CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/489/2009-DB; ST/490/2009; ST/172/2009; ST/3568/2012; ST/20792/2017

[Arising out:

(i) Order-in-Original No.2/2009-(Commr.) dated 26/02/2009 passed by the Commissioner of Central Excise and Customs, Belgaum;

(ii) Order-in-Original No.4/2009-(Commr.) dated 05/03/2009 passed by the Commissioner of Central Excise and Customs, Belgaum.

(iii) Order-in-Original No.01/2009-Commr dated 21.01.2009 passed by the Commissioner of Central Excise and Customs, Belgaum;

(iv) Order-in-Appeal No.572/2012 dated 18.10.2012 passed by the Commissioner of Central Excise (Appeals) Mangalore;

(v) Order-in-Appeal No.BEL-EXCUS-000-APP-087-16-17 dt. 9.2.2017 passed by the Commissioner of Central Excise (Appeals), Mysore.]

(1) & (2) M/s. BALAJI MINES AND MINERALS PVT LTD.
SREE SAAPTHAGIRI ENCLAVE,
COLLEGE ROAD,
HOSPET – 583 201.

(3) & (4) M/s. Shailaja Earth Movers
Amruth Nivas, Krishnanagar,
Sandur – 583 119.

Appellant(s)

(5) The Commissioner of Central Excise and Customs
NO. 71, CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM – 590 001.
KARNATAKA

Versus

(1) & (4) The Commissioner of Central Excise and Customs
NO. 71, CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM – 590 001.
KARNATAKA

Respondent(s)

(5) M/s. Shailaja Earth Movers
Amruth Nivas, Krishnanagar,
Sandur – 583 119.

Appearance:

Mr. Rajesh Kumar, CA
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For the Appellant

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Mr. Veerabhadra Reddy,
Commissioner (AR)

For the Respondent

Mr. Gopa Kumar,
Joint Commissioner (AR)

Date of Hearing: 26.06.2019
Date of Decision: 24.09.2019

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20769 – 20773 / 2019

Per : P. ANJANI KUMAR

The appellants, M/s Shailja Earth Movers, are engaged in the activities of drilling, blasting, excavation and raising (extraction) of iron ores from mines and crushing, screening, sorting, grading, processing etc. of iron ore in the processing unit. They have entered into a "raising contract" with Shri H.G. Ranganagoud in terms of which the appellants are paid Rs.110 per metric ton of iron ore excavated. Department contended that the activity undertaken by the appellants falls under the category of "Business Auxiliary

Service” as per Section 65 (19) of Chapter 5 of Finance Act, 1994. Department has issued a SCN dated 28.09.2007 demanding Service Tax of Rs.1,40,47,532/- along with interest and penalties for the period 10.09.2004 to 30.09.2006. The SCN was adjudicated by Commissioner vide Order No. 01/2009 dated 21.01.2009. Hence Appeal No. ST/172/09 was filed. Further, for the period 01.06.2007 to 30.09.2007, Department contended that the appellants are engaged in the services of “Site Formation and Clearance, Excavation, Earth Moving & Demolition Service” as per Section 65 (97a) of Finance Act, 1994, Business Auxiliary Service as per Section 65 (19) of the Finance Act, 1994 and taxable service in relation to mining or mineral service as per Section 65 (105) of the Finance Act, 1994. A SCN dated 21.10.2008 was issued and was confirmed by OIO No.25/2011-ADC (ST) dated 31.03.2011 passed by Additional Commissioner confirming Service Tax demand of Rs.16,66,289/- along with interest and penalties which have been upheld by Commissioner (A) vide OIA No. 572/2012 dated 18.10.2012 against the same Appeal No. ST/3568/12 was filed. Department has issued a SCN dated 15.10.2009 to the appellants covering the period 01.10.2006 to 31.05.2007 alleging that they have rendered “Business Auxiliary Service” and demanding a duty of Rs.14,04,018/-. The demand was confirmed by the Additional Commissioner vide Order dated 18.11.2014 along with interest and penalties. On an appeal filed by the appellants, Commissioner (A) vide Order dated 09.02.2017 set aside the Order of the Additional Commissioner holding that the activity undertaken by the appellants has the essential ingredients of mining service taxable as per Section 65 (105) (zzzy) of Finance Act, 1994. The Department has filed Appeal No.ST/20792/17 against the order.

