CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT No. III

Service Tax Appeal No. 315 of 2012

(Arising out of Order-in-Original No. 09/2012 dated 23.02.2012 passed by Commissioner of Central Excise, MHU Complex, Nandanam, Chennai – 600 035)

M/s. Core Minerals **...Appellant**
TVH Belicia Towers,
5th Floor, Tower II,
No. 94, MRC Nagar,
Chennai – 600 028.

Versus

Commissioner of GST and Central Excise **...Respondent**
Chennai South Commissionerate,
MHU Complex,
No. 692, Anna Salai,
Nandanam,
Chennai – 600 035.

APPEARANCE:

For the Appellant : Shri M. Karthikeyan, Advocate
For the Respondent : Shri P.R.V. Ramanan, Authorised Representative (Spl. Counsel)

CORAM:
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No. 41633/2024

DATE OF HEARING : 15.10.2024
DATE OF DECISION : 23.12.2024

Order :- Per Mr. P. DINESHA

M/s. Core Minerals, Chennai, the appellant herein, are engaged in providing various services such as GTA, Mining Service, Renting of immovable property, *etc*. and had obtained Service Tax Registration bearing AACFC5210GST001 for the said services and paying service tax and filing periodical returns. Admittedly, the appellant is engaged in extraction of iron ore from Thakurani Mines, Orissa and Nuagaon mines, Jharkhand on behalf of the owners and purchased the mined iron ore from the owners of the mines and exported the same except for a small portion sold domestically. The appellant had entered into two separate contracts/agreements in respect of the above Mines, one for extraction of iron ore on behalf of the mine owners and other for purchase of iron ore. The levy of service tax on Mining Service was introduced w.e.f. 01.06.2007 and the appellant is claimed to be discharging service tax liability on the said service thereafter, on receipt basis, till the year 2010-2011.

2. Consequent to audit of the accounts of The appellant conducted by the Department, it was observed that the extraction of Ore involves the following processes, namely, (i) overburden removal, (ii) raising and stacking, (iii) hiring of pay loaders, (iv) mining, (v) screening, (vi) sampling and analytical study of iron ore, *etc.* and hence, it appeared that the appellant was engaged in providing 'site formation service' as they were undertaking various activities to prepare the site for iron ore extraction and levy of service tax on such service was introduced from 16.06.2005 and the appellant had not made payment of service tax on provision of such service from June 2005 to May 2007.

3. Secondly, it was observed by the audit that the though the appellant had been paying service tax on the mining service provided by them from 1.06.2007 on receipt basis, since the appellant had entered into a contract with the mine owners for purchase of the entire mined ores separately, the delay in realising the mining charges lacked conviction, since the appellant had every opportunity to adjust the mining charges against their liability towards purchase of iron ore. Accordingly, it was pointed out that there is a short payment of service tax during the period from June 2007 to September 2008.

4. Lastly, it was pointed by the Audit that for the very same mining services provided by the appellant during the very same period June 2007 to September 2008, they had undervalued the provision of service for the reason that (a) the mining agreements executed in the year 2002 fixed an amount of Rs.40/- PMT and Rs.60/- PMT as mining charges to be paid by the mine owners for extraction of iron ore of 'fine variety' and 'lumps' respectively and the agreements had clauses to provide escalation of 10% of such charges per year in the case of Thakurani Mines and escalation of Rs.5/- PMT in the case of Nuagon Mines. Further, the agreements also provided for review of rates of extraction from time to time considering the change in cost of extraction. However, though the appellant had got the rates

increased to Rs.168.70 PMT and Rs.234.20 PMT in respect of Fines and lumps respectively with Thakurani Mines, they had not got the rates increased with Nuagon Mines, especially when similar escalation clauses existed in the iron purchase agreement also and the prices of iron ore got increased multifold against the original rate fixed in the agreements. Accordingly, the audit proposed to re-determine the value of mining charges based on the cost of extraction as reflected in the balance sheet of The appellant which was also significantly high.

5. Accordingly, Show Cause Notice dated 20.04.2010 was issued to the appellant proposing to demand service tax of : -

a) Rs.2,04,84,245/- under Site Formation Services for the period June 2005 to May 2007;
b) Rs.1,66,17,211/- under Mining Service for the period June 2007 to September 2008; and
c) Rs.7,72,80,040/- under Mining service for the period June 2007 to September 2008.

The above notice also proposed to deny credit of Rs.1,26,002/- taken in respect of services received by them at the railway siding which was carried out after the purchase of iron ore and not related to raising of iron ore. The notice also proposed to demand interest and to impose penalty under Section 76 and Section 78. The appellant *vide* their reply dated 22.08.2010 contested the above proposals.

6. The above notice came to be adjudicated by the Commissioner of Central Excise, Chennai II Commissionerate *vide* his impugned Order-in-Original No. 09/2012 dated 23.02.2012 wherein, the entire demand of service tax along with applicable interest was confirmed and penalty equal to the demand of tax was imposed. The demands in the Order-in-Original has been assailed by the appellant in this appeal.

7. Heard Shri M. Karthikeyan, Ld. Advocate appearing for the appellant, his submissions are summarised as under: -

Site Formation Service

8.0 The Levy of Service tax on Site Formation services came into effect from 16.06.2005. Site Formation was defined in Section 2(97a) of the Finance Act 1994 which read as follows: -

> *"(97a) "site formation and clearance, excavation and earthmoving and demolition" includes, -*
>
> *i. drilling, boring and core extraction services for construction, 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;"*

8.1 The Board *vide* its TRU Letter dated 28.02.2007 clarified the following while levy on mining service was introduced.

