CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70321 of 2023

(Arising out of Order-in-Appeal No.NOI/EXCUS/001/APPL-948-2019-20 dated 13/09/2019 passed by Commissioner (Appeals) Central Excise & CGST, Noida)

M/s Simbhaoli Sugar Ltd., **.....Appellant**
(Simbhaoli, Hapur)

VERSUS

Commissioner of Central Excise &

Service Tax, Noida **....Respondent**

(Commissionerate, Noida)

APPEARANCE:

A letter on record, for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70184/2025

DATE OF HEARING & DECISION : 20 February, 2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.NOI/EXCUS/001/APPL-948-2019-20 dated 13/09/2019 passed by Commissioner (Appeals) Central Excise & CGST, Noida. By the impugned order, Commissioner (Appeals) has upheld the Order-in-Original dated 10.01.2018 wherein following has been held:-

"6. Order

6.1 By the dint of the power conferred upon me by the Finance Act, 1994 and the Rules framed thereunder and the Central Goods and Services Tax (CGST) Act, 2017, and in the light of the above discussion and findings thereof, I pass the following order:

(i) I, hereby, confirm the demand of Service Tax of Rs.8,70,000/- (Rupees Eight Lacs Seventy Thousand only) not paid during the financial year 2015-16under the provisions of proviso to Section 73(1) of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017. I also appropriate an amount of Rs.8,70,000/- paid by them vide Service Tax Account Debit Entry No. 1236 dated 28.11.2016.

(ii) I, also, impose an interest of Rs.1,04,000/-(Rupees One Lakh Four Thousand only) as calculated by audit team at appropriate rate of interest on the aforesaid amount under Section 75 of the Finance Act, 1994read with Section 174 of the CGST Act, 2017and also appropriate the interest amount of Rs.1,04,000/-deposited vide challan No. 01152 dated 16.05.2017.

(iii) I, also, impose a penalty of Rs.8,70,000/- (Rupees Eight Lacs Seventy Thousand only)upon them under Section 78 of the Finance Act, 1994read with Section 174 of the CGST Act, 2017 for reason of suppression of facts with the intent to evade aforesaid payment of service tax."

2.1 Appellant is engaged in manufacture of sugar and molasses etc. They were registered with the Central Excise Department and also registered under Service Tax for payment of service tax for the GTA, Manpower/Security Services etc.

2.2 During the course of audit and examination of balance sheet, it was observed that appellant have show miscellaneous receipt of Rs.2,38,08,880/- in their trial balance. On going through this miscellaneous receipt, it was observed that appellant have received Rs.60,00,000/- as miscellaneous receipt which was received by them as late lifting charges of sugar bags as stated by the appellant. It was stated that the said lifting charges were received by them from one of their vendor who had not lifted sugar bags during peak crushing season. These late lifting charges are under the category of declared services under Section 66E(e) of the Finance Act, 1994. Appellant deposited the due tax of Rs.8,70,000/- along with interest of Rs.1,40,000/- but do not deposited any penalty and requested for waiver of the same.

2.3 Show cause notice dated 21.08.2017 was issued to the appellant asking them to show cause as to why-

(i) *the Service Tax on amounting to Rs. 870000 (Rs. Eight Lakhs Seventy Thousand only), as detailed in preceding paras should not be demanded and recovered from them under the provisions of proviso to Section 73(1) of the Finance Act, 1994 and read with Section 174 of CGST Act 2017. Since the party has deposited the said service tax liability, why the same should not be appropriated against the demanded amount.*

(ii) *the interest of Rs. 104000/- (Rs. One Lakh Four Thousand Only) on the aforesaid amounts as shown at (i) above should not be demanded and recovered from them under the provisions of Section 75 of the Finance Act, 1994 and Section 174 of CGST Act 2017. Since the party has deposited the said Interest liability, why the same should not be appropriated against the demanded amount.*

(iii) *the penalty for failure to pay service tax as shown at (i) above for reason of suppression of facts and contravention of the provisions of Service Tax as detailed in preceding paras with intent to evade aforesaid payment of Service Tax, should not be imposed upon them under the provisions of Section 78 of the Finance Act, 1994 read with Section 174 of CGST Act 2017."*

2.4 This show cause notice has been adjudicated as per the Order-in-Original referred in para-1 above.

2.5 Aggrieved appellant have filed appeal before Commissioner (Appeals), which has been disposed of upholding the confirmation of demand and interest which were appropriated in the impugned order. Penalty under Section 78 has been set aside.

