# IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

## Service Tax Appeal No.40046 of 2020

(Arising out of Order-in-Original No. 23/2019 (C) dated 30.8.2019 passed by the Commissioner of GST and Central Excise, Chennai South)

**Chennai Metro Rail Ltd.** **Appellant**
Admin Building, CMRP Depot
Poonamallee High Road
Koyambedu, Chennai – 600 107.

Vs.

**Commissioner of GST & Central Excise** **Respondent**
Chennai South Commissionerate
5th Floor, MHU Complex
692, Anna Salai
Nandanam, Chennai – 600 035.

**And**

## Service Tax Appeal No.40058 of 2020 and Service Tax Miscellaneous Application (CO) No. 40366 of 2023

(Arising out of Order-in-Original No. 23/2019 (C) dated 30.8.2018 passed by the Commissioner of GST and Central Excise, Chennai South)

**Commissioner of GST & Central Excise** **Appellant**
Chennai South Commissionerate
5th Floor, MHU Complex
692, Anna Salai
Nandanam, Chennai – 600 035.

Vs.

**Chennai Metro Rail Ltd.** **Respondent**
Admin Building, CMRP Depot
Poonamallee High Road
Koyambedu, Chennai – 600 107.

**APPEARANCE:**

Shri P. Ravindran, Advocate for the Appellant-Assessee
Shri Rudra Pratap Singh, ADC (AR) for the Respondent-Department

**CORAM**

**Hon'ble Shri P. Dinesha, Member (Judicial)**
**Hon'ble Shri M. Ajit Kumar, Member (Technical)**

Final Order No.40778 & 40779/2023

Date of Hearing : 18.08.2023
Date of Decision: 12.09.2023

**Per M. Ajit Kumar,**

Appeal No. ST/40046/2020 filed by Chennai Metro Rail Ltd. (CMRL) and Appeal No. ST/40058/2020 is filed by Revenue and cross-objection in Misc. Application No. 40366 of 2023 filed by the assessee CMRL are against the impugned order passed by Commissioner of GST and Central Excise, Chennai South Commissionerate vide Order in Original No. 23/2019 dated 30.8.2019 (impugned order).

2. Brief facts of the case are that Chennai Metro Rail Ltd. herein after referred to as CMRL, is a joint venture between the Government of India and the Government of Tamil Nadu that builds and operates Chennai Metro, which is proposed to be a rapid transport system serving the city of Chennai, Tamil Nadu. CMRL were centrally registered with the erstwhile Service Tax Commissionerate, Chennai. Intelligence developed by the officers of Directorate Generate of GST Intelligence, Chennai Zonal Unit revealed that CMRL have not paid service tax on the consideration received by them for tolerating the non-performance of agreed obligations by their contractors. It appeared that the Performance Guarantee executed in the form of Bank Guarantee was encashed by CMRL for violation of agreed obligations and that it is a consideration received by CMRL from the contractors for tolerating the financial loss due to non-performance of the contractors. Besides that, CMRL have retained / collected consideration as liquidated damages for non-performance and failure to comply with the agreed obligation by various contractors / sub-contractors. It appeared to the department that CMRL is liable to pay service tax of Rs.14,31,75,822/- and Rs.23,72,71,674/- on the taxable

amounts received and retained by CMRL along with interest for not paying their service tax liability within the prescribed time and on account of various acts of omission and/or commission on their part have rendered themselves liable to penalty under section 76, 77 and 78 of the Finance Act, 1994. It also appeared that Shri P.K. Parthiban, Joint General Manager (Finance) is instrumental in the contraventions by CMRL leading to loss of revenue. Therefore, a Show Cause Notice dated 29.9.20218 was issued to demand the service tax amount of Rs.14,31,75,822/- received through encashment of performance Guarantee / Bank Guarantee and Rs.23,72,71,674/- towards collected/ retained as liquidated damages during the period along with interest and for imposition of penalties under various sections of Finance Act, 1994 on the appellant as well as the Joint Managing Director shri P.K. Parthiban. After due process of law, the Adjudicating Authority vide the order impugned dropped the proceedings relating to Performance Guarantee holding that the amount of Rs.115.8 crores is a compensation for the huge default of the contractors and no service tax is payable on the same and that the argument of the assessee claiming it to be an 'actionable claim' is sustainable. As regards the activity of collecting liquidated damages, the Adjudicating Authority held that it is an act of agreeing to an obligation to tolerate the act and situations created by the contractors, the appellant is liable to pay service tax being a declared service under section 66E(e) read with Section 65B(22) of the Finance Act, 1994 confirmed the demand of Rs.20,81,25,159/- being the service tax payable on the liquidated damages / retention money collected during the period from 2013 –

