CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

SERVICE TAX APPEAL No. 51462 OF 2019

[Arising out of Order in Appeal No. 301 (CRM)ST/JDR/2019 dated 26.03.2019 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jodhpur]

M/s. Hindustan Zinc Limited **...Appellant**
Zawar Mines,
Udaipur (Raj.)

Versus

Commissioner of Customs, **....Respondent**
Office of the Commissioner,
Central Goods & Service Tax Commissionerate
142-B, Hiran Magri,
Sector-11, Udaipur (Rajasthan)

APPEARANCE:
Mr. Shivam Bansal, Advocate for the appellant
Mr. Aejaz Ahmed, Authorized Representative for the Respondent

Coram:
HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 04/11/2024
DATE OF DECISION: 04/11/2024

FINAL ORDER NO.59733/2024

DR. RACHNA GUPTA

The appellant herein is engaged in manufacturing of Bulk Concentrate and Fly Ash. Appellant is also registered under Service Tax for providing/receiving following services:-

1. Goods Transport Services
2. Manpower Recruitment/Supply Agency Service
3. Security Detective Agency Service
4. Rent-a-Cab Scheme Operative Service
5. Renting of Immovable Property Service &

6. Works Contract Service.

2. During the Audit of records of the appellant for the period from April 2014 to March, 2016, the department observed that the appellant has forfeited the amount received in the name earnest money / security deposits of the contractors retaining the said amount as fines and penalties imposed on those various contractors, in the name of liquidated damages for delayed completion of works. The appellant was alleged to have failed to pay the following amount of service tax.

(i) failed to pay Service Tax amounting to Rs.13458/- on the amount of Rs. 1,01,680/- retained through forfeiture of earnest money/security deposits of contractors during the period 2014-15 & 2015-16, which resulted in contravention of section 66 &68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994;

(ii) failed to pay Service Tax amounting to Rs. 9,38,370/-on the amount of Rs. 67,90,263/- retained through fines/penalties from contractors during the period 2014-15 & 2015-16, which resulted in contravention of section 66 868 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994;

(iii) failed to pay Service Tax amounting to Rs. 5,77,857/- on the amount of Rs. 42,88,027/ retained through liquidated damages for delayed completion of works or completion of works beyond permissible limit from contractors during the period 2014-15 & 2015-16, which resulted in contravention of section 66 & 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994;

3. The retained amount is alleged to be an amount of consideration for tolerating the act of poor performance by service providers /contractors.

4. Accordingly vide Show Cause Notice No.30/2016 dated 24.04.2018 service tax amounting to Rs.15,29,685/- on the value received towards providing the declared service defined under section 66 (E)(e) of Finance Act, 1994 was proposed to be recovered as Service Tax alongwith the proportionate interest and the appropriate penalties. The said proposal has initially been confirmed vide Order-in-Original No.25/2018 dated 14.12.2018. The appeal against the said order has been dismissed vide Order-in-Appeal No. 301 (CRM)ST/JDR/2019 dated 26.03.2019. Still being aggrieved, the present appeal has been filed by the appellant.

5. We have heard Mr. Shivam Bansal, ld. Counsel for the appellant and Mr. Aejaz Ahmed, ld. Authorised Representative for the department.

6. Ld. Counsel for the appellant has mentioned that the amount recovered by the appellant is not a consideration for providing any service as for an amount to qualify as consideration there has to be "quid pro quo". However, the appellant had not undertaken any

activity against the recovery of such amount. Hence the retention of amount do not quality to be called as service under section 65 B (44) of the Act. The demand is therefore, not sustainable under section 66 E (e) of the Act. The disputed amounts are mentioned to be nothing but the penal charges which have been recovered by the appellant with the intention to make good for the losses and to also act as a deterrent to ensure that buyer or supplier do not violate the terms of the contract. Above all, there is no independent agreement to refrain or tolerate or to do an act between the parties. Question of applicability of section 66 E (e) of the Act does not at all arise. Ld. Counsel has further submitted that the issue is no longer res-integra. The following decisions have been relied upon:-

i) Pankaj Ispat Ltd. v. CCE, Raipur, Final Order No. 56219/2024 dated 24.7.2024-CESTAT New Delhi

ii) Steel Authority of India Limited v. Pr. Commissioner, Central Tax, CE & Customs, Raipur, Final Order No. 50898/2023 dated 6.7.2023 - CESTAT New Delhi

iii) Bharat Heavy Electricals Ltd. v. Commissioner of CGST, Dehradun - Final Order No. 50329/2023 dated 16.2.2023-CESTAT New Delhi

iv) Northern Coalfields Ltd. v. Commissioner of CGST, CE & Customs, 2023 (71) GSTL 63 (Tri. - Del.)

7. The Show Cause Notice dated 24.04.2018 raising the demand for the period 01.04.2014 to 30.09.2015 is also alleged to be barred by time. It is mentioned that appellant was maintaining all the

records. The demand in fact has been proposed based on the appellant’s data only. There is no element or fraud or suppression as has been established by the Department. The Show Cause Notice is alleged to be barred by time. The order is prayed to be set aside on merits as well as on the grounds of limitation and the appeal is prayed to be allowed.

8. Ld. DR on the other hand has submitted that as per Section 66E(e) of Finance Act, 1994 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'. In the instant case, the service provider have performed act viz. poor performance of work, not meeting the obligations in full, less than expected quality of work, delayed completion of work etc. and hereby resulted in non-compliance of mutually agreed terms in the contract. These acts have been tolerated by the appellant who has deducted certain amount from the Bill amount of the Service Providers for tolerating these acts in. In other words, it is explicit that the appellant has generated this forfeited amount by tolerating the aforesaid act/omission of service providers/contractors. Both the authorities below have confirmed the demand based on these observations only. However, ld. D.R. has conceded that the issue involved herein stands already decided in favour of the appellant and that the issue is no more *res-integra*.

