IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.75128 of 2017

(Arising out of Order-in-Original No.95/PR.COMMR/ST-I/KOL/2016-17 dated 26.10.2016 passed Principal Commissioner of Service Tax-I, Kolkata)

M/s. M.N.Dastur & Company Private Limited
(P-17, Mission Row Extension, Kolkata-700013.)

...Appellant

VERSUS

Commissioner of Service Tax-I, Kolkata

.....Respondent

(180, Shantipally, Rajdanga Main Road, Kolkata.)

APPEARANCE

S/Shri Rajeev Agarwal, Amit Jain, Sanjay Dixit, all Advocates for the Appellant (s)

Shri J.Chattopadhyay, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 75816/2023

DATE OF HEARING : 5 June 2023
DATE OF DECISION : 23 June 2023

Per : P.K. CHOUDHARY :

The instant appeal has been preferred by the assessee, M/s. M. N. Dastur & Co. Pvt Ltd, assailing Order-in-Original dated 26.10.2016 whereby the Ld. Commissioner, Service Tax, Kolkata, has confirmed demand of service tax of Rs. 74,46,900/- and imposed equivalent penalty for the period from July 2012 to March 2013.The said demand

has been raised under the category of 'Declared Service' under Section 66E(e) of the Finance Act 1994, on the amount received by the Appellant in excess of the purchase price paid for the immovable property, subsequent to cancellation of the agreement to Sale of the said property.

2. Briefly stated, the facts of the case are that the Appellant had entered into two agreements with M/s. Panyam Cements and Mineral Industries Ltd (seller) and M/s. Kare Electronics & Development Pvt Ltd who is the General Power of Attorney Holder(the confirming party) for purchase of 25 residential flats along with 25 car parking spaces and other amenities. The development of property was entrusted to one M/s. Salarpuria Properties Private Limited (the Developer).The entire purchase price of Rs. 9,97,50,000/- was paid in advance. The above facts are evidenced by two 'Agreement to Sell' which were executed on 29.03.2006 and 10.08.2006, forming part of the Appeal Paper Book.

The development of the property was inordinately delayed due to dispute between the confirming party, seller and the developer. The dispute continued and subsequently a Suit for Specific Performance under the Code of Civil Procedure was filed by the Confirming Party against the seller and the developer before the City Civil Court in Bangalore on 23.08.2010. Subsequently on 27.08.2012, the parties to the dispute informed the City Civil Court that they have reached a compromise and the compromise agreement was recorded on 21.09.2012. The Appellant in the wake of uncertainty of development of the project even after six and a half years, the pending dispute between the seller and developer, decided to cancel the agreement of sale and the two cancellation agreements each dated 10th August 2012 were executed.

In pursuance to the said cancellation agreements the Appellant received a compensation of Rs. 6,02,50,000/- over and above the advance paid at the time of agreement to sell. The contention of the

Revenue is that the Appellant has agreed to an obligation to refrain from an act i.e. execution of the initial agreement, and/or agreeing to an obligation to tolerate an act, done by the first party i.e. delaying in execution of the initial agreements by agreeing to cancel the initial agreements in lieu of compensation amount; and thus the receipt of said compensation will be covered as a declared service under Section 66E(e) of the Act.

3. Sri Sanjay Dixit and Sri Amit Jain, both CA and Sri Rajeev Agarwal, Advocate appeared for the appellant and Sri J. Chattopadhyay, Ld. A/R appeared for the Revenue.

