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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 76423 of 2019

(Arising out of Order-in-Original No. 50/COMMR/CGST & CX/KOL/NORTH/2018-19 dated 31.01.2019 passed by the Commissioner of CGST & CX, Kolkata North, GST Bhawan 180, Shantipally, Rajdanga Main Road, Kolkata – 700 107)

M/s. Bharat Heavy Electricals Limited : Appellant
BHEL Bhawan,
Plot No. 9/1, Block-DJ, Sector-II,
Salt Lake City, Kolkata – 700 091

VERSUS

Commissioner of C.G.S.T. and Central Excise : Respondent
Kolkata North Commissionerate,
GST Bhawan, 180, Shantipally, Rajdanga Main Road,
Kolkata – 700 107

APPEARANCE:

Shri Harsh Gadodia, Chartered Accountant for the Appellant

Shri Tariq Sulaiman, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76616 / 2024

DATE OF HEARING / DECISION: 07.08.2024

ORDER: [PER SHRI ASHOK JINDAL]

The demand of Service Tax has been confirmed against the appellant under Section 66E(e) of the Finance Act, 1994, on liquidated damages recovered by the appellant from the service recipient. The Revenue sought to demand Service Tax under the said provisions discussed hereinabove and a Show Cause Notice was issued to the appellant. Accordingly, the matter was adjudicated and the demand of Service Tax was confirmed by way of the impugned order. Against the said order, the appellant is before us.

2. Heard the parties.

3. We observe that the said issue has already been dealt with by this Tribunal in the case of *M/s. National Aluminium Co. Limited v. Principal Commissioner, C.G.S.T. & Central Excise, Bhubaneshwar vide Final Order No. 75658 of 2024 dated 21.03.2024 in Service Tax Appeal No. 75739 of 2021 (CESTAT, Kolkata) [2024 (6) TMI 763 – CESTAT, Kolkata]* wherein it has been held that no Service Tax is payable by the appellant.

3.1. The same view has also been taken by the Tribunal, Principal Bench, New Delhi in the appellant's own case vide *Final Order No. 50905 of 2022 dated 20.09.2022 in Service Tax Appeal No. 52744 of 2019 (CESTAT, New Delhi)* wherein it was observed as under: -

> *"7. Learned counsel for the respondent is justified in submitting that the issue stands covered by the Division Bench judgement of the Tribunal in M/s South Eastern Coal Fields Ltd. The Division Bench observed as follows:*
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> > *"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.*

40. It is in this context and in the context of Section 74 of the Contract Act, that the Supreme Court observed :

"20. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract for predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated."

8. The aforesaid decision of the Tribunal in M/s South Eastern Coal Fields Ltd. was followed by a Division Bench of the Tribunal in M.P. Poorva Kshetra Vidyut Vitran Co. Ltd.

9. It, therefore, follows that the liquidated damages collected by the respondent as penalty/late delivery charges cannot be subjected to service tax under section 66E (e) of the Finance Act."

4. As the issue is no longer *res integra*, therefore, we hold that on the liquidated damages recovered by the appellant, the demand of Service Tax confirmed against the appellant in the impugned order is not

sustainable as penalty / late delivery charges cannot be subjected to Service Tax under Section 66E(e) of the Finance Act, 1994.

4.1. Accordingly, we hold that no penalty is imposable on the appellant.

5. In view of this, we set aside the impugned order and allow the appeal with consequential relief, if any.

(Dictated and pronounced in the open court)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd