CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>MUMBAI</u>

REGIONAL BENCH - COURT NO. 01

Service Tax Appeal No. 85355 Of 2018

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-435/2017-18 dated 09.10.2017 passed by Commissioner of Central Tax (Appeals-I), Pune)

Thermax Ltd. .....**Appellant**
D-13, MIDC Industrial Area, A R Aga Road,
Chinchwad, Pune – 411 019.

VERSUS

Commissioner of Central Excise & Service Tax-Pune-I .....**Respondent**
41A, ICE House, Sassoon Road,
Opp Wadia College, Pune- 411 001.

<u>Appearance:</u>

Shri Sachin Mishra, Advocate for the Appellant
Shri Priyesh Bheda, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M. M. PARTHIBAN KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87230/2023

Date of Hearing: 13.10.2023
Date of Decision: 13.10.2023

PER : S. K. MOHANTY

Briefly stated, the facts of the case are that the appellant herein is *inter-alia*, engaged in manufacture and trading of various equipment such as boilers, heaters, pollution control equipment etc. During the disputed period July, 2012 to September, 2015, the appellant had collected "notice pay" from its employees as a compensation for breach of the terms of employment agreement by the employees and for failure on the part of such employees, who serves the appellant during the notice period. The appellant did not pay service tax on the amount recovered as notice pay from its employees. On verification of the records maintained by the appellant, the department interpreted that by collecting the notice pay from the employees, the appellant had tolerated the act of such employees in failing to serve during the notice period and therefore, such activity squarely falls under the ambit of 'declared service' under Clause (e) of Section 66E of the Finance Act, 1994. On the basis of such interpretation, the department had issued the show cause notice (SCN) dated 31.08.2016, proposing for recovery of service tax demand of Rs. 31,34,931/- along with interest and for imposition of penalties on the appellant. The matter was adjudicated by the Assistant Commissioner of Service Tax, Pune vide Order-in-Original No. PI/STD/Demand/69/2016-17 dated 08.02.2017, in confirming the proposals made in the SCN. On appeal against the said adjudication order, the learned Commissioner (Appeals-I), Pune vide Order-in-Appeal No. PUN-EXCUS-001-APP-435-2017-18 dated 06.10.2017, has re-quantified the demand on account of cum-tax benefit and reduced the demand of service tax to Rs. 27,81,004/- along with interest and penalty. Feeling aggrieved with the impugned order, the appellant has preferred this appeal before the Tribunal.

2. Heard both sides and examined the case records.

3. The 'notice pay' collected by the appellant in the present case is merely a compensation for breach of employment agreement by the employee and is not a consideration for provision of any contractual service. Therefore, in our considered view, in absence of any consideration, there can be no agreement to tolerate an act. Further, the sum which is payable in pursuance of the contractual obligation, is different, from a sum payable under breach of contractual obligation. Hence, the notice pay, payable by an employee on breach of its contractual obligation cannot be treated as a payment for any obligation on the part of the appellant towards the employee. We find that the issue arising out of the present

dispute is no more *res integra*, in view of the judgement dated 07.11.2019 delivered by the Hon'ble Madras High Court in the case of *GE T & D India Limited (formerly Alstom T & D India Limited) Vs. Deputy Commissioner of Central Excise* reported in 2020 (35) G.S.T.L. 89 (Mad.). While answering to the question as to whether, service tax is leviable on the notice pay collected by the employer from the employee, the Hon'ble Madras Court in the said cited judgement has held as under:

> ***"10.*** *The provisions of Section 66E(e) appear to have given rise to some ambiguity, on this very issue, clarified by the Central Board of Excise and Customs (C.B.E. & C.) in C.B.E. & C.s' Guidance Notes dated 20-6-2012. At para 2.9.3 the Board states as follows :*
>
>> *2.9 Provision of service by an employee to the employer is outside the ambit of service.*
>>
>> *2.9.3. Would amounts received by an employee from the employer on premature termination of contract of employment be chargable to service tax?*
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>> *No. Such amounts paid by the employer to the employee for premature termination of a contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of employment. Hence, amounts so paid would [not] be chargeable to service tax. However any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act.*
>
> ***11. …………***
>
> ***12.*** *Though normally, a contract of employment qua an employer and employee has to be read as a whole, there are situations within a contract that constitute rendition of service such as breach of a stipulation of non-compete. Notice pay, in lieu of sudden termination however, does not give rise to the rendition of service either by the employer or the employee."*

4. Further, the issue involved in the present case has also been dealt with by the Tax Research Unit in the Department of Revenue, Ministry of Finance under the GST regime. The following clarification was furnished vide Circular No.178/10/2022-GST dated 03.08.2022:

"<u>Forfeiture of salary or payment of bond amount in the event of the employee leaving the employment before the minimum agreed period</u>

7.5 An employer carries out an elaborate selection process and incurs expenditure in recruiting an employee, invests in his training and makes him a part of the organization, privy to its processes and business secrets in the expectation that the recruited employee would work for the organization for a certain minimum period. Premature leaving of the employment results in disruption of work and an undesirable situation. The provisions for forfeiture of salary or recovery of bond amount in the event of the employee leaving the employment before the minimum agreed period are incorporated in the employment contract to discourage non-serious candidates from taking up employment. The said amounts are recovered by the employer not as a consideration for tolerating the act of such premature quitting of employment but as penalties for dissuading the non-serious employees from taking up employment and to discourage and deter such a situation. Further, the employee does not get anything in return from the employer against payment of such amounts. Therefore, such amounts recovered by the employer are not taxable as consideration for the service of agreeing to tolerate an act or a situation."

5. In view of the judgement referred above and the circular issued by the Ministry, we do not find any merits in the impugned order, insofar as it has confirmed the adjudged demands on the appellant. Therefore, the impugned order is set aside and the appeal is allowed in favour of the appellant.

(Operative part of the order pronounced in the open court)

(S. K. Mohanty)
Member(Judicial)

(M. M. Parthiban)
Member (Technical)

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