CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. I

SERVICE TAX APPEAL NO. 50022 OF 2020

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-31-12-20 dated 30.09.2019 passed by the Principal Commissioner, Central Excise & Service tax, Jaipur]

RAJCOMP INFO SERVICES LIMITED **Appellant**

Vs.

PRINCIPAL COMMISSIONER, CGST & CENTRAL EXCISE-JAIPUR I **Respondent**

APPEARANCE:

Ms. Shagun Arora, Advocate for the Appellant
Shri Harshvardhan, Authorized Representative for the Department

CORAM:
HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING : 27 January, 2023
DATE OF DECISION : 14 February,2023

FINAL ORDER No. 50124 /2023

PER HEMAMBIKA R PRIYA

Service Tax Appeal No. 50022 of 2020 has been filed by M/s Rajcomp Info Services Limited to assail the order-in-original dated September 30, 2019 wherein the service tax of an amount of Rs.99,98,02,107/- (Rs.98,34,83,774 + Rs.1,63,18,333/- inclusive of all cesses) and penalty of Rs.9,99,80,210/- was confirmed. This order adjudicates the Show Cause Notice dated 30.09.2019 issued for the period 01.04.2016 to 30.06.2017 demanding service tax and appropriate interest and penalty under the relevant sections of the Finance Act, 1994.

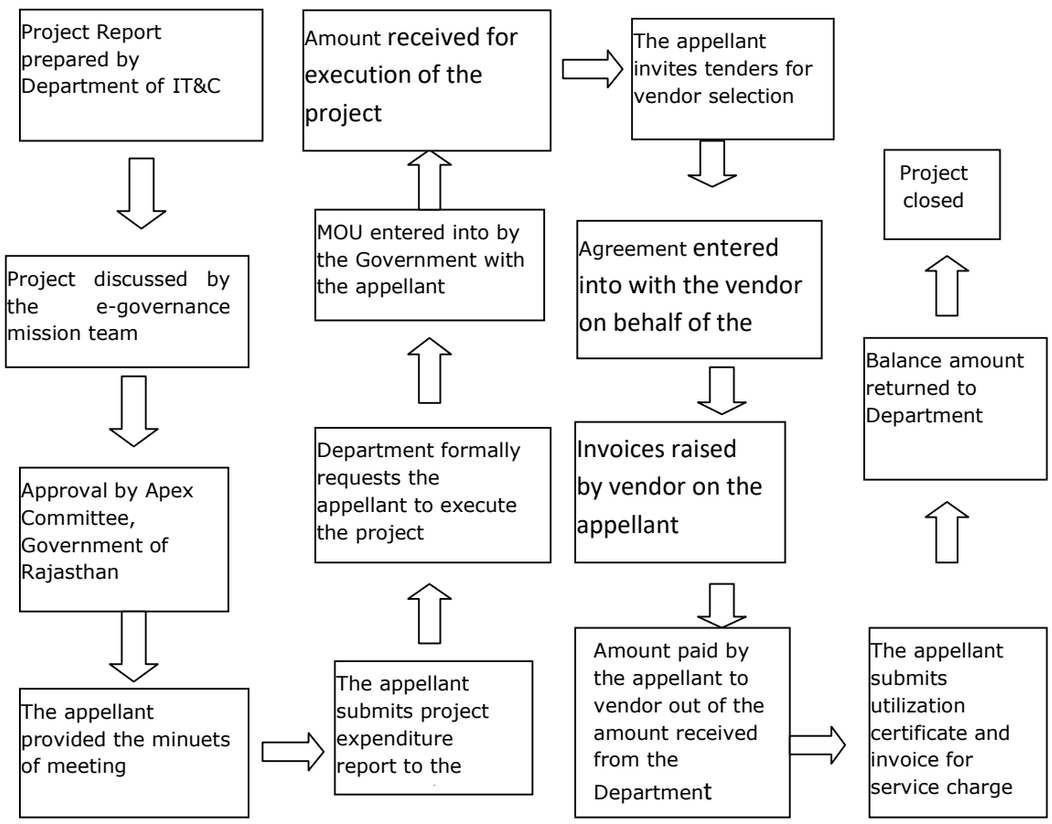
2. The appellant is a wholly owned undertaking of the Government of Rajasthan, and acts as a nodal agency in the

implementation of various Information and Technology projects of the State Government. The process for undertaking a project was as follows:

