CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH – COURT NO. 1

Service Tax Appeal No. 52267 Of 2019

[Arising out of Order-in-Appeal No. 463 (CRM)ST/JDR/2019 dated 15.05.2019 passed by the Commissioner (Appeals) of Central Excise & Central Goods and Service Tax, Jodhpur]

M/s Hindustan Zinc Limited : **Appellant**
Sindesar khurd Mines, Dariba, Udaipur (Raj.)

Versus

Commissioner of Central Goods, Service Tax and Central Excise, Customs, Udaipur : **Respondent**
142-B, Sector 11, Hiran Magri, Udaipur
Rajasthan, 313001

APPEARANCE:
Shri Ashutosh Choudhary, Advocate for the Appellant
Shri Harshvardhan, Authorized Representative for the Respondent

CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 50025/2025

Date of Hearing:01.01.2025

Date of Decision:01.01.2025

JUSTICE DILIP GUPTA

The order dated 15.05.2019 passed by the Commissioner (Appeals) dismissing the appeal filed by M/s Hindustan Zinc Limited[1] has been assailed in this appeal. The appeal before the Commissioner (Appeals) was filed for setting aside the order dated 31.12.2018 passed by the Joint Commissioner confirming the demand of service tax and penalty.

1 the appellant

2. A show cause notice dated 18/19 April 2018 was issued to the appellant alleging that the appellant provided a declared service contemplated under section 66 E (e) of the Finance Act, 1994[2] in as much as it deducted an amount from the bills of the contractors in lieu of tolerating the various acts like poor performance or not meeting the obligations in full. Thus, as the amount was retained through forfeiture of earnest money/security deposits, the show cause notice alleges that the appellant has generated the amount by tolerating the acts of service rendered by the service provider/contractors.

3. The Commissioner (Appeals) has confirmed the demand and the relevant portion of the order is reproduced below:

> "5.1. **I find that the appellant shown miscellaneous income 4,48,22,188/- during the period April 2013 to March 2016 on account of amount of 'SD/EMD forfeited and amount of 'fine/penalties recovered' from various contractor's who failed to comply with the condition of contracts within the specified time or non compliance of any condition of contracts in their trial balance sheet.** I further find that the amount collected by the appellant, the 'promisor', from their clients/contractors the 'promisee', tolerated the situation by failing to comply with the condition of contracts within the specified time or non compliance of any condition of contracts, as a result the appellant has to tolerate an act or situation created by their clients/contractors due to non fulfilment of the terms and condition of contract. **Thus the activity falls within the purview of Section 66E (e) of the Finance Act, 1994.** Thus forfeiting/collecting the amount by the 'promisor' i.e. appellant, which was received from the 'promisee' i.e. their

2 the Finance Act

clients/contractors, amounts to tolerating of an act or a situation and hence the amount of Rs. 4,48,22,188/- forfeited/collected during the period April 2013 to March 2016 by the appellant is liable for Service Tax and the activity falls under the purview of Section 66E(e) of the finance Act, 1994.

5.2 I find that the appellant has also contended that in the instant case, that as per Section 65B (44) of the Finance Act, 1994 it is required that there should be in 'activity' in return of the consideration. However in the present case there is no activity by the appellant whatsoever in this case and not even tolerating or agreeing an act, thus there is no service being provided in this case in terms of section 65 B (44).

I find that the appellant has also submitted that in the present case no "activity' has been carried out. I find that in terms of the common understanding the word 'activity' includes an act done, a work done, a deed done, an operation carried out, execution of an act, provision of a facility etc. It is a term with very wide connotation. Activity could be active or passive and would also include for bearance to act. Agreeing to an obligation to refrain from an act or to tolerate an act or a situation has been specifically listed as a declared service under section 66E of the Act.

In view of above, I find that the service provided by appellant, rightly falls under the 'Declared Service' and liable to Service Tax, hence the amount of Service Tax not paid/ short paid by the appellant is recoverable under proviso to Section 73 of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994."