> *"6.2 Mining Service [section 65(105)(zzzy)]: Presently, geological, geophysical or other prospecting, surface or sub-surface surveying or map- making services relating to location or exploration of deposits of mineral, oil or gas are leviable to service tax under "survey and exploration of mineral service" [section 65(105)(zzv)].*
>
> *Services such as -*
>
> - *site formation and clearance, and excavation and earth moving, drilling wells for production/exploitation of hydrocarbons (development drilling)*
> - *well testing and analysis services*
> - *sub-contracted services such as deploying workers and machinery for extraction/breaking of rocks into stones, sieving, grading, etc.*
> - *outsourced services,*
>
> *provided for mining are individually classified under the appropriate taxable service. <u>Services provided in relation to mining of mineral, oil and gas are comprehensively covered under this proposed service. With this, services provided in relation to both exploration and exploitation of mineral, oil or gas will be comprehensively brought under the service tax net.</u>"*

8.2 It is the case of the Ld. Counsel that from the above TRU Letter, it is clear that when the levy of service tax was introduced on Mining Service, it was brought comprehensively/compositely under service tax net which *inter alia* included the site formation services also. The contracts/agreements entered into by the appellant for providing mining service is comprehensive and including site formation service also and the same is assessed to service tax under 'Mining Service' from 01.06.2007. However, the expenses incurred by the appellant by way of engaging/receiving services of sub-contractor for removal of overburden has been carved out separately and demand has been proposed under Site Formation service for the period prior to 01.06.2007.

8.3 Further, he placed reliance on the following Orders of various Co-ordinate Benches wherein, it has been categorically held that in case of composite contract of mining, which are brought to tax under Mining service post 01.06.2007, tax cannot be levied under Site formation service or any other service for the period prior to the said date by vivisecting the contract.

a) *G.S.Atwal & Co Engineers Pvt. Ltd. [2023 (6) TMI 310 CESTAT Kolkatta]*
b) *R. K Marketing Services [2022 (4) TMI 517 CESTAT Bangalore]*
c) *Thriveni Earthmovers [2018 (11) TMI 31 CESTAT Kolkatta]*
d) *Balaji Mines & Minerals [2019 (9) TMI 1037 CESTAT Bangalore]*
e) *Hazaribagh Mining & Engineers [2016 (12) TMI 1131 CESTAT Kolkatta]*
f) *Ramakrishna Reddy [2018 (1) TMI 1498 CESTAT Hyderabad]*
g) *Ramakrishna Reddy [2008 (10) TMI 115 CESTAT Bangalore]*
h) *Ramakrishna Reddy SC Order.*

8.4 Accordingly, it's his case that in view of the ratio laid down in the above decisions / orders, the demand under site formation service is not at all sustainable.

Mining Service

9.0 The Ld. Counsel submitted that there are two demands under this category for the same period of June 2007 to September 2008 and in relation to the same two contracts/agreements. The first demand of tax of Rs.1,66,17,211/- is on the ground that the appellant had billed income of Rs. 12,86,51,936/- during the period June 2007 to March 2008 as per the balance sheet, whereas, the appellant has paid service tax only on Rs.4,81,13,579/- and they have not discharged service tax on the balance income. Similarly, for the period April 2008 to September 2008, it is alleged that they have not discharged service tax on an amount of Rs.5,39,05,328/-. The appellant had contended that they have paid service tax on the amount of income received from the mine owners but the SCN did not accept the same on the ground that the appellant is charging the mine owners for raising of ores through debit notes and that, as per the contract/agreement, the charges for raising of ore has to be paid within a month, failing which these charges are adjustable against payments to be made to the mine owners for the purchase of ores.

9.1 He further submitted that the appellant had contended before the adjudicating authority that in terms of Rule 6 of the Service tax Rules, they are liable to pay service tax only on receipt of value of taxable service and they have accordingly paid the service tax on receipt basis. The appellant contended that the SCN merely relied on the agreement clause contemplating payment within 30 days by the mine owner after adjusting any amounts payable by the appellant and has presumed that the payments have been adjusted against the amounts payable for the purchase of ores, which is not correct and which is not a fact, and the department has not let any evidence to substantiate any such adjustment. In fact, the appellant had put forth before the adjudicating authority that as and when the amounts receivable from mine owner are collected at a later point of time, they have discharged the service tax liability based on receipts.

9.2 Ld. Counsel argued that from 01.04.2011, Rule 6 of the Service Tax Rules has been amended and service tax is required to be discharged on accrual basis and not on receipt basis thereafter and in this regard, Point of Taxation Rules, 2011 (P.T.R., 2011) was introduced. As per proviso to Rule 9 of the said Point of Taxation Rules, for the services provided before 30.06.2011 or where invoices have been raised before 30.6.2011, the point of taxation shall, at the option of the taxpayer, be the date on which payment is received. The TRU letter issued from File F.No. 334/3/2011 dated 28.02.2011 clarified the amendments made as above during the Budget 2011-2012 and Para 6.2 of the said clarification read as follows: -

> *"6.2 Consequential changes have also been made to the Service Tax Rules, 1994 to alter the payment of service tax from receipt of payment to provision of service..."*

9.3 He submitted that the appellant had discharged service tax liability on the amount receivables pending as on

31.03.2011 during the year 2011-2012. In support of the same, he has referred to the CA Certificate along with the copies of the balance sheets for the period from 2007-2008 to 2011-2012 and the ST-3 returns filed, from which, it could be seen that they have been carrying forward the mining charges receivable from the mine owners year-on-year basis from 2007-2008 and as on 31.03.2011, the appellant had a balance of the receivable amount at Rs. 17,04,66,648/-. During the year 2011-2012, the appellant had a raising charges income of Rs.40,25,39,421/-. From the ST-3 returns filed by the appellant during the year 2011-2012, it is clear that they had discharged service tax liability on both the opening balance receivable (on receipt basis) as well as the billings made during the year (on accrued basis). Therefore, the demand of tax made on account of short payment is not at all sustainable.

