CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi
PRINCIPAL BENCH – COURT NO. 3
SERVICE TAX APPEAL No. 50818 Of 2019

[Arising out of Order-in-Appeal no. 37(CRM)ST/JDR/2019 dated: 08.01.2019 passed by the Commissioner of Customs, Central Excise & Service Tax Appeals]

MANGALAM CEMENT LIMITED **Appellant**
Aditya Nagar, Morak Kota,
Rajasthan-326520

Vs
COMMISSIONER OF CENTRAL GOODS SERVICE TAX, CENTRAL EXCISE, UDAIPUR **Respondent**
142-B. Sector-11, Hiran Magri
Udaipur, Rajasthan-313001

APPEARANCE:
Shri B.L. Narsimahan, Shri Kunal Agarwal, Advocates for the Appellant
Shri S.K. Ray, Authorized Representative for the Respondent

CORAM :
HON'BLE MS BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 58512/2024

Date of Hearing: 31.05.2024
Date of Decision:05.09.2024

HEMAMBIKA R. PRIYA

The present appeal arises out of the Order-in-Appeal No. 37(CRM)ST/JDR/2019 dated 08.01.2019 passed by the Ld. Commissioner (Appeals) Central Excise and Central Goods & Service Tax, Jodhpur, against M/s Mangalam Cement Ltd., Aditya Nagar, Morak, Kota vide which the demand of service tax of Rs. 15,11,667/- along with interest and equal penalty was confirmed.

2. The brief facts of the case are that the appellant is engaged in the manufacture of cement, Clinker and holds Central Excise Registration No. AABCM6602QXM001. The appellant was also registered for payment of service tax vide registration number AABCM6602ST001.

2.1 During the course of Audit, it was observed that during the impugned period, the appellant had shown income of Rs. 38,18,710/- in their books under the head 'Other Receipts'. These amounts had been collected from their customers as penalty for cheque dishonour. The appellants had collected Rs 500/- or 1000/- or Rs 1500/- etc on each dishonoured cheque as per the terms of the contract. The department formed an opinion that being a consideration, the same was liable to service tax. Accordingly Show Cause Notice dated 08.03.2016 was issued to the appellant. Vide Order in Original no. 11/ST/2017 dated 28.11.2017, the demand of Rs. 15,11,667/- along with interest and penalty was confirmed. This order was upheld by the Commr (A) Vide the impugned order. Being aggrieved by the said Order, the present appeal is before this Tribunal.

3. Learned Counsel for the appellant submitted that the appellant has collected cheque dishonour charges from the buyers on account of their cheques being dishonoured and late delivery Charges from the suppliers who failed to provide the services within the agreed stipulated time. The said charges were collected as penalty which has been noted in the impugned order. He also contended that the amount recovered by the Appellant is not a consideration, as for an amount to qualify as consideration, there has to be "quid pro quo" or "activity for such consideration". However, the Appellant does not undertake any activity against recovery of such amounts. Thus, there is no service under Section 65B(44) of the Act which is provided by the Appellant. Hence, no demand is sustainable under Section 66E(e) of the Act. In this regard, Learned Counsel relied upon the following decisions wherein the issue regarding the taxability of "late delivery charges" amount recovered from the suppliers who failed to provide the

services within agreed time has been settled by holding that no Service Tax is leviable on such charges:

- **DY. GM (Finance), BHEL V. Commissioner of Customs & Central Excise, Bhopal 2022 (9) TMI 1005-CESTAT New Delhi**
- **Steel Authority of India Ltd., Salem V. Commissioner of GST & Central Excise, Salem 2021 (7) TMI 1092-CESTAT Chennai**
- **Northern Coalfields Ltd. V. Commissioner of CGST, CE & Customs-Jabalpur 2023 (1) TMI 934-CESTAT New Delhi**
- **NDMC Ltd. V. Commissioner of Goods and Service Tax, Raipur 2023 (12) TMI 904-CESTAT New Delhi**
- **Bharat Heavy Electricals Ltd. V. Commissioner of CGST, Dehradun 2023 (4) TMI 54-CESTAT New Delhi**
- **Southern Power Distribution Company of Andhra Pradesh Ltd. V. Commissioner of Central Tax, Tirupati 2022 (9) TMI 625-CESTAT Hyderabad.**

3.2 Learned Counsel also placed reliance on the following decisions/judgements wherein the issue regarding the taxability of "dishonour charges" amount recovered from the buyers on account of dishonour of their cheques has been settled by holding that no Service Tax is leviable on such charges:

- **Rohan Motors Ltd. V. Commissioner of Central Excise, Dehradun 2021 (45) G.S.T.L. 315**
- **KJS Cement Ltd. V. Commissioner of CGST, Central Excise & Customs Jabalpur (MP) 2023 (12) TMI 903-CESTAT New Delhi**
- **Clix Capital Services Pvt. Ltd. V. Commissioner of Service Tax, Chennai 2023 (5) TMI 302 CESTAT Chandigarh**

3.3 Learned Counsel further submitted that the issue of non-taxability of the amounts collected on account of dishonour/bouncing of cheque and on account of delay in delivery of services is well settled and accepted by the Department. Hence, impugned demand is liable to be set aside. He stated that the disputed amounts recovered are penal charges with the intention to make good for the losses and to also act as a deterrent to ensure that buyer or supplier do not violate the terms of contract.

3.4 Learned Counsel further contended that the Appellant was maintaining all the records and the demand was proposed on the basis of the records of the Appellant's data only. Further, no element of fraud or suppression has been established. Thus, suppression cannot be alleged and extended period of limitation cannot be invoked. Reliance in this regard was placed on the decision in the case of **MTNL V. UOI 2023-TIOL-407-HC-DEL-ST.**

3.5 Learned Counsel also contended that no interest is payable under Section 75 of the Act and no penalties is imposable under Section 78 of the Act as the demand itself is not sustainable for the reasons reiterated above. Further, no penalty is imposable under Section 78 of the Act in the absence of any malafide. Further, considering that the demand itself has no penalty is imposable in terms of Section 80 of the Act, and penalty under Section 78, if any, can only be limited to 50% as Appellant has maintained specified records.

3.6 Learned Authorized Representative for the Department submitted that the appellant has shown income of Rs. 38,18,710/- in their books of accounts under the head of "other income". It was found that they have collected a certain amount of Rs. 500/- or Rs. 1000/- or Rs. 1500/-etc. on each dishonoured cheque received from the buyers and these collections of amount shown in other receipts but did not pay service tax on it. During the period 2013-14 they have also shown other income of Rs. 84,11,604/- which relates to late delivery charges. He stated that they have collected sums of money against late delivery charges on account of not completing the services provided with in the time specified by them and these collection of amount shown in miscellaneous income but did not pay service tax on it. He further stated that the amount collected by the appellant, the 'promisor', from

their clients the 'promisee', tolerated the situation by not paying the due amount timely to appellant as a result the appellant has to tolerate an act or situation created by their clients due to cheque return/dishonor or late delivery charges on account of not completing the services by the service provider within time specified by the appellant. Thus the activity squarely fall within the purview of Section 66E (e) of the Finance Act, 1994.

3.7 Learned Authorized Representative further submitted that the appellant has also contended that in the instant case, as per Section 65B (44) of the Finance Act, 1994 it is required that there should be an 'activity' in return of the consideration. However, in the present case there is no activity by the appellant whatsoever in this case and not even tolerating or agreeing an act, thus there is no service being provided in this case in terms of Section 65 B (44).

3.8 Learned Authorized Representative further submitted that appellant has taken plea that value of taxable service does not include accidental charges due to unforeseen action in terms of Rule 6(2) (vi) of Service Tax Rules 2006. In this context Learned Authorized Representative stated that appellant has collected above amount from their client as penalty towards refraining to pay the amount due as their cheque was either returned or bounced/dishonored and further they have also received certain amount from the service providers on account of the late delivery of services or late or delayed performance of the services by the service provider, these amounts collected are over and above the amount due as such there is no damages due to unforeseen actions, rather it was an additional consideration on account of toleration of an act or a situation. The appellant plea is ,

therefore, not sustainable as their case is not covered under Rule 6(2)(vi) of Service Tax Rules 2006.

4. We have heard the Learned Counsel & the Learned Authorized Representative. We note that this issue is no more res-integra. The Learned Counsel reliance on the Tribunal's decision in **M/s South Eastern Coal Fields Ltd** is justified. The Division bench had held 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 :
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> (i) consideration for agreeing to the obligation torefrain from an act; or
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> (ii) consideration for agreeing to tolerate an act or a situation; or
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> (iii) consideration to do an act.
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> 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).
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> 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.
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> **40.** It is in this context and in the context of Section 74 of the Contract Act, that the Supreme Court observed :
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> > "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."

We note that the Tribunal has consistently held that penalty/late delivery charges cannot be subjected to Service Tax Under Section 66E of the Finance Act 1994. Consequently, the impugned order dated 08.01.2019 is set aside.

5. The appeal is, accordingly allowed.

(Order pronounced in the open Court on 05.09.2024)

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

PRIYA