14 to 2017-18 (upto June 2017) under section 73(2) of the Finance Act, 1994 along with appropriate interest under sec. 75. The adjudicating authority also imposed equal penalty under section 78 of the FA. The penalty proposed under section 78A against the Joint Managing Director Shri P.K. Parthiban was dropped by the adjudicating authority holding that he is not a signatory to the contracts and neither to the bank guarantee nor the collection of liquidated damages.

3. Aggrieved against confirmation of service tax demand of Rs.20,81,25,159/- along with interest and imposition of equal penalty by the Adjudicating Authority, CMRL has filed Appeal No. ST/40046/2020. Revenue has filed Appeal No. ST/40058/2020 against the dropping of demand of Rs.14,31,75,822/- pertaining to encashment of performance / Bank Guarantee which is a consideration for an act of agreeing to an obligation to tolerate all the acts and situations under section 66E(e) of the Act. We take up both the appeals against the impugned order for disposal together.

4. We have heard Shri P. Ravindran, learned counsel for the Chennai Metro Rail Ltd. and Shri Rudra Pratap Singh, learned Additional Commissioner (AR) for the Revenue.

4.1 Shri P. Ravindran, learned counsel submitted that the Appellant M/s Chennai Metro Rail Ltd, (hereinafter referred to as CMRL) is a joint venture between the Government of India and the State Government of Tamil Nadu with equal partnership. It builds and operates Chennai Metro, the elevated & underground rail network in the city of Chennai towards fulfilling its mission of meeting the modern transportation needs of the citizens of Chennai. CMRL engages various companies as

contractors to execute specified works for CMRL given the high cost of the project involved and in public interest. The contracts entered into between CMRL, and the contracting entities require clear and strict clauses on performance and provision for compensation and even termination in the event of breaches by the contracting parties. The contracts inter alia stipulated scheduled time for the completion of each activity of the work and any delay in execution shall attract liquidated damages. Since certain contractors failed to execute work as per the terms of contract, CMRL retained some amount towards liquidated damages and invoked bank guarantees for the slippage of the scheduled performance on the civil contracts. The Service Tax Department has sought to recover service tax on the amount retained by CMRL as damages from the contractor on the basis that the amount retained as damages was consideration for tolerating breach of contract and was allegedly liable to service tax under section 66E(e) of Finance Act 1994. The Appellants are now in Appeal before the Hon'ble Tribunal. He further submitted that out of the sum of Liquidated damages involved in the SCN of Rs. 170,72,40,005/-, the balance of liquidated damages as on date is Rs. 27,46,21,489/-. The contractor-wise details are as follows –

| Sl. No. | Name of the Contractor | Liquidated damages amount as per SCN | Liquidated damages amount adjusted against CAPEX | Liquidated damages balance as on 09-08-2023 |
|---|---|---|---|---|
| 1 | ALSTOM TRANSPORT INDIA LIMITED | 7,12,81,442 | - | 8,51,948 |
| 2 | CONSOLIDATED CONSTRUCTION CONSORTIUM LTD | 17,70,75,188 | - | 17,70,75,188 |

