CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 52414 OF 2019

(Arising out of Order-in-Original No. JAI-EXCUS-000-COM-15-16-19-20, dated 31.05.2019 passed by The Principal Commissioner, Jaipur)

M/s. Rajasthan State Beverages, Corporation Limited ...Appellant
Vitta Bhawan, Jyoti Nagar,
Jaipur

versus

The Principal Commissioner, ...Respondent
The office of the Principal Commissioner,
Central Goods and Service Tax & Central Excise
Commissionerate, Jaipur, NCR Building,
Statue Circle, C-Scheme, Jaipur-302005

APPEARANCE:

Shri Ranjan Mehta & Pratha Aggarwal, Advocates for the Appellant
Shri Rajeev Kapoor, Authorized Representative for the Respondent

WITH

SERVICE TAX APPEAL NO. 52404 OF 2019

(Arising out of Order-in-Original No. JAI-EXCUS-000-COM-15-16-19-20, dated 31.05.2019 passed by The Principal Commissioner, Jaipur)

The Principal Commissioner, ...Appellant
CGST & Central Excise Commissionerate,
Jaipur

versus

M/s. Rajasthan State Beverages Corporation Limited ...Respondent
Vitta Bhawan, Jyoti Nagar,
Jaipur (Rajasthan)

AND

SERVICE TAX APPEAL NO. 52405 OF 2019

(Arising out of Order-in-Original No. JAI-EXCUS-000-COM-15-16-19-20, dated 31.05.2019 passed by The Principal Commissioner, Jaipur)

The Principal Commissioner, ...Appellant
CGST & Central Excise Commissionerate,
Jaipur

versus

M/s. Rajasthan State Beverages Corporation Limited **...Respondent**
Vitta Bhawan, Jyoti Nagar,
Jaipur (Rajasthan)

APPEARANCE:

Shri Rajeev Kapoor, Authorized Representative for the Appellant
Shri Ranjan Mehta & Pratha Aggarwal, Advocates for the Respondent

CORAM:

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

Date of Hearing: 30.01.2023
Date of Decision: 03.07.2023

FINAL ORDER NO's. 50804-50806/2023

JUSTICE DILIP GUPTA:

Service Tax Appeal No. 52414 of 2019 has been filed by M/s. Rajasthan Renewable Energy Corporation Limited, Jaipur[1] to assail the order dated 31.05.2019 passed by the Principal Commissioner CGST and Central Excise Commissionerate, Jaipur[2] adjudicating the show cause notice dated 18.11.2016 for the period 01.04.2011 to 01.03.2015 and the show cause notice dated 05.04.2018 for the period 01.04.2015 to 30.06.2017. In regard to the first show cause notice dated 18.11.2016, the Principal Commissioner has confirmed the demand of Rs. 2,80,71,100/- with interest and penalty out of the total demand of Rs. 20,53,16,530/- and has dropped the demand for the remaining amount. With respect

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1. **the Corporation**
2. **the Principal Commissioner**

to the second show cause notice dated 05.04.2018, the Principal Commissioner has confirmed the demand of Rs. 3,42,50,377/- with interest and penalty out of the total demand of Rs. 17,12,17,363/- and has dropped the remaining demand. This appeal has been filed by the Corporation for setting aside the demand that has been confirmed by the Principal Commissioner.

2. **Service Tax Appeal No. 52404 of 2019** has been filed by the department for setting aside the order passed by the Principal Commissioner to the extent it dropped the demand with regard to the first show cause notice dated 18.11.2016. **Service Tax Cross Objection No. 50757 of 2022** has been filed by the Corporation with a prayer that this appeal filed by the department may be dismissed.

3. **Service Tax Appeal No. 52405 of 2019** has been filed by the department for setting aside that portion of the order of the Principal Commissioner that dropped the demand proposed in the second show cause notice dated 05.04.2018. **Service Tax Cross Objection No. 50730 of 2022** has been filed by the Corporation for dismissing this appeal.

