

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
KOLKATA**

REGIONAL BENCH – COURT NO. 2

SERVICE TAX APPEAL NO. 75218 OF 2020

[Arising out of Order-in-Original No. 03/CCE/S.Tax/RKL/20-21 dated 12.05.2020 passed by the Commissioner, Central Goods & Service Tax & Central Excise, Rourkela)

MNH Shakti Limited

Appellant

Versus

**Commissioner, Central Goods And Service
Tax & Central Excise, Rourkela**

Respondent

Appearance

Shri Rajeev Kumar Agarwal, Advocate for the Appellant

Shri K. Chowdhury, Authorized Representative for the Respondent

**CORAM : HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

Date of Hearing : 16.09.2021

Date of Decision : 10 November 2021

Final Order No.75689 / 2021

P.V. Subba Rao:

The appellant, a joint venture company of Mahanadi Coal Fields Ltd, Neyaveli Lignite Corporation and Hindalco Industries Ltd., mines and sells coal. Coal Blocks allocated to the appellant for the purpose by the Government of India in 2005 were cancelled by the Hon'ble Supreme Court vide its order dated 24th September 2014 along with similar allocations to other mining companies. The blocks were thereafter allocated to other companies. Since the appellants and other companies which are similarly placed had already invested in these mines, the Coal Mines (Special Provisions)

Act, 2015¹ and Coal Mines (Special Provisions) Rules, 2015 were enacted which provided for a compensation to be paid by the new allottees to the old ones (such as the appellant) in lieu of the financial loss incurred. Section 9 of CMSPA provides that a part of the proceeds, collected from the new allottees was to be paid to the old allottees as compensation.

2. The appellant received compensation under this Act from the new allottees through the Government. A SCN dated 18.10.2019 was issued by the DG, GSTI, Bhubaneswar alleging that the appellant “tolerated the act of cancellation of coal blocks” by the Ministry of Coal and received a compensation in lieu of the cancellation and that this activity of the appellant appears to be covered by the definition of service as per Section 65B (44) read with 65B (22) and section 66E (e) of the Finance Act, 1994 and hence is chargeable to service tax. Service tax was demanded in the SCN under the proviso to section 73(1) invoking extended period of limitation along with interest under section 75. Penalties were proposed to be imposed under sections 76, 77 and 78 of the Finance Act, 1994. After following the due process, the learned commissioner has issued the impugned order as follows:

- “(i) I confirm the demand of Rs. 2,78,32,500/- (Rupees Two Crore Seventy Eight Lakh Thirty Two Thousand Five Hundred only) (Service Tax of Rs. 2,59,77,000/- Swachh Bharat Cess of R. 9,27,750/- & Krishi Kalyan Cess of Rs. 9,27,750/-) not paid under the proviso to Section 73(1) of the Finance Act, 1994 and Section 73(2) of the Finance Act, 2016 from the Noticee;
- (ii) I order for recovery of interest at applicable rates on the Service Tax as confirmed at sub-para (i) above, under Section 75 of the Finance Act 1994 from the Noticee;
- (iii) I impose penalty of Rs. 10,000/- (Rupees Ten Thousand only) upon the Noticee under Section 77(2) of the Finance Act 1994 for failure to self-assess their service tax liability properly and for failure to declare to

¹ CSMIPA

correct liability in their statutory ST-3 return in contravention of Section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994;

- (iv) I also impose penalty of Rs. 2,78,32,500/- (Rupees Two Crore Seventy Eight Lakh Thirty Two Thousand Five Hundred only), under Section 78(1) of the Finance Act, 1994 for wilful suppression of taxable value of services and wilful contravention of statutory provisions and rules made there-under with the intent to evade payment of Service Tax, on the Noticee. Provided that where the service tax confirmed at sub-para (i) above and the interests payable thereon are paid within a period of 30 (thirty) days of the date of receipt of this order, the penalty payable shall be twenty five percent of the service tax demand confirmed at sub-para (i) above, provided also that the benefit of reduced penalty shall be available only if the amount of such reduced penalty is also paid within a period of 30 (thirty) days of the date of receipt of this order.

3. Aggrieved, the appellant filed this appeal. Learned counsel for the appellant submitted as follows:

- a) The act of cancellation of the coal blocks and consequent receipt of compensation was as per the law pronounced by the Hon'ble Supreme Court and the subsequent CMSPA passed by the Parliament.
- b) The appellant had no choice but to accept the cancellation of the allocation. It is not a case of choice made by the appellant in consideration of the compensation. Part of the losses incurred by the appellant due to cancellation of the allocation was covered by the compensation. Section 66E (e) intends to levy service tax in respect of three activities:
 - Agreeing to the obligation to refrain from an act
 - Agreeing to the obligation to tolerate a situation
 - Agreeing to the obligation to do an act.

