CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH COURT NO.IV

Service Tax Appeal No. 51117 / 2019

[Arising out of Order-in-Appeal No. IND-EX-CUS-000-APP-380-18-19 dated 19.02.2019, passed by the Commissioner (Appeals) Customs, GST & Central Excise, Indore]

RUCHI SOYA INDUSTRIES LTD **APPELLANT**

Vs.

COMMISSIONER OF CUSTOMS, CENTRAL GOODS AND SERVICE TAX, AND CENTRAL EXCISE, INDORE **RESPONDENT**

APPEARANCE:
Shri R Sudhinder, Advocate for the Appellant
Shri P Juneja, Authorised Representative for the Department

CORAM:
HON'BLE MRS RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: June 15, 2021
DATE OF DECISION: 09.07.2021

FINAL ORDER No. 51652 /2021

PER RACHNA GUPTA

M/s. Ruchi soya appellant herein has filed impugned appeal to assail the order in appeal No. 380-18-19 dated 19.2.2019. the facts in brief given rise to this appeal are as follows:

2. The appellant has set up a project for generating electricity using wind energy comprising of one Suzlon made Wind Turbine Generators (WTG) having output of 1500 KW electricity. The appellant requested the operator of said WTG M/s. Suzlon Global Services Ltd. (SGSL) to maintain the said WTG. SGSL *inter alia* is in the business of operating, managing and maintaining wind farm

for projects for generation of wind energy by means of WTG. Hence, they accepted the aforesaid request of the appellant vide agreement dated 17.12.2014 so entered between them.

3. During the course of audit, the officers of Audit, Indore observed that the appellant has shown the receipt of Rs.1.33 crores in the year 2015-16 from M/s SGSL. To explain the nature of activity conducted for such consideration that the appellant provided the Maintenance Agreement dated 17.12.14.

The Department observed that as per the said agreement M/s. SGSL has agreed for providing maintenance services to the appellant who shall be liable to pay operation and maintenance service charges to M/s. SGSL against the invoices as were to be raised from time to time by M/s. SGSL. However, there has been a Machine Availability clause in the said agreement of 17.12.2014. For the purpose thereof M/s. SGSL had issued credit notes on the appellant for the claims raised by the appellant towards Machine availability due to brake down in WTGs.

4. Forming an opinion that under section 65 B(44) of Finance Act, 1944, services includes 'Declared Services' defined under section 66(e) of Finance Act, the department issued a show cause notice bearing No. 3185 dated 1.12.17 to the appellant alleging that "agreeing to the obligation to tolerate the Act" as per said Machine Availability clause amounts to declared services as envisaged under section 66E(e) of Finance Act, 1944, and thus the amount received, through credit notes, by the appellant i.e. Rs.1.33 crores from M/s. SGSL during the period 2015-16 was alleged to be service liability of the appellant towards said 'Declared Services' and as such, the Service tax of Rs.19,34,212/- was proposed to be recovered from the appellant along with appropriate interest and the proportionate penalties. This proposal was confirmed vide the order-in-original No. 27 of 2018-19 dated

12.10.2018. The appeal thereof has been rejected vide the order under challenge.

5. I have heard Shri R Sudhinder, learned Counsel for the appellant and Shri P Juneja, learned Authorised Representative for the Department.

6. It is submitted on behalf of the appellant that the appellant has been the owner of WTG and it is M/s. SGSL who has been in the business of operating, managing and maintaining the said WTGs; The agreement dated 17.12.2014 was executed between the two vide which M/s. SGSL agreed to provide services to the appellant for maintaining his WTG. It is impressed upon that this fact is sufficient to show that the appellant was the service recipient and M/s. SGSL was the service provider. It is further submitted that though there has been a clause in the said agreement that in case Machine Availability falls between below 95.5% and upto the machine availability of 92.5 %, then the M/s. SGSL shall compensate to the owner an amount from the service charges recovered, so as to warrant an annual average machine availability of 95.5% per year in the WTG under the said agreement.

7. It is mentioned that the impugned demand has been raised upon the said amount of compensation received by the appellant which from any stretch of imagination cannot be called as the amount received by the appellant in lieu of any service rendered by the appellant to M/s. SGSL. It is submitted that the findings of adjudicating authority below that the said agreement has created an obligation on the appellant to tolerate a situation of deficiency of service provided by M/s. SGSL is absolutely wrong. The concept of 'Declared Services' has wrongly been invoked in the present case. The order under challenge is prayed to be set aside and appeal prayed to be allowed.

