

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.218 of 2011

(Arising out of OIO-STC/24/COMMR/ASD/2010 dated 31/12/2010 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD)

Associated Soap Stone Distributing Company Pvt LtdAppellant

01, Sandhya Bunglow-2,
Opp. Anand Nagar Shopping Centre, Vejalpur, Ahmedabad, Gujarat

VERSUS

C.S.T.-Service Tax – Ahmedabad

.....Respondent

7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
CENTRAL EXCISE BHAVAN, AMBAWADI,
AHMEDABAD, GUJARAT-380015

APPEARANCE:

Shri Jigar Shah, Advocate for the Appellant

Shri Dinesh Prithiani, Assistant Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
 HON'BLE MEMBER (TECHNICAL), MR. P. ANJANI KUMAR**

Final Order No. A/ 10223 /2022

DATE OF HEARING: 16.11.2021
DATE OF DECISION: 08.03.2022

RAMESH NAIR

The appeal is against impugned order dated 31-12-2010 of Commissioner of Service tax, Ahmedabad. Brief facts of the case are that Appellant were awarded tender No. LP-2/04-05 dated 23.12.2004 for over burden removal at lignite project Panandhrao Dist. Kutch. and tender No. LP-3/04-05 dated 15.10.2004 for Earth excavation work & hiring of loose Soil of old dump by M/s GMDC. Investigation was taken up by the Department with reference to said Tenders Contract and it was found that appellants are not paying service tax on their activity which was covered under the category of 'Site formation and Clearance, Excavation and Earthmoving and Demolition Service. Accordingly, a Show Cause Notice dated 22-12-2009 was issued to the appellants demanding service tax for the period 16-6-2005 to 31-5-2007 along with interest and also proposing penalties on them. The Show Cause Notice was adjudicated by the Commissioner against the appellants vide impugned order confirming the service tax of Rs. 2,10,25,661/- with interest and imposing penalty under

Sections 76, 77 and 78 of the Finance Act. Appellants have challenged the impugned order in the present appeal.

02. Shri Jigar Shah, Learned Counsel appearing for the appellant submits that though the subject mentioned in Tender No. LP-2/04-05 dated. 23.12.2004 is "hiring of heavy earthmoving machinery for overburden removal at Lignite Project, Panandhro; the actual work carried out under the said contract is overburden removal during the mining of lignite. The same is also clear from the summary table given on the first page of Tender Documents. Such Service can, therefore be said to be classifiable only under the category of "Mining Services" and taxable w.e.f. 01.06.2007 only. "Mining" is not a single and isolated activity but it comprises of a series of activities involving drilling, excavation, overburden removal, extraction of mineral and other activities carried out at the mines during the course of mining. Appellant are paying service tax on the impugned service under the category of "Mining Service" w.e.f. 01.06.2007 and such payment of service tax under the category of "Mining Services" is accepted by the department. It is therefore appellant were not liable to pay any service tax under the category of "site formation and clearance, excavation, earth moving and demolition service" on the activity of "Overburden Removal at Lignite Project" undertaken in the course of mining of lignite in terms Tender No. LP-02/04-05. The said issue stand clarified by C.B.E.C. letter issued from F.No. 232/2/2006-CX.4 dated 12.11.2007. He also placed reliance on Section 65A of the Finance Act, 1944. On request of Appellant M/s Gujarat Minerals Development Corporation has issued the certificate dated. 06.03.2012 wherein it is specifically certified that the Appellant were assigned to work of removal of overburden to extraction of last mineral in the specified block of the mine.

2.1 He further submits that the issue is squarely covered in favour of the Appellant in their own case in order passed by the CESTAT, New Delhi reported in 2014 (34) STR 865 (Tri-Del). On the same issue of classification of services he also relies on following Judgments:

- (i) PRAHLAD RAI & CO. 2018(17)GSTL 272(TRI. DEL)
- (ii) SADBHAV ENGINEERING LTD. 2016(43)STR288(TRI. AHMD)
- (iii) VIJAY LEASING CO. 2011(22)STR 553 (TRI. BANG)
- (iv) M. RAMAKRISHNA REDDY 2009(13)STR 661 (TRI.- BANG)

- (v) ARAVIL CONSTRUCTION CO. PVT. LTD. 2017 (6) GSTPL 347 (TRI. DEL)
- (vi) TEKNOMIN CONSTRUCTION LTD. 2017(4) GSTPL 65 (TRI.- DEL)
- (vii) QUIPPPO OIL & GAS INFRASTRUCTURE 2020-TIOL-1599-CESTAT-DEL.

2.2 He also submits that it is well established and settled principle that any services which is introduced from a particular date/ time, it will be deemed that said activity was not covered under any of the existing categories of the services. The mining Service were introduced in service tax net w.e.f. 01.06.2007 then in that case it will be deemed that the said activity was not covered within the taxable category of site formation and excavation activity. He relies upon the case of Indian National Ship Owners Association 2009-TIOL-155-HC-MUM-ST.