2.6 Aggrieved appellant have filed this appeal.

3.1 None appeared on behalf of the appellant, however, a letter has been received on behalf of the appellant.

3.2 I have heard Shri Santosh Kumar Authorized Representative appearing for the revenue, who reiterated the findings recorded in the impugned order

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

4.2 I find that impugned order records as follows:-

> *"3. Being aggrieved, M/s Simbhaoli Sugars Ltd. filed the present appeal on the following grounds:*
>
> *a. That charging the customers for not lifting the sugar by the given dated does not come under the category of section 66(E)(e) of the Finance Act, 1994.*
>
> *b. That any amount received by a person from another on any account could not be liable to Service Tax.*
>
> *c. That the appellant was not involved in clandestine activity and that the taxability of such income is a matter of interpretation and therefore, the ingredients for invoking penal provisions under section 78 of the Finance Act, 1994 was absent.*
>
> *d. That all the transactions were entered in their statutory records and there was no misstatement or suppression of facts in the case.*
>
> *…….*
>
> *6. I have carefully gone through the submission of the appellant, the grounds of appeal and impugned order and find that the amount of late lifting charges recovered from their customer amounting to Rs.60,00,000/- was duly recorded in their books of accounts which was found out by the audit team during the Audit Inspection. Such income, in the opinion of the Department would fall in the category of declared services in terms of section 66(E) of the Finance Act, 1994 in as much as there is an agreement with an obligation to refrain from an act or to tolerate an*

act or to do an act. The late lifting charges is an outcome of the agreement to tolerate an act of not lifting the sugar bags within the agreed upon time period."

4.3 I find that the issue involved in the present appeal is squarely covered by the Board Circular No.178/10/2022 dated 03.08.2022 wherein following has been clarified:-

"2. "Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" has been specifically declared to be a supply of service in para 5 (e) of Schedule II of CGST Act if the same constitutes a "supply" within the meaning of the Act. The said expression has following three limbs: -

a. Agreeing to the obligation to refrain from an act-

Example of activities that would be covered by this part of the expression would include non-compete agreements, where one party agrees not to compete with the other party in a product, service or geographical area against a consideration paid by the other party.

Another example of such activities would be a builder refraining from constructing more than a certain number of floors, even though permitted to do so by the municipal authorities, against a compensation paid by the neighbouring housing project, which wants to protect its sunlight, or an industrial unit refraining from manufacturing activity during certain hours against an agreed compensation paid by a neighbouring school, which wants to avoid noise during those hours.

b. Agreeing to the obligation to tolerate an act or a situation-

This would include activities such a shopkeeper allowing a hawker to operate from the common pavement in front of his shop against a monthly payment by the hawker, or an RWA tolerating the use of loud speakers for early morning prayers by a school located in the colony subject to the school paying an agreed sum to the RWA as compensation.

c. Agreeing to the obligation to do an act-

This would include the case where an industrial unit agrees to install equipment for zero emission/discharge at the behest of the RWA of a neighbouring residential complex against a consideration paid by such RWA, even though the emission/discharge from the industrial unit was within permissible limits and there was no legal obligation upon the individual unit to do so.

3. The description "agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" was intended to cover services such as described above. However, over the years doubts have persisted regarding various transactions being classified under the said description.

3.1. Some of the important examples of such cases are Service Tax/GST demands on –

i. Liquidated damages paid for breach of contract;

ii. Compensation given to previous allottees of coal blocks for cancellation of their licenses pursuant to Supreme Court Order;

iii. Cheque dishonour fine/penalty charged by a power distribution company from the customers;

iv. Penalty paid by a mining company to State Government for unaccounted stock of river bed material;

v. Bond amount recovered from an employee leaving the employment before the agreed period;

vi. Late payment charges collected by any service provider for late payment of bills;

vii. Fixed charges collected by a power generating company from State Electricity Boards (SEBs) or by SEBs/DISCOMs from individual customer for supply of electricity;

viii. Cancellation charges recovered by railways for cancellation of tickets, etc. In some of these cases, tax authorities have initiated investigation and in some advance ruling authorities have upheld taxability.

4. In Service Tax law, 'Service' was defined as any activity carried out by a person for another for consideration. As discussed in service tax education guide, the concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. An activity done without such a relationship i.e., without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration'. The element of contractual relationship, where one supplies goods or services at the desire or another, is an essential element of supply.

5. -----------------

6. This goes to show that the service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such an act. There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.

