

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH,COURT NO. 1**

SERVICE TAX APPEAL NO. 50460/2018

[Arising out of Order-in-Appeal No. BHO-EXCUS-002-APP-268-17-18 dated 04.10.2017 passed by the Commissioner (Appeals), Central Excise & Customs, Raipur (CG)]

BHAGWATI POWER & STEEL LTD.

Village Siltara, Phase II
Raipur (CG)

Appellant

Vs.

**COMMISSIONER OF CENTRAL EXCISE,
RAIPUR (CG)**

Respondent

Appearance:

Present for the Appellant : Shri Ankur Upadhyay, Advocate

Present for the Respondent: Shri S K Meena, Authorised Representative

CORAM:

HON'BLE Mr.JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE Ms.HEMAMBIKA R. PRIYA, MEMBER(TECHNICAL)

Date of Hearing/ Decision: **07/07/2023**

FINAL ORDER No. 50944 /2023

JUSTICE DILIP GUPTA

The order dated 04.10.2017 passed by the Commissioner (Appeals) confirming the demand raised by the department has been assailed in this appeal.

2. The issue that arises for consideration is whether the amount of Rs.45,68,197/- deducted by the appellant towards the compensation for not supplying the WHR boiler in time can be said to be an activity covered under declared service under section 66E(e) of Finance Act 1994.

3. The records indicate that the appellant had placed a purchase order dated 20.06.2009 upon M/s. Veasons Energy Systems Pvt. Ltd. for supply of boiler but as the boiler was not supplied in time, the appellant deducted certain amount towards compensation. The Commissioner (Appeals) has found that deduction of the amount was an obligation to tolerate the act of delay in supplying WHR boiler on time, which is a situation covered by the definition of 'declared service' under section 66E (e) of the Finance Act.

4. Shri Ankur Upadhyay, learned counsel of the appellant has submitted that the issue involved is covered by the decision of the Tribunal in **South Eastern Coal Fields vs Commissioner of Central Excise and Service tax, Raipur¹** as also by Circular No. 214/2023 Service Tax dated 28.02.2023 issued by the Central Board of Indirect Taxes and Customs and, therefore, the order deserves to be set aside.

5. Learned Authorised Representative appearing for the department has supported the impugned order.

6. Learned counsel for the appellant is justified in submitting that the issue stands covered by the Division Bench judgment of the Tribunal in **M/s South Eastern Coal Fields**. The Division Bench observed as follows:

¹ [2021 (55) GSTL 549 (Tri-Del)]

“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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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. "

7. The Circular dated 28th February, 2023 issued by the Board, on which reliance has been placed, is as follows:

" Subject: Leviability of Service Tax on the declared service "Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" under clause (e) of section 66E of the Finance Act, 1994 - reg.

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 CBIC-110267/14/2023-CX-VIII SECTION-CBEC I/62066/2023 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 3rd August, 2022, may also be referred to in this regard.

7. Difficulty experienced, if any, in implementing the circular should be brought to the notice of the Board. Hindi version will follow.”

(emphasis supplied)

8. In the present case, it is not the case of the department that the agreement provides for a consideration for an obligation to refrain from an act or for agreeing to tolerate an act or a situation. The demand, therefore, could not have been confirmed in view of decision of the Tribunal in **South Eastern Coalfields** and the Circular dated 28.02.2023.

9. The order dated 04.10.17 passed by the Commissioner (Appeals) cannot, therefore, be sustained and is set aside. The appeal is, accordingly, allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER(TECHNICAL)