2.3 He also argued that if the true nature of service is ascertained from the tender documents then the Appellants were required to provide only excavation machineries on hire. In that case the activity would fall under supply of tangible goods for use and would be taxable only w.e.f 16.05.2008.

03. Per contra Shri Dinesh M. Prithiani, Learned Assistant Commissioner (AR) for the respondent revenue supports the impugned order and submits that tender was awarded to Appellant for Overburden Removal at Lignite Project and not for mining activity. Commissioner has rightly demanded the service tax on this activity under "Site formation and clearance, excavation and earthmoving and demolition service". He relies upon the decision of the Hon'ble Tribunal order No. 52288/2018 dated 20.06.2018 passed by in the matter of HANUMANT CONSTRUCTION PVT. LTD. VS CCE RAIPUR.

04. We have considered the submissions made by both the sides and perused the records. In the present case, the issue to be decided is that the service in question is classifiable under the category of 'Site Formation and clearance, Excavation and Earth Moving and Demolition service' as contended by the revenue or under the category of 'Mining service' as contended by the appellant. As per the facts of the case, the appellant have carried out the service in terms of contract under Tender No.LP-2/04-05 and

similar other contract. As per the contract document, the relevant clauses thereof are reproduced below:-

7. Exploration & Interpretation

Commissionerate of Geology & Mining and GMDC have so far completed about 410 boreholes in this area. Out of those about 172 boreholes were in the mined out area and about 50 boreholes are in the block IV area where overburden removal work has to be carried. The exploration data of block I IV has further scrutinized by GMDC and the general sequence of formation is observed as below,

- Top soil*
- Sub soil*
- Limestone/Siderite*
- shale and clay*
- Lignite (with clay /shale intercalation)*
- Sand white.*
- Trap*

The constitution of overburden can be derived follows;

- | | |
|-----------------------------------|-------------|
| <i>1. Top soil & Sub Sol</i> | <i>-15%</i> |
| <i>2. Limestone</i> | <i>-7%</i> |
| <i>3. Shale/Clay</i> | <i>-45%</i> |
| <i>4. Carbonaceous Clay/Shale</i> | <i>-35%</i> |

1. METHOD OF WORKING

- i) The equipment deployed by the contractor and methods and organization for handling the work shall be such as will ensure a regular and continuous production of lignite of required quality, which will ensure the completion of the works within the time herein specified. Further, the work should be executed strictly in conformity with the provisions of CMR 1957, Mines Act 1952 and all relevant rules, bye laws and statutory provisions and instruction given by the GMDC and/or Mines Manager from time to time.*
- V) if any economic mineral other than lignite is found in overburden / interburden, the contractor shall excavate it separately and stack it in a separate dump to be earmarked by the GMDC for this purpose. No extra payments shall be made on this account.*

1. SCOPE OF WORK

(a) Hiring of earth moving machinery like hydraulic excavators, dumpers and other ancillary equipment for removal of Overburden (OB) / Inter burden (IB), which includes all types of strata like top soil, alluvium, different types of clay and shale etc., as given in bore hole lithologs enclosed in drawing section at plate no.2 to 12, up to all depths from surface and with all leads and lift, so as to expose all minor and major lignite seams for mining.

(c) Some times during OB removal, intermediate thin lignite seams or other economical minerals may intercept, which may or may not be quality-wise suitable for sale. In such cases, lignite or other economical minerals so intercepted will also be excavated and stacked by the successful bidder (herein after called Contractor), at place(s) directed by the Mines Manager, at no extra payment.

(d) If such lignite seams are mined out departmentally or through any other authorised agency, proper records, duly signed by the Mines Manager and the Contractor, shall be maintained in terms of tonnage of lignite so removed. Pro-rata volumetric quantity shall then be reduced from Contractor's measured quantity for the plot. Specific gravity of lignite, for this purpose, shall be considered as 1.2

From the above clauses of the contract, the nature of the work is the removal of overburden in relation to mining of lignite therefore, the removal of over burden is exclusively in relation to mining of lignite only therefore, the activities carried out by the appellant i.e. Removal of over burden by excavation in relation to mining of lignite. It is further noticed that the service recipient M/s. GMDC also issued a certificated dated 16.3.2012 which is reproduced below:



To whom So Ever It May Concern

This is to certify that the work awarded to M/s. Associated Soapstone Dist. Co. Pvt.Ltd. Golcha Garden, Jaipur vide tender Notice No. LP-2/04-05 for removal of Overburden and interburden in all types of strata till de-coaling level i.e. end of mineral level in the mines.

This is to further certify that the work under this tendered document was carried out in the course of mining of mineral.

This work of overburden / interburden removal was not for preparation of mine, prior to mine but it was done as a part of mining during the course of mining of minerals.

For GMDC Ltd.,

Date: : 6th March 2012

C.R. Patel
6/03/12
C.R.Patel

Place: Panandhro.