4. The State Government of Rajasthan incorporated the Corporation to ensure quality of liquor and effective controlled distribution. For this purpose, all the liquor manufacturers/ re-sellers have to sell their products only to the Corporation as per the excise laws of the State and all the retail licensees can purchase liquor only from Corporation. Thus receipt, storage and dispatches of liquor can only be done by Corporation. To ensure optimum utilisation of space

and resources, the Corporation gives advance planning of purchase and sale of liquor and the manufacturers have to abide by that. In case of failure, conditions are imposed under the Agreement and the consequence have to be borne by the liquor manufacturers. These conditions with the consequences are as follows:

(i) Late Inward Charges: The fines are chargeable from the manufacturers to discourage them to effect delayed supplies;

(ii) Order for Supply Extension/Cancellation Fee: Corporation issues the order for supply, which has to be adhered to. If a liquor manufacturer perceives that it will not be able to fulfil the order for supply in due time, it approaches the Corporation to extend/cancel the same against payment of this fee;

(iii) Transfer Out Order Fees: The Corporation has different area wise godowns in different districts where the liquor manufacturer send their goods. If a liquor manufacturer perceives that in a particular area the product is moving slowly, he can transfer it to other Depots through Transfer Out Order to save himself from losses;

(iv) RSBCL Margin: Expenditure incurred by the Corporation on draining the stock of beer and liquor lying unsold or that which has expired at the depot as otherwise it would have to be taken back by the manufacturer after bearing the demurrage;

(v) Inactive stocks/demurrage charges: Charges collected by the Corporation in respect of stock of liquor

lying with the Corporation, which has not been sold over a certain period. To save itself from space constraint, the Corporation asks the suppliers to keep only active stocks and take back the inactive stock. These charges are levied to deter the manufacture and use the space in the most optimum manner;

(vi) Liquidity Damages from supplier: When the manufacturers default in preparing correct cost sheet for submission to the Corporation, a penalty is levied; and

(vii) Miscellaneous Receipts Other Non-Operating income and others: These Charges are recovered against shortage of stock in depot.

5. The aforesaid appeals pertain to the show cause notice dated 18.11.2016 for the period 01.04.2011 to 31.03.2015 and the show cause notice dated 05.04.2018 for the period 01.04.2015 to 01.06.2017. These two show cause notices allege that the Corporation had earned commission on sale of liquor and the balance sheet/ trial balance also showed income under the head 'other incomes', but the Corporation had not paid service tax which was required to be deposited by it under 'business auxiliary services'[3] prior to 01.07.2012 and, thereafter, as a taxable service not covered either in the negative list of services or exempted list of services. The show cause notice alleged that the Corporation was not a purchaser of liquor and it was merely providing sales, marketing activities covered under BAS. The show cause notice separated the taxability of

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3. BAS

service prior to 01.07.2012 and after 01.07.2012. The relevant portion of the show cause notice dated 18.11.2016 is reproduced below:

> **"<u>Taxability of the service prior to 01.07.2012.</u>**
>
> xxxxxxxxxxxx
>
> 11. Whereas, it appears that when the above referred documents namely LSPs and agreement with the manufacturer/suppliers of the liquorare examined in the light of the applicable statutory provisions i.e. Section 65(19) read with 65(105) (zzb) ibid, **the only conclusion which is coming out is that the activities of the RSBCL in relation to liquor stored by the manufacturer/supplier of the liquor in their Godown constitute provision of Business auxiliary service (hereinafter 'BAS'), since they provide a service in relation to the sale of goods produced by the manufacturer/supplier of the liquor. Further, it appears that any argument that they were engaged in trading of the liquor is not tenable** being contrary to the stipulations made in LSPs as well as agreement entered with the manufacturer/supplier of the liquor as on analysis of the several clauses of the agreement (referred to above), it appears that the RSBCL was never the owner of the liquor nor had title in the liquor supplied to it. It appears that they were just acting as the consignee of the goods belonging to the manufacture/supplier. **Therefore, it appears that within the framework of the agreements, considered in the context of the taxable BAS, as defined in Sections 65(19) read with 65(105) (zzb) of the Act ibid, there appears to be overwhelming evidences present to show that the RSBCL, was rendering the taxable BAS as they were clearly marketing and providing services in relation to sale of goods** (IMFL, Beer etc.) produced/belonging to the manufacturer/suppliers.
>
> **<u>Taxability of the service post 01.07.2012.</u>**
>
> 12. Whereas after introduction of negative list of services with effect from 1.7.2012, as per section