The present case falls under none of these categories.

- c) The receipt of compensation is a consequence of the operation of a statute and not the result of any agreement. Service, as per section 65B(44) is "**Any activity carried out**

by a person for another for consideration” . In the present case, the appellant has neither carried out any service nor has it entered into an agreement to tolerate an act or situation for a consideration. What happened was by operation of law and the appellant had no choice but to tolerate and the compensation was also paid by operation of law. It was not the result of any contractual agreement either to render a service or to tolerate an act.

d) As per the explanation (a) to Section 67, ‘Consideration’ includes any amount that is payable for the taxable services provided. Since this is an inclusive definition, Guidance Note dated 20.6.2012 issued by the CBEC has advised that section 2(d) of the Contract Act, 1872 may be referred to. This defines ‘ consideration’ as:

“When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act, or abstinence or promise is called a consideration for the promise.”

In the present case, the appellant has not promised to abstain from doing or tolerate any situation at anybody’s instance and therefore, the compensation received cannot be termed as ‘consideration’.

e) A distinction needs to be drawn between a consideration under a contract and the compensation or damages under a contract. The compensation- either liquidated or unliquidated- cannot be equated with the consideration. While consideration is a result of execution of the contract, the

damages are a result of frustration of the contract. Reliance is placed on the following case laws:

- South Eastern Coal Fields Ltd vs Commissioner of Central Excise Raipur decided by CESTAT Final order no. 51651/2020 dated 22 December 2020.
- K.N. Food Industries Pvt. Ltd. Vs CCE Kanpur 202 (38) GSTL 60- (Tri-All)
- Amit Metalinks Ltd. Vs CCGST, Bolpur 2019-TIOL—3177-CESTAT Kol.
- Lemon Tree Hotels vs CCE, Indore 2020 (34) GSTL 220 (Tri-Del)

f) Invoking extended period of limitation is not correct as none of the elements required to invoke the same have been proved. They have been filing their ST-3 Returns.

g) No penalties can be imposed on the appellant.

4. Learned departmental representative supported the impugned order.

5. We have considered the arguments on both sides and perused the records. It is undisputed that the compensation was received by the appellant. Coal blocks allocated to the appellant as well as to several others were cancelled as per the judgment of the Hon'ble Supreme Court. Thereafter, they were allotted to new companies. From the time they were allotted to the appellant till their cancellation by the Supreme Court, the appellant had invested in mining in these blocks. Similar was the case with other allottees. In order to take care of this situation, CMSPA was passed which provided for payment of compensation to the old allottees by the new allottees. The appellant received such compensation through the Government. The case of the

Revenue is that the appellant is tolerating the act of cancellation and has received this amount as consideration for such tolerance.

6. The question of tolerating something and receiving a compensation for such tolerance pre-supposes that:

- a) the person had a choice to tolerate or not;
- b) the person chose to tolerate;
- c) such tolerance was for a consideration as per an agreement (written or otherwise) to tolerate;
- d) the tolerance was a taxable service.

None of the above elements are present in the present case. The appellant had no choice of tolerating cancellation or not. The appellant has not chosen to tolerate the cancellation. The cancellation was in pursuance of the order of the Supreme Court and not as a result of a contract to tolerate cancellation. There was no consideration for tolerating the cancellation, only a compensation provided for statutorily for the investment made in the mines by the appellant.

7. Even in cases where any amount is received under a contract as a compensation or liquidated or unliquidated damages, it cannot be termed 'Consideration'. This case is not even a case of payment under a contract. Both the cancellation of the allocation of the blocks and the receipt of compensation are by operation of law. They are like the receipt of a compensation when one's land is acquired by the Government in public interest or the payment to a Government employee of an amount equal to the salary for unused leave at the time of his/her retirement. It is unthinkable to say that the land-owner has tolerated the acquisition of his land as per an

agreement and charge service tax on the compensation. Equally unthinkable is to say that the Government employee has tolerated the non-sanction of leave during his service as per an agreement and in consideration, received the leave encashment at the time of retirement and to charge service tax on the amount received as leave encashment. These, cannot be called taxable services of tolerating a situation by any stretch of imagination. No service tax can be levied on the amounts received by the appellant as compensation.

8. Since we have decided the matter in favour of the appellant on merits, we do not find it necessary to examine the question of limitation. For the same reason, all the penalties need to be set aside as well.

9. In view of the above, the impugned order cannot be sustained. The impugned order is set aside with consequential relief, if any, to the appellant.

(Pronounced in open Court on 10 November 2021.)

Sd/
(P.K. Choudhary)
Member (Judicial)

Sd/
(P.V. Subba Rao)
Member (Technical)