IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Service Tax Appeal No. 75432 of 2022

(Arising out of Order-in-Original No. 20/CCE/S/Tax/RKL/2021-22 dated 28.03.2022 passed by Commissioner of CGST & Central Excise, Rourkela Commissionerate.)

M/s Mahanadi Coalfields Limited (Orient Area)
(GM Office, Orient Area, Brajraj Nagar, Jharsuguda-768216, Odisha)

....Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Rourkela.
(KK-42, Civil Township, Rourkela-769012)

....Respondent(s)

APPERANCE :
Shri Rajeev Agarwal, Advocate & Sri Sanjoy Dixit, C.A. for the Appellant
Shri J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No……76176/2023

DATE OF HEARING : 13.07.2023
DATE OF DECESION : 13.07.2023

PER K. Anpazhakan:

M/s Mahanadi Coalfields Ltd., (Orient Area) (The Appellant) has been engaged in mining of Iron Ore and Manganese at Katamati Iron Ore and granted lease of mines by the Govt. of Odisha. For the said mining project, the Appellant sought forest clearance so that forest land falling under the said project can be utilized for non forest purposes. Accordingly, such clearance was granted by Ministry of Environment an Forest and Climate Change on payment of charges, known as 'Net Present Value (NPV) in the Compensatory Afforestation Fund(CAMPA

FUND). The Investigating officers contended that such payment of NPV to Govt. of India, appeared to be in lieu of 'Declared Service' of toleration of the act of use of forest land for non-forest purposes rendered by Government and attracts service tax under reverse charge mechanism in terms of Notification No.30/2012-Service Tax dated 20.06.2012, which the Appellant failed to discharge.

2. A Show Cause Notice dated 04.10.2021 was issued to the Appellant demanding service tax of Rs.3,37,43,465/- for the period 01.04.2016 to 30.06.2017, along with interest and penalty. The said Notice was adjudicated by the Commissioner, Rourkela vide Order-in-Original dated 08.03.2022, wherein he ordered as under:

> I find that the service of 'Agreeing by Union of India to tolerate the act of Odisha State Government of diversion of forest land for mining purpose …….', in the instant case provided by the Government to the Noticee, having registered at GM Officer, Orient Area, Brajraj Nagar, Jharsuguda-768216, Odisha is a declared service by virtue of Section 65B(22) read with Section 66E(e) of the Finance Act, 1994 and is covered within the definition of 'Service' under Section 65B(44) and 'Taxable Service' under Section 65B(51) of the Finance Act, 1994; and therefore, is liable to service tax under Section 66B of the Act read with Rule 6 of the Service Tax Rules, 1994 and Rule 7 of the Point of Taxation Rules, 2011. Further, the applicable service tax on said service is further payable by the Noticee who is service recipient as per rule

2(1)(d)(i) E of Service Tax Rules read with Notification No. 30/2012 ST dated 20.06.2012 in respect of taxable services notified under Section 68(2) of the Act, under reverse charge mechanism.

I confirm the demand of Service Tax including SB Cess & KK Cess amounting to Rs.3,37,43,465/- (Rupees Three Crore Thirty Seven Lakh Forty Three Thousand Four Hundred Sixty Five) only not paid by the Noticee i.e. M/s Mahanadi Coalfields Ltd (Orient Area) having registered at GM Office, Orient Area, Brajraj Nagar, Jharsuguda-768216, Odisha under proviso to Section 73(1) and Section 73(2) read with Section 119 of Finance Act, 2015 and Section 161 of the Finance Act, 2016; and order for recovery of the same from the Noticee;

I order for recovery of interest from the Noticee, at the appropriate rate (s) on the amount confirmed at Para (ii) above, under provision of Section 75 of the Finance Act, 1994;

I impose penalty of Rs.3,37,43,465/- (Rupees Three Crore Thirty Seven Lakh Forty Three Thousand Four Hundred Sixty Five) only on the Noticee under Section 78 of the Finance Act, 1994 for suppressing the facts from the department with an intent to evade payment of service tax. However, if the amount as determined under Sr. No. (ii) above is paid within 30 days from the receipt of the order along with the interest payable then as per proviso to Section 78 the penalty will be only 25% of the

service tax determined at Sl. No. (ii) above. The benefit of reduced penalty shall be available only if the amount of penalty so determined has also been paid within the period of thirty days from the receipt of the order.

3. Aggrieved against the impugned order, the Appellant filed the present appeal. In their Grounds of appeal, the Appellant made the following submissions

(i) The payment of NPV, Compulsory Afforestation etc are towards a Constitutional mandate enshrined in Article 48 of the Constitution of India.

(ii) The payment of NPV and other charges in pursuance to the decision of the Hon'ble Supreme Court and thus by operation of law.

(iii) The observation that the Government is 'tolerating the act'of the appellant against a 'consideration' is totally absurd inasmuch as one cannot envisage the situation as apprehended in the SCN that by collecting NPV, the Government is tolerating the act of appellant.