Under-Valuation

10.0 The Ld. Counsel submitted that the Second demand of service tax on Mining Service also is for the very same period June 2007 to September 2008 in respect of the very same service provided under the two agreements. In the first demand, Department had alleged that there is a delay in realizing the billed income for raising of ore from the mine owners and presumed that it has been adjusted against the payments to be made by the appellant to the mine owners for purchase of ore. The second demand of service tax of Rs.7,72,80,040/- has been proposed on the ground that the agreements provided for certain escalation charges for raising of ore but the appellant had enhanced the charges in respect of Thakurani Mines which is more than two fold but had not increased the same in respect of Nuagaon Mines. Further, the expenses of cost of mining accounted for in the books of the appellant is more than double the raising income shown in the balance sheet. The SCN also alleges that the purchase price of ore from the two mines had gone multifold higher than the rates originally fixed in the agreement. Accordingly, the SCN alleged that the raising charges billed was not the actual one and the same has been suppressed and therefore, it was proposed to redetermine the value of the taxable service based on the cost of providing the service. In this regard, total expenses shown under the head 'production expenses' towards raising of ore as the cost and the demand has been proposed accordingly by considering such cost as the value of the taxable service.

10.1 He further submitted that the price of ore is determined by the prevailing market rate and increase or decrease in the market rates of ore cannot be a reason to have a proportionate increase/decrease in the mining charges. Secondly, though the contract contained price escalation clause, that does not mean that increase in prices would be granted automatically. Though negotiation would happen, billing at increased rates can happen only when it is agreed to by the mine owners. Therefore, billing a higher mining charge on one mine owner cannot be made a reason to automatically enhance the value of mining charges in respect of the other mine owner. Further, the appellant is engaged in export of ore and when there is substantial demand for ore and the appellant has committed exports to be made, merely because one mine owner has not agreed for price escalation, they would not be in a position to take any drastic steps which would only be detrimental to their business interest, they would have to pull on in such situations. Hence, difference in the mining charges collected from different mine owners in respect of two different mines located in two different states, due to various business compulsions and highly competitive market, cannot be made a ground for revising or enhancing the value of taxable service.

10.2 He drew our attention to Section 67 of the Finance Act, 1994 which provides for valuation of taxable services and sub section (1) of the said section read as follows during the relevant period of demand: -

> *"67. Valuation of taxable services for charging service tax*
>
> *(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,-*

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner."

10.3 He would thus contend that, it is lucid and clear from clause (i) above, that where the provision of service is for a consideration in money, then the value of taxable service is the gross amount charged by the service provider and as already stated, in the instant case, the provision of service is for consideration in money and hence, the gross amount charged by the service provider is the taxable value and hence, the value cannot be altered otherwise. Further, clause (ii) above, stipulates that where the provision of services is for a consideration not wholly or partly consisting of money, then the value of taxable service is equal to the money value of such consideration. In the instant case, it has not even been alleged that the consideration is other than money and as such, clause (ii) is not applicable. The residual clause (iii) provides that where the provision of service is for a consideration which is not ascertainable, then the value of taxable service may be determined in the prescribed manner. Sub-section (4) of Section 67 provides that the value shall be determined in terms of the above provisions and in the manner prescribed accordingly. The Service Tax

(Determination of Value) Rules, 2006 provides for the prescribed manner and the notice proposes to determine the value in terms of Rule 3 of the above Rules.

10.4 He further put forth that the Rule 3 based on which it has been proposed to adopt the cost of provision of mining service accounted for in the balance sheet as the taxable value, reads as follows as it existed during the relevant period, reads thus: -

> *"**3. Manner of determination of value**.- Subject to the provisions of section 67, the value of taxable service, where the consideration received is not wholly or partly consisting of money, shall be determined by the service provider in the following manner:-*
>
> *(a) the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration;*
>
> *(b) where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such taxable service."*

10.5 He argued that the value of taxable service shall be determined in terms of the above said Rule only when the consideration received is not wholly or partly consisting of money and it is not the Rule prescribing the manner for determination where the value of taxable service is not ascertainable in terms of clause (iii) of Section 67(1). He submitted that in the instant case, the entire consideration is in money only and it is not the case of the Revenue that the consideration in the instant case is other than money. It is relevant to note that the SCN and the impugned order has treated the consideration in the contract as ascertainable, in money and accordingly, proceeded to demand service tax on such consideration in money on the basis that payment of such consideration in money has been adjusted in the books against the amount payable for purchase of ore by the appellant. Even otherwise, clause (ii) of Section 67(1) and Rule 3 above would directly apply only if the consideration is wholly or partly consisting of not money. But in the impugned proceedings, nowhere it has been mentioned or held that the consideration has been received by the appellant in kind, and the impugned order proceeds to determine the value because the consideration is not ascertainable. That being the case, determining the value in terms of the above rule is not legally permissible at all.

