

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 864 of 2009

[Arising out of Order-in-Appeal No. 328/2009 dated
04/08/2009 passed by Commissioner of Central
Excise(Appeals), Mangalore,]

**DECCAN MINING SYNDICATE (P)
LTD**

NO.6, SUMEER MANSION,
MARTIN ROAD, BELLARY – 583 101.

Appellant(s)

VERSUS

CCE, BELGAUM

NO. 71...CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM,
KARNATAKA
590001

Respondent(s)

AND

Service Tax Appeal No. 846 of 2009

[Arising out of Order-in-Original No.12/2009 dated
20/07/2009 passed by Commissioner of Central Excise,
Belgaum]

CCE, BELGAUM

NO. 71...CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM,
KARNATAKA
590001

Appellant(s)

VERSUS

**DECCAN MINING SYNDICATE (P)
LTD**

NO.6, SUMEER MANSION,
MARTIN ROAD, BELLARY – 583 101.

Respondent(s)

Appearance:

Shri M.S. Nagaraja, Advocate for the assessee.

Shri P. Gopakumar, Addl. Commissioner(AR) for the Revenue.

CORAM:

HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

HON'BLE MR. P DINESHA, JUDICIAL MEMBER

Final Order No: 20133-20134 / 2022

Date of Hearing: 16/02/2022

Date of Decision: 31/03/2022

Per : P. DINESHA

The assessee-appellant in its appeal has challenged the denial of refund of the tax wrongly paid by them and the period of dispute is 01-01-2006 to 28-02-2007. Revenue in its appeal, has only challenged the dropping of penalties under Sections 76, 77 and 78 of Finance Act, 1994, which are relating to the period 2005.

2.1. Shri M.S. Nagaraja, learned advocate appearing for the assessee-appellant would request for considering the appellant's appeal first since the penalty question in the Revenue's appeal would be consequential. His request was accepted and he was heard. His contentions, briefly, are as under:-

- i. The assessee is engaged in extraction, processing and export of iron ore; they had exported the entire quantity of iron ore produced/manufactured.
- ii. They had availed the services of private transports for removal and transportation of iron ore, ore burden from their mines to

the plant. For which, they had paid certain amounts towards the same.

- iii. They had also used the same transporters, upon payment, for transportation of iron ore from mine head to plant, from plant to the railway siding, from railway siding to the river side and finally to the ports for shipment.
- iv. The assessee had not paid the service tax on the above charges paid for removal and transportation of iron ore and ore burden.
- v. There was a visit by the officers of Preventive Division and during the investigation, the assessee deposited an amount of Rs.1,07,03,293/- towards service tax and education for the period in dispute on the service of transportation of iron ore by road.

2.2. Learned advocate further submitted that they sought for the refund of the above amount by filing application dt. 16/04/2007. In response to which, a show-cause notice dt. 19/07/2007 was issued proposing to reject their claim. The assessee-appellant filed its reply but being not satisfied, the adjudicating authority vide the Order-in-Original dt. 15/05/2008 rejected the assessee's claim. The assessee preferred first appeal and the Commissioner(Appeals), Mangalore vide Order-in-Appeal No.328/2009 dt. 04.08.2009 rejected the appeal, against which the present appeal has been filed before this forum.

2.3. Learned advocate would also contend that the amount paid by them was under protest and hence the limitation prescribed under Section 11B of the Central Excise Act, 1944 would not be applicable and in this regard, he would rely on the decision of the Hon'ble Apex Court in *Mafatlal Industries Vs. UOI* [1997(89) ELT 247 (SC)]. He would also submit that the amount which was paid during the investigation would take the colour of a deposit and hence not a duty or tax and therefore limitation under Section 11B would not apply and in this regard, he would rely on the following decisions:-

- i. CC Vs. Motorala India Pvt. Ltd. [2006(206) ELT 370 (Tri. Bang.)]
- ii. Laxmi Board & Paper Mills Ltd. Vs. CCE, Bombay [2007(208) ELT 384 (Tri. Mum.)]