8. To rebut the said agreement, learned Departmental Representative has impressed upon the definition of 'Declared Services' under section 66E (e) of the Finance Act which clarifies that agreeing to the obligation to tolerate an Act is specifically classified as 'Declared Services'. It is submitted that the machine availability clause of the agreement amounts to agreement on the part of the appellant to tolerate the deficiency in the service provided to him by M/s. SGSL. Accordingly, the amount received by the appellant on account of said tolerance is definitely an amount on which there accrues the payment of service tax liability on the appellant as well. Impressing upon that there is no legality in the impugned appeal and is prayed to be dismissed.

9. After hearing the rival contentions and perusing the record, I hold as follows:

> The moot question to be adjudicated herein is whether the Machine Availability clause of agreement dated 17.12.2014 creates the service tax liability upon the appellant.

10. For the purpose we need to first understand the concept of service and tax liability thereof. Section 65(64) of Finance Act defines the "Service" to mean any activity carried out by a person for another for consideration and includes a declared service . This section provides an exclusion clause also which is not required to be invoked in the given facts and circumstances. "Tax" is defined by section 64(50) of the Act to mean an amount of service tax leviable under the provisions of Chapter 5 of Finance Act. As per Sub clause 51 'Taxable Service' is to mean any service on which service tax is leviable under section 67E. Section 66 B reads as follows:

> "There shall be levied a tax at such specified rate on the value of the services other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one

person to another and collected in such manner as may be prescribed. ”

11. The service involved in the present case is that of maintenance or repair. Accordingly, sub-clause 64 of section 65 is also relevant which defines the service to mean any service provided by

“(64) “management, maintenance or repair” means any service provided by –

(i) any person under a contract or an agreement; or’

(ii) a manufacturer or any person authorised by him, in relation to,-

(a) management of properties, whether immovable or not;
(b) maintenance or repair of properties, whether immovable or not; or
(c) maintenance or repair including reconditioning on restoration, or servicing of any goods, excluding a motor vehicle; ”

12. The cumulative reading of all these provisions makes it clear that to invoke the tax liability qua a service provided following is required.

1. Service provider
2. Service recipient
3. Payment of charges by the recipient at the time of rendition of service
4. tax to be paid by the service provider on the said amount as is received from the recipient at such rate as is prescribed under section 66B of the Finance Act.
5. That any service is taxable if and only if it is provided by one person to another and the liability thereof is to be discharged by the service provider. Though the cost thereto is to be received by said provider from the service recipient itself. Section 67 of Finance Act clarifies that this situation further

deals with the valuation of taxable service for charging service tax. It reads as follows:

"67.Valuation of taxable services for charging service tax. —

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation. — For the purposes of this section, —

(a) ["consideration" includes —

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.'.]"

13. This provision clearly indicates that the gross amount has to be charged by the service provider strictly for the services provided by him. The provision has used the words “for such service provided” makes it clear that the Act has provided nexus between the amount charged and the taxable service and that the tax liability has to be calculated on the amount charged for the service provided”…….

Thus the amount charged has necessarily to be a consideration for the service provided which is taxable in the Act.

14. Hon’ble Supreme Court in **Bhayana Builders and Intercontinental Consultants** case has held that “consideration‖ must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and that the amount charged has necessarily to be a consideration for the taxable service provided under the Finance Act. Any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable. It should also be remembered that **there is marked distinction between ‘conditions to a contract’ and “considerations for the contract”. A service recipient may be required to fulfil certain conditions contained in the contract but that would not necessarily mean that this value would form part of the value of taxable services that are provided**.

15. With this understanding of law the facts of the present appeal are perused. It is clear from the facts that there is no denial on the part of the department, as is apparent from para 4 of the Show cause notice to the fact that the appellant/ service recipient, has already suffered service tax on the invoices raised by M/s. SGSL from time to time. The credit note issued by M/s SGSL, service provider is a refund of excessive amount paid by the appellant on account of defined service to be provided by M/s

SGSL. It does not represent any service rendered by the appellant to M/s SGSL so as to attract any service liability of the appellant. The basis of transaction between the parties is the agreement dated 17.12.2014. Perusal thereof makes it abundantly clear that the appellant is service recipient and M/s SGSL is service provider. Hence the payment of service tax can be the liability only and only of M/s. SGSL.

16. Coming to the Machine Availability clause as has been taken as a basis by the Department to fasten tax liability on the appellant, I have perused the clause which reads as follows:

> SGSL warrants a annual average machine availability 95.5% per year for the WTG covered under this agreement.
>
> In case the annual average machine availability of the WTG falls below 95.5% and up to machine availability of 92.5% then SGSL shall compensate to the owner and amount equal to @3% of the annual O & M service charges for every 1% of shortfall below 95.5% of average machine availability, subject to maximum of 50% of annual O & M charges.
>
> Perusal clarifies that in case, the annual machine availability falls below 95.5% then SGSL the service provider has agreed to compensate the service recipient an amount equal to SEB captive power purchase rate (for the corresponding year), subject to maximum of 50% of the annual O & M service charges."