10.6 He pointed out that the Adjudicating authority has observed in Para 18.3 of the impugned order that the arguments put forth by the appellant are not acceptable for the simple reason that the determination of value as envisaged under Rule 3(b) goes beyond the consideration under Section 67. From the Rule 3(b) reproduced above, it is lucid and clear that it only provides for determination of the value of taxable service only when the consideration is either wholly or partly consisting of money and it nowhere permits to go beyond the consideration mandated under Section 67 and as such, the impugned order is not legally sustainable. The said Rule 3(b) has been amended *vide* Notification No. 24/2012 ST dated 06.06.2012 whereby, the Rule has been made applicable to cases where taxable value is not ascertainable. The said amendment is prospective and hence, the determination of the value of taxable service based on cost of provision of service by applying the said Rule 3(b) during the relevant period of demand in the instant case is not legally sustainable.

10.7 He further argued that, notwithstanding the above, even assuming but not admitting, that the value of taxable services has to be determined in terms of the above Rule 3(b) on the basis of the cost of provision of service, in terms of Rule 6 of the Service Tax Rules, 1994 the service tax is required to be paid on the basis of receipt of the value of taxable service, which they have been consistently following and paying tax on receipt basis. If the consideration/value of taxable service is not received, then there is no requirement to pay tax during the relevant period till 01.04.2011. Only from the said date, Rule 6 was amended to state that tax is required to be paid at the time when the service is deemed to be provided in terms of P.T.R., 2011 However, in terms of Rule 9 of the P.T.R., 2011 if the service has been provided before 31.03.2011 or if the bill is raised before 31.03.2011, then the point of taxation is the date of receipt of payment and as such, for the services provided till 01.04.2011, the service tax is required to be paid only when payment is received. Therefore, even if the value of taxable service is re-determined on the basis of cost of provision of service, unless and otherwise the appellant receives payment towards such enhanced value, there is no liability to pay tax. The enhancement of the value on the basis of cost of provision of service is only for the purpose of service tax assessment, it does not really increase the receivables under the contract with the mine owner and the appellant will never realise any such payment and that therefore, the demand of service tax is not legally sustainable at all and merits to be set aside.

10.8 Without prejudice to the above contentions, learned counsel submitted that cost of provision of mining service reckoned in the SCN is not relating to mining activity alone. In terms of the agreement, the appellant is required to raise the ore and hand it over to the mine owner. Thereafter, the mine owner would sell the ore back to the appellant on payment of applicable VAT/CST. After the purchase, the appellant would do further processing of the ore to meet the export requirements. Thus, the cost of further processing of the ore raised for the purpose of making it suitable for export is not to be included in the cost of mining service. In this regard, reliance is placed on the Board Circular dated 12.11.2007 wherein, it is clarified as follows: -

> *"4 Coal cutting or mineral extraction and lifting them up to the pithead:*
>
> *These activities are essential integral processes and are part of mining operations. As stated earlier, mining activity has been made taxable by legislation under the Finance Act, 2007 (w.e.f. 1-6-2007). Prior to this date, such activities, being part of mining operations itself are not subjected to service tax. Therefore, no service tax is leviable on such activities prior to the said date.*
>
> *5. Handling and transportation of coal/mineral from pithead to a specified location within the mine/factory or for transportation outside the mine:*
>
> *These activities are post-mining activities and are chargeable to service tax under the relevant taxable services, i.e., "Cargo Handling service" and "Goods Transport by Road". However, in case, such transportation is undertaken by systems, such as conveyor belt system, ropeway system, merry-go- round systems etc., and the same is not transported by road, no service tax would be chargeable. Service tax is, however, chargeable under cargo handling service, even if the loading, unloading and similar activities are done using mechanical systems."*

From the above clarification, it is all the more clear that raising of ore and lifting them upto the pithead is covered under the 'Mining service' and 'handling of ore and transporting of ore' from the pit head are 'post mining activities'. Without considering all these aspects, the impugned order holds that all the costs accounted under the production expenses are relating to Mining service, which is not tenable as lacking any factual basis.

10.9 He has placed reliance on the decision of the Hon'ble Supreme Court in the case of *Intercontinental*

Consultants & Technocrats [2018 (10) GSTL (401) SC] which had held as follows: -

> *"24. In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service"*

10.10 Based on the above ratio, he contended that the value of taxable service cannot be anything more or less than the consideration paid as *quid pro quo* for rendering such a service and the question of re-determining the value of taxable service does not arise when the consideration is in money.

11. Notwithstanding the above, the learned counsel also submitted that while proposing to enhance the value based on the production expenses accounted for in the balance sheet and make a demand of service tax based on such enhanced value, the SCN failed to exclude the value

declared in the ST-3 returns and service tax paid on the same for making the demand.

12. He further submitted that the appellant have not suppressed any fact with intent to evade payment of tax and all the details have either been declared in the ST-3 Return or the same are available in the Balance Sheet of the appellant which is a public document as such, he contended that invocation of extended period is not sustainable at all.

13.0 The Ld. Special Counsel Shri P.R.V. Ramanan represented the Department and put forth the following submissions.

13.1 Placing reliance on the Board's Circular dated 27.07.2005, he submitted that w.e.f. 16.06.2005 'Site Formation Service' is leviable to tax and its scope included 'overburden removal and other development and preparation services of mineral properties and sites' and hence, the demand proposed from June 2005 to May 2007 under 'Site Formation Service' is sustainable and hence, the appellants have no case on merits in their favour.

