

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

PRINCIPAL BENCH - COURT NO.III

Service Tax Appeal No.53641 of 2018 (DB)

(Arising out of Order-in-Appeal No.BHO-EXCUS-001-APP-204-18-19 dated 31.08.2018 passed by the Commissioner (Appeals), GST, Customs & Central Excise, Bhopal (M.P.))

**Commissioner of CGST, Customs &
Central Excise,**

GST Bhawan, Napier Town,
Jabalpur-482 001 (M.P.).

Appellant

Versus

M/s. Maihar Cement,

(Prop. Century Textile and Industries Ltd.),
P.O.-Sarala Nagar, Maihar,
District –Satna (M.P.)-485 772.

Respondent

AND

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(Prop. Century Textile and Industries Ltd.),
P.O.-Sarala Nagar, Maihar,
District –Satna (M.P.)-485 772.

Respondent

APPEARANCE:

Shri Sangeet Kumar Meena, Authorised Representative for the Appellant/Department.

Shri Sanjay Grover and Shri Shiv Lal Singh, Advocates for the assessee/respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NOs.55582-55583/2024

DATE OF HEARING/DECISION: 08.04.2024

BINU TAMTA:

1. Revenue has filed two separate appeals against the order-in-appeal no.BHO-EXCUS-001-APP-204-18-19 dated 31.08.2018, where the Commissioner (Appeals) held that the accidental damages do not come within the purview of "declared service" and therefore dropped the demand in that regard. On facts both the appeals are identical and involve the same issue, hence we are considering them together.

2. The respondent is engaged in the manufacture of cement. The cement produced by the two plants is dispatched for sale to various locations all over India through more than 50 C & F agents at different locations. The basic role of the C & F agents is to receive the rakes at the unloading points, to unload cement from the rakes to the truck, transport the same to the godown of either the respondent or the Customer as the case may be. The C & F agents were made responsible for loss, damages, short delivery and were liable to compensate the respondent for the loss suffered in that regard. Clause 19 of the agreement with the C & F agents read as under: -

"19. The C & F Agent will be responsible for loss incurred by the Company, if the bags are replaced and or tampered with during clearing and/or at any time when same is in C & F Agent's possession due to negligence or

default on the C & F Agent's part and/or on the part of the C & F Agent's employees."

3. On audit, it was found that during the period July 2012 to March 2016, the respondent dispatched a large volume of cement which was to be handled by the C & F agents and in the course of such handling there were occasional losses which were the responsibility of the C & F agents and the total value of the cement lost or damaged by the C & F agents were recovered by means of a debit entry against the bills of the C & F agents. The above amount of recovery was then reflected in the trail balance of the General Ledger account of the respondent as miscellaneous income. Show cause notice dated 27.11.2017 and 13.11.2017 were issued to the respondent on the allegation that the respondent has recovered charges for :

- "i) cost of cement due to shortage and damages
- ii) "notice pay" recovery in case of employee leaving the job before completing contractual period."

According to the revenue, both these activities are "declared services" and covered under Section 66E(e) of the Finance Act ,1994. The respondent has not paid service tax on such amounts recovered from their C & F agents/Stockists/dealers in lieu of deficient services. Hence, demand of service tax amounting to Rs.80,54,402/- was made along with interest and penalty. On adjudication vide separate orders-in-original dated 07.06.2018 and 13.06.2018, the demand was confirmed, however, on appeal, demand towards cost of cement due to shortage and damages was dropped and the demand towards notice

pay was upheld along with interest. On reviewing the said order, the revenue has filed the present appeals.

4. We have heard Sh. Sangeet Kumar Meena, learned AR for the Revenue and Sh. Sanjay Grover, the learned counsel for the respondent.

5. At the outset, the learned counsel for the respondent referring to the decision in **Neyveli Lignite Corporation Ltd. Vs. Commissioner of Customs – 2021 SCC Online CESTAT 2511 and Madhya Pradesh State Mining Corporation Ltd. Vs. Principal Commissioner, CGST and Central Excise – 2023 (118) GSTR 371** submitted that the issue is no longer res-integra as the same stands decided by this Tribunal. The learned AR agrees that the issue is settled in favour of the respondent.