2. Brief facts in Balaji Mines and Minerals Ltd. are that the appellants had entered into agreements with M/s E. Ramamurthy, M/s Jyoti Brothers and M/s T.V.Channanja Shettappaa and Brothers, individual Mine Owners, for undertaking excavation, drilling, blasting, sorting and screening of iron ores and supply of the same to the Mine owners for further sale to M/s Salgaocar Mining Industries Pvt. Ltd., Goa. Department issued a SCN dated 13.06.2008 (for the period 01.04.2006 to 31.03.2007, alleging that activities of excavation, extraction, producing and processing of crude iron ore into two or more types of iron or is classifiable under "Site Formation and Clearance, Excavation and Earthmoving and Demolition Service" as defined under Section 65 (19) of the Finance Act, 1994 and Business Auxiliary service. Another SCN dated 03.10.2008 was issued (covering the period June 2007 to March 2008) alleging that the activity of surveying for the purpose of commercial exploitation of iron ore deposit for the mine owners during the period June 2007 to March 2008 is classifiable under "Survey and Exploration of Minerals Service"; activity such drilling, blasting, excavation of iron ore and raising of iron ore etc., during June 2007 to March 2008 is classifiable under "Site Formation and Clearance, Excavation and Earthmoving and Demolition Service"; the activity of raising/extraction of minerals during the period June 2007 to March 2008 is classifiable under "Mining of Minerals, Oil or Gas Service" and the activities such as crushing, screening, sorting, grading, producing and processing of crude iron ore into end products of two or more types of iron ores comes under "Business Auxiliary Service". Learned Commissioner passed impugned orders 02/2009 dated 26.02.2009 and 04/2009 dated 05.03.2009 respectively and confirmed duty demanded along with penalty under Section 77 and 78.

3. Coming to the Appeal No. ST/172/09, Learned Counsel for the appellants submits that the activity undertaken by them amounts to production of excisable goods which is leviable to Central Excise duty in terms of Section 3 of the Central Excise Act, 1944 and in terms of Notification No. 04/2006-CE dated 01.03.2006, the goods are exempted. As they are engaged in the activity of manufacture, no Service Tax can be levied on them; Section 3 of Iron Ore Mines, Manganese Ore Mines and Chrome Ore Mines Labour Welfare Cess Act, 1976 imposes Cess on iron ore produced in India. As Cess is collected only as duty of Excise when levy under Section 3 of Central Excise Act is attracted; by the activity they undertake, a different commodity which has a distinct name, character and use comes into existence and therefore, the activity requires to be considered as manufacture and thus, not leviable to any Service Tax. He further submits that CBEC vide Circular No. 232/2/2006-CX IV dated 12th November 2007 clarified that service provided by any person to any other person in relation to mining of minerals, oil or gas has been comprehensively brought under the ambit of Service Tax w.e.f 1st June 2007. Therefore, no Service Tax is leviable from 1st June 2007. The Learned Counsel also submits that there was no suppression of any fact by them and the dispute relates to chargeability of Service Tax on some of the activities undertaken by them; the Department vide letter dated 14.09.2006 asked them to submit certain details which were submitted on 12.12.2006; therefore, SCN dated 28.09.2007 is time barred. He also submits that as there is no *mens rea*, no penalty can be imposed and interest can be charged.

3.1. Coming to the Appeal No. ST/3568/2012, Learned Counsel submits that the demand of Service Tax has been made under three categories of service but was confirmed under one heading i.e. Mining Service which is beyond the SCN; the production of ores results in excisable goods being chargeable to Excise duty therefore Service Tax cannot be levied. He also submits that the contract is vivisectable and demand is under three separate categories and therefore confirmation of demand under one category of Mining Service is beyond the SCN. He relied upon the following cases:

- Aluminium Corporation of India Ltd. Vs Coal Board AIR, 1959 Calcutta 222 (Vol. 46 C.58)
- Empire Industries Ltd. Vs UOI, 1985(20) ELT 179 (SC).
- Commissioner of Income Tax Vs Sesa Goa Ltd. (2004) 13 Supreme Court cases 548
- Moti Lainates Pvt. Ltd. Vs Collector of Central Excise.
- Barnagore Jute Factory Co. Vs Inspector of C.Ex., 1992 (57) ELT 3 (SC).
- Avaian Overseas Pvt. Ltd. Vs Commissioner of Central Excise, Cus and Service Tax, 2009 (15) STR 540 (Tri – Kol)
- Makjai Laboratories Vs Commissioner of Central Excise, 2011(21) STR 398 (Tri. Mum)
- Mehta Plast Corporation Vs Commissioner of C.Ex., Jaipur, 2014 (34) STR 401 (Tri. Del.)
- Aggarwal Colour Advance Photo System Vs. Commissioner of Central Excise, 2011 (23) STR 608 (Tri. LB)
- Jayakrishna Flour Mills Pvt. Ltd. Vs Commissioner of Central Excise, 2014-TIOL-2354-CESTAT-MAD.

- Rajaram Flour Mill (P) Ltd. Vs Commissioner of C.Ex., 2015-TIOL-159-CESTAT-MAD.
- Aryan Energy (P) Ltd. Vs Commissioner of Cus. & C.Ex., 2009 (13) STR 42 (Tri. Bang)
- M. Ramakrishnan Reddy Vs Commr. of Central Excise & Cus., 2009 (13) STR 661 (Tri. Bang)
- Osnar Chemical Pvt. Ltd. Vs Commissioner of C.Ex., 2009 (240) ELT 115 (Tri. Bang)
- Ferro Scrap Nigam Ltd. Vs Commissioner of C.Ex., 2014 (36) STR 955 (Tri. Del.)

4. Learned Counsel for the appellants in Appeals No. ST/489 & 490/2009 submits that they had rendered into composite agreements for carrying out the drilling, blasting, excavation, extraction, lifting of ore up to the pit head, screening, etc., of iron ore in the mines of the owners; the entire activity comes within the meaning of raising iron ore for the mine owner and were undoubtedly in relation to 'mining of minerals'; there is no question of carrying out survey and exploration for minerals in the functioning mines; the actual mining operation does not include survey and exploration; similarly, the site formation and clearance, excavation and earth moving and demolition, etc., are not undertaken as no such activities relating to construction are undertaken; the appellants have also not undertaken removal of over burden, etc; therefore, the allegation in the show-cause notice and the impugned orders are without any basis. The consideration received by them was a lumpsum payment as consideration towards the raising transporting and processing of iron ore and it was paid per MT basis. Therefore the essential character/nature of the activities is mining of minerals as defined under Section 65(105)(zzzy) of Finance Act, 1994 which attract levy from 1.6.2007; the activity of screening of iron ore for segregation was incidental and ancillary to the activity of mining; the service tax and transportation (GTA) has been paid when there is no dispute in this regard. He further submits that whereas the show-cause notice dated 13.6.2008 (appeal No.489/2009) has classified activities of drilling, blasting, excavation of iron ore and raising of iron ore undertaken by the appellants for the mine owners under "Site Formation and Clearance, Excavation and

Earth moving and demolition" under Section 65(97a); the activity of crushing, screening, sorting, grading, producing or processing of iron ore under "Business Auxiliary Service" under Section 65(19). However, while confirming the Commissioner has consolidated the demand without determining the value of each service and tax payable thereof. The Learned Counsel further submits that in respect of SCN dated 3.10.2008 (appeal ST/490/2009) while the show-cause notice has discussed the services under various activities like:

(i) Survey and exploration of mineral as defined in Section 65(104a) read with Section 65(105)(zzv) of the Finance Act, 1994;
(ii) Drilling, blasting, excavation of iron ore, undertaken under "Site Formation and Clearance, Excavation and earth moving and Demolition" services as defined under Section 65(97a) read with Section 65(105)(zzza);
(iii) raising/extraction of iron ore under "Mining of mineral, oil or gas" as defined under Section 65(105)(zzzy); and
(iv) Crushing, screening, sorting, grading producing and processing of iron ore in to two more end products under "Business Auxiliary Service" as defined under Section 65(19) read with Clause (v) of Section 65(19) – "Production of goods on behalf of the client".
However, the Commissioner confirmed without determining the value of each service and apportioning the service tax on such values of each service as required in terms of Section 65A read with Section 67 of the Finance Act, 1994.

