CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 60565 of 2019

[Arising out of Order-in-Appeal No. APPL/PKL/ST/270/2018-19 dated 27.03.2019 passed by the Commissioner (Appeals), CGST, Panchkula]

M/s HSF Foods Pro Tech Pvt Ltd **......Appellant**
Babwali Road, Sirsa, Haryana 125055

VERSUS

Commissioner of Central Excise, Goods & Service Tax, Rohtak **......Respondent**
SCO No. 6 to 8 & 10, Sector 1, Huda Market,
Rohtak, Haryana 124001

APPEARANCE:

Shri Vikrant Kackria, Advocate for the Appellant

Shri Narinder Singh, Authorized Representative for the Respondent

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60542/2025

DATE OF HEARING: 19.05.2025
DATE OF DECISION: 19.05.2025

P. ANJANI KUMAR :

The present appeal is directed against the Order-in-Appeal No. APPL/PKL/ST/270/2018-19 dated 27.03.2019 passed by the Commissioner (Appeals), CGST, Panchkula, vide which the learned Commissioner (Appeals) has rejected appeal of the appellant.

2. Briefly stated facts of the present case are that the appellant M/s HSF Foods Pro Tech Pvt Ltd are engaged in manufacturing and clearance of Rice Processing Machinery falling under Tariff Heading 84193100 of Central Excise Tariff Act, 1985. During the course of audit, the audit team noticed that the appellant had received income by way of forfeiting advances received from the buyers during the financial years 2013-14, 2015-16 and 2016-17. The department was of the opinion that the amounts received are towards the taxable service under the category "tolerating an Act or situation". A show cause notice dated 11.05.2018, proposing to recover the service tax amounting to Rs.17,60,597/- alongwith interest and penalty, was issued to the appellant. The Assistant Commissioner, CGST Division, Sirsa vide order dated 26.12.2018 confirmed the demand alongwith interest; an equal penalty under Section 78 of the Act, was also imposed. On an appeal, the learned Commissioner (Appeals) has upheld the order of adjudicating authority; hence, the present appeal.

3. Shri Vikrant Kackria, learned Counsel for the appellant submits that the amounts collected by the appellant are not a consideration for any service rendered or to be rendered to the appellant but are deposits taken to safeguard the commercial interest of the appellant against any possible default by the clients; as there is no service rendered and no consideration received for the same, demand cannot be sustained. He relies on the following case-laws:

a) South Eastern Coal Fields Ltd vs. CCE & ST – 2021 (55) GSTL 549 (Tri. Del.)

b) Northern Coalfields Ltd vs. CGST & CE – (2023) 3 Centax 211 (Tri. Del.)

c) Krishnapatanam Port Co. Ltd vs. CCE & ST – 2023 (72) GSTL 259 (Tri. Hyd.)

d) Madhya Pradesh Power Transmission Co. Ltd vs. CGST & CE – (2023) 6 Centax 49 (Tri. Del.)

e) Western Coalfields Ltd vs. CGST & CE – (2023) 4 Centax 271 (Tri. Mumbai)

f) CBIC Circular No. 214/1/2023-ST dated 28.02.2023

g) CBIC Circular No. 178/10/2022-GST dated 03.08.2022

4. Shri Narinder Singh, the learned Authorized Representative for the Revenue reiterates the findings of the impugned order.

5. Heard both sides and perused the records of the case.

6. We find that the issue involved in the present case is no longer *res integra* having been decided by the Tribunal in the case of South Eastern Coal Fields Ltd (supra), wherein the Tribunal has held as under:

> **"24.** What follows from the aforesaid decisions of the Supreme Court in *Bhayana Builders* and *Intercontinental Consultants,* and the decision of the Larger Bench of the Tribunal in *Bhayana Builders* is that "consideration" must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and that the amount charged has necessarily to be a consideration for the taxable service provided under the Finance Act. Any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable. It should also be remembered that there is marked distinction between "conditions to a contract" and "considerations for the contract". A service recipient may be required to fulfil certain conditions contained in the contract but that would not necessarily mean that this value would form part of the value of taxable services that are provided.
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> **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.

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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 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.**"**

7. We also find that the same principle has been followed by the Tribunal in the cases of Northern Coalfields Ltd (supra), Krishnapatanam Port Co Ltd (supra), Madhya Pradesh Power Transmission Co Ltd (supra) and Western Coalfields Ltd (supra).

8. We also find that the CBIC vide Circular No. 214/1/2023-ST dated 28.02.2023 has accepted the decisions of the Tribunal in the cases of South Eastern Coal Fields Ltd (supra) and Western Coalfields Ltd (supra). The CBIC has clarified as follows:

> "**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.
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> **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 3rd August, 2022, may also be referred to in this regard."

9. In view of the above, we are of the considered opinion that as the issue is no longer *res integra*, therefore, the impugned order cannot be sustained. The appeal is, accordingly, allowed.

(Operative part of the order pronounced in the open court)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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