy Electricals Ltd., PPEI Building, Plot No. 25, Sector-16A, Noida- 201301, U.P. is allowed."

2.1 Appellant is a public sector undertaking and is providing total engineering solutions for conventional thermal and gas based power projects offering complete Engineering, Procurement and Construction projects. Appellant was charging penalties/liquidated damages from the suppliers/vendors in case of delayed delivery of the goods and were not paying any service tax on such amounts. During audit objection was raised to the fact that these charges are subject to levy of service tax.

2.2 Show cause notice dated 05.01.2017 were issued to the appellant asking them to show cause as to why-

a. *Total Service Tax of Rs.1,97,95,096.00 (Rs 1,92,18,540.00 S. Tax Rs.3,84,371.00 Ed Cess + Rs.1,92,185.00 S&H.E. Cess) should not be demanded and recovered from them under proviso to Section 73 (1) of the Finance Act, 1994.*
b. *Interest under Section 75 of the Act ibid on the aforesaid amount should not be demanded,*

c. Late fee should not be imposed upon them under Section 70 of the Finance Act, 1994 read with Rule 76 of the Service Tax Rules, 1994 in case of each default of late submission of ST-3 return during the period of default, and

d. Penalty should not be imposed upon them under Section 77 of the Finance Act, 1994 for contravention of Provisions of Section 658 (44), 66E and 69 of the Finance Act, 1994 read with Rule 4 of Service Tax Rules, 1994.

e. Penalty should not be imposed upon them under Section 78 of the Finance Act 1994 for contravention of Section 68 of the Act read with Rules 6 of Service Tax Rules, 1994 for their act of wilful suppression of taxable value of service to evade payment of correct Service Tax, as mentioned in the preceding paras."

2.3 This show cause notice was adjudicated as per the Order-in-Original dated 20.04.2018 by holding as follows:-

"ORDER

1. *I hereby confirm he demand Rs.1,97,95,096/- (Rupees One Crores, Ninety Seven Lakhs, Ninety Five Thousand and Ninety Six only) under Section 73(1) of the Finance Act, 1994. along with interest under Section 75 of the Finance Act, 1994.*
2. *I impose late fee amounting to Rs. 40,000/-(Fourty thousand only) upon the party under Section 70 of the Finance Act, 1994 read with Rule 7C of the Service tax Rules, 1994 in case of default of late submission of returns for the period July, 2012 to September, 2012 and October, 2012 to March, 2013.*
3. *I impose a penalty of Rs.10,000/- (Rupees Ten Thousand only) under Section 77 of the Finance Act, 1994 for contravention of Section 658(44),66E and 69 of the Finance Act read with Rule 4 of the Service Tax Rules, 1994.*
4. *I impose a penalty of Rs. 1,97,95,096/- (Rupees One Crores, Ninty Seven Lakhs, Ninety Five Thousand and Ninety Six only)under Section 78 of the Finance Act, 1994*

for contravention of Section 68 Of the Act read with Rule 6 of Service Tax Rules, 1994."

2.4 Aggrieved appellant preferred appeal before Commissioner (Appeals) which has been allowed as per the impugned order referred in para-1 above. Aggrieved revenue have filed appeal before this Tribunal.

3.1 We have heard Shri Santosh Kumar learned Authorised Representative appearing for the appellant-revenue and Ms Ushmeet Kaur Monga learned Counsel appearing for the respondent-assessee.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 We find that while deciding this appeal Commissioner (Appeals) has referred to various Board Circular's and also the decisions to arrive at the finding.

4.3 We also note that the issue in this case is no longer res-integra and decided by the decision of Delhi Bench in the case of RAJCOMP INFO SERVICES LTD. [2023 (73) G.S.T.L. 237 (Tri. - Del.)] observing as follows:

"10.*The next issue to decide is whether the appellant is liable to pay service tax on the amount deducted from the payment of various service providers/vendors in the name of liquidated damages for violating terms of agreement entered into.*

11.*It is seen that this issue was examined at length by the Division Bench of the Tribunal in M/s. South Eastern Coalfields Ltd. (supra) and the observations are as follows :*

It is trite that an agreement has to be "27. 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.*

It also needs to be noted that section 28. 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.

The situation would have been different if 29. the party purchasing coal had an option to purchase coal from 'A' or from 'B' and if in such a situation 'A' and 'B' enter into an agreement that 'A' would not supply coal to the appellant provided 'B' paid some amount to it, then in such a case, it can be said that the activity may result in a deemed service contemplated under section 66E(e).

The activities, therefore, that are 30. 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.

xx xx xx

In the present case, the agreements do not 32. specify what precise obligation has been cast upon the appellant to refrain from an act or tolerate an act or a situation. It is no doubt true that the contracts may provide for penal clauses for breach of the terms of the contract but, as noted above, there is a marked distinction between 'conditions to a contract' and 'considerations for a contract'."

12.*We also find that the C.B.I. & C. Circular No. 178/10/2022-GST, dated 3-8-2022 has clarified that "liquidated damages cannot be said to consideration received for tolerating the breach or non-performance of contract. They are rather payments for not tolerating the breach of contract……"*

4.4 Taking note of the above decision which also refers to the Circular dated 03.08.2022 clarifying that service tax could not have been levied on such liquidated damages recovered by the appellant, we do not find any merits in this appeal.

5.1 Appeal filed by the revenue is dismissed.

(Dictated and pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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