

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. I

Service Tax Appeal No. 50080 of 2019

[Arising out of Order-in-Original No. 19/COMMR/ST/BPL-I/2018-19 dated 29.09.2018 passed by the Commissioner, Central Goods & Service Tax, Customs & Central Excise, Bhopal]

Dy. GM (Finance)

Appellant

Bharat Heavy Electricals Ltd.,
(Excise & Taxation Division),
Block-VI, Annexe WWGF,
P.O. Piplani Bhopal-462022.

Versus

**Commissioner of Customs & Central Excise,
Bhopal**

Respondent

35-G, GST Bhawan, Arera Hills,
Jail Road, Bhopal-462011.

Appearance

Shri Z.U. Alvi, Advocate - for the Appellant

Shri Ravi Kapoor, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/Order: 20.09.2022

Final Order No. 50879/2022

Justice Dilip Gupta:

This appeal has been filed by the Dy. General Manager (Finance) of Bharat Heavy Electrical Limited Bhopal¹ to assail the order dated 28.09.2018 passed by the Commissioner, CGST & Central Excise, Bhopal by which the demand of service tax for the period July 2012 to March 2017 has been confirmed with interest and penalty.

1 the appellant

2. The issue involved in this appeal is as to whether the charges collected by the appellant towards penalty/late delivery charges can be subjected to service tax under section 66E (e) of the Finance Act, 1994².

3. The appellant is a Central Government Public Sector Undertaking engaged in the manufacture of plant and machinery. According to it, for supply of goods and services to the engineering industry the contractual price representing the price of goods/services is payable by the customer subject to the condition that the delivery of goods/services is effected by the dates specified in the contract failing which the contractual value representing the price of goods/services payable by the buyer stands reduced by a certain amount. This condition of the contract providing for deduction of contractual value is termed as Liquidated Damages Clause.

4. A show cause notice dated 15.09.2017 was issued to the appellant mentioning therein that the appellant was charging and collecting amount in the name of penalty/late delivery charges from the contractors/material supplier on account of delay in supply of goods, delay in execution of work but the appellant was not making payment of the service tax under section 66E (e) of the Finance Act on this amount. The appellant filed a reply denying the allegations made in the show cause notice but the Commissioner, by the order dated 28.09.2018, confirmed the demand of service tax.

5. Shri Z.U. Alvi, learned counsel appearing for the appellant has submitted that this issue as to whether the amount collected

² the Finance Act

towards liquidated charges can be subjected to service tax under section 66E (e) of the Finance Act has been decided by a Division Bench of the Tribunal in **M/s South Eastern Coal Fields Ltd. Vs. Commissioner of Central Excise And Service Tax, Raipur**³ which was subsequently followed by the Tribunal in **M.P. Poorva Kshetra Vidyut Vitran Co. Ltd. Vs. Principal Commissioner, CGST And Central Excise, Bhopal**⁴.

6. Shri Ravi Kapoor, learned authorised representative appearing for the Department, however, has supported the impugned order.

7. Learned counsel for the appellant 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:

"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.

3 2020 (12) TMI 912-CESTAT-NEW DELHI

4 2021 (2) TMI 821-CESTAT NEW DELHI

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 appellant as penalty/late delivery charges cannot be subjected to service tax under section 66E (e) of the Finance Act.

10. The impugned order dated 28.09.2018 passed by the Commissioner, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Dictated & Pronounced in open Court)

(Justice Dilip Gupta)
President

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

RM