2.4. On merits, learned advocate would submit that they had engaged the services of individual truck owners for transportation of iron ore right from mine head up to the ports for shipment and therefore the same would not be covered under Goods Transport Agency(GTA) and that the individual truck owners were not the registered agencies to be covered under GTA. He would also refer to the Works Orders issued to M/s. Global Logistics, Bellary to the effect that the contract price for removal of iron ore and ore burden from the plant was Rs.20 PMT and for the transportation from mines to the plant was at

Rs.45 PMT. He also submitted that those services were separate and distinct and the contract also contained different rates for different services but the same could not be classified as a whole since the activity of mining of iron ore became taxable w.e.f. 01/06/2007. It is therefore his contention that the value of non-taxable service could not be included in the value of taxable service, if any, since the amount of Rs.20 PMT paid for removal of iron ore and ore burden was not of taxable until 01/06/2007. This being the legal position of law, the rejection of refund to the extent of the service tax paid on mining services prior to 01/06/2007 was erroneous. He would also content that the denial of refund being incorrect, the assessee could be entitled to the interest as well under Section 11BB *ibid*.

2.5. In support of his above contentions, he would rely on the following decisions/orders:-

- i. Lakshminrayana Mining Co. Vs. CCT, Bangalore [2019-TIOL-1833-CESTAT-BANG]
- ii. CCE&ST, Aurangabad Vs. Jaikumar Fulchand Ajmera [2017(48) STR 52 (Tri. Mum.)]
- iii. CCE&C, Guntur Vs. Kanaka Durga Agro Oil Products Pvt. Ltd. [2009(15) STR 399 (Tri. Bang.)]
- iv. South Eastern Coalfields Ltd. Vs. CCE, Raipur [2017(47) STR 93 (Tri. Del.)]
- v. Nandganj Sihori Sugar Co. Ltd. Vs. CCE, Lucknow [2014(34) STR 850 (Tri. Del.)]
- vi. Ultra Tech Cement Ltd. Vs. CCE, Kolhapur [2018(10) GSTL 80 (Tri. Mum.)]

- vii. Bellary Iron Ores Pvt. Ltd. Vs. CCE, Belgaum [2010(18) STR 406 (Tri. Bang.)]
- viii. Mafatlal Industries Ltd. Vs. UOI [1997(89) ELT 247 (SC)]
- ix. CCE, Coimbatore Vs. Pricol Ltd. [2015(39) STR 190 (Mad.)]
- x. CST, Chennai Vs. Wardes Pharmaceuticals Pvt. Ltd. [2011(22) STR 274 (Mad.)]
- xi. CC, Bangalore Vs. Motorola India Pvt. Ltd. [2006(206) ELT 370 (Tri. Bang.)]
- xii. Laxmi Board & Paper Mills Ltd. Vs. CCE, Mumbai [2007(208) ELT 384 (Tri. Mum.)]
- xiii. CCE, Bangalore Vs. KVR Constructions [2012(26) STR 195 (Kar.)]- Maintained in 2018(14) GSTL 170 (SC).
- xiv. Parijat Construction Vs. CCE, Nashik [2018(359) ELT 113 (Bom.)]
- xv. Hind Agro Industries Ltd. Vs. CC [2008(221) ELT 336 (Del.)]
- xvi. Ranbaxy Industries Ltd. Vs. UOI [2011(273) ELT 3 (SC)]
- xvii. UOI Vs. Hamdard (Waqf) Laboratories [2016(333) ELT 193 (SC)]

3. *Per contra*, Shri P. Gopakumar, learned Additional Commissioner(AR) for the Revenue supported the finding of the lower authorities. He invited our attention to paragraph 13 page 6 of the Order-in-Original wherein the adjudicating authority has concluded after verification of documents that the appellant had indeed issued a consignment note, by which the conditions of GTA stood satisfied and hence there is no question of refund to be granted. He would also refer to the conclusions drawn by the adjudicating authority as to his verification of the "pay slips" prepared by the assessee which accompanied the goods from mines to railway yard and from railway yard to the

port/railway receipts. He also referred to the adjudicating authority's observation: "... .. On perusal of sample copies of "Pay slips" furnished by the assessee, it is noticed that the said "pay slips" were issued by the assessee contain the details like S.No., date of issue, Lorry No., Description & quantity of the goods transported, Loading time, contractor name, place of loading & unloading station, signature of the contractor / representative etc." By these, learned AR would contend that the arrangement of non-issue / non-maintenance of documents in respect of movement of goods out of the mines and issue of pay slips for movement of goods from mines to railway yard, pay slips were maintained and hence the same would establish that the assessee did issue consignment note. He would refer to Section 65(23), Section 65(50b) and Rule 4B of Service Tax Rules, 1994: that GTA under Section 60(50b) would mean any person who provides service in relation to transport of goods by road and issues consignment note by whatever name called; that Rule 4B ibid wherein explanation is given insofar as consignment note is concerned, and from the above he would conclude that a harmonious reading would indicate that the assessee-appellant having issued consignment note in any form is liable to be taxed and hence his refund claim has been rightly rejected.

