

GIB/TN/Steel Authority of India Ltd./26.07.2021/OTHERS-26

Others Category : Classification

State : Tamil Nadu

Order No.: GIB/TN/Steel Authority of India Ltd./26.07.2021/OTHERS-26

Name of Entry :

Steel Authority of India Ltd.

Date : 26-07-2021

Breif Issue :

CESTAT Chennai - Steel Authority of India Ltd. Vs. Commissioner of GST & Central Excise, Salem, SERVICE TAX APPEAL NO. 40052 OF 2019, FINAL ORDER NO. 41707/2021

Facts of the Case:

1. Appellant is engaged in Manufacturing of carbon steel, carbon steel sheet, coin blanks and alloy steel.
2. There are some conditions in the contract entered by the appellant with their customers which are as follows:
 - a. Whenever the supplier defaulted in adhering to the time schedule prescribed by the appellant, appellant recovered liquidated damage @ 1%.
 - b. The appellant also sold goods through Online Forward Auction (OFV). The bidder who intent to purchase goods through OFV has to pay EMD as prescribed in the notice A permanent customer as well as temporary customer is required to pay certain amount as EMD for every auction they intend to participate. The successful bidder has to pay 10% of the bid value towards Additional Security Deposit (ASD) and Full Sale Value (FSV) as per sale order. In the event of failure on the part of the successful bidder to make ASD/FSV payments within the due date as stipulated in the Sale Order, (ii) the EMD shall forfeited. In the OFA transaction, the appellant permits extension of time for payment of the FSV for a period not exceeding 3 days on payment of specified amount for every day of extension. This amount is termed as (iii) Ground Rent.
3. On the basis of these transactions Assistant Commissioner issued SCN dated 17.04.2017 by invoking section 73(1), 75 of the Finance Act, 1994 considering the recovery of these amount as consideration for tolerating an act of their customers or a situation and hence considering the activity as “Declared Service” as stated under section 66(E)e of the Finance Act,1994. Appellant filed reply to SCN on 18.07.2017 with a request that the proceedings may be dropped for the reason that no service tax was payable on liquidated damage and penalties recovered under the contract.

Assistant Commissioner, however did not accept the contentions of the appellant and confirmed the demand of service tax by invoking the provision of section 73(1) of the Finance Act with interest and penalty. Feeling aggrieved, the appellant filed an appeal before the commissioner (Appeals) who by order dated 4-10-2018 upheld the order passed by the Assistant Commissioner and dismissed the appeal.

Issues:

Whether the amount recovered by the appellant for Non-fulfilment of obligation in terms of the agreement can be treated as “Declared Services” as stated under Section 66 (E)e of the Finance Act, 1994 ?

Views of the Tribunal:

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

1. 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 consideration for Agreeing to the obligation to refrain from an act/Agreeing to tolerate an act or a situation/ consideration to do an act.

2. An agreement has to be read as whole so as to gather the intention of the parties. The intentions of the appellant and the parties was for supply of coal, for supply of goods and for availing various type of services and not for flouting the terms of the agreement so that the penal clauses get attracted.

3. 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.

Decision of Advance Ruling Authority :

Decision

“In view of the aforesaid decisions of the Tribunal, it is not possible to sustain the view taken by the Commissioner that since the task was not completed within the time schedule, the appellant agreed to tolerate the same for a consideration in the form of liquidated damages, which would be subjected to service tax under section 66E(e) of the Finance Act.”

Relevant Section Discussed in the case:

1. Section 73(1) of the Finance Act, 1994 : Where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, central excise officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short levied or short paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of

a. Fraud, or

b. Collusion, or

c. Wilful mis statement, or

d. Suppression of fact, or

e. Contravention of any of the provisions of this chapter or of the rules made thereunder with intent to evade payment of service tax,

By the person chargeable with the service tax or his agent, the provisions of this sub section shall have effect, as if, for the words “thirty months” the words “five years” had been substituted.

2. Section 75 of the Finance Act, 1994: Every Person, liable to pay the tax in accordance with the provisions of section 68 or rules made there under, who fails to credit the tax or any part thereof to the account of the central government within the period prescribed shall pay simple interest (at such rate not below ten per cent. And not exceeding, thirty six per cent per annum, as is for the time being fixed by the central government, by notification in the official gazette for the period by which such crediting of the tax or any part thereof is delayed.

Provided that in the case of a person who collects any amount as service tax but fails to pay the amount so collected to the credit of the Central Government, on or before the date on which such payment is due, the Central Government may, by notification in the official gazette, specify such other rate of interest, as it may deem necessary.

Provided further that in the case of a service provider, whose value of taxable services provided in a financial year does not exceed sixty lakh rupees during any of the financial years covered by the notice or during the last preceding financial year, as the case may be, such rate of interest, shall be reduced by three percent, per annum

3. Section 65B(44) of the Finance Act, 1994: Service means any activity carried by a person for another for consideration and includes a declared service, but shall not include

a. An activity which constitutes merely

i. A transfer of title in goods or immovable property, by way of sale, gift or any other manner, or

ii. Such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the constitution, or

iii. A transaction in money or actionable claim.

b. A provision of service by an employee to the employer in the course of or in relation to his employment.

c. Fees taken in any court or tribunal established under any law for the time being in force.

4. Section 66(E) e of the finance act, 1994: “Agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act.