The State e-governance mission team accords administrative and financial approval to a Information and Technology project. Thereafter, Memorandum of Understanding is entered between the Appellant and the Department of Information Technology and Communication (hereinafter referred to as Department of IT & C), Government of Rajasthan. The memorandum specifies the role of the appellant, of being responsible for the complete implementation of the project. Advance amount is released to the appellant for such implementation, and any interest earned on the advance amount is utilised as part of the project. Then, the appellant issues the Notice for Tender/Request for Proposal for selecting an implementing agency. On selection, the appellant enters into a contract with the vendor for implementation of the project. The vendor raises invoices which includes VAT and Service tax, which is paid by the Appellant through payment sanction orders. The appellant raises invoices, including service charges, to the Government of Rajasthan. Upon completion of the project, the unutilized amount is returned to the Government of Rajasthan.

3. The Learned counsel for the Appellant elucidated that the schemes being implemented by the appellant as a nodal agency, are predominantly oriented towards technological advancement of the various Departments of the State Government. The concerned Department of the State Government, along with the Department of Information Technology & Communications prepares a report for a project. This report is given sanctity by the Apex Committee of the State Government, subsequent to which a project estimate is assigned. Considering the expertise of the appellant in execution of such projects, a formal request is extended to the appellant by the Department of IT&C for implementing the project. Thereafter, the appellant floats tenders on behalf of the

concerned Department of the State Government and awards the work to one or more vendors for supply of goods and/or services. The vendor is thereafter reimbursed out of the funds sanctioned by the Department of the State Government. Wherever the appellant recovers a separate service charge from the Departments of the State Government, service tax is paid thereon, which fact has not been disputed by the Revenue. The process involved in the execution of the project has been succinctly explained in the flow chart as below:-



4. As regards the issue of service tax leviability on Liquidated Damages, the learned Counsel informed that the issue is no longer Res integra in as much as the amount received by the appellant and paid to the vendors and the liquidated damages have been held to be not susceptible to service tax by the Tribunal in the appellant's own matter. Dealing with the identical issue of taxability of amounts collected by the appellant for payment to vendors for implementation of government projects, it

was held that the appellant was acting only as a nodal agency to supervise and monitor the execution of the project. On this aspect, it was held that the amount paid to the appellant was for acting as Pure Agent.

5. The learned Authorised Representative in his submissions reiterated the findings of the adjudicating authority. He also drew the attention of the Bench to the final order of the Tribunal in the case of appellant, which had since been challenged before the Supreme Court vide Civil Appeal 6715 - 6717/2021. He further informed that the Supreme Court vide order dated 12. 12. 2022 has admitted the appeal of the Central Board of Indirect Taxes and Customs, though no stay had been granted. He prayed for setting aside the appeal. In the interest of fairness, the learned Authorised Representative highlighted the Tribunal's decision in **Northern Coalfield Vs Commissioner**[1] wherein reliance was placed on this Tribunal's decision in **South Eastern Coalfield Vs Commissioner of C. Ex & Service Tax, Raipur**[2] which had decided identical issue in favour of the Appellant. Attention was also drawn to the CBIC Circular no. 178/10/2022-GST dated 03.08.2022 regarding the applicability of goods and service tax on liquidated damages, compensation and penalty arising out of breach of contract in the context of 'agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act'.

6. We have heard the learned Counsel for the appellant and the learned Authorised Representative.

7. The two main issues being agitated by the Appellant are the following:

(i) Demand of service tax on the gross amount/consideration being received by the Appellant for execution of IT projects for the Government of Rajasthan

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1 2023 (1) TMI 934-CESTAT New Delhi
2 2021 (55) GSTL 549 (Tri-Del) decided on 22.12.2020

(ii) Demand of service tax on amount deducted in the name of liquidated damages for violating the terms of Agreement.

8. We observe that the present appeal filed is against a periodical show cause notice issued to the appellant, consequent to an Audit of the records of the assessee.

