CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. I

SERVICE TAX APPEAL NO. 52613 OF 2019

[Arising out of the Order-in-Appeal No. BHO-EXCUS-002-APP-047-19-20 dated 25/06/2019 passed by The Commissioner (Appeals), Central Excise, Customs, Raipur (C.G.).]

M/s NMDC Ltd. **Appellant**
Kirandul Complex, Dantewada,
Chhattisgarh – 494 556.

VERSUS

Commissioner of Goods and Service Tax, Raipur Commissionerate, **Respondent**
GST Bhawan Tikrapara, Dhamtari Road,
Raipur (C.G.).

APPEARANCE

Shri Vikas Agarwal, Chartered Accountant, Shri Manish Sachdeva, Chartered Accountant – for the appellant.
Shri Manoj Kumar, Authorized Representative (DR) – for the Department

CORAM : **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51663/2023

DATE OF HEARING : 11.12.2023

JUSTICE DILIP GUPTA

M/s National Mineral Development Corporation Limited[1] seeks to assail the order dated 25.06.2019 passed by the Commissioner (Appeals) by which the order dated 28.12.2018 passed by the Additional Commissioner has been confirmed,

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1. the appellant

except to the extent that the penalty imposed by the Additional Commissioner under section 77 of the Finance Act, 1994[2] has been set aside.

2. It transpires that during the period from July 2012 to June 2017, the appellant had collected the following amount :-

(i) Forfeiture of Earnest Money Deposit/Security Deposit from the customers for breach of contract (short lifting or non lifting of the agreed quantity of goods) ;

(ii) Liquidated Damages/penalties on goods for breach of contract (delayed delivery of goods)

(iii) Liquidated Damages/penalty on contractors (service providers) for breach of the contract terms (delayed performance of services)

3. According to the appellant, the aforesaid charges were collected from the buyers/vendors in terms of the contract when they failed to meet the requirements stipulated in the contracts, such as non-performance of the contracts or delay in performance of the contracts.

4. A show cause notice was issued to the appellant contending that the earnest money deposit/security deposit and liquidated damages collected by the appellant would be against rendering of a service in the nature of "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" as defined under section 66E (e) of Finance Act and so would be leviable to service tax. The appellant filed a detailed reply to the show cause notice and denied the allegations made therein. The Additional Commissioner, by order dated 28.12.2018, confirmed

2. the Finance Act

the demand of service tax. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals), which appeal was dismissed by the order dated 25.06.2019.

5. Shri Vikas Agarwal, learned consultant for the appellant assisted by Shri Manish Sachdeva submitted that :

(i) It is a settled position of law that liquidated damages recovered on account of breach or non-performance of contract are not consideration in lieu of any service, but are in the nature of a deterrent imposed so that such a breach or non-performance is not repeated. In support of this contention learned consultant placed reliance on the decision of the Tribunal in **South Eastern Coalfields** versus **Commissioner of Central Excise and Service Tax**[3], and to other decisions which have followed this decision ; and

(ii) The Circular dated 28.02.2023 issued by Central Board of Indirect Tax & Customs regarding leviability of service tax under section 66E (e) of the Finance Act also answers this issue in favour of the appellant.

6. Shri Manoj Kumar, learned authorized representative appearing for the department has, however, supported the impugned order.

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

8. The impugned order mentions that as the appellant received the amount as consideration for failure on the part of the contractors to honor the terms of the contract or violating the conditions of the contract, it would be taxable under clause (e) of section 66E of the Finance Act.

9. In **South Eastern Coalfields**, the Tribunal held that since liquidated damages recovered on account of breach or non-performance of contract are not consideration for any service, but are in the nature of deterrent imposed so that such a breach or non-performance is not repeated service tax would not be leviable on the amount so collected. The relevant paragraphs of the decision of the Tribunal are reproduced below:

> "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.**
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> 32. In the present case, the agreements do not specify what precise obligation has been cast upon the appellant to refrain from an act or tolerate an act or a situation. It is no doubt true that the contracts may provide for penal clauses for breach of the terms of the contract but, as noted above, there is a marked distinction between 'conditions to a contract' and 'considerations for a contract'.
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> **(emphasis supplied)**

10. The Circular dated 28.02.2023 issued by the Central Board of Indirect Tax and Customs also provides that service tax cannot be levied on the amount collected for the said purpose and 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)

11. In view of the aforesaid decision of the Tribunal in **South Eastern Coalfields** and the Circular dated 28.02.2023 issued by the Central Board of Indirect Tax and Customs, the contention advanced by the learned counsel for the appellant has to be accepted.

12. It is, therefore, not possible to sustain the demand. The order dated 25.06.2019 passed by the Commissioner (Appeals) is, accordingly, set aside and the appeal is allowed.

(Dictated and pronounced in open court.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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