> 65(B)(44) of the Finance Act, 1994, service" means any activity carried out by a person for another for consideration. **Since the RSBCL is engaged in the activity of sale on behalf of the manufacturer/suppliers of IMFL/Beer and charging fixed consideration for the same, therefore for, the activities of the RSBCL falls with the definition of the "service given in the Finance Act, 1994.** Further "taxable service" has been defined under Section 65(B) (51) of the Act ibid to mean any service on which service tax is leviable tinder Section 66B of the said Act. Service tax under Section 66B of the Act ibid, is leviable on all the services except for the services mentioned in the Negative list of services provided under Section 66D of the Act ibid or where Government has extended exemption to any service by way of Notification issued under the said Act. **It appears that the service so provided by the RSBCL is not covered in negative list of services given in Section 66D of the Act ibid and there appears to** be no exemption to the said service from payment of service tax which is leviable under Section 66B ibid, **therefore, the RSBCL is liable to pay service tax on the said taxable service provided by them even after 1.7.2012.**
>
> **(emphasis supplied)**

6. The show cause notice also invoked the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act 1944[4].

7. For the period 01.04.2015 to 01.06.2017, a second show cause notice dated 05.04.2018 was issued to the appellant on allegations similar to the allegations contained in the first show cause notice dated 18.11.2016.

8. It transpires that for the period 01.02.2005 to 31.08.2007 a demand of service tax, by a show cause notice dated 11.07.2018,

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4. the Finance Act

was created against the Corporation for providing BAS for sale of liquor of Liquor manufacturers. This demand was upheld by the Tribunal, but the Rajasthan High Court set aside the order of the Tribunal on the ground that the Corporation was involved in sale of goods only and no services were provided. The department filed a Special Leave Petition before the Supreme Court which was dismissed. The review petition filed before the Rajasthan High Court was also dismissed.

9. It also transpires that for the period 01.09.2007 to 31.03.2011, a demand for service tax was created by a show cause notice dated 11.10.2012 but the Tribunal, relying on the Rajasthan High Court judgment, decided the issue in favour of the Corporation and the order confirming the demand of service tax was set aside.

10. It would, therefore, transpire that prior to the issue of the two show cause notices dated 18.11.2016 and 05.04.2018 which are the subject matter of in the present appeals, the issue as to whether the Corporation was liable to pay service tax for sale of liquor of liquor manufacturers under BAS had been settled by the Rajasthan High Court holding that the Corporation was involved in sale of goods only and no services were provided for the period prior to 01.07.2012.

11. The appellant filed a detailed reply to the two show cause notices dated 18.11.2016 and 05.04.2018 pointing out that it was not liable to pay in service tax. The Principal Commissioner, however, adjudicated both the aforesaid show cause notices by a common order dated 31.05.2019. The demand raised for the amount collected as commission was dropped in view of the decision of the Rajasthan

High Court, but the demand raised on the amount shown as 'other incomes' or 'miscellaneous income' was confirmed. The relevant portions of the order passed by the Principal Commissioner are reproduced below:

> 31.1 The show cause notices proposed to collect Service Tax on the commission charged by the noticee and also other incomes collected from the suppliers.
>
> xxxxxxxxxxxx
>
> 34.8 In view of the foregoing discussions, wherein Hon'ble High Court of Rajasthan has held that the noticee was engaged in sale and purchase of liquor for the state, then no Service Tax was payable; which has been upheld by the Apex Court and that there has been no change in the terms and conditions of the agreement between the notice and suppliers, except the rates of commission; I find that Service Tax cannot be demanded from the noticee on the commission charged by them even in the service tax regime post 1-7-2012.
>
> 35. Having decided that the commission or the margin collected by the noticee do not come within the mandate of the service tax by virtue of sale of goods, the next allegation in the show cause regarding levy of service tax upon other incomes or miscellaneous income, as shown in balance sheets of various years of the notice, need to be examined.
>
> xxxxxxxxxxxx
>
> 38.2 The noticee has also placed reliance upon the decision of the Apex Court in the case of Intercontinental Technocrats and Consultant Pvt. Ltd. contending that any reimbursement made by the supplier is ultra-virus section 67 of the Finance Act. **It would appear from the said contention is that the assessee is claiming that the charges collected or paid to them by the suppliers fall in the category of reimbursement for certain activities undertaken by them. However, I find that the said contention is not applicable in the case in hand as these are matters of other income and miscellaneous income rather than reimbursement.**