4.1 The learned counsel for the appellant further submits that the essential features of all the activities as part of composite service for raising and supply of iron ore; in terms of subsection (2b) of Section 65A of the Finance Act, 1994

> *"(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 given then their essential character, in so far as this criterion is applicable".*

He relied upon the following decisions:

i. CCE vs. Ores India (P) Ltd.: 2012 (27) STR 188 (Tri.-Kol.)
ii. Teknomin Construction Ltd. Vs. CCE, Jaipur-II: 2017 (4) GSTL 65 (Tri.-Del.)
iii. Kanak Khaniz Udyog vs. CCE, Jaipur: 2017 (52) STR 46 (Tri.-Del.)
iv. Hazaribagh Mining & Eng. P. Ltd. vs. CCE: 2017 (49) STR 289 (Tri.-Kol.)
v. M. Ramakrishna Reddy vs. CCE: 2009 (13) STR 661 (T)
vi. National Construction Company vs CCE, Jaipur: 2014 (34) STR 739 (T)
vii. Aravali Construction C. P. Ltd. vs. CCE, Jaipur: 2017 (6) GSTL 347 (T)
viii. Associated Soapstone Distribution Co. Ltd. vs. CCE, Jaipur: 2014 (34) STR 865 (T)
ix. CBEC Circular No.334/1/2007-TRU dt.28.2.2007
x. CBEC Circular No.232/2/2006 CX dated 12.11.2007

4.2 He further submits that in the absence of determination of value of each service and service tax thereupon, the impugned orders are defective, therefore, cannot be sustained. He relies upon following cases:

i. CCE vs. BSBK Pvt. Ltd.: 2010 (18) STR 555 (Tri.-LB)
ii. CMS (I) Operations & Maintenance Co. Pvt. Ltd. vs. CCE, Pondicherry: 2007 (7) STR 369 (Tri.-Chennai) affirmed by Hon'ble Supreme Court as reported in 2017 (4) GSTL J75 (SC)
iii. CCE, Ludhiana vs. Bishambar Lal Arora: 2014 (36) STR 1050 (Tri.-Del.)

4.3. Moreover, Hon'ble Supreme Court in the case of ***Intercontinental Consultants and Technocrats Pvt. Ltd.: 2018 (10) GSTL 401 (SC)*** held that the value of taxable service cannot be anything more or less than consideration paid as quit pro quo for rendering such service.

5. Learned AR for the Department has reiterated the findings of OIO and OIA in respect of Appeal Nos. ST/172/09 & ST/3568/12. He further submits that there is no dispute that the appellants have rendered the Mining Services and that the same has been to help the business of their principals and therefore it is rightly categorized under "Business Auxiliary Service". He submits that just because a service "Mining Service" was carved out from

"Business Auxiliary Service", it does not mean that the activity undertaken is not subjected to Service Tax earlier if the same is falling under one Head or the other. He also submits that even if the activity undertaken by the appellants amounted to manufacture the same can also be liable to Service Tax under "Business Auxiliary Service". He points out that the contract does not speak of any value vis-à-vis consideration. Therefore, the appellants have certainly produced goods on behalf of the owners. In respect of Departmental Appeal No. ST/20792/17, he reiterates the grounds of appeal. He relies upon the following:

- Ujjawal Parivahan Sahkari Samiti Ltd., 2013 (10) TMI 587- CESAT, NEW DELHI.
- HSBC Securities & Capital Markets (I) Pvt. Ltd., 2014 (33) STR 530 (Tri. Mum).
- Prahlad Rai & Company vs. CCE, Jaipur: 2018 (17) GSTL 272 (Tri.-Del.)