6.1 A perusal of the entry at serial 5(e) of Schedule II would reveal that it comprises the aforementioned three different sets of activities viz. (a) the obligation to refrain from an act, (b) obligation to tolerate an act or a situation and (c) obligation to do an act. All the three activities must be under an "agreement" or a "contract" (whether express or implied) to fall within the ambit of the said entry. In other words, one of the parties to such agreement/contract (the first party) must be under a contractual obligation to either (a) refrain from an act, or (b) to tolerate an act or a *situation or (c) to do an act. Further some "consideration" must flow in return from the other party to this contract/agreement (the second party) to the first party for such (a) refraining or (b) tolerating or (c) doing. Such contractual arrangement must be an independent arrangement in its own right. Such arrangement or agreement can take the form of an independent stand-alone contract or may form part of another contract. Thus, a person (the first person) can be said to be making a supply by way of refraining from doing something or tolerating some act or situation to another person (the second person) if the first person was under an obligation to do so and then performed accordingly.*

Agreement to do or refrain from an act should not be presumed to exist

7. There has to be an express or implied agreement; oral or written, to do or abstain from doing something against payment of consideration for doing or abstaining from such act, for a taxable supply to exist. An agreement to do an act or abstain from doing an act or to tolerate an act or a situation cannot be imagined or presumed to exist just because there is a flow of money from one party to another. Unless there is an express or implied promise by the recipient of money to agree to do or abstain from doing something in return for the money paid to him, it cannot be assumed that such payment was for doing an act or for refraining from an act or for tolerating an act or situation. Payments such as liquidated damages for breach of contract, penalties under the mining act for excess stock found with the mining company, forfeiture of salary or payment of amount as per the employment bond for leaving the employment before the minimum agreed period, penalty for cheque dishonour etc. are not a consideration for tolerating an act or situation. They are rather amounts recovered for not tolerating an act or situation and to deter such acts; such amounts are for *preventing breach of contract or non-performance and are thus mere 'events' in a contract. Further, such amounts do not constitute payment (or consideration) for tolerating an act, because there cannot be any contract: (a) for breach thereof, or (b) for holding more stock than permitted under the mining contract, or (c) for leaving the employment before the agreed minimum period or (d) for doing something leading to the dishonour of a cheque. As has already been stated, unless payment has been made for an independent activity of tolerating an act under an independent arrangement entered into for such activity of tolerating an act, , such payments will not constitute 'consideration' and hence such activities will not constitute "supply" within the meaning of the Act. Taxability of these transactions is discussed in greater detail in the following paragraphs.*

Liquidated Damages

7.1 Breach or non-performance of contract by one party results in loss and damages to the other party. Therefore, the law provides in Section 73 of the Contract Act, 1972 that when a contract has been broken, the party which suffers by such breach is entitled to receive from the other party compensation for any loss or damage caused to him by such breach. The compensation is not by way of consideration for any other independent activity; it is just an event in the course of performance of that contract.

7.1.1-7.1.4 ----------

7.1.5 Examples of such cases are damages resulting from damage to property, negligence, piracy, unauthorized use of trade name, copyright, etc. Other examples that may be covered here are the penalty stipulated in a contract for delayed construction of houses. It is a penalty paid by the builder to the buyers to compensate them for the loss that they suffer due to such delayed construction and not for getting anything in return from the buyers. Similarly, *forfeiture of earnest money by a seller in case of breach of 'an agreement to sell' an immovable property by the buyer or by Government or local authority in the event of a successful bidder failing to act after winning the bid, for allotment of natural resources, is a mere flow of money, as the buyer or the successful bidder does not get anything in return for such forfeiture of earnest money. Forfeiture of Earnest money is stipulated in such cases not as a consideration for tolerating the breach of contract but as a compensation for the losses suffered and as a penalty for discouraging the non-serious buyers or bidders. Such payments being merely flow of money are not a consideration for any supply and are not taxable. The key in such cases is to consider whether the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a 'supply' within the meaning of the Act, otherwise it is not a "supply".*

7.1.6 If a payment constitutes a consideration for a supply, then it is taxable irrespective of by what name it is called; it must be remembered that a "consideration" cannot be considered de hors an agreement/contract between two persons wherein one person does something for another and that other pays the first in return. If the payment is merely an event in the course of the performance of the agreement and it does not represent the 'object', as such, of the contract then it cannot be considered 'consideration'. For example, a contract may provide that payment by the recipient of goods or services shall be made before a certain date and failure to make payment by the due date shall attract late fee or penalty. A contract for transport of passengers may stipulate that the ticket amount shall be partly or wholly forfeited if the passenger does not show up. A contract for package tour may *stipulate forfeiture of security deposit in the event of cancellation of tour by the customer. Similarly, a contract for lease of movable or immovable property may stipulate that the lessee shall not terminate the lease before a certain period and if he does so he will have to pay certain amount as early termination fee or penalty. Some banks similarly charge pre- payment penalty if the borrower wishes to repay the loan before the maturity of the loan period. Such amounts paid for acceptance of late payment, early termination of lease or for pre-payment of loan or the amounts forfeited on cancellation of service by the customer as contemplated by the contract as part of commercial terms agreed to by the parties, constitute consideration for the supply of a facility, namely, of acceptance of late payment, early termination of a lease agreement, of prepayment of loan and of making arrangements for the intended supply by the tour operator respectively. Therefore, such payments, even though they may be referred to as fine or penalty, are actually payments that amount to consideration for supply, and are subject to GST, in cases where such supply is taxable. Since these supplies are ancillary to the principal supply for which the contract is signed, they shall be eligible to be assessed as the principal supply, as discussed in detail in the later paragraphs. Naturally, such payments will not be taxable if the principal supply is exempt."*