39. Having held some amounts other than Commission received by the noticee under Para 37 above as taxable, I now quantify/calculate the Service Tax payable by the assessee as under:

(Amount in Rs.)

Demand found sustainable					
Year	**Value of Demurrage Charges/ inactive stock penalty**	**Non operating income(excluding interest received from suppliers and Income from Hologram Charges)**	**Total Taxable value**	**ST payable (inclusive of cesses)**	
(1)	**(2)**	**(3)**	**(4)**	**(5)**	**(6)**
2011-12	38680642	3672889	42353531	4362414	In case of SCN-1
2012-13	42851635	7903511	50755146	6273336	
2013-14	39587347	11380498	50967845	6299626	
2014-15	68388935	21705916	90094851	11135724	
Total-A	**189508559**	**44662814**	**234171373**	**28071100**	
2015-16	75092000	18822000	93914000	13617530	In case of SCN-2
2016-17	75760000	37710000	113470000	17020500	
2017-18 (up to 6/2017)	12427987	11654326	24082313	3612347	
Total-B	**163279987**	**68186326**	**231466313**	**34250377**	
Total-A+B	**352788546**	**112849140**	**465637686**	**62321477**	

39.1 **Summing up, I hold that the assessee is liable to Service Tax amounting to Rs. 6,23,21,477/- (inclusive of all Cesses)on the amounts other than the commission collected and they are also liable to pay due interest thereupon in terms of Section 75 of the Act.** Out of the total demand under SCN-1 and SCN-2 of Rs. 37,65,33,893/- (Rs.20,53,16,530/- + Rs.17,12,17,363/-), the balance amount of Demand of Rs.31,42,12,416/- is held unsustainable and is, therefore, liable to be dropped.

(emphasis supplied)

12. The aforesaid position in regard to the four show cause notices, including the two involved in this appeal would be clear from the following Table:

Sl. No.	**Period**	**Show Cause Notice**	**Order-in-original**	**Tribunal**	**High Court**	**Supreme Court**
1.	01.02.2005 to 31.08.2007	Show cause notice dated 11.07.2008 creating demand for tax on alleged	Order dated 31.03.2010 was passed upholding the demand	Order dated 29.05.2013 dismissing the appeal filed by	Appeal No. 12/2013 filed by Corporation allowed	SLP (Civil) Diary No. 21662/2018 filed by department

		commission on Sale of Liquor		Corporation	by order dated 12.10.2017	dismissed on 16.07.2018
2.	01.09.2007 to 31.03.2011	Show cause notice dated 11.10.2012 creating demand for tax on alleged commission on Sale of Liquor	Order dated 30.12.2013 was passed upholding the demand	Order dated 30.11.2017 setting aside the demand	Appeal No. 105/2018 filed by department dismissed on 27.11.2019	
3.	01.04.2011 to 31.03.2015	Demand created of Rs. 20,53,16,530/- by notice dated 18.11.2016	Order dated 31.05.2019 upholds the demand of Rs. 2,80,71,100/- and interest and penalty thereon (rest dropped against alleged commission)	Impugned in the present appeal		
4.	01.04.2015 to 01.06.2017	Demand created of Rs. 17,12,17,363/- by notice dated 05.04.2018	Order dated 31.05.2019 upholds the demand of Rs. 3,42,50,377/- and interest and penalty thereon (rest dropped against alleged commission)			

13. The Corporation has filed service Tax Appeal No. 52414 of 2019 to set aside the demand confirmed by the Principal Commissioner, while Service Tax Appeal No. 52404 of 2019 and Service Tax Appeal No. 52405 of 2019 have been filed by the department for setting aside that portion of the order passed by the Principal Commissioner that has dropped the demand.

