CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 654 OF 2009

[Arising out of Order-in-Original No. 09/2009-ST-(Commr.) dated 29/04/2009 passed by Commissioner of Central Excise and Customs, Belgaum]

R.K. Marketing Services
No.1-2-49/15, Nizampet Road, Hydernagar,
Kukatpally,
Hyderabad – 500072.

Appellant(s)

VERSUS

The Commissioner of Central Excise and Customs,
No.71, Club road,
Belgaum 590 001.

Respondent(s)

AND

Service Tax Appeal No. 656 OF 2009

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Appellant(s)

VERSUS

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Hyderabad – 500072.

Respondent(s)

Appearance:

Shri G. Venkatesh, Advocate for the assessee

Shri Rama Holla, Superintendent(AR) for the Revenue.

CORAM:
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER
HON'BLE MR. P DINESHA, JUDICIAL MEMBER

Final Order No: 20137-20138 / 2022

Date of Hearing: 16/02/2022
Date of Decision: 30/03/2022

Per : P. DINESHA

The assessee is engaged in the services of excavation, extraction, grading, sorting, crushing, screening, loading and transportation of iron ore; during the period under challenge, the assessee was engaged by M/s. Vyshnavi Minerals for carrying out the above activities; for winning of minerals, the assessee had in-turn entered into an agreement with M/s. Vijay Leasing Company (VLC, for short) and the VLC, after carrying out the work of winning of minerals, have billed the assessee. In its bills, VLC had also charged services tax and collected the same from the assessee before this forum.

2. A show-cause notice dt. 17/03/2008 was issued to the assessee proposing to classify the services undertook by it viz. excavation, extraction, loading, grading, sorting, crushing and screening of iron ore etc. under the taxable service of 'Business Auxiliary Service' under Section 65A of the Finance Act, 1994, also proposing the service of transportation of iron ore by road in a goods carriage under the Goods Transport Agency(GTA) service under Section 65A ibid; and

thereby proposing to demand service tax and education cess on both the above services, along with applicable interest and penalties under Sections 76, 77 and 78 ibid. The assessee filed detailed reply by denying any service tax liability as proposed, but however, the adjudicating authority viz. Commissioner of Central Excise and Customs, Belgaum, vide impugned Order-in-Original dt. 29/04/2009 confirmed the demand as proposed, under BAS and consequently allowed the assessee to claim the credit of service tax paid on input services. The adjudicating authority also took note of the assessee's claim as to the payment of service tax by VLC and thus held that the assessee's eligibility for the credit of service tax was limited to Rs.45,26,438/- and the balance tax liability of Rs.3,99,092/- was held to be liable for appropriation.

3. Insofar as the demand under GTA is concerned, the Commissioner has held that there was no evidence to show that the assessee had availed the services of a GTA and that it was VLC which had charged and collected freight charges from the assessee.

4. Both assessee and the Revenue are aggrieved by the order of Commissioner and hence, appeal No.ST/654/2009 has been filed by the assessee wherein the appellant has questioned the classification of its activities under BAS apart from challenging the penalty under Section 78 ibid.

The Revenue has filed appeal No.ST/656/2009 questioning the allowability of credit of service tax to the extent of Rs.45,26,438/-. Both the appeals are therefore arising out of the common impugned Order-in-original and hence, they are taken for common disposal, for convenience.

5. Heard Shri G. Venkatesh, learned advocate for the assessee and Shri Rama Holla, Superintendent(AR) for the Revenue. We have considered the rival contentions.

6.1. At the threshold, we find that the classification of activities of the assessee under BAS is no more res integra as the same is considered by this very Bench of CESTAT in the case of M. Ramakrishna Reddy Vs. CCE&C, Tirupathi [2009 (18) STT 465 (Bang.-CESTAT)]. In the above case, after recording, the factual position vis-à-vis the activities undertook by the appellant therein, it has been held as under:-

> ***10.1*** *From the above, it is very clear that the salient feature of the services rendered by the appellant is mining. In other words, the appellant is expected not only to remove the overburden but also to excavate the Barytes Ore. We cannot say that the appellant is not undertaking site formation work, but site formation work undertaken by the appellant is incidental to the mining activity. To put it in different words, the essential character of the work undertaken by the appellant is mining or winning of minerals. The mining services became taxable only with*

effect from 1-6-2007. The period in the present case is prior to 1-6-2007. It cannot be said that the entire service rendered by the appellant comes under the category of site formation. If that were so, one cannot say that it also falls under "Mining Services." In any case, Section 65A (2) of Chapter V of the Finance Act, 1994 reads as follows :

"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".

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.*

6.2. From the above, we find that the primary activity of the appellant viz. winning minerals or raising iron ore from mines which was carried out through a separate contractor and as per the above order of this Bench, services relating to winning of minerals is held to be falling under the category of 'mining services' which has become taxable w.e.f. 01/06/2007. Period involved in the case in hand is April 2006 to October 2006 and hence, the demand cannot sustain. In view of the above discussions, the assessee should succeed and consequently, impugned order to this extent is set aside. The assessee's appeal is allowed with consequential benefits, if any, as per law.

7. Revenue has come in appeal against the order of appropriating and allowing credit of service tax to the extent of Rs.45,26,438/-. We find that the Government's Litigation Policy, i.e. Instruction F.No.390/Misc./116/2017-JC dt. 22/08/2019 was issued whereby the monetary limit for filing appeal before this forum was enhanced to Rs.50 lakhs, i.e. to say, any dispute involving less than Rs.50 lakhs should not filed by

the Revenue before the CESTAT and it has also been made clear in the said instructions that the same would apply to pending cases as well. The disputed amount in the case on hand is Rs.45,26,438/- which is below the prescribed monetary limit for filing appeal by the Revenue and hence, in terms of the above instruction, the appeal becomes non-maintainable and the appeal is therefore dismissed in view of the Litigation Policy.

8. In the result, assessee's appeal No.ST/654/2009 is allowed and appeal No.ST/656/2009 filed by the Revenue is dismissed on monetary limit.

(Dictated and pronounced in open court on **30/03/2022**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(P DINESHA)
JUDICIAL MEMBER

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