5.1. In respect of appeal Nos.ST/489 & 490/2009, the learned AR has reiterated the findings of the OIO and OIA.

6. Heard both sides and perused the records. On perusal of the contract, it is seen that the contract is termed a "raising contract" wherein the principals (first party) desirous of utilizing the knowledge and expertise of the second party i.e. appellants who possess the necessary expertise, labour, machinery and equipment, technical know-how to carry on scientific and systematic mining operations such as excavation, extraction, grading, sorting etc. permits the appellants to act as "rising contractor". In terms of Article 3 of the Contract, the second party shall during the continuation of this Agreement, systematically extract, excavate, raise, grade, sort, etc. minerals from the mines. In terms of Article 8, the first party shall pay a sum of Rs.110 per metric tonne of iron ore and Rs.125 per metric tonne for iron ore fines. Ongoing through bills available on records, it is seen that the appellants are paid for the quantity of iron ore lumps and C' Ore extraction, iron ore extraction charges and iron ore fines extraction for various periods

7. The main contention of the appellants in this case is that they are manufacturing iron ore and in view of the Hon'ble Supreme Court' decision in the case of Empire Industries Ltd. (supra) and Others the activity undertaken by them amounts to manufacture and therefore, it is beyond the scope of the levy of Service Tax. They contended that they are converting material recovered from earth into a separately identifiable and marketable commodity called as iron ore. Therefore, they are exempted from Service Tax as per CBEC Circular No. B1/6/2005-TRU dated 27th July 2005, the activities that amount to manufacture within the Central Excise Act were not covered within the scope of taxable service. We find that Hon'ble Calcutta High Court in the case of Aluminium Corporation India Ltd. Vs Coal Board, AIR-1959- Calcutta-222 observed that "Although, coal is undoubtedly a natural product, the operations required to bring it to the surface and to make it marketable or even usable is so elaborate of expensive that to speak of the mining and condition of coal as its production is wholly appropriate." Further, Hon'ble Supreme Court in the case of Empire Industries (supra) held that any process or processes creating something else having distinctive name, character and use would be manufactured. Hon'ble Supreme Court in the case Sesa Goa Ltd. (supra) held that extraction and processing of iron ore would amount to production. We find that the appellants are undertaking process that would create iron ore ready to be marketed by their principals. In fact, the contract is for raising of the iron ore. The contract does not speak of any particular service.

7.1. Learned Commissioner has not accepted this contention of the appellants stating that the appellants were never the owners of the ore produced. We find that this reasoning is not acceptable. As contended by the appellants, the products manufactured, have a separate heading in the Central Excise Tariff Act and taxable in terms of Section 3 of Central Excise Act and also Cess is collected as duty of Excise only when levy under Section 3 of the Central Excise Act is attracted. Irrespective of the fact that the said goods are exempted by virtue of Notification No. 4/2006-CE, they remain to be excisable goods chargeable to Excise duty. This being the case, we do not find merit in the Learned Commissioner's argument that the appellants are not engaged in manufacture. We find that the issue of mining a product vis-à-vis levy of Service Tax under "Business Auxiliary Service" came before the Tribunal and the different Benches were unanimous in considering that the activity of mining will not attract Service Tax.

7.2. Tribunal in the case of Avian Overseas Pvt. Ltd. (supra) have observed in Para 2 as under:

> *"**2.** We have heard the arguments from both sides and perused the case records and the various citations. We find that the business auxiliary services relate to the production of goods other than the goods produced by way of manufacture. Since coal is an excisable product (presently attracting nil rate of duty), the activity of mining coal and producing coal would come under the definition of 'manufacture' under Section 2(f) of the Central Excise Act, 1944. Therefore, the contention of the department that the activity of the appellants can be covered under the business auxiliary services during the period 10-9-04 to 15-6-05, cannot be accepted."*