14. Service tax would be leviable only when an activity is considered to be a service and such service classifies as a 'taxable service' defined in section 65(105) of the Finance Act. Section 66 provides that service tax shall be levied at the rate of 12 per cent of the value of taxable services referred to in various sub-clauses of

clause (105) of section 65. Section 67 deals with valuation of taxable service for charging service tax. It is reproduced below:-

> "**67.** (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, 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.
>
> (b) *****
>
> (c) *****"

15. It is, thus, clear that where service tax is chargeable on any taxable service with reference to its value, then such value shall be determined in the manner provided for in (i), (ii) or (iii) of subsection (1) of section 67. What needs to be noted is that each of these refer to 'where the provision of service is for a consideration', whether it be in the form of money, or not wholly or partly consisting of money, or where it is not ascertainable. In either of the cases, there has to be a 'consideration' for the provision of such service. Explanation to sub-section (1) of section 67 defines 'consideration' to include any amount that is payable for the taxable services provided or to be provided, or any reimbursable expenditure, or any amount retained by the lottery distributor or selling agent. It is clear from the aforesaid definition of 'consideration' that only an amount that is payable for the taxable service will be considered as 'consideration'. Reimbursements in course of providing a taxable service can only be brought to tax. Reimbursements without the underlying or principal transaction being a taxable service cannot be said to be an independent service and hence reimbursement in course of trading of goods cannot be brought to tax under the provisions of the Finance Act.

16. The contention of the Corporation is that the amount collected by the Corporation for the reason that the conditions stipulated in the

agreement had not been complied with by the liquor manufacturers are not consideration in view of any service and, therefore, cannot be held to be taxable under section 66E(e) of the Finance Act 1994 in view of the Larger Bench decision of the Tribunal in **Commissioner of Service Tax, Chennai** vs. **Repco Home Finance Ltd.**[5] and the Division Bench decision of the Tribunal in **South Eastern Coalfileds** vs. **Commissioner of Central Excise and Service Tax**.

17. The Corporation also places reliance upon the Circular 28.02.2023 issued by Central Board of Indirect Tax & Customs regarding leviability of service tax under section 66E(e) of the Finance Act.

18. In **Repco Home Finance**, the Larger Bench of the Tribunal held that the consideration must flow from the service recipient to the service provider for a taxable service provided under the Finance Act. The service recipient may have to fulfil certain conditions of the contract but that would not necessarily mean that it would form part of the value of the taxable service. The relevant paragraphs of the decision are reproduced below:

> "27. What follows from the aforesaid decisions is 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 Act. 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.

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5. 2020 (42) G.S.T.L. 104 (Tri.-LB)

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44. It, therefore, clearly follows that foreclosure charges are recovered as compensation for disruption of a service and not towards "lending" services. In fact, the amount for processing charges and documentation charges or like charges are subjected to service tax because they are essential for the activity of lending and are treated as activities "in relation to lending". Foreclosure is anti thesis to lending and, therefore, cannot be construed to be "in relation to lending". The phrase "in relation to lending" cannot be so stretched so as to bring within its ambit even activities *****

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46. Thus, merely because the clause relating to damage is featuring in a contract, it would be incorrect to conclude that the party has been given an option to violate the contract. Hence, to treat eventuality of foreclosure as an optional performance is incorrect. The contract cannot be understood to be providing an option to the parties to either perform or not perform/violate."

19. In **South Eastern Coalfileds**, the Tribunal held that liquidated damages recovered on account of breach or non-performance of contract are not consideration in view of any service but are in the nature of deterrent imposed so that such a breach or non-performance is not repeated. The relevant paragraphs of the decision of the Tribunal are reproduced below:

"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'.

20. The Circular dated 28.02.2023 issued by the Central Board of Indirect Tax and Customs also provides that service tax cannot be levied on the amount collected for the said purpose and it is reproduced below:

"4. As can be seen, the said expression has three libs: -i) Agreeing to the obligation to refrain from an act, ii) Agreeing to the obligation to tolerate an act or a situation, iii) Agreeing to the obligation to do an act. Service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. **A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such an act. Such contractual arrangement must be an independent arrangement in its own right. There must be a necessary and sufficient nexus between the supply** (i.e. agreement to do or to abstain from doing something) **and the consideration**.