9. Having heard both the parties perusing the decisions relied upon by the appellant we observe that this Tribunal in the case of **South**

Eastern Coal Fields Ltd. vs. CCE & ST, Raipur reported in 2021 (55) GSTL 549 has already held as follows:-

"There is marked distinction between "conditions to a contract" and "considerations for the contract". A service recipient may be required to fulfill certain conditions contained in the contract but that would not necessarily mean that this value would form part of the value of taxable services that are provided. Hence, payment of the impugned 'compensation charges' in the present case merely amounts to fulfillment of the condition envisaged in Para No. 6.5.3 of the Agreement dated 12-7-2011 and not consideration for the said contract [Agreement dated 12-7-2011].

12.*Further, the issue of leviability of Service tax on penalty, liquidated damages, compensation, forfeiture amounts, cancellation charges etc. stands settled by various pronouncements wherein it has consistently been held that the said amounts recovered as charges for breach or non-compliance of contractual terms and conditions cannot be construed as 'consideration' for 'refraining or tolerating an act' and were thus not leviable on Service Tax in terms of Section 66E(e) of the Finance Act, 1994. Reliance in this regard is placed on the following decisions :*

(i) M/s. K.N. Food Industries Pvt. Ltd. v. Commissioner of CGST & Central Excise, Kanpur [2019-VIL-731-CESTAT-ALH-ST] wherein it was held that if a contract provides for an eventuality which is uncertain and also remedy if that eventuality occurs, such charges made towards making good the damages, losses or injuries arising from unintended events cannot be considered to be the payments for any services under Section 66E(e) of Finance Act, 1994.

(ii) M/s. Monnet Ispat & Energy Ltd. v. CCE & ST, Raipur [2018 (9) TMI 1514] - while deciding whether Service Tax liability arises on the UI Charges received by the Company in terms of Section 66E(e) of the Finance Act, 1994, the Court held that UI Charges have been received by the Appellant only in those cases where the buyer has drawn more electricity than what was scheduled for him and does not amount to consideration for declared service.

(iii) M/s. Lemon Tree Hotels v. Commissioner, GST, Central Excise & Customs - 2020 (34) G.S.T.L. 220 (Tri. - Del.)/[2021] 127 taxmann.com 247 (New Delhi - CESTAT) [2019 (7) TMI 676] wherein it was held that 'cancellation charges' collected in lieu of cancellation of booking of hotel room does not attract Service Tax in terms of Section 66E(e) of the Finance Act.

(iv) In M/s. South Eastern Coalfields Ltd. v. CCE & ST, Raipur [supra]-The Tribunal held that the view taken by the Principal Commissioner that penalty amount, forfeiture of earnest money deposit and liquidated damages have been received by the Appellant towards "consideration" for "tolerating an act" leviable to Service Tax under Section 66E(e) of the Finance Act cannot be sustained and also relied on the following decisions of the Hon'ble Supreme Court :

(a) Commissioner of Service Tax v. M/s. Bhayana Builders (P.) Ltd. [2018 (2) TMI 1325] = 2018 (10) G.S.T.L. 118 = [2018] 91 taxmann.com 109/66 GST 320 wherein the Apex Court observed that any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under the Finance Act.

(b) Union of India v. International Consultants and Technocrats [2018 (10) G.S.T.L. 401 (S.C.)] - since Service Tax is with reference to the value of service, as a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the Service Tax payable thereupon.

(v) M/s. M.P. Poorva Kshetra Vidyut Vitran Co. Ltd. v. Principal Commissioner CGST and CE, Bhopal [2021 (2) TMI 821]/2021 (46) G.S.T.L. 409 (Tri. - Del.), wherein the ratio of the decision in the case of M/s. South Eastern Coalfields (supra) was followed and the order confirming the demand of Service Tax on the amount collected towards liquidated damages and theft of electricity was set aside.

10. From the perusal of these decisions it becomes abundantly clear that the issue of considering a forfeited amount as an amount of consideration towards declared services stands already settled in favour of the assessee. The same is already held to not to be the consideration towards rendering declared service defined under section 66E(e) of the Finance Act, 1944. In fact the cancellation of contract itself is held to not to be a service. We find no reason to differ from these findings.

11. We further observe that department also vide Circular No.214/1/2023-ST dated 28th February, 2023 has clarified about leviability of service tax on the declared services, "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 Finance Act, 1994 and has clarified that the activities contemplated under section 66 E (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 agreements specifically refers to such an activity and there is a flow of consideration for this activity. The decision of this Tribunal in the case of Dy. General Manager (Finance), Bharat Heavy Electricals Limited in appeal No.50080 of 2019 wherein the earlier decision of the Tribunal in the case of M/s. South Eastern Coalfields (supra) was dealt with, has been referred in this Circular. The Board has decided to not to file any appeal against the decision in M/s. South Eastern Coalfields (supra). The said decision has also been upheld by Hon'ble Supreme Court vide its order dated 11.07.2023 passed in the case of

Commissioner of Central Excise and Service Tax vs. South Eastern Coal Fields Limited in Civil Appeal No. 2372/2021.

12. In view of the entire above discussion, we hold that the amount retained has wrongly been held to be the amount towards rendering declared service. The order under challenge is therefore set aside and consequent thereto, the appeal is hereby allowed.

[Pronounced in the open Court]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Anita