9. It is pertinent to appreciate the fact that earlier two show cause notices issued to the appellant on identical issue stand decided by this Tribunal vide Final Order No. 50148-50150/2022 dated 18.02.2022[3] wherein the previous demands made have been set aside. The impugned Order-in-Original has demanded service tax on two issues. The audit of the record of the appellant reveal that they were providing taxable service to various Government departments in which supply, installation of various hardware and /or software or provision of service was involved. M/s. Rajcomp was found paying service tax only on the service charges so received from the concerned Department, instead of paying the service tax on the gross value of the amount so received. In this context, we note that the Tribunal vide its Final order has held that-

> "22. The factual position described above would clearly indicate that as a nodal agency appointed by the various State Government Departments, the primary responsibility of the appellant was to supervise and monitor the overall execution of projects; computation of estimate of cost; issuance of notice inviting tenders; and appointment of vendors. The vendors so appointed by the appellant then entered into the contracts with the appellant on behalf of the State Government. The vendors performed their obligations stipulated in the contracts for execution of the projects and upon completion of the projects, a working report with utilization certificates and invoices were furnished by the appellant to the concerned Departments, which thereafter released the sanctioned amount to be paid to the vendors through the appellant.
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> 23. It would, therefore, be seen that two independent activities were performed for which consideration was received. When the appellant supervised the project, the appellant received consideration towards the service charges for supervising the project. The vendors, on the other hand, received the project cost for the activity of execution of the

3 MANU/CE/0063/2022

project. The services rendered by the appellant were limited to the supervision and monitoring of the execution of the projects, in lieu of which it recovered service charges and service tax has been paid by the appellant on the consideration received for the service. In respect to the amount paid to the vendors towards the project cost, the appellant has not provided any service and, therefore, no service tax can be levied for the reason that in terms of section 67 of the Finance Act, the amount paid to the vendors has not been received by the appellant 'for such service'.

24. The contention of the Department is that the amount paid by the appellant to its vendors is in the nature of expenses incurred by the appellant in the course of providing service to the State Government and such expenses would be includable in the taxable value of the services in terms of rule 5 of the Valuation Rules.

25. In the first instance, as noticed above, rule 5(1) of the Valuation Rules has been struck down by the Supreme Court as being ultra vires section 67 of the Finance Act.

26. Secondly, the appellant had appointed vendors on behalf of the State Government for procurement of goods and/or services. The amount payable to the vendors are borne by the State Government, though, through the appellant for which the appellant submits utilization certificates to the State Government with the corresponding invoices raised by the vendors. This would be apparent from the documents annexed with the appeal.

33. It would, therefore, be seen that the amount paid by the State Government Departments to the appellant are reimbursements, which cannot be subjected to levy of service tax. The only consideration received by the appellant was the 'service charge' on which service tax was discharged by the appellant.

38. Thus, as all the conditions of rule 5(2) of the Valuation Rules are satisfied, the appellant acted as a pure agent as a result of which the amount collected by the appellant from the State Government for payment to the vendors cannot be subjected to service tax. "

10. The next issue to decide is whether the appellant is liable to pay service tax on the amount deducted from the payment of various service providers /vendors in the name of liquidated damages for violating terms of agreement entered into.

11. It is seen that this issue was examined at length by the Division Bench of the Tribunal in **M/s. South Eastern Coalfields Ltd.** (supra) and the observations are as follows:

"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.

29. The situation would have been different if the party purchasing coal had an option to purchase coal from 'A' or from 'B' and if in such a situation 'A' and 'B' enter into an agreement that 'A' would not supply coal to the appellant provided 'B' paid some amount to it, then in such a case, it can be said that the activity may result in a deemed service contemplated under section 66E (e).

30. The activities, therefore, that are contemplated under section 66E (e), when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.

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32. In the present case, the agreements do not specify what precise obligation has been cast upon the appellant to refrain from an act or tolerate an act or a situation. It is no doubt true that the contracts may provide for penal clauses for breach of the terms of the contract but, as noted above, there is a marked distinction between 'conditions to a contract' and 'considerations for a contract'."

12. We also find that the CBIC Circular No. 178/10/2022-GST dated 03.08.2022 has clarified that "liquidated damages cannot be said to consideration received for tolerating the breach or non-

performance of contract. They are rather payments for not tolerating the breach of contract…..”

13. In this view of the above, service tax levied on the amount received from the Departments of the State Government and which has been paid to the vendors cannot sustain. We also hold that the demand of service tax on amount received as liquidated damages also does not sustain.

14. Therefore, we follow the precedent decision and set aside the order dated September 30,2019. The appeal is, accordingly, allowed.

(Pronounced in the open court on 14.02.2023)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R PRIYA)
MEMBER (TECHNICAL)

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