13.2 The Special Counsel argued that the appellant has contested invocation of extended period on the basis of the SCN issued to them earlier in respect of GTA services involving transportation of ores within and outside the mines under the same mining contracts but the said contention is not sustainable as the appellants have not disclosed the activity of 'overburden removal and other development and preparation services of mineral properties and sites' and clearly suppressed the material particulars as brought out in Para 7 of the SCN, as confirmed at Para 20 of the impugned order.

13.3 With regard to demand of short payment of service tax under 'Mining Service' during the period June 2007 to September 2008, the Special Counsel put forth that the appellant has stated that as and when payments were received, service tax has been paid in terms of Rule 6 of Service Tax Rules, 1994 and the implication of this averment is that payments for the 'Gross amount charged' as per bills was received in subsequent periods and tax has been paid on such receipts in the subsequent period, but the appellant failed to reconcile the large difference between the gross amount charged as per bills and the gross amount declared in the ST3 returns and such payment of tax in the subsequent periods has not been substantiated by the appellant.

13.4 With regard to the payment of service on account of under valuation of above mining service during the very same period, the special counsel contended that the SCN alleged that cost of extraction of iron ore was more than double the income shown as 'raising income' in their balance sheets and invited our attention to Section 67(1)(iii) which provides that "in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner", and Service Tax (Determination of Value) Rules, 2006 prescribes the manner. The special counsel reiterated the facts based on the audit observation/SCN as put out above in Para 4 of the order and contended that the said facts have been taken note of in the impugned order and as a result, the provisions of Rule 3(b) of the above valuation rules is found applicable, and thus, the demand made in this regard is well founded.

13.5 He further took us through Para 20 and 21 of the impugned order and reiterated the same with regard to invocation of extended period.

14. With regard to the CA Certificate submitted by the appellant during the course of the hearing, reconciling the billing details as per the balance sheet and the income reported in the ST-3 returns for the period from 2007-2008 to 2011-2012 along with copies of balance sheets, ST3

returns, and service tax payment challan for the said period, the Ld. Special Counsel objected to the same being submitted during the hearing as the same required verification. Further, we find that the appellant has only summarized in the tabular form for ease of reference, the reconciliation statement and hence, the same was taken on record. Accordingly, the appellant preferred a Miscellaneous Application No. 40660 of 2024 for filing of additional documents under Rule 23 of the CESTAT Procedure Rules, 1982 and the same was allowed by this Bench *vide* Miscellaneous Order No. 40358/2024 dated 24.10.2024.

15.0 We have heard both sides and considered their submissions and the following questions arise for decision in this matter: -

i. Whether demand of service tax made under 'Site Formation service' for the period from June 2005 to May 2007 by culling out the site formation charges from a composite mining contract is sustainable?
ii. Whether the demand of service tax made under 'Mining service’ on account of short payment for the period June 2007 to September 2008 is sustainable?
iii. Whether the demand of service tax made under 'Mining Service' for the very same period June 2007 to Sept 2008 on account of charge of under valuation is sustainable?

We proceed to take up the above issues for decision in *seriatim.*

(i) Demand of Service Tax under "Site Formation Service": -

15.1 We have perused the agreement dated 15.05.2002 entered for Mining in Nugaon Mines and also the agreement dated 01.09.2002 entered for mining in Thakurani Mines by the appellant and both are composite agreements for mining of iron ore and the consideration for mining is fixed at 'per metric ton' of iron ore mined. There is no separate mention about provision of 'site formation service' or the connected scope or activity in the above contracts. Para 3.1 of the SCN observes that the extraction of ore involves the following processes namely (i) overburden removal, (ii) raising and stacking, (iii) hiring of pay loaders, (iv) mining, (v) screening, (vi) sampling and analytical study of iron ore, etc and hence, it appeared that the appellant was engaged in providing 'site formation service', but there is no such details mentioned anywhere in the agreements. From the expenses incurred by the appellant during the relevant period, the audit appears to have culled out the figures for such site formation activity and proposed to demand service tax.

15.2 The Ld. Adjudicating Authority has considered the activity of site formation independently. From the documents available on record and the agreements between the parties which is the 'cause' for any action between the parties, it is definitely not the intention of either of the signing parties to undertake SFS and hence, at the most, it could be incidental to the mining service. This is in fact of the spirit of the TRU Letter dated 28.02.2007 wherein the Board has considered the incidental activities insofar as the Mining Service is concerned. Hence, we are of the view that the Circular F.No. B1/6/2005–TRU dated 27.07.2005 would apply only when the scope of work is SFS per se. The scope of work would naturally flow from the intention between the parties, as reduced into writing, which alone is instrumental in working out the tax liability. Hence, demanding tax on a service that was not agreed upon, for which no separate consideration is payable or paid, is clearly unsustainable.

