

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

PRINCIPAL BENCH,
COURT NO. IV

SERVICE TAX APPEAL NO. 54751 OF 2023 (SM)

[Arising out of the Order-in-Appeal No. 289 (RLM) ST/JPR/2022 dated 30/12/2022 passed by The Commissioner (Appeals), Central Excise & CGST, Jaipur – 302 005.]

**M/s Rajasthan State Road Development
& Construction Corporation Limited Unit II,**
Setu Bhawan, Jaipur – Agra Bye Pass, Jhalana Doongri,
Jaipur, Rajasthan – 302 004.

Appellant

VERSUS

**Commissioner (Appeals),
Central Excise & CGST, Jaipur**
NCRB, Statue Circle,
Jaipur – 302 005.

Respondent

APPEARANCE

Shri Tushar Sharma, Advocate – for the appellant.
Shri Rohit Issar, Authorized Representative for the Department.

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

FINAL ORDER NO. 55778/2024

DATE OF HEARING/DECISION : 13.05.2024.

RACHNA GUPTA

The present appeal has been filed to assail the order-in-appeal No. 289/2022 dated 22.12.2022 vide which decision has been taken against the present appellant holding that the event of forfeiting the amount of earnest money deposited in financial year 2015-2016 amounts to tolerate an act and submission subsequent disposal of the transfer of the said amount of earnest

money by the appellant will not change the taxability of already occurred event.

2. The facts, in brief, relevant for the purpose are as follows:

That appellant is registered under Service Tax Commissionerate for discharging liability on Works Contract Service as the provider of service and on legal consultancy, rent a cab service, GTA service, as the recipient of service. During the course of audit of appellant's record, the verification of the ledgers of miscellaneous income for the period 2015-2016, department observed that appellant forfeited earnest money of Rs. 1,44,480/- and Rs. 1,68,000/- from M/s H.K. Iron Industries and M/s Marudhar Constructions respectively. The said amount was forfeited in terms of Clause 24 of General Rules and directions for Guidelines of contractor of Rajasthan State Road Development Construction Limited (RSRDC). Forming an opinion that the amount forfeited is an amount for rendering the declared service defined under Section 66E (e) of the Finance Act, i.e., towards agreeing to the obligation to refrain from an Act or to tolerate an Act or a situation or to do an act. Hence vide show cause notice No. 138/2017-2018 dated 29.05.2020 an amount of Rs. 38,623/- is proposed to be recovered from the appellant along with interest and penalty. The said proposal was confirmed initially vide order-in-original No. 33/2021 dated 14.07.2021. The appeal against the said order has been rejected by Commissioner

(Appeals) vide the afore-mentioned order-in-appeal. Being aggrieved, the appellant is before this Tribunal.

3. I have heard Shri Tushar Sharma, learned counsel for the appellant and Shri Rohit Issar, learned departmental representative for the revenue.

4. Learned counsel for the appellant has mentioned that the appellant is PSU engaged in services of construction of civil building and other works for Government of Rajasthan. Being a PSU, the appellant is interested to follow the General Rules (GOR Rules). It is mentioned that during the financial year of 2015-2016 the amount of Rs. 3,12,480/- was erroneously booked as miscellaneous income instead of adjusting the same against the cost of the work. The said amount being the earnest money forfeited, subsequent to receipt of the impugned show cause notice, has been transferred and credited to the respective work and stands returned to the concerned sub-contractor. The benefit of such amount forfeited, therefore, stand passed on to the client. The supporting voucher dated 21.05.2021 was provided to the department dated 09.04.2021, but neither the original adjudicating authority nor the Appellate authority has considered the same. It is submitted that forfeiture of earnest money has already been denied to be an amount for consideration towards rendering 'declared service'. Otherwise also, the amount was not retained by the appellant. The order under challenge is,

therefore, prayed to be set aside and appeal is prayed to be allowed.

5. Rebutting the submissions, learned departmental representative has mentioned that irrespective the appellant had corrected the ledger entry, but the said act does not alter the taxability nor the liability of the appellant towards service tax as has been confirmed vide the order under challenge. Learned departmental representative has relied upon observations of Commissioner (Appeals) in paragraph 6.5 of the order under challenge. Impressing upon no findings the appeal prayed to be dismissed.

6. Having heard the rival contentions I observed and hold as follows :-

Commissioner (Appeals) while adjudicating the appeal before him has actually adjudicated the issue as below :

“Whether or not the amount of earnest money of Rs. 3,12,480/- i.e. forfeited from the contractors is taxable as declared services in terms of Section 66E (e) of Finance Act upon which the appellant was liable to pay an amount of Rs. 38,623/-. The aforesaid issue is observed to have been no more res-integra. This Tribunal has held that forfeiture of earnest money and retention of compensation/liquidation damage for not delivery of purchased goods by the other party is not the ‘declared service’ under Section 66E (e) of Finance Act, 1994 as

it does not amount agreeing to refrain from or tolerating an act. Learned counsel has laid emphasis upon decision in the case of **M/s South Eastern Coalfields Ltd. versus Commissioner of Central Excise and Service Tax, Raipur** reported as **2020 (120) TMI 912 – CESTAT New Delhi** and the decision in the case of **M/s Steel Authority of India Ltd. versus Commissioner of GST & Central Excise, Salem** reported as **2021 (7) TMI 1092 – CESTAT Chennai**. This Tribunal also in case titled as **Tirupati Balaji Furnace Pvt. Ltd. versus Commissioner, CGST, Jaipur** vide order dated 09.11.2021 in appeal No. ST/50105 of 2019 has held as follows :

“The only purpose is for minimum compensation and of forfeiting the earnest money is to ensure that the default act is not undertaken again or repeated. However, from any stretch of imagination the retention of such amount cannot be said to be an act of receiving consideration that too towards toleration of the defaulting act of the other parties. What only appears from retention of the money in question is the expectation of the appellant that other party should comply with the terms of the contract and such other party shall be burdened if there is any non compliance on its part. Hence question of tolerating the act of default as alleged by the Department, does not at all arises”.

7. Once the activity of appellant that is of forfeituring the amount of earnest money is not a declared service, question of retaining said money as consideration for rendering the such service becomes absolutely redundant. Otherwise also it is always the value of service, which is actually rendered that has to be ascertained for the purpose of calculating the service tax payable thereupon. I draw my support from the decision of Hon'ble apex Court in the case of **M/s Bhayana Builders** reported as **2018 (2) TMI 1325**.

8. From the above, it is absolutely cleared that the amount, in question, was not towards rendering the taxable service. In addition, it is also on record that the amount was not actually retained by the appellant. Subsequent to the receipt of show cause notice, the same was transferred to the sub-contractor as is apparent from the General Voucher dated 25.01.2021. The said voucher was submitted with the department along with reply to the show cause notice itself i.e. dated 09.04.2021. Once the activity of the appellant cannot be called as the taxable service as that of rendering the declared service and that the appellant has returned the amount alleged to be a consideration for the said activity the question of any tax liability of the appellant as has been appreciated in paragraph 6.4 and 6.5 of the impugned order under challenge has no sustainability.

9. In view of the entire above observation, the order under challenge is hereby set aside. Consequent thereto the appeal stands allowed.

(Order dictated and pronounced in open court.)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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