CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COURT No. IV

SERVICE TAX APPEAL No.54931 of 2023

(Arising out of Order-in-Appeal No.IND-EXCUS-000-APP-97-2022-23 dated 27.02.2023 passed by the Commissioner(Appeals) of CGST & Central Excise, Manik Bagh Palace, Indore -452014)

KORES INDIA LTD.
Plot No.6, Industrial Area, Sector-I,
Pithampur-M.P. **Appellant**

Vs.

COMMISSIONER OF CGST & CENTRAL EXCISE,Indore
Manik Bagh Palance, Indore-452014 **Respondent**

APPEARANCE:
Ms.Tuhina Sinha, Advocate for the Appellant
Mr.Vishwajeet Saharan, Authorised Representative for the Respondent

CORAM:
HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER NO. 51604/2023

Date of Hearing: 22.11.2023

Date of Decision:06.12.2023

The appellant in the present case is engaged in manufacture of dustless chalk, pencil crayons etc. Appellant are also engaged in manufacturing of machines used in coal mining. The appellant is also holding service tax registration for providing taxable services and are also availing the benefit of Cenvat credit on inputs, input services and capital goods under the Cenvat Credit Rules, 2004 (hereinafter referred to as CCR,2004).

2. The Department while scrutiny of appellant's records for the year 2014-15 to June,2017, observed that they have shown an amount of Rs.29,57,753/- as miscellaneous income and receipts under head the "balance written back" in the balance sheet of 2016-17. From further enquiry of ledger, the department found that the appellant has write off above said payable amount to their debtors/vendor of contract drill. Department formed an opinion that the appellants have tolerated the situation and thus are covered under the ambit and scope of declared service as provided under section 66E (e) of the Finance Act, 1994. Resultantly, vide show cause notice F.No.III(10)A-IND/37/CE/Gr.15/C-IV/Kores/18-19/1842 dated 18.02.2020, the service tax amounting to Rs.4,43,663/- on the amount of Rs.29,57,753/- was proposed to be recovered alongwith interest and appropriate penalty. The proposal was confirmed initially vide Order-in-Original No.08/ST dated 31.03.2021, the appeal against the said order has been rejected by the Commissioner (Appeals) vide Order-in-Appeal No.IND-EXCUS-000-APP-97-2022-23 dated 27.02.2023. Being aggrieved, the appellant is before this Tribunal.

3. I have heard Ms.Tuhina Sinha, learned counsel for the appellant and Mr. Vishwajeet Saharan, learned Authorised Representative for the department.

4. It is mentioned on behalf of the appellant that the appellant had given the commitment of performance towards the supplied machines

to the extent that in case the machines supplied by them perform subdued as per the standard committed performance, then the appellant shall be liable to pay to the buyer, in lieu of such under performance of supplied machines. It is submitted that the appellant otherwise has paid excise duty on the machines supplied, at the applicable rate on the full transaction value of supplied goods of Rs.29,57,753/-. The amount on which duty has been proposed is the part of said transaction value on which excise duty stands already discharged. Resultantly, the appellant is not liable to pay Rs.4,43,663/- in the name of service tax merely on the basis of "balance written back" entries amounting to Rs.29,57,753/-. The written back entries were duly in view of the provision towards the performance deduction charges. It is further submitted that from no stretch of imagination, it can be alleged that appellant has tolerated any act. Thus, the show cause notice has invoked a wrong provision. Though it is not the case of act or tolerance, it which is classified as declared service under section 66E (e) of the Finance Act, 1994, even if it had been the tolerance, it would have been on part of the receiver of machines supplied by the appellant. Seen from all of the above submissions, the demand under question is liable to be set aside. No question for imposition of penalty at all arises for want of any malafide intent on the part of the appellant to evade its tax liability. The order under challenge is, therefore, prayed to be set aside and appeal is prayed to be allowed.

5. While rebutting these submissions, learned Authorised Representative has impressed upon the correctness of the finding in the order under challenge. It is submitted that an amount of Rs.29,57,753/-, as received by the appellant, was booked on account of "Other income & Receipts – Excess Provisions/Balances written back" i.e. sundry entry "balance write off", arising out of mutual agreement between them and their debtors/vendors of machine (contract drill). Hence, act of the appellant has rightly been categorized as the declared services. Also for the reason that at the time of sale, the appellant did not book the entire consideration as income, rather had put some consideration as provision for the compensation to future non performance of the machines supplied. Impressing upon, no infirmity in the order under challenge, the appeal is prayed to be dismissed.

6. Having heard the rival contentions and perusing the record, I observe following to with admitted facts:

The appellant had supplied the contracted drill to its vendors with a clause for performance deduction charges in the agreement of supply between the two. The clause reads as follows:

(i) Provision towards the Performance deduction charges:- Noticee have given the commitment of performance towards the supplied machines. In case if supplied machines perform subdued as per the standard committed performance then Noticee would have liable to pay for such under performance of supplied machines.

7. Perusal of this clause in light of other clauses of the agreement makes it clear that the appellant was supposed to write off 20% of the value of machine received by them, after one year of the supply, to their vendors in case the machines perform subdued as per standard committed performance. In light of this provision, the appellant agreed its liability to compensate the receiver of machine in case receiver notices any lacuna in the performance of supplied machine within one year thereof. The appellant thus had made provision for the probable future liability towards the supplied machines. The appellant was showing in its record the said agreed 20% of total sale consideration received, as its contingent liability. In case, the appellant was not found liable for the said contingency, the amount was written back as their income in the records. We also observe that the appellant had discharged the excise duty liability on the entire amount of consideration received for supply of machine including the amount in question.

8. In the light of these observed facts but to adjudicate the impugned demand, foremost we need to know as to whether the above appreciated facts constitute an act of tolerance on part of the appellant such that the appellant has provided the declared service against the aforesaid amount of Rs.29,57,753/-. Section 66E (e) of the Finance Act, 1994 reads as under:- agreed to the obligation to refrain from any act was simply has been agreed by the appellant as discussed above,

"66E. Declared Services. The following shall constitute declared services, namely,:-

(a) …………
(b) …………
(c) …………
(d) …………
(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.”

9. Perusal makes it clear that the appellant has not agreed to tolerate an act or a situation nor has agreed to the obligation to refrain from any act. What has been agreed by the appellant, as discussed above, is commitment of performance towards the machines supplied by them in case those perform subdued as per the standard committed performance. The alleged tolerance, in the given circumstances, is possible on the part of the receiver of machines. Hence, the question of tolerating any act by the appellant does not at all arise. The Appellant, therefore, cannot be held liable for rendering any declared service as defined under section 66E (e) of Finance Act, 1994. The findings to that extent of order under challenge are therefore, not sustainable and are thus liable to be set aside.

10. Coming to the issue of imposition of penalty, it is held that the admitted facts on record and the findings above are sufficient to hold that there is no liability of payment any service tax on the part of the appellant, the question of evasion, thereof, does not at all arises. Penalty is, therefore, not imposable upon the appellant. The presence of any malafide intent to evade becomes irrelevant in the given scenario. Thus, I hold that there is neither any legal basis nor factual with the adjudicating authorities to penalize the appellant. Resultantly, the order imposing penalty is also held liable to be set aside.

11. As consequence of the above discussion, the order under challenge is hereby set aside. The appeal accordingly stands allowed.

(Order pronounced in open court on 06.12.2023)

(DR.RACHNA GUPTA)
MEMBER (JUDICIAL)

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