5. **The issue also came up in the CESTAT in Appeal No. ST/50080 of 2019 in the case of M/s Dy. GM (Finance) Bharat Heavy Electricals** Ltd in which the Hon'ble Tribunal relied on the judgment of divisional bench in case of M/s South Eastern Coal

> Fields Ltd Vs. CCE Raipur (2021 (55) G.S.T.L 549(Tri-Del)). Board has decided not to file appeal against the CESTAT order ST/A/50879/2022-CU[DB] dated 20.09.2022 in this case and also against Order A/85713/2022 dated 12.8.2022 in case **of M/s Western Coalfields Ltd.** Further, Board has decided not to pursue the Civil Appeals filed before the Apex Court in M/s South Eastern Coalfields Ltd. supra (CA No. 2372/2021), M/s Paradip Port Trust (Dy. No. 24419/2022 dated 08-08-2022), and M/s Neyveli Lignite Corporation Ltd (CA No. 0051-0053/2022) on this ground.
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> 6. **In view of above, it is clarified that the activities contemplated under section 66E(e), i.e. when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are the activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.** Field formations are advised that while taxability in each case shall depend on facts of the case, the guidelines discussed above and jurisprudence that has evolved over time, may be followed in determining whether service tax on an activity or transaction needs to be levied treating it as service by way of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. Contents of Circular No. 178/10/2022-GST dated 3rd August, 2022, may also be referred to in this regard."
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> **(emphasis supplied)**

21. The Commissioner, therefore, was not justified in confirming the demand of Rs. 2,80,71,100/- while adjudicating the first show cause notice dated 18.11.2016 nor was the Commissioner justified in confirming the demand of Rs. 3,42,50,377/- while adjudicating the second show cause notice. The order dated 31.05.2019 passed by the Commissioner to the extent it confirms the aforesaid demand of

service tax deserves to be set aside. Service Tax Appeal No. 52414 of 2019 filed by the Corporation, therefore, deserves to be allowed.

22. Service Tax Appeal No. 52404 of 2019 and Service Tax Appeal No. 52405 of 2019 have been filed by the department to assail that part of the order of the Principal Commissioner that drops the demand. The Principal Commissioner has dropped the demand in view of the decision of the Rajasthan High Court in **Rajasthan State Beverages Corporation** vs. **Commissioner of C. Ex., Jaipur**[6]. The Rajasthan High Court relied upon the decision of the Chhattisgarh High Court in **Union of India** vs. **M/s. Chhattisgarh Estate Beverages Corporation**[7]. The Chhattisgarh High Court held as follows:

> "9. It is not disputed that if the Corporation was engaged in sale and purchase of liquor for the State, then no Service Tax was payable.
>
> 10. The Tribunal has recorded a finding of fact that the Corporation was engaged in purchase and sale of liquor and could not be considered as clearing and forwarding agent for the State Government. It is finding of fact. No illegality in the finding has been pointed out."

23. The Rajasthan High Court also relied upon its earlier decision in **M/s. Hindustan Coca Cola Beverages Pvt. Ltd.** vs. **Commissioner of Income Tax-III, Jaipur**[8].

24. In view of the aforesaid two decisions of the Rajasthan High Court and the decision of the Chhattisgarh High Court it has to be held that the transaction of purchase and sale of liquor by the

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6. 2018 (11) G.S.T.L. 157 (Raj.)
7. Tax Case No. 6/2009 decided on 02.05.2013
8. DBITA No. 205/2005 decided on 11.07.2017

Corporation will not fall within the ambit of BAS and would, therefore, not be taxable. The two appeals filed by the department, therefore, deserve to be dismissed.

25. Thus, Service Tax Appeal No. 52414 of 2019 is allowed while Service Tax Appeal No. 52404 of 2019 and Service Tax Appeal No. 52405 of 2019 are dismissed. Service Tax Cross Objection No. 50757 of 2022 and Service Tax Cross Objection No. 50730 of 2022 are, accordingly, disposed of.

(Order pronounced on **03.07.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

JB, Shreya