4.4 Through the other Board Circular No.214/1/2023-ST dated 28.02.2023 Board has clarified as follows:-

"An issue has arisen on the levy of service tax on liquidated damages arising out of breach of contract, forfeiture of salary or payment of bond amount in the event of the employee leaving the employment before the minimum agreed period and similar other issues arising out of clause (e) of section 66E of the Finance Act, 1994. Reference has also been invited to Circular No.

178/10/2022-GST dated 3 rd August, 2022 regarding applicability of GST on liquidated damages, compensation and penalty arising out of breach of contract or other provisions of law, and its applicability to service tax related issues.

2. It may be seen that "Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" is a Declared Service as per clause (e) of section 66E of the Finance Act, 1994. A service conceived in an agreement where one person agrees to an obligation to refrain from an act or to tolerate an act or to do an act, would be a 'declared service' under section 66E(e) read with section 65B(44) and would be leviable to service tax.

3. The description of the declared service in question, namely, agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is similar in GST. "Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" has been specifically declared to be a supply of service in para 5 (e) of Schedule II of the CGST Act, 2017.

4. As can be seen, the said expression has three limbs: - i) Agreeing to the obligation to refrain from an act, ii) Agreeing to the obligation to tolerate an act or a situation, iii) Agreeing to the obligation to do an act. Service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such an act. Such contractual arrangement must be an independent arrangement in its own right. There must be a necessary and sufficient nexus between the supply (i.e. agreement to *do or to abstain from doing something) and the consideration.*

5. The issue also came up in the CESTAT in Appeal No. ST/ 50080 of 2019 in the case of M/s Dy. GM (Finance) Bharat Heavy Electricals Ltd in which the hon'ble Tribunal relied on the judgement of divisional bench in case of M/s South Eastern Coal Fields Ltd Vs. CCE Raipur {2021(55) G.S.T.L 549(Tri-Del)}. Board has decided not to file appeal against the CESTAT order ST/A/50879/2022-CU[DB] dated 20.09.2022 in this case and also against Order A/85713/2022 dated 12.8.2022 in case of M/s Western Coalfields Ltd. Further, Board has decided not to pursue the Civil Appeals filed before the Apex Court in M/s South Eastern Coalfields Ltd. supra (CA No. 2372/2021), M/s Paradip Port Trust (Dy. No. 24419/2022 dated 08-08-2022), and M/s Neyveli Lignite Corporation Ltd (CA No. 0051-0053/2022) on this ground.

6. In view of above, it is clarified that the activities contemplated under section 66E(e), i.e. when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are the activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity. Field formations are advised that while taxability in each case shall depend on facts of the case, the guidelines discussed above and jurisprudence that has evolved over time, may be followed in determining whether service tax on an activity or transaction needs to be levied treating it as service by way of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. Contents of Circular No. 178/10/2022-GST dated 3 rd August, 2022, may also be referred to in this regard."

4.5 In case of Mangalam Cement [FINAL ORDER No. 58512/2024 dated 05.09.2024 in Service Tax Appeal No. 50818 Of 2019] Delhi Bench has held as follows:

4. We have heard the Learned Counsel & the Learned Authorized Representative. We note that this issue is no more res-integra. The Learned Counsel reliance on the Tribunal's decision in M/s South Eastern Coal Fields Ltd is justified. The Division bench had held 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).*
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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 goods; and for availing various types of services. The consideration contemplated under theagreements 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 ofimposing 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."

We note that the Tribunal has consistently held that penalty/late delivery charges cannot be subjected to Service Tax Under Section 66E of the Finance Act 1994. Consequently, the impugned order dated 08.01.2019 is set aside.

4.6 In view of the above Board's Circulars and the decision of Delhi Bench, I do not find any merits in the demand confirmed against the appellant and the same is set aside.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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