7.3. Further, Tribunal in the case of Makjai Laboratories (supra) held in Para 5 as under:

> *"**5.** As such, the exclusion covers activities which amount to "manufacture under Section 2(f) of the Central Excise Act, 1944". The exclusion is not limited to excisable goods. A plain reading of the statutory provision makes it clear that all activities which amount to manufacture within the meaning given under Section 2(f) of the Central Excise Act, 1944 get excluded, whether or not such manufacture results in an excisable product charged to duty under the Central Excise Act, 1944, or under any other Act such as the MTPA or such manufactured product is totally exempt. The impugned goods are clearly manufactured product conforming to the definition under Section 2(f) of the Central Excise Act, 1944. In view of the constitutional scheme for levy of duty, the impugned goods containing alcohol are not chargeable to duty under the Central Excise Act, 1944 but are charged to duty under the MTPA.*

In our considered view, since the impugned goods are manufactured products, the activity of manufacturing the same by the appellants for their clients clearly falls outside the purview of the levy of service tax under the category 'Business Auxiliary Service' under the Finance Act, 1994. Our view as above is also supported by the earlier decisions of the Tribunal in the case of Rubicon Formulations Pvt. Ltd. v. C.C., C.E & S.T., Aurangabad, 2010 (19) S.T.R. 515 and SPA Pharmaceuticals Pvt. Ltd. v. Commissioner of Central Excise & Service Tax, Aurangabad, 2010 (18) S.T.R. 421, both of which have been rendered considering the Board's Circular Letter F. No. 249/1/2006-CX.4, dated 27-10-2008."

7.4. Further, Tribunal in the case of Mehta Plast Corporation (supra) held in Para 8 as under:

*"**8.** We are not in agreement with the observation of the adjudicating authority that exemption under Notification No. 12/2003-S.T. cannot be granted because there is no sale within the meaning of the term as defined under section 2(h) of the Central Excise Act. As per this section what is required is transfer of possession of goods which takes place in the instant case. The adjudicating authority is also not correct in referring to clause (f) of Article 366(29A) of the Constitution instead of clause (b) which needs to be considered because clause (b) deals with deemed sale in a works contract. We also note that C.B.E. & C. itself has acknowledged the position that deemed sale defined in Article 366(29A) of the Constitution will constitute sale for the purpose of levying service tax, as seen from para 2.5.7 of Draft Guidance Paper A of the instruction issued regarding changes proposed in the Budget of 2012-13."*

7.5. We also find that this Bench in the case of M. Ramakrishna Reddy (supra) have held in Para10.2 as under:

*"**10.2** If the above provision is applied, the services rendered would amount to only mining services. As the contract is a comprehensive one for mining, it cannot be vivisected for levying service tax on that portion of the activity relating to "Site Formation" in the light of the decision of the Tribunal in the case of Daelim Industrial Company v. CCE, Vadodara [2006 (3) S.T.R. 124 (Tri.-Del.) = 2003 (155) E.L.T. 457 (Tri.-Del.)] upheld by the Apex Court [2007 (5) S.T.R. J99 (S.C.) = 2004 (170) E.L.T. A181 (S.C.)]. Consequently, we hold that the services rendered by the appellant are classifiable only under the category of "Mining Services" and therefore they would not be liable to service tax prior to 1-6-2007. In the light of the above finding, there is no justification for imposition of any penalty. Hence, we allow the appeal with consequential relief."*

7.6. This Bench in the case of Commissioner of Central Excise, Belgaum Vs SVM Net Project Solutions Pvt. Ltd. 2010 (17) STR 298 held in Para 8 as under:

"8. We find that in the instant case, the activity undertaken by the appellants is essentially mining which became taxable with effect from 1-6-2007. Therefore, as per the ratio of the above decision, the appellants are not liable to pay Service Tax on the impugned activity under the category "Business Auxiliary Service". The lower authorities had wrongly demanded tax treating part of the activity involved as amounting to production/processing of goods for, or on behalf, its client. We find that the demand of service tax under "Business Auxiliary Service" from the appellants is not sustainable. Therefore, the penalty imposed on SVM under Section 76 of the Act is not sustainable. The same is accordingly set aside and appeal filed by the SVM allowed. "

7.7. Similar view was taken by the Tribunal in the case of Hazaribagh Mining & Engineering Pvt. Ltd. 2017 (49) STR 289 wherein it has been held that once the contract is a composite contract for the entire activities from site formation to segregation of ores, the same has to be charged as separate service (Mining Service), which was made chargeable to Service