| Sl. No. | Name of the Contractor | Liquidated damages amount as per SCN | Liquidated damages amount adjusted against CAPEX | Liquidated damages balance as on 09-08-2023 |
|---|---|---|---|---|
| 3 | GAMMON OJSC MOSMETROSTROY JOINT VENTURE | 67,49,990 | - | 67,49,990 |
| 4 | ITD CEMENTATION INDIA LIMITED | 94,00,877 | 15,00,000 | - |
| 5 | KIRTI STRUCTURAL CONSULTANTS PVT LTD | 5,00,000 | - | - |
| 6 | LARSEN & TOUBRO LTD | 61,42,39,941 | - | 50,00,000 |
| 7 | MOTT MC DONALD PVT LTD | 21,81,175 | - | - |
| 8 | NCC LIMITED | 3,42,67,773 | 40,00,000 | - |
| 9 | NATIONAL RAILWAY EQUIPMENT CO. (NERC) | 84,24,722 | - | 84,24,722 |
| 10 | SARASWATHI ENGINEERING CONSTRUCTION PVT LTD | 7,58,882 | - | - |
| 11 | SIEMENS INDIA LTD | 16,60,39,818 | - | - |
| 12 | SIEMENS AKTIENGESELLSCHAFT | 19,04,12,561 | - | - |
| 13 | SIMPLEX INFRASTRUCTURES LIMITED | 3,00,000 | - | - |
| 14 | TIRUCHITAMBALAM PROJECTS LTD | 58,51,456 | 10,00,000 | 5,50,001 |
| 15 | TRANSTONNELSTROY AFCONS JOINT VENTURE | 18,14,70,000 | - | 7,49,70,000 |
| 16 | AFCONS INFRASTRUCTURE LTD | 16,60,00,000 | - | - |
| 17 | URC CONSTRUCTION PVT LTD | 4,92,86,180 | 39,00,000 | 10,00,000 |
| 18 | METRO TUNNELING CHENNAI L&T - SUCG JV | 2,30,00,000 | - | - |
| | **Total amount** | **1,70,72,40,005** | **1,04,00,000** | **27,46,21,849** |

That there have been important legal developments since filing of the Appeal. The Central Board of Indirect tax & Customs (CBIC) has issued Circular 178/10/2022-GST dated 3-8-2022 & Circular No. 214/1/2023-Service Tax dated 28-02-2023 (covering service tax & GST) accepting non-taxability of damages recovered on account of breach of contract.

Further the ratio of a catena of case laws was in favour of the Appellant, as listed:

a) Neyveli Lignite Corporation Ltd. Vs. Commissioner, Chennai -2021 (53) G.S.T.L. 401 (Tri. - Chennai)

b) Northern Coalfield Ltd. Vs. Commissioner, Jabalpur - 2023 (71) G.S.T.L. 63 (Tri. - Del.)

c) South Eastern Coalfields Ltd. Vs. Commissioner, Raipur - 2021 (55) G.S.T.L. 549 (Tri. - Del.)

d) Commissioner of Service Tax Vs. Repco Home Finance Ltd. - 2020 (42) G.S.T.L. 104 (Tri. - LB)

e) Northern Coalfields Ltd. Vs. Commissioner, Jabalpur - 2023 (71) G.S.T.L. 63 (Tri. - Del.)

f) Paradip Port Trust Vs. Commissioner - 2022 (62) G.S.T.L. 186 (Tri. - Kolkata)

g) Krishnapatnam Port Co. Ltd. Vs Commissioner of GST, Guntur -2023 (72) G.S.T.L. 259 (Tri. - Hyd.)

h) Steel Authority of India Ltd. Vs Commissioner of GST, Salem - 2021 (55) G.S.T.L. 34 (Tri. - Chennai)

He stated that the cumulative effect of the CBIC Circular dated 03.08.2022 and the Tribunal case laws is in favour of the stand of the Appellant that there is no service tax liability on damages for breach of contract. He prayed that the Tribunal may be pleased to set aside the demand for duty along with interest and the penalty imposed.

4.2 Shri Rudra Pratap Singh, learned Additional Commissioner (AR) for the Revenue stated that 'actionable claim' is defined under sec. 3 of the Transfer of Property Act 1882. According to which, actionable claim means, a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of

moveable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing confidential or contingent. He took us through Section 66E of the Finance Act 1994 and stated that as per section 66E(e) agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act, constituted 'declared service'. Since CMRL had received a consideration for tolerating the delay in execution of the projects contracted by them it amounted to a service and they were liable to pay service tax on the same. He stated that service tax liability on damages for breach of contract may be upheld and suitable orders passed.

5. We have carefully gone through the appeal and heard the rival parties. It is the Departments charge that a breach of contract by the contractors/ sub-contractors, whenever it occurred, was tolerated by the appellant and accordingly they have received consideration in two ways, one by way of collection/ retention of liquidated damages and secondly by way of encashment of performance guarantees. Hence the main issue to be decided is the legality of demand for service tax under section 66E(e) of Finance Act 1994, on the monies received for allegedly tolerating breach of contract through encashment of performance Guarantee / Bank Guarantee and that collected/ retained as liquidated damages for non-performance and failure to comply with the agreed obligation by various contractors / sub-contractors.