15.3 In this context, we deem it appropriate to refer to the 'Raising agreement' entered into between the contracting parties, relevant clauses of which are extracted below: -

> "1. *The validity of the Agreement shall be initially for a period of 20 (Twenty) years with-effect-from 01.09.2002 and upon expiry there of the agreement shall be renewed for such further periods upon Terms & Conditions that may be mutually agreed upon. However Party of the First Part would ensure renewal of the Lease within the required time of expiry of the Lease (30 Years from 01.01.1982). However, the increase in the extraction charges would be increased @ 10% per MT every year for Lump Ore/Natural Fines on account of cost revision. The maximum extraction*

> *cost that can be attained only over a period of time will be Rs. 96.63 (Rupees ninety six Paisa sixty three only) per MT for Lump Ore and Rs. 64.42 (Rupees four Paisa-forty two only) per MT for Natural Fines. For example, in the Second Year Lump Ore price will be Rs. 66.00 (Rupees sixty six only) per MT and for Natural Fines will be Rs. 44.00 (Rupees Forty Four only) per MT.*
>
> *2. The Party of First Part hereby grant full right and liberty to that contractor to enter upon the said mine for carrying out surveying, prospecting and extraction of Iron Ore and related mining work from the said mine. The contractor has agreed to depute/loan the services of such of its personnel, as it may deem fit and proper to the leaseholder. The Party of the First Part has agreed to keep the contractor's qualified mining personnel on its pay rolls on terms and conditions including emolument and other allowances as may be decided by the contractor. Such contractor's personnel shall be deemed to be the party of first party employees for all legal effects and purposes. The party of first party shall appoint one of the contractor's person as the "Mines Manager" and/or "Agent for the said Mine, Thakurani Iron Ore Mines. The party of first part shall accordingly notify the Indian Bureau of Mines, the Labour Enforcement Officer, the District Magistrate, the Department of Mines Safety and such other authorities as required under the law. The contractor reserves its right to recall and/or replace all or any of its deputed/loaned personnel at any time and from time to time as it may deem fit and proper, without assigning any reason. However all payment of salaries and other expenditure of deputed personnel mentioned hereinabove shall be borne by the contractor."*

At this juncture, we find it most appropriate to refer to a recent decision of the Hon'ble Apex court in the case of *Commissioner of Service Tax Delhi Vs. Quick Heal Technologies Limited [with Civil Appeal Nos. 5168-5169 of 2022 dated 05.08.2022]* wherein, the Hon'ble court, while considering the importance of 'contract' between the parties, has ruled as under: -

"Construction of agreement between the parties: -

53. *......*

54. *In Delta International Ltd. v. Shyam Sundar Ganeriwalla, (1999) 4 SCC 545 : AIR 1999 SC 2607 and Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel, (2006) 8 SCC 726, this Court quoted with approval the following principles of construction of contracts from the 'Interpretation of Contracts' by Kim Lewison, Q.C. as follows :*

> *"1.03 For the purpose of the construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning.*
>
> *6.09 Where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former construction should be preferred.*
>
> *Sir Edward Coke [Co. Litt. 42a] expressed the proposition thus :*
>
> > *'It is a general rule, that whensoever the words of a deed, or of one of the parties without deed, may have a double intendment and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken.'*
>
> *In more modern times that statement was approved by the Privy Council in Rodger v. Comptoir D'Escomple de Paris, (1869) LR 2 PC 393 : 16 ER 618, in which Sir Joseph Napier, delivering the advice of the Board said :*
>
> > *'The rule that words shall be construed most strongly against him who uses them gives place to a higher rule; higher because it has a moral element, that the construction shall not be such as to work a wrong.'*
>
> *Similarly, in Fausset v. Carpenter, (1831) 2 Dow & Cl 232 : 6 ER 715, the House of Lords accepted the submission of counsel that the court :*
>
> > *'... in judging of the design and object of a deed, will not presume that a party executing the deed meant to do and did what he was wrong in doing, when a construction may be put on the instrument perfectly consistent with his doing only what he had a right to do.*
>
> *However, the question of construction should not be approached with a leaning in one direction or another. Thus although the law frowns upon covenants in restraint of trade, nevertheless such a covenant should not be approached on the basis that it is prima facie illegal. 'You are to construe the contract, and then see whether it is legal.' "*

55. *The sum and substance of the ratio of the case of **BSNL** (supra) as discernible is that the contract cannot be vivisected or split into two. Once a lump sum has been charged for the sale of CD (as in the case on hand) and sale tax has been paid thereon, the revenue thereafter cannot levy service tax on the entire sale consideration once again on the ground that the updates are being provided. **We are of the view that the artificial segregation of the transaction, as in the case on hand, into two parts is not tenable in***

> ***law.*** *It is, in substance, one transaction of sale of software and once it is accepted that the software put in the CD is "goods", then there cannot be any separate service element in the transaction. ….."*

[emphasis added by us]

Now, it is equally relevant to refer to the determination of classification as prescribed under Sec. 65A of the Finance Act, 1994. The same is reproduced for convenience:

> *"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 (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 merits consideration;"*

When we consider the understanding between the parties as reduced in the form of 'Agreement', the scope and objective of which are reproduced herein above, the same clearly mandate that the appellant shall extract Iron Ore. The rate is one payment, as agreed to between the parties, which is for the extraction of Iron Ore and nothing else. Thus, the above ruling of Apex court would squarely apply. Secondly, even going by the Order-in-Original and assuming the vivisection of the above terms of the agreement which may lead to the provision of multiple services, then the same has to be examined in the context of Sec. 65A *ibid*, for classification. So, if we assume more than one service, then we have to go by the essential character, in terms of Sec. 65A(2)(b) *ibid*. This is because, the agreement is for 'Mining Service' which is being treated as the one for 'SFS'. Thus, when the agreement, the ratio of the above decision of the Apex court and Sec. 65A(2)(b) are read together, the only service that is being perceived between the parties, for which the consideration flows is the 'Mining Service'.

