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

Appeal No. ST/60/2012

[Arising out of Order-in-Appeal No.351/2011 dt. 30.11.2011 passed by Commissioner of Central Excise (Appeals), Madurai]

Chettinad Earth Movers (P) Ltd — Appellant

Versus

Commissioner of Central Excise &
Customs, Madurai — Respondent

Appearance :

Shri R. Parthasarathy, Consultant
For the Appellant

Shri R. Subramaniyan, AC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 10.07.2018

FINAL ORDER No. 41986 / 2018

Per Madhu Mohan Damodhar

The facts of the case are that appellants had removed over boulders / over burdens in respect of mines owned by Chettinad Cement Corporation Ltd.. Department took the view that these are pre-mining operations and hence would amount to rendering of Site Formation Service. Accordingly, proceedings were initiated against the appellant by way of issue of show cause notice dt.

28.09.2010 inter alia, proposing demand of an amount of Rs.1,72,136/- with interest thereon and penalties under various provisions of law. In adjudication, the original authority by an order dt. 24.11.2010 confirmed these proposals and also imposed penalties under Section 77 & 78 of the Finance Act, 1994. In appeal, the Commissioner (Appeals) vide the impugned order upheld the order of original authority. Hence appellants are before this forum.

2. Today when the matter came up for hearing, on behalf of the appellants, Ld.Consultant Shri R. Parthasarathy submits that during the period of dispute 2005-06, 2007-08 (upto May 2007), they had been contracted to remove only over size boulders from crusher area to crusher hopper. He submits copies of work orders in this regard. Ld. Consultant also draws our attention to the decision of Tribunal in *Kanak Khaniz Udyog Vs CCE Jaipur-II* - 2017 (52) STR 46 (Tri.-Del.) where inter alia, the activities of removal of overburdens has been held to be classifiable only under 'Mining Services'.

3. On the other hand, Ld.A.R supports the impugned order.

4. Heard both sides and have gone through the facts.

5. We find that it is not in dispute that nature of activity carried out by the appellant was removing of over boulders / over burdens. We find that CBEC in Circular F.No.232/2/2006- CX dt. 12.11.2007 had in para 2 (i) clarified that following services on contract basis will fall under the fold of Mining Service.

> "(i) Excavation / drilling and removal of overburdens (ie stratum layer of mud, boulder etc. that need to be removed during or prior to extraction of coal / minerals."

We note that the nature of activities has been taken cognisance of by the lower appellate authority in para-6 of the impugned order, however the said authority has opined that order of original authority does not call for interference on the ground that appellants having paid service tax were now estopped from denying their liability. This, surely, is not a sustainable conclusion, since it would mean that appellants cannot appeal on merits if they have paid up part or whole of the tax liability as insisted upon by the department, in most cases to buy peace. In any case, the clarification given by the CBEC is amply clear and there should not be any doubt on the issue. The case law relied upon by ld. consultant also supports his contention. In the event, we find that the impugned order to the contrary upholding the order of original authority to confirm demand of tax liability under 'Site Formation and Clearance services' cannot be sustained, and therefore will have to be set aside, which we hereby do. Appeal is allowed with consequential relief, if any as per law.

(dictated and pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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