(emphasis supplied)

4. Shri Ashutosh Choudhary, learned counsel for the appellant submitted that the findings recorded by the Commissioner (Appeals) that the appellant had rendered declared service under section 66 E (e) of the Finance Act is not correct and in support of his contention, learned counsel placed reliance upon the decision of this Tribunal in the matter of the appellant itself in **M/s Hindustan Zinc Limited** versus **Commissioner of Customs, Udaipur (Rajasthan)**[3] as also the decision of the Tribunal in **South Eastern Coalfields Limited** versus **Commissioner of Central Excise & Service Tax, Raipur**[4]**.**

5. Shri Harshvardhan, learned authorized representative appearing for the appellant, however, placed reliance upon the Board Circular dated 28.02.2023 issued by the Central Board of Indirect Tax & Customs relating to the provision of section 66E (e) of the Finance Act. Learned authorized representative also placed on record the order dated 11.07.2023 passed by the Supreme Court in the appeal that had been filed by the department against the decision of the Tribunal rendered in **South Eastern Coalfields Limited.** Learned authorized representative pointed out that in view of the statement made by the learned Additional Solicitor of India that that he has instruction to withdraw the appeal, the appeal was dismissed as withdrawn by the Supreme Court by order dated 11.07.2023.

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

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4 2021 (55) GSTL 549 (Tri.-Del.)

7. The issue that is involved is whether the appellant is providing a "declared service" contemplated under section 66E(e) of the Finance Act, which service became taxable w.e.f July 1, 2012. The period of dispute in the present appeal is from April 2013 to March 2016.

8. Section 65B(44) of the Finance Act defines "service" to mean any activity carried out by a person for another for consideration, and includes a declared service, but does not include what is mentioned in (a), (b) and (c). The relevant portion of the definition of "service" is reproduced below:

> **"Section 65B(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 title in goods or immovable property, by way of sale, gift or in 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."

9. "Declared Services" have been defined in section 66E and sub-section(e) of section 66E, which is involved in this appeal, is as follows :

> **"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;

10. The show cause notice and the impugned order indicate that the appellant was charging and collecting an amount under the following two heads:-

(i) the amount retained through the forfeiture of earnest money/security deposits

(ii) the amount retained through fines/penalties from the contractors

11. The Tribunal in **South Eastern Coalfields Limited** observed as follows:-

> **"25. It is in the light of what has been stated above that the provisions of section 66E(e) have to be analyzed.** Section 65B(44) defines **service** to mean any activity carried out by a person for another for consideration and includes a declared service. One of the declared services contemplated under section 66E is a service contemplated under clause (e) which service is agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. **There has, therefore, to be a flow of consideration from one person to another when one person agrees to the obligation to refrain from an act, or to tolerate an act, or a situation, or to do an act. In other words, the agreement should not only specify the activity to be carried out by a person for another person but should specify the:**
>
> **(i) consideration for agreeing to the obligation to refrain from an act; or**
> **(ii) consideration for agreeing to tolerate an act or a situation; or**
> **(iii) consideration to do an act.**

26. Thus, a service conceived in an agreement where one person, for a consideration, agrees to an obligation to refrain from an act, would be a "declared service" under section 66E(e) read with section 65B (44) and would be taxable under section 68 at the rate specified in section 66B. Likewise, there can be services conceived in agreements in relation to the other two activities referred to in section 66E(e).

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.
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> **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).
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> **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.**
>
> xxxxx xxxxx xxxxx xxxxx
>
> **43. It is, therefore, not possible to sustain 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.**
>
> (emphasis supplied)

12. The aforesaid decision of the Tribunal in **South Eastern Coalfields Limited** was followed by the division bench of the Tribunal in the matter of the appellant itself in the decision rendered on 04.11.2024, and the relevant portion of the decision is reproduced below:-

> "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 bell to not to be a service. We find no reason to differ from these findings."

13. This Tribunal, in the aforesaid matter of the appellant, also referred to the Circular dated 28.02.2023 issued by the Central Board of Indirect tax & Customs and the relevant paragraph is reproduced below:-

> "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 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.

14. Thus, as the matter has been settled by decisions of the Tribunal and the Central Board of Indirect Taxes & Customs has also issued a Circular wherein the views expressed by the Tribunal have been accepted, it is not possible to sustain the order dated 15.05.2019 passed by the Commissioner (Appeals). It is accordingly set-aside and the appeal is allowed.

(Order dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

G.Y.