General Manager (Project)

From the above certificate issued by the Gujarat Minerals Development Corporation Ltd., who is the recipient of service in this case, makes it clear that the work of overburden/interburden removal is a part of mining during the course of mining therefore. The service is pre-dominantly related to mining. We find that even if, the contention of the revenue that the activities of the appellant taken independently is of 'Site Formation and Clearance, Excavation and Earth Moving and Demolition but at the same time, all these activities undertaken by the appellant is for the purpose of mining only. In this position, we find that if at all, there is a doubt about the particular service to be classified under one or more category the principle laid down for classification of taxable service under Section 65A need to be applied. The same is reproduced below:-

"SECTION 65A. Classification of taxable services. (1) *For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of section 65;*

(2) *When for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows:*

(a) *the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;*

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;

(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration."

From the above provision for classification of taxable service, it is provided that if taxable service is prima facie classified under two or more sub-clauses of clauses under Section 65, classification shall be effected on the basis of sub-clauses which provides the most specific description as compared to sub-clauses providing more general description. In the facts of the present case, it is undoubtedly clear that between appellant and the service recipient M/s. GMDC even though the nature of activity independently is of excavation and removal of soil but the objective of this activity is for mining only. In case of any mining activity, the activity of removal of over burden is inevitable. If the contention of the revenue is accepted then in case of all mining activities, the activity of excavation, removal of soil will go out of mining service which is not the intention of the legislature. Therefore, considering the above provision for classification of taxable service particularly in terms of Sub-section (1)(2a) of Section 65A as per the nature of the service in the present case, the removal of over burden which is exclusively meant for mining of lignite shall fall under the category of mining service only. The same issue in the appellant's own case came before the Tribunal Division Bench- Delhi which is reported at ASSOCIATED SOAPSTONE DISTRIBUTING CO. P. LTD. vs. CCE- 2014 (34) STR 865 (Tri.-Del.) wherein, the tribunal has passed the following order:-

5. After hearing both sides, we find that issue involved is whether activity undertaken by the appellants falls under the Site Formation, Clearance and Excavation and Earthmoving and Demolition services as contended by Revenue or under Mining Service as contended by the appellants. For the sake of convenience, Section 65(97a), 65(105)(zzza) and Section 65(105)(zzzy) are reproduced below :-

"Section 65(97a) "Site formation and clearance, excavation and earth moving and demolition" includes -

- (i) Drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or
- (ii) Soil stabilization; or
- (iii) Horizontal drilling for the passage of cables or drain pipes; or
- (iv) Land reclamation work; or
- (v) Contaminated top soil stripping work; or
- (vi) Demolition and wrecking of building, structure or road,

But does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies".

"Section 65 (105)(zzza) - to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities".

"Section 65 (105)(zzzy) - to any person, by any other person in relation to mining of mineral, oil or gas;"

We note that activity undertaken by the appellants is excavation and removal of O/B waste and mining of ore. We also note that there is only one contract with the appellants showing the scope of work as excavation and removal of O/B waste and mining of ore. This activity starts from excavation and ends at mining of ore. We find that this is a composite activity and cannot be split into two separate parts for levy of service tax. We are supported in taking this view by the decision of Tribunal in case of M. Ramakrishna Reddy v. CCE reported in [2009 \(13\) S.T.R. 661](#) (Tri.-Bang.) wherein it was held that removal of over burden and excavation of ore is undertaken for mining of ores only and activity does not fall under Site Formation and Excavation and Earth moving and Demolition service. Following the said decision, we hold that since the activity undertaken by the appellants is also excavation and removal of over burden and mining of ore, it is not classifiable under Site Formation, Cleaning, Excavation, Earthmoving and Demolition services.

6. In the aforesaid circumstances, we set aside the order of the Commissioner and allow the appeal. The Miscellaneous Application filed by the appellants also stands disposed of

From the above judgment, it can be seen that in the appellant's own case similar activities were considered as 'Mining Service' therefore, the ratio of the above judgment directly applies in the facts of the present case also. The

identical issue has been considered in the various judgments cited by the appellant as mentioned in above Para 2.1 wherein, similar view was taken by the Tribunal therefore, we can conveniently view that the issue is no longer res-integra. It is also pertinent to note that the appellant, on the same service, paid service tax under the category of 'Mining Service' with effect from 1.6.2007 and it is admitted fact that the revenue had accepted the classification of the same service under 'Mining Service'. It also strengthens the case of the appellant that the service provided by them is of 'Mining Service' and does not fall under the category of 'Site Formation and Clearance, Excavation and Earth Moving and Demolition Services'.

4.1 The appellant also argued that the service can alternatively be classified under supply of tangible goods for use as they have provided the machineries on hire for excavation. Since, we have taken the view that the service per-se is a Mining Service therefore, we are not addressing the alternate submission made by the appellant.

05. As per the above discussions and findings, we are of the view that the appellant have provided the Mining Service which was not liable to service tax during the relevant period in this case. Therefore, the impugned order is not sustainable hence the same is set aside. Appeal is allowed with consequential relief.

(Pronounced in the open court on 08.03.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR M)
MEMBER (TECHNICAL)