Tax w.e.f from 18.06.2007. Tribunal in the case of Reply and Company Ltd.: 2019 (24) GSTL 565 (Tri.-Kol.) has held that the activities carried out are in the nature of mining services and therefore, liable to service tax only from 1.6.2007. From the holistic reading of the various judgments discussed above, we find that as the appellants are engaged in mining of iron ore. The activity involved includes transfer of goods and show-cause notice does not specify as to the value of the goods involved and has not excluded the same from the taxable value. Service Tax, if at all, can be levied on them for the mining activity, they are undertaking in terms of the raising contract, and not under Business Auxiliary Services before 1.6.2007. Therefore, the demand of Service Tax on the appellants under the category of "Business Auxiliary Service", the impugned order does not survive on merits.

7.8. The appellants have also contended that the issue is barred by limitation. Understandably, the levy of Service Tax on the activities undertaken by the appellants is a question of interpretation. The issue is certainly debatable. Against the very same appellant, Department has issued various SCNs seeking payment of Service Tax under different Heads. When the Tax administration itself is in doubt as to the nature of the service allegation of suppression of fact on the appellants is not sustainable. Therefore, the present appeal is allowed.

ST/3568/2012

8. The appellants contended that the demand of Service Tax was made under three different categories of services and the same was confirmed under the Head "Mining Service" which is beyond the scope of the SCN. If the Department considers the contract is vivisectable and demand was made under three separate categories, confirmation of the same under one heading alone would be beyond the scope of the SCN. We find that SCN was issued demanding Service Tax under "Site Formation and Clearance, Excavation and Earth Moving and Demolition Service"; "Business Auxiliary Service" i.e. (v) production or processing of goods for or on behalf of the client and under Section 65 (105) (zzzy) in relation to Mining of Mineral, Oil or Gas. The adjudicating authority has confirmed the same under "Mining of

Mineral, Oil or Gas Service” under Section 65 (105) (zzzy) of Finance Act, 1994. The appellants contended that the contract is not vivisectable and therefore the demand cannot be raised on different headings. We find that as discussed above, the appellants are engaged in mining in terms of the raising contract. The Department has earlier issued a show cause notice discussed above classifying the service under Business Auxiliary Service. In the instant show-cause notice covering the period 1.6.2007 to 30.9.2007 duty was demanded under three separate services as mentioned above. However, the adjudicating authority has confirmed all the demands under “Mining of Mineral, Oil or Gas” service. The adjudicating authority has confirmed the demand finding that in terms of provisions of Section 65A of the Finance Act, 1994 in case of composite services, there cannot be dissection or service but have to be determined based on the service which gives the essential character. He found that the raising contract has the essential character of mining, therefore, he has confirmed the duty under Mining Service. As per the discussion above, we find that Tribunal has been consistently maintaining that the Service Tax on Mining cannot be demanded under “Business Auxiliary Service” as Service Tax under “Mining Service” came to be specifically levied from 1.06.2007. The activity undertaken by the appellants is undoubtedly Mining. We find that the SCN has sought to demand duty under three different services. However, the adjudicating authority has found that the essential character of the service is mining therefore the entire activity should be considered under Mining. We do not find any infirmity in such decision. The SCN charges the appellant for all the services without giving bifurcation either the period or the quantity. The appellants sought to rely upon the decisions of the Tribunal in the case of Coramandel Fertilizers, 2009 (13) STR 542. However, we find that in that case there was ambiguity in the SCN wherein duty was sought to be demanded on storage and warehousing/cargo handling services and the appellants were registered for Port Services. Therefore, we find that the facts of the case are slightly different. In the instant case, there is a non-vivisectable contract for Mining. There is no doubt that the activity the appellant comes under Mining which is the essential character of the contract. Therefore, the conclusion drawn by the Original Authority and upheld by the Appellate Authority cannot be faulted. Therefore, this appeal is dismissed as far as the demand of Service Tax is concerned. As the issue relates to interpretation of tax liability, penalties are set aside.