15.4 In view of the above, we hold that the Order-in-Original passed by the Ld. Commissioner is clearly on surmises and wrong interpretation of the understanding between the parties, and thus the impugned order lacks any credit and cannot be supported.

15.5 The TRU Letter dated 28.02.2007, explaining the budget proposals made, *inter alia* explained the scope of Mining service which was proposed to be brought under tax net wherein, it was clearly mentioned that the services provided in relation to mining are comprehensively covered under the proposed service of mining. Further, the case law relied upon by the appellant have decided the issue in question as to whether the site formation activity undertaken incidentally by a service provider in a mining contract is leviable to tax under 'site formation service' for the period prior to 01.06.2007 and the issue is no more res integra. The Co-ordinate Bench at Bangalore held as follows in the case of *M. Ramakrishna Reddy [2008 (10) TMI 115 CESTAT Bangalore*]: -

> *"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."*

15.6 The Department has preferred an appeal to Hon'ble Supreme Court against the above order which came to dismissed *vide* order dated 27.11.2019 since the tax effect is very low. The above decision of the Tribunal has been followed in many decisions of the co-ordinate benches cited *supra* and though the dept has preferred appeals in some cases, no stay has been granted in any of the cases. The above decision has been followed by the co-ordinate bench at Hyderabad in the case of M. Ramakrishna Reddy himself, as reported in *2018 (1) TMI 1498-Cestat Hyderabad,* Department appears to have preferred an appeal against the said decision also and the same was dismissed by the Hon'ble Supreme Court along with the earlier appeal, on 27.11.2019.

15.7 Under the circumstances, we are of the view that the above issue is settled in favour of the appellant and hence, we find no reason not to follow the above ratio laid down therein and accordingly, we hold that the contract entered into in 2002 by the appellant with the mine owners for raising of ore is a composite mining contract and the alleged activity of 'site formation' is only incidental to the of mining service and hence, the scope of mining contract cannot be vivisected to demand service tax on the incidental activity of site formation. Therefore, the demand confirmed under 'site formation service' for the period from June 2005 to May 2007 is not sustainable and is ordered set aside.

(ii) Demand of service tax under "Mining Service" on account of alleged short payment from June, 2007 to September, 2008:-

16.0 In this regard, the appellant contended that they have been paying service tax on mining services for the period from 01.06.2007 onwards. In terms of Rule 6 of Service Tax Rules existing during the years 2007-08, 2008-09 till April 2011, every assessee is required to declare only the realised income and discharge service tax on such realised income on receipt basis. Accordingly, the appellant also has been paying service tax on the mining charges as and when realised and the difference between gross income reflected in the balance sheet for the years 2007-2008 and 2008-2009 and the gross income reflected in the ST-3 returns filed by them is only the unrealised income during the said years. However, the SCN proposed to demand service tax in this regard since the appellant had entered into agreement with the mine owners for purchase of the entire mined ores separately, the delay in realising the mining charges lacks conviction since the appellant had every opportunity to adjust the mining charges against their liability towards purchase of iron ore. The notice merely proposed to demand on the ground that the appellant had opportunity to adjust and did not even categorically allege that the appellant had adjusted as above and also did not let in any proof to substantiate such adjustment. The same was confirmed in the Order-in-Original, in the absence of any such allegation or evidence, the Ld. Counsel rightly argued that, the demand confirmed in this regard is frivolous and not sustainable. Further, the appellant had also pleaded before the lower authority that they have paid service tax on receipt basis even on such differences as and when such amounts were realised during the subsequent periods. The learned Special Counsel agreed to it but argued that though they have made such a plea before the adjudicating authority, they have not substantiated the same with a reconciliation statement.

16.1 However, the appellant had submitted a Chartered Accountant’s certificate with a reconciliation statement along with relevant balance sheets and ST-3 returns cum service tax payment challans before us during the hearing and we have allowed the application filed in this regard for filing additional documents before us. Though the Department counsel wanted to verify the above and furnish a report, no such report has been furnished. From the worksheet annexed to the Chartered Accountant's Certificate which also has been duly certified, it can be seen that the said working contains details of taxable income reflected in the balance sheet for every year starting from 2007-2008 to 2011-2012, amount of income actually realised during the said years and service tax discharged on such realised income. Every year, the balance of unrealised taxable income is arrived at and shown as balance and the same is carried forward as opening balance of the next year. Any realisation against such opening balance as well as the income billed during the year would be accounted as taxable income in the ST-3 returns and service tax was discharged on the same and in a similar manner, the balance of unrealised income would be arrived at and carried forward as opening balance of next year.

16.2 Rule 6 was amended in the year 2011 to levy service tax from receipt basis to accrual/billing basis. However, in terms of proviso to Rule 9 of P.T.R., 2011, the point of taxation for the services provided/invoice raised before 30.06.2011 would continue to be the date on which payment is received. As per the certified worksheet, the appellant had an opening balance of unrealised income of Rs.17,04,66,648/-as on 01.04.2011 and during the said year 2011-2012 they had billed income of Rs.40,25,39,421/-. However, it is seen from the said worksheet itself and the ST3 returns, that the appellant had discharged service tax on the opening balance of unrealised income as well as the billing income during the year 2011-2012 consequent to the above amendment, irrespective of realisation and despite the above proviso to Rule 9 of P.T.R., 2011, except for a short fall of Rs.4,03,673/-.