17. The said clause fixes the liability upon the service provider M/s. SGSL to render annual average machine availability on 95.5% for the WTG of appellant. It simultaneously deals with the situation where while discharging the said mandate, the machine availability could not be provided by the service provider on the agreed rate, but falls short below the said 95% upto machine availability of 92.5 %. In that case the service provider is burdened

with the liability to compensate the service recipient at an amount equal to @ 3% of annual machine maintenance service charges for every 1% of shortfall beyond 95% of average machine availability. Payment of compensation to service recipient in case of lacunae on the part of the service provider for providing the requisite services, from any stretch of imagination cannot be called as act of tolerance on the part of service recipient. **The impugned clauses rather conveys that service provider has agreed to provide maintenance service of as good as of 92-95% accuracy and any downfall therefrom shall not be tolerable to the service recipient instead the service provider shall be liable to compensate the recipient**.

18. Further, the fact still remains that the appellant herein has never been the service provider. The liability to pay tax is on the service provider only. The concept of Declared Service as invoked by the Department, is not opined correct, in the given facts and circumstances. First of all machine availability clause is not opined to be an act of tolerance on the part of the appellant not even from the perspective of the dictionary meaning of word 'tolerance'. Secondly, to fall under the section 66E(e) of Finance Act, the act has still to be the service by one person to be provided to another. The order under challenge is miserably silent as to what services stand provided by the appellant to M/s. SGSL while receiving consideration from the service provider when he fails to provide the desired quality of service.

19. The Tribunal Chennai in the case of **Futura Polyester Ltd. vs. Commissioner of Central Excise, Chennai** reported as **[2013 (29) STR 371 (Tri-Chennai)]** has held that when on facts it is found that the appellant has neither provided any service nor received any consideration in lieu of providing the said services, no tax can be made payable merely because of the entries made in its book of accounts. Admittedly books of accounts of appellant has

shown the receipt of Rs. 1.33 crore approximately in the year 2015-16 but as the compensation on account of failure on part of SGSL, for not providing requisite service to the appellant. The Larger Bench of this Tribunal while deciding the issue in appeal filed by **M/s. South Eastern Coalfields Ltd. Final order No. 51651 of 2020** has held that recovery of liquid damage from the other party cannot be said to be an amount towards any service per se. **The purpose of imposing compensation is merely to insure that the defaulting act is neither undertaken nor repeated and the same cannot said to be towards tolerance of the defaulting party**.

20. It has further been appreciated that contract may provide for penal clause for breach of terms of contract but that will amount to distinction between 'the condition to contract' and 'consideration for a contract' and to ascertain either of the situation, the agreement as a whole has to be read together with the intention and the purpose thereof. The Machine Availability clause in the present case, to my opinion when read with the entire agreement, there is an apparent intent that the terms of agreement shall not be violated and that the service provider shall not compromise with the quality of service else the commercial interest of the appellant shall remain safeguarded in the form of compensation to be paid by M/s. SGSL. Hence, it cannot, by any stretch of imagination, be stated that the recovery of sum by invoking the said clause is the reason behind the execution of agreement for a accrued consideration.

21. In view of entire above discussion, I am of the opinion that the amount received by the appellant in terms of Machine Availability clause, from the service provider with reference to maintenance of WTG due to shortcoming in said service is merely an amount to safeguard the loss of appellant. The said amount cannot be called as consideration for the tolerance of service

provided and some lacunae thereof nor it makes the appellant the service provider. Infact once the appellant receives compensation for the downfall in service quality, it is because he is not inclined to tolerate the loss as he may suffer on account of said downfall. The concept of 'Declared Services' has therefore been wrongly invoked by the Department and the adjudicating authority below. As already discussed above, service recipient cannot be fastened with any liability to pay tax. I also rely upon the decision of Hon'ble Apex Court in the case of **Association of Leasing and Financial Service Companies vs. Union of India** reported on 2010 (20) STR 417 (SC) wherein it has been held that when no service has been rendered, service tax cannot be levied.

22. In view of entire above discussions, the findings in order under challenge are not at all sustainable. The same are held to be absolutely imaginary and assumptive in nature and thus are hereby set aside.

23. As a consequence thereto the appeal is hereby allowed.

(Pronounced in the open Court on 09.07.2021)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

ss