5.1 Section 65B(44) defines 'service' to mean any activity carried out by a person for another for consideration and includes a declared

service. The contract entered into by the appellant with the contractors/ sub-contractors is not aimed at any activity to receive compensation by a breach of contract, similarly it cannot be said that it was the intention of the contractors to breach or violate the contract and incur a loss. Hence there is no agreement/ contract between the parties involving a consideration to be received for a service provided by the appellant which will attract service tax. We find that the issue is no longer res intigra and has been clarified by the CBIC itself as per the Circulars cited by the appellant. The relevant portion of **Circular No. 214/1/2023-Service Tax dated 28-02-2023** is reproduced below.

> *"2. It may be seen that "Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" is a Declared Service as per clause (e) of section 66E of the Finance Act, 1994. A service conceived in an agreement where one person agrees to an obligation to refrain from an act or to tolerate an act or to do an act, would be a 'declared service' under section 66E(e) read with section 65B(44) and would be leviable to service tax.*
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> *3. . . . .*
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> *4. As can be seen, the said expression has three limbs: - i) Agreeing to the obligation to refrain from an act, ii) Agreeing to the obligation to tolerate an act or a situation, iii) Agreeing to the obligation to do an act. Service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such an act. Such contractual arrangement must be an independent arrangement in its own right. There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.*
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> *5. The issue also came up in the CESTAT in Appeal No. ST/ 50080 of 2019 in the case of M/s Dy. GM (Finance) Bharat Heavy Electricals Ltd in which the hon'ble Tribunal relied on the judgement of divisional*

*bench in case of M/s South Eastern Coal Fields Ltd Vs. CCE Raipur {2021(55) G.S.T.L 549(Tri-Del)}. Board has decided not to file appeal against the CESTAT order ST/A/50879/2022-CU[DB] dated 20.09.2022 in this case and also against Order A/85713/2022 dated 12.8.2022 in case of M/s Western Coalfields Ltd. Further, Board has decided not to pursue the Civil Appeals filed before the Apex Court in M/s South Eastern Coalfields Ltd. supra (CA No. 2372/2021), M/s Paradip Port Trust (Dy. No. 24419/2022 dated 08-08-2022), and M/s Neyveli Lignite Corporation Ltd (CA No. 0051-0053/2022) on this ground.*

*6. In view of above, it is clarified that the activities contemplated under section 66E(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 agreement specifically refers to such an activity and there is a flow of consideration for this activity. Field formations are advised that while taxability in each case shall depend on facts of the case, the guidelines discussed above and jurisprudence that has evolved over time, may be followed in determining whether service tax on an activity or transaction needs to be levied treating it as service by way of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. Contents of Circular No. 178/10/2022-GST dated 3 rd August, 2022, may also be referred to in this regard.*

*(emphasis added)*

In the case of the CMRL, Revenue has not pointed out any such contractual arrangement which is an independent arrangement in its own right to receives damages by tolerating breach of contract. The amounts retained towards liquidated damages and also invoked as bank guarantee are not a consideration for tolerating breach of contract. Any amount, which is not a consideration for provision of service, cannot be subjected to service tax. We hence do not agree that CMRL had received a consideration for tolerating the delay in execution of the projects contracted by them. The benefit of the CBIC circular and the judgments mentioned in the circular and by the appellant are applicable to this case. A demand for service tax on the monies received through encashment of performance Guarantee /

Bank Guarantee and that collected/ retained as liquidated damages for non-performance and failure to comply with the agreed obligation by various contractors / sub-contractors, hence fails. This being so the demands for duty along with interest made and the penalties imposed by the impugned order are required to be set aside and so ordered.

6. Having regard to the discussions on merits above, against the impugned order, Appeal No. ST/40046/2020 filed by the appellant succeeds and is allowed and Appeal No. ST/40058/2020 filed by Revenue fails. The appeals and cross objection are ordered to be disposed off accordingly. The appellant is eligible for consequential relief, if any, as per law.

(Pronounced in open court on 12.09.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

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