

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 50528 of 2018

(Arising out of Order-in-Original No. RPR/EXCUS/000/COM/ST/063/2017 dated 22.11.2017 passed by the Principal Commissioner, Central Tax, Central Excise & Customs, Raipur)

M/s. Steel Authority of India Ltd.Appellant
(Bhilai Steel Plant), Bhilai Chhattisgarh

VERSUS

**Principal Commissioner, Central Tax,
Central Excise & Customs, Raipur**Respondent

APPEARANCE:

Mr. Shashwat Arya, Advocate for the Appellant
Mr. Rajesh Jain, Authorized Representative of the Department

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

Date of Hearing/Decision: 06.07.2023

FINAL ORDER NO. 50898/2023

JUSTICE DILIP GUPTA

The order dated November 22, 2017 passed by the Principal Commissioner confirming the demand of service tax with interest and penalty for the reason that the amount collected by the appellant on account of liquidated damages, penalty and forfeiture of security deposits would be leviable to service tax under section 65B(44) and section 66E of the Finance Act, 1994¹, has been assailed in this appeal.

2. The appellant, which is engaged in the manufacture of Blooms, Slabs, TMT Bars, Plates, Angles, Joists, Channels and Rails, entered into supply contracts and works contracts with

1. the Finance Act

suppliers/service providers for supply of goods as well as rendering of services to the appellant. The appellant claims that to ensure smooth operations of the business of the appellant and timely execution of the said contracts, clauses relating to liquidated damages, penalty, forfeiture of earnest money/ security deposits were included as part of the terms of such Agreements/Purchase orders and situations in which such charges were collected by appellant have also been stated by the appellant in the following manner:

S.NO.	CONTRACTUAL CLAUSES	SITUATIONS
1.	Liquidated Damages	Delay in completion of work beyond the scheduled time
		Delay in supply of stores, spares and raw materials
2.	Penalty	Poor performance or where job done is not as per specifications
		Supply of poor quality of raw materials, i.e., variation from contract specification
3.	Forfeiture of Security Deposits	Non-performance of the contract

3. The department entertained a view that the collection of the said amount by the appellant under the head of liquidated damages, penalty and forfeiture of security deposits due to non-fulfillment of contractual obligation(s) would be a 'declared service' contemplated under section 66E(e) of the Finance Act.

4. Accordingly, a show cause notice dated June 21, 2016 was issued to the appellant, proposing to recover service tax of Rs.4,62,40,146/- with interest and penalty.

5. The appellant submitted a detailed reply on October 11, 2017 contending that the allegations were not correct and no service tax could be leviable.

6. The Principal Commissioner, by impugned order, confirmed the demand of service tax with interest and penalty.

7. Shri Shashwat Arya, learned counsel appearing for the appellant contended that the issue involved in this appeal has been decided in the case of the appellant itself in **Steel Authority of India Ltd. vs. Commissioner of GST & Central Excise, Salem²**. Learned counsel also placed reliance upon a Circular dated February 28, 2023 issued by Central Board of Indirect Tax and Customs on this issue.

8. Shri Rajesh Jain, learned authorized representative appearing for the department, however, supported the impugned order and contended that the appeal should be dismissed.

9. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

10. The aforesaid decision of the Tribunal in **Steel Authority** would squarely apply to the facts of the present appeal. It is seen that in **Steel Authority** the Tribunal had relied on an earlier decision of the Tribunal in **M/s. South Eastern Coalfields Ltd. vs. Commissioner of Central Excise and Service Tax, Raipur³**.

11. In **South Eastern Coalfields Ltd.**, the Tribunal 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

2. 2021 (55) G.S.T.L. 34 (Tri.-Chennai)

3. 2020 (12) TMI 912-CESTAT, New Delhi

the declared services contemplated under section 66 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.**

29. The situation would have been different if 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).

30. **The activities, therefore, that are 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."**

(emphasis supplied)

12. The Circular dated February 28, 2023 issued by Board also provides that service tax cannot be levied on the amount collected towards liquidated damages. It is reproduced below:

"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 judgment 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.”

(emphasis supplied)

13. In view of the aforesaid decisions of the Tribunal and the Circular, it is not possible to sustain the view taken by the Commissioner that since the task was not completed within the time schedule, the appellant agreed to tolerate the same for a consideration in the form of liquidated damages, which would be subjected to service tax under section 66E(e) of the Finance Act.

14. As service tax could not be levied, the imposition of interest and penalty also cannot be sustained.

15. Thus, for all the reasons stated above, the order dated October 04, 2018 passed by the Commissioner (Appeals) is set aside and the appeal is allowed

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)**