16.3 Moreover, we find from the above worksheet attached to the Chartered Accountant's Certificate that though the appellant had an unrealised income of Rs.9,04,92,898/- at the end of the year 2007-2008, they had no such unrealised income at the end of the year 2008-2009, which would establish that for the relevant years in dispute, *viz.,* 2007-2008 & 2008-2009, the appellant had discharged service tax in full on the gross income accounted for in respective years' balance sheet. Therefore, we hold that the demand of service tax on account of short payment of service tax on mining service for the year 2007-2008 & 2008-2009 (Upto September 2008) is not at all sustainable as the appellant had already paid the service tax in full on the gross income reported in their balance sheet by the end of year 2008-2009 itself. Accordingly, the demand of service tax confirmed in the impugned order in this regard cannot be sustained and is required to be set aside.

(iii) Demand of service tax made under 'Mining Service' for the very same period June 2007 to Sept 2008 on account of charges of under valuation is sustainable: -

17.0 We notice that the demand confirmed in this regard is on the very same mining services and for the very same period for which the earlier demand had been made. In other words, in respect of bill/debit note raised for mining charges during the year 2007- 2008 and 2008-2009 (up to September 2008) and accounted for in the balance sheet, other than the above demand of short payment made, demand of service tax has been made on the grounds of under-valuation. We notice that while making such second demand of service tax on the grounds of under valuation on the basis of cost of provision of service, the value declared in the ST-3/declared in the balance sheet and the service tax paid on the said value has not been deducted and the demand made is overlapping and to this extent the demand confirmed is not legally sustainable.

17.1 The grounds put forth in support of under-valuation in the SCN is recorded in Para 4 and the same has been confirmed in the impugned order. The appellant had entered into contract/agreement with Mine owners in 2002 for raising of iron ore (mining services) and for purchase of entire mined iron ore separately and the agreement contain clauses for fixed escalation in both the mining services agreement as well as purchase of ore agreements. Accordingly, the rates for purchase of ore was revised multifold in the case of both the mines namely, Thakurani Mines and Nuagaon Mines but the rates of mining services got revised more than two fold only in respect Thakurani Mines and in respect of Nuagaon Mines, the rates of mining services remained the same and were never revised. Further, the cost of extraction of iron ore as per the expenses accounted for in the balance sheet was found to be double than the mining charges billed on the mine owners. Accordingly, the demand proposed in terms of Rule 3(b) of the Service tax Determination of Value Rules, 2006 by redetermining the value based on the above cost of extraction was confirmed in the impugned order.

17.2 The Ld. Counsel invited our attention to Section 67 of the Finance Act, 1994 and Service Tax (Determination of Value) Rules, 2006 which is reproduced in the earlier paras of this order. He contended that in terms of Section 67(1)(iii), in case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner. The impugned order has relied upon this provision while confirming the service tax demand. Whereas, Section 67(1)(ii) provides that in a case where the provision of service is for a consideration not wholly or partly consisting of money be such amount in money with the addition of service tax charged, is equivalent to the consideration. In the instant case, however, there is no allegation that the appellant had realised any part of the consideration in kind other than money. Rule 3 of the above rules provides that the value of taxable service, where the consideration received is not wholly or partly consisting of money, shall be determined in the manner prescribed under clause (a) or (b) below in the said Rule. Ld. Counsel submitted that the above Rule 3 would apply only in cases where the consideration is received wholly or partly in kind other than money and in the instant case, clearly, there is no allegation that the appellant had received any consideration in kind and as such, Rule 3 itself would not apply to this case and hence, the re-determination of value proposed in terms of such Rule 3 is not legally sustainable. We find the above argument of the Ld. Counsel for the appellant is valid and legally correct.

17.3 Notwithstanding the above, the Ld. Counsel argued that during the relevant demand period namely, 2007-2008 and 2008-2009, as already explained in relation to the earlier demand in terms of Rule 6 of the Service Tax Rules, the appellant is required to discharge service tax only the basis of the amount of consideration received and not on the basis of the billed value. In other words, if a bill has been raised for Rs.1 Lakh towards consideration for the service provided but received payment of only Rs.50,000, then the service tax is required to be paid only Rs.50,000/- which is received and nothing more. That being the case, since the demand of service tax in respect of billed amount itself is not sustainable if the payment is not received, even presuming without admitting that the redetermination of value as proposed in terms of Rule 3(b) is sustainable for a moment, the question of realising such notionally enhanced value based on cost of provision from the mine owners is not possible at all and as such, in the absence of any realisation of such enhanced value, the demand of tax lacks any merit and is an impossibility. We do not find any counter argument from the side of the Department. Further, we find that the above argument is valid and the demand of any service tax for the period from 2007-2008 to 2008-2009 is not sustainable at all since the appellant could not realise the enhanced value as proposed from the mine owners. Therefore, we hold that the demand of service tax is not legally sustainable for the reason that enhancement of value based on cost of provision in terms of Rule 3(b) is not applicable as there is no realisation of consideration in kind in this case, in the absence of any realisation of the enhanced value. Accordingly, the enhancement of value as well as the demand of service tax in this regard lacks any merit and hence, the same is set aside.

18. We have held on merits that all the three demands proposed and confirmed in the impugned order is not sustainable and have set aside the same, we do not propose to delve into the issue of invocation of extended period.

19. Further, for the reasons set out in the preceding paragraphs, we hold that the demand of interest confirmed and the penalty imposed in the impugned order are also not sustainable and we set aside the same as we find the demand of service tax itself as not sustainable on merits.

20. In the result, the appeal is allowed with consequential relief, as per the law.

(Order pronounced in open court on 23.12.2024)

sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

MK