(iv) The CESTAT, Kolkata in the case of **MNH Shakti Limited vs. Commr, CGST & CX, Rourkela (Service Tax Appeal No. 75218 of 2020),**while deciding the applicability of Section 66E(e) on the issue of compensation received by the erstwhile coal mine allottees in pursuance to the law pronounced by the Hon'ble Supreme Court and the subsequent Coal Mines Special Provisions Act (CMSPA) passed by the Parliament held that:

"The question of tolerating something and receiving a compensation for such tolerance pre-supposes that:

a) the person had a choice to tolerate or not;

b) the person chose to tolerate;

c) such tolerance was for a consideration as per an agreement (written or otherwise) to tolerate;

d) the tolerance was a taxable service.

None of the above elements are present in the present case. ***The appellant had no choice of tolerating cancellation or not.*** *The appellant has not chosen to tolerate the cancellation. The cancellation was in pursuance of the order of the Supreme Court and not as a result of a contract to tolerate cancellation. There was no consideration for tolerating the cancellation, only a compensation provided for statutorily for the investment made in the mines by the appellant.*

Even in cases where any amount is received under a contract as a compensation or liquidated or unliquidated damages, it cannot be termed 'Consideration'. This case is not even a case of payment under a contract. ***Both the cancellation of the allocation of the block and the receipt of compensation are by operation of law.*** *They are like the receipt of a compensation when one's land is acquired by the Government in public interest or the payment to a Government employee of an amount equal to the salary for unused leave at the time of his/her retirement. It is unthinkable to say that the land-owner has tolerated the acquisition of his land as per an agreement and charge service tax on the compensation. Equally unthinkable is to say that the Government employee has tolerated the non-sanction of leave during his service as per an agreement and in consideration, received the leave encashment at the time of retirement and to charge service tax on the amount received as leave encashment. These, cannot be called taxable services of tolerating a situation by way stretch of*

imagination. No service tax can be levied on the amounts received by the appellant as compensation."

*(v)T*he ratio of the above judgment is squarely applicable to the facts of the instant appeal, as the payment of NPV, compulsory afforestation amounts etc are by operation of law and the appellant has no choice whatsoever. Thus, the amounts paid cannot by any stretch of imagination be considered as *'consideration'* for the alleged 'service'. Furthermore, the Government is duty bound by the Constitutional Mandate (Article 48 of the Constitution of India) and by the Parliament (The CAMPA Act, 2016, Forest Conservation Act 1980) to collect the charges for granting diversion of forest land for non-forest purposes like mining to preserve, conserve and regeneration of lost ecological balance.

*(vi)The Appellant fu*rther submitted that there is no **service provider – service recipient relationship** in the instant case. Assuming without accepting, that Government is providing a service, it cannot be said, by any stretch of imagination that the appellant is the service recipient since the benefit of regeneration of ecosystem/natural vegetation is being received by public at large as also observed by the Hon'ble Supreme Court in the case of T.N. Godavarman . Since the Appellant is not the service recipient, no service tax liability can be fastened under reverse charge mechanism. **Further the amount paid by the appellant has no nexus to the alleged services, if at all, received by it.**

*(vii)T*here is no 'consideration' paid for any service in this case inasmuch as the payment of NPV is a 'contribution'/'compensation' paid to the Government for the loss of forest vegetation pursuant to the constitutional mandate. Therefore, the very definition of service under Section 65B(44) of the Act has not been fulfilled in the instant case in absence of 'consideration'.

(viii) Accordingly, the Appellant submitted that Section 66E(e) is not applicable in the facts of the instant appeal , and they prayed for setting aside the impugned order.

(ix) Even if it is assumed that the Government has provided Declared services under Section 66E(e), the said service would qualify for exemption in terms of **Serial No. 39 of Mega Exemption Notification No. 25/2012 dated 20.06.2012** which exempts services by Government by way of an activity in relation to any function entrusted to a municipality under Article 243W of the Constitution. In the said Article amongst forest functions, the function for ***urban forestry, protection of the environment and promotion of ecological aspects*** is also covered.

(x) The Appellant submits that even if it is assumed that service under Section 66E(e) has been provided by the Government then also the appellant would still be entitled to avail exemption provided under entry **serial no. 57 of Notification no. 25/2012** (supra) which reads as ***"Services provided by Government or a local authority by way of tolerating non-performance of a contract for which consideration in the form of fines or liquidated damages is payable to the Government or the local authority under such contract"***.

4. The Ld. A.R reiterated the findings in the impugned order.

5. Heard both sides and perused the appeal records.

6. The issue to be decided in the present appeal is whether the Appellant has rendered any Service as defined in clause (44) of Section 65B of the Finance Act, 1944. As per clause (44) of Section 65B, 'Service' means any activity carried out by a person for another for consideration, and includes a 'Declared Service'. Clause (22) of Section

65B of the Act defines 'Declared Service' as "an activity carried out by a person for another for consideration and specified in Section 66E of the Act". The following activity has been specified in Section 66E(e) of the Act, as 'Declared Service'.

'Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act'

7. From the impugned order, we observe that the Revenue has considered the clearance granted by Ministry of Environment, Forest and Climate Change for usage of the forest land falling under the said project for non forest purposes, as a 'Declared Service' and the charges of NPV paid by the Appellant as 'Consideration' for the said service and demanded service tax under Reverse Charge. The allegation of the Revenue is that the payment made to CAMPA Fund is for the purpose of toleration of an act or a situation. In the present case the act of the Appellant tolerated by the Government is the act of conversion/diversion of forest land and use of the same for non-forestry purposes and consideration has been paid for the purpose of tolerating the mining activity by the Government. And for such act of toleration by the Govt., the appellant have paid compensatory levies/charges to CAMPA Fund which is being administered under the aegis of Central Government. Accordingly, the impugned order justified the demand and confirmed the same.

8. We observe that the payment of NPV to the CAMPA Fund has been made by operation of law and the Appellant has no choice whatsoever. Thus, the amounts paid cannot be called as *'consideration'* by any stretch of imagination, for the alleged 'service'. Furthermore, the Government is duty bound by the Constitutional Mandate (Article 48 of the Constitution of India) and by the Parliament (The CAMPA Act, 2016, Forest Conservation Act 1980) to collect the charges for granting diversion of forest land for non-forest purposes like mining to preserve, conserve and regeneration of lost ecological balance.

8.1 When a patch of forest is diverted for non-forestry purposes, its implications are felt at various spatial and temporal scales on account of possible loss of natural resources of the country. While developmental activities are essential for economic growth of the country, at the same time it is necessary to ensure that this development does not come at the cost of India's invaluable natural capital, particularly the forests. Therefore, a payment in the form of Net Present Value, Compensatory Afforestation Charges and other such site specific charges are required to be paid to make good the damage caused by such user agency. In the process, application for non-forestry use of forest land is made by the user agency to Ministry of Environment & Forest, Govt. of India, and final approval for such non-forestry use of such forest land is given by Ministry of Environment & Forest, Govt. of India, on payment of specified charges as mentioned above and after receiving recommendation of the concerned State Government.

8.2. We find that Tribunal Kolkata has decided a similar issue in the case of MNH Shakti Ltd Vs Commissioner of Central Excise and Service tax, Rourkela, wherein it has been held as under:

> "6. The question of tolerating something and receiving a compensation for such tolerance pre-supposes that:-
>
> (a) The person had a choice to tolerate or not;
>
> (b) The person had a choice to tolerate or not;
>
> (c) Such tolerance was for a consideration as per an agreement (written or otherwise) to tolerate;

(d) The tolerance was a taxable service.

None of the above elements are present in the present case. The appellant had no choice of tolerating cancellation or not the appellant has not chosen to tolerate the cancellation. The cancellation was in pursuance of the order of the Supreme Court and not as a result of a contract to tolerate cancellation. There was no consideration for tolerating the cancellation, only compensation provided for statutorily for the investment made in the mines by the appellant.

7. Even in cases where any amount is received under a contract as compensation or liquidated or un-liquidated damages, it cannot be termed 'Consideration'. This case is not even a case of payment under a contract. Both the cancellation of the allocation of the blocks and the receipt of compensation are by operation of law. They are like the receipt of a compensation when one's land is acquired by the Government in public interest or the payment to a Government employee of an amount equal to the salary for unused leave at the time of his/her retirement. It is unthinkable to say that the land-owner has tolerated the acquisition of his land as per an agreement and charge service tax on the compensation. Equally unthinkable is to say that the Government employee has tolerated the non-sanction of leave during his service as per an agreement and in consideration, received the leave encashment at the time of retirement and to charge service tax on the amount received as leave encashment. These, cannot be called taxable services of tolerating a situation by any stretch of imagination. No service tax can be levied on the amounts received by the appellant as compensation. "

9. We observe that the facts of the present appeal are similar to that of the decision cited above. Relying on the above decision, we hold that the clearance granted by Ministry of Environment, Forest and Climate Change for usage of the forest land falling under the said project for non forest purposes, cannot be considered as a 'Declared Service' as defined under Section 66E(e) of the Finance Act, 1944 and

the charges of NPV paid by the Appellant cannot be considered as 'Consideration' for the said service . Accordingly, we hold that the demand of service tax along with interest, in the impugned order is not sustainable. We observe that the Appellant has not suppressed any information from the department. In fact the entire NPV was paid to the CAMPA Fund as per law. Hence, extended period cannot be invoked to demand Service tax. As there is no suppression established, penalty under Section 78 of the Finance Act, 1994 not imposable in this case. Accordingly we set aside the impugned order.

10. In view of the above findings, we allow the appeal filed by the Appellant.

(Dictated and pronounced in the open court)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

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