ST/20792/2017

9. The Department issued a SCN covering the period 01.10.2006 to 31.05.2011 demanding duty under "Business Auxiliary Service" "Excavation/Extraction and Raising of Iron Ore". The original authority has confirmed the same. The Appellate Authority has set aside the order and held that the activity is classifiable under "Mining of Mineral Oil or Gas Services". The Department is in appeal against the order. We find that as per our discussion above, the service rendered by the appellants is clearly a Mining Service. The Department has issued a SCN dated 21.10.2008 to the appellants seeking to demand duty under three categories which includes the category of Mining of Mineral, Oil or Gas. The Adjudicating Authority has confirmed the demand under only one heading of Mining of Mineral, Oil or Gas. The same was upheld by the Appellate Authority. The Department has accepted this order and no appeal was filed. As we have held above, in respect of Appeal No. ST/3568/2012, the Original Authority and the Adjudicating Authority were correct in concluding that the service rendered by the appellants is Mining of Mineral, Oil or Gas. Therefore, we find that the findings of the Appellate Authority are in conformity with our finding. Therefore, we find that there is no reason to interfere with the same. Accordingly, the appeal filed by the Department is rejected.

ST/490/2009

10. As discussed above, the period covered in this impugned order is 1st April 2006 to 31st March 2007. In the instant case also, the contract is for raising of iron ore by the appellants for the persons with whom they have contracted with. Apparently, the activity undertaken by the appellants is essentially that of mining. It cannot be vivisected into different elements and cannot be charged to duty under any other service during relevant period. As held in the cases discussed above, the contract being for the mining and essential character of the service rendered by the appellants is that of mining, it can only be taxable under "Mining of Minerals, Oil or Gas Service". Therefore, prior to 1.6.2007, no service tax can be collected under the heads "Site Formation and Clearance, excavation and earth moving and demolition" service or "Business Auxiliary Services". In the result, appeal No.ST/490/2009 is allowed.

ST/489/2009

11. In this case, as contended by the appellant the show-cause notice alleges four types of services to have been rendered by the appellants. The services are (i) Survey and exploration of mineral as defined in Section 65(104a) read with Section 65(105)(zzv) of the Finance Act, 1994; (ii) Drilling, blasting, excavation of iron ore, undertaken under "Site Formation and Clearance, Excavation and earth moving and Demolition" services as defined under Section 65(97a) read with Section 65(105)(zzza);(iii) raising/extraction of iron ore under "Mining of mineral, oil or gas" as defined under Section 65(105)(zzzy); and (iv) Crushing, screening, sorting, grading producing and processing of iron ore in to two more end products under "Business Auxiliary Service" as defined under Section 65(19) read with Clause (v) of Section 65(19) – "Production of goods on behalf of the client". Learned Commissioner though classified the services rendered by the appellants into four categories, he confirmed the demand together on all the four services without apportioning amount each of the service. We find that, the facts of this appeal are invariance with the facts discussed above in the case of Appeal No.ST/3568/2012. In ST/3568/2012, though the show-cause notice has discussed different types of services, the adjudicating authority and the appellate authority have come to a conclusion that the services fall under one category i.e., Mining of Ores, Minerals or Gas. Therefore, we found that there was no confusion in the mind of the adjudicating authority as to under which, the service of the appellant's falls in. Whereas in the instant appeal, allegation was of four services rendered by the appellant and confirmation was also of the four services proposed in the show-cause notice. However, the confirmation of duty was consolidated. This is not acceptable in view of the submissions of the appellant. As held the Tribunal in the cases of CMS (I) Operations & Maintenance Co. P. Ltd. vs. CCE: 2007 (7) STR 369 (Tri.-Chennai) maintained as reported in 2017 (4) GSTL J5 (SC) and CCE, Ludhiana vs. Bishambar Lal Arora: 2014 (36) STR 1050 (Tri.-Del.). We hold that the impugned order is not maintainable.

12. Accordingly, the appeals are disposed i.e., ST/127/2009, ST/489 & 490/2009; are allowed; Appeal ST/3568/2017 is dismissed as far as the demand of Service Tax is concerned. However, penalties are set aside. Appeal No. ST/20792/2012 filed by the department is rejected.

(Order was pronounced in Open Court on **24.09.2019**.)

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

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