4. The Counsel appearing for the appellant submits that the intention of the appellant was only to purchase the residential property for which it had entered into the two agreements to sell with the sellers. The subsequent cancellation of these original agreements was neither even thought of at the time of entering into these agreements nor was even provided in the agreements to sell. They submit that it was never the intention of the appellant to receive compensation by cancelling the agreement to sell which arose due to the acts of the seller and developer which was never envisaged at the time of entering into the agreement. They relied on the decision of the Tribunal in the case of M/s Madhya Pradesh Poorva Kshetra Vidyut Vitaran Company Limited v Commissioner of CGST & Central Excise 2022 (67) GSTL 86 (Tri-Del)to submit that scope of coverage under the provisions of Section 66E(e). They further submit that the appellant came to know that an out of court settlement has been reached between the disputing sellers and developers whereby the Confirming Party in terms of the compromise may assign its rights to the Developer for a consideration. The said act cannot be said to be covered under the provisions of Declared Service, as contended by the Revenue. Apart from the submissions on merits, they also contested the demand on limitation.

5. The Ld. A/R for the revenue reiterated and justified the findings made by the Ld. Commissioner and prayed that the appeal be rejected since devoid of any merit.

6. We have elaborately heard both sides and perused the case records. The issue to be decided in this case is whether cancellation of the 'Agreement to Sell' and subsequent excess amount received over and above the payment made by the appellant for purchase of the immovable property is a 'consideration' against 'declared service' as per Section 66E(e) of the Finance Act, introduced w.e.f. 1st July 2012. We find that the provisions contained in Section 66E(e) has been elaborately dealt by the co-ordinate Bench of the Tribunal in the case of M/s Madhya Pradesh Poorva Kshetra Vidyut Vitaran Company Limited (Supra), wherein the judgment in the case of South Eastern Coalfields Ltd. v Commissioner of Central Excise and Service Tax, Raipur, Service Tax Appeal No. 50567 of 2019 decided by Final Order No 51651/2020 dated 22.12.2020was relied by the Tribunal. It has been observed therein that there is a distinction between a "consideration under a contract" and the "compensation for failure to fulfill the contract". It has also been held that while the consideration is paid for doing something by one party at the desire of the other party and is thus the result of the performance of the contract whereas, on the other hand, 'compensation' or damages is paid when one party fails to perform his part and is thus the result of frustration of contract and/or not performing the contract. It is relevant to extract Para 6 :

> *"6………What is chargeable to service tax under Section 66 E (e) as a declared service is where the very purpose of the contract is tolerance of an Act or a situation. If (A) agrees with (B) to tolerate an act or situation for a consideration, it is covered under Section 66E (e) as declared service. However, if A agrees with B to do something and f ails to do so and pays liquidated damages for his failure, it is not*

covered under Section 66E(e) as a declared service. ***What is chargeable to service tax is where the tolerance itself is the purpose of the contract.*** *Liquidated damages are a compensation for failure of the defaulting party to perform as per the contract. Therefore, no service tax can be levied on liquidated damages received under any contract. We find no reason take a different view in this case."*

7. We find that in the present case, the appellant had paid the entire purchase price to the sellers who were in turn duty bound to carry out the development of the property within a reasonable period of time and immediately thereafter execute the Sale Deed in favour of the appellant. However, they failed to perform their part of the obligation. The appellant came to know that an out of court settlement has been reached between the disputing sellers and developers whereby the Confirming Party in terms of the compromise may assign its rights to the Developer. The appellant agreed to cancel the two agreements for a lump-sum payment, a portion of which was compensation, which can at best be said to be for the damages/compensation of loss of interest on funds invested solely due to the non-fulfilment on the part of the seller and its associates.

8. The entire case of the Department for raising demand, as evident from Para 7.7 of the adjudication order, is that the appellant has received 'compensation' by way of cancellation of the subject agreement, which fact is on record and not in dispute. In view of the decision of the Tribunal in the case of Madhya Pradesh Poorva Kshetra Vidyut Vitaran Company Limited (Supra) which is squarely applicable to the facts of the present case, we are of the considered view that the receipt of compensation cannot, by any stretch of imagination, fall under the provisions of Declared Service under Section 66E(e) of the Finance Act.

In view of above, the impugned order cannot be legally sustained and hence, set aside. The appeal is thus allowed with consequential relief as per law.

(Order pronounced in the open court on 23 June 2023.)

Sd/

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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