4. We have heard the rival contentions and we have gone through the documents as well

as case laws relied upon by both the sides during the course of argument.

4.1. Admittedly, the assessee appellant has only engaged the services of individual truck owners for transporting the iron ore and ore burden from its mine head up to the port and hence he would become the recipient of GTA service.

4.2. We have gone through the findings of the adjudicating authority insofar as the contents of the "pay slips" are concerned and right from the assessee's reply to the show-cause notice or even in the grounds of appeal before us, the assessee has disputed the said findings and hence we have to uphold the findings as to the contents of "pay slips". A perusal of paragraph 13 of the Order-in-Original referred to by the learned AR when read conjointly with Rule 4B *ibid*, we find that the explanation given to consignment note matches with the contents extracted at paragraph 13 of the Order-in-Original. Definition under Section 65(50b) would also refer to issuing of consignment note, "by whatever name called" and hence if for convenience, the assessee has termed as "pay slips", that by itself would not result in any other thing other than a consignment note. Secondly, even the definition of GTA as per Section 65(50b) would mean any person, including individuals and hence we are not in agreement with the contentions of the learned advocate in this regard.

Insofar as the other contentions of the learned advocate that the work order was in a nature of composite contract for both removal and transportation of iron ore and ore burden at specified rates and hence the same would qualify, as understood by the assessee, as cargo handling service. This contention cannot also be accepted. Firstly, for the reason, the predominant service is in relation to the transportation. In this regard, the reliance placed by the authorities in the case of Dalveer Singh Vs. CCE, Jaipur [2008(9) STR 491 (Tri. Del.)] wherein this Tribunal has held that the loading / unloading in the Truck is a part and parcel of the transportation of goods services.

4.3. We also find that similar view expressed by Principal Bench of this Tribunal at New Delhi in the case of Jain Carrying Corporation Vs CCE, Jaipur [2019(24) GSTL 376 (Tri. Del.)] in the following words:-

25. *A perusal of the same shows that composite service may include various intermediary and ancillary services such as loading/unloading, packing/unpacking etc. provided in the course of transportation of goods by road. These services are not provided as independent activity but as means of successful implementation of the principal service, namely the transportation of goods by road. It has, therefore, been clarified that a composite service even if it consists of more than one service, should be treated as a single service based on the main or principal service. It has, therefore, been held that any*

ancillary/intermediate service provided in relation to transportation of goods, and the charges, if any, for such services are included in the invoice issued by the Goods and Transport Agency and not by any other person. Such service would form part of Goods and Transport Agency Service and, therefore, the abatement of 75% would be available on it. It has, therefore to be seen whether in the present case transportation is the main service and loading/unloading is ancillary service provided for successful completion of the main service. The cost of transportation charge is Rs. 29.60 per ton of lime stone quantity delivered to the crusher out of which the labour element is only Rs. 2.96 per ton. It is apparent that the essential feature of the service is transportation. Loading and unloading are ancillary/intermediate service provided in relation to transportation of goods, and such service would be Goods and Transport Agency Service. It cannot be 'Cargo Handling service' as was found by the Commissioner.

4.4. In view of the above, we do not find any infirmity in the order of learned Commissioner(Appeals) and hence we dismiss the appeal filed by the assessee.

5. Insofar as Revenue's appeal is concerned, we find from the decisions relied upon by the learned advocate that penalties under Sections 76, 77 and 78 are not automatic and are governed by Section 80 *ibid*. The adjudicating authority has elaborately discussed and appreciated the *bona fide* belief entertained by the

assessee that they were not liable to pay service tax since the trucks used for transportation were owned by the transporter himself. In any case, the adjudicating authority has exercised his discretion by dropping penalties being satisfied that the assessee had made sufficient case for invoking Section 80 ibid. Revenue has not found any *mala fide* insofar as the plea which provided the assessee in not paying service tax in time and hence we have to conclude that the assessee has proved reasonable cause for its failure which has been duly accepted by the adjudicating authority. In view of the above, we do not find any merit insofar as the appeal filed by the Department is concerned and consequently, we dismiss the same.

6. In the result, both the appeals are dismissed.

(Dictated and pronounced in open
court on **31/03/2022**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(P DINESHA)
JUDICIAL MEMBER

Raja...