6. We would like to refer the relevant paragraphs from the decisions in **South Eastern Coalfields** as under:—

“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 respondent 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 respondent 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 respondent 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 respondent 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 respondent 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 respondent 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."

7. Following the aforesaid decision in **Neyveli Lignite Corporation Ltd** (supra), the Tribunal rejected the findings of the Commissioner that since BHEL did not complete the task within the time schedule, the respondent 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 Act. Similarly,

the service tax demand on the liquidated damages on account of breach or non-performance of contract was held to be unsustainable in **Madhya Pradesh State Mining Corporation Ltd**, (supra). In the said decision, the Tribunal took note of the Circular dated 28.02.2023 issued by the Central Board of Indirect Taxes and Customs, which provided that service tax cannot be levied on the amount collected for the said purpose and the Board had decided not to pursue the civil appeals filed before the Apex Court in the case of **South Eastern Coalfields, M/s Paradip Port Trust and Neyveli Lignite Corporation Ltd**. The relevant para of the Circular clarifies as under:

“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 part 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.”

8. Before examining the facts of the present case, we would like to quote the provisions of the Act as under:

“Section 65

In this Chapter, unless the context otherwise requires, --
(25) “clearing and forwarding agent” means any person who is engaged in providing any service, either directly or indirectly, connected with the clearing and forwarding operations in any manner to any other person and includes a consignment agent;

Section 65 B. Interpretations:

In this Chapter, unless the context otherwise requires –

(22) “declared service” means any activity carried out by a person for another persons for consideration and declared as such under Section 66 E;

(44) “Service” means any activity carried out by a person for another for consideration and includes a declared service, but shall not include –

- (a) an activity which constitutes merely, --
 - (i) a transfer of life in goods or immovable property, by way of wale, gift or any other manner; or
 - (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of Clause (29A) of Article 366 of the Constitution; or
 - (iii) a transaction in money or actionable claim;
- (b) a provision of service by an employee to the employer in the course of or in relation to his employment;
- (c) fees taken in any Court or Tribunal established under any law for the time being in force."

Section 66E. Declared Services

The following shall constitute declared services, namely:-

- (e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;"

9. Applying the principle enunciated in **South Eastern Coalfield (supra)**, the intention of the respondent and C&F agents was to despatch the cement to various locations. The purpose of Clause 19 of the agreement was only to ensure that the cement is transported without any loss and therefore the responsibility to incur the loss was of the C&F agent if the bags of cement are replaced or tampered with during transit when they were in the possession of the C & F agent. As held above, the penal clauses are in the nature of providing a safeguard to the commercial interest of the respondent and recovering any sum by invoking the penalty clause is not the reason behind the execution of the contract for an agreed consideration. Thus it is not the intention of the respondent to impose this responsibility on the C & F agent nor is it their intention to get penalised.

10. The transaction between the respondent and the C & F agent does not fall within the definition of "Declared Service" under Section

66E(e) of the Act. It is a simple case of recovery of Cement lost or damaged by the C & F agent. This is neither any 'activity' nor any 'service' by the respondent to the C & F agent. Rather it is the C & F agent who is providing the service and while doing so has undertaken the responsibility to compensate the respondent for any loss or damage on account of negligence on his part. The respondent has only a contractual right to recover for the loss or damage caused to its goods and is not a consideration flowing to the respondent from the C & F agent.

11. The impugned order has been passed in accordance with the Board guidelines extracted from para 8.6.2, which provides that accidental damages due to unforeseen events are not service. The damages are not related to any services as the respondent has not provided any services. The loss is accidental and in that event the respondent has a right to recover the losses.

12. We do not find any error in the impugned order which is in line with the judicial pronouncements and the clarification issued by the Board and hence the same is upheld. Consequently, both the appeals by the Revenue have no merits and are hereby dismissed.

[Operative portion already pronounced in open court].

(Binu Tamta)
Member (Judicial)

(Hemambika R.Priya)
Member (Technical)

Ckp.

