CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH,
COURT NO. I

Service Tax Appeal No. 51699 of 2015

[Arising out of the Order-in-Appeal No. 327 (OPD)ST/JPR-II/2013 dated 22/11/2013 passed by The Commissioner, Customs & Central Excise (Appeals – II), Jaipur.]

M/s Ram Minerals **Appellant**
(Formerly known as Shree Minerals),
Post Gotan,
Nagpur (Rajasthan) – 341 001.

VERSUS

The Commissioner of Central Excise **Respondent**
NCR Building, Statue Circle, C-Scheme,
Jaipur (Rajasthan) – 302 005.

<u>Appearance</u>

Ms. Amoha Sharma, Advocate – for the appellant.

Shri G.R. Singh, Authorized Representative (DR) – for the Respondent.

CORAM: **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE SHRI C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 51430/2019

DATE OF HEARING : 23/05/2019.
DATE OF DECISION: 07/11/2019.

<u>C.L. MAHAR :-</u>

The brief facts of the matter are that a show cause notice dated 28 August 2009 was issued to the appellant mentioning that it was engaged in providing taxable services namely site formation and clearance, excavation, earthmoving and demolition service and survey and exploration of mineral service which are taxable under sections 65 (97a) and 65 (104a) of Finance Act, 1994[1]. The show cause notice makes a demand of service tax amounting to Rs. 29,85,126/- for the period from September 2004 to May 2007. The above-mentioned amount of the service tax demanded under Section 73 of the Act has been bifurcated. Service tax demand of Rs. 20,80,178/- pertains to site formation and clearance, excavation service and a demand of Rs. 9,66,504/- on account of inclusion of the value of free supply of the explosives in the taxable value for calculation of service tax.

2. The matter was adjudicated by the Additional Commissioner by order-in-original dated 7 June 2011. The Additional Commissioner confirmed the amount of the service tax of Rs. 20,18,622/- and dropped the demand of Rs. 9,66,504/- raised on the issue of the addition of the cost of explosives in the assessable value of the taxable service. The relevant extract of the impugned order-in-original is reproduced below :-

> "(i) In view of findings made above I confirm of demand of Rs. 20,18,622/- on the issue of classification of service under site formation and clearance excavation, earthmoving and demolition service and vacate a demand of Rs. 9,66,504/- on the issue of addition of cost of explosives in the assessable value of taxable service raised vide show cause notice No. V(ST) Adj.-II/Jpr-II/277/ 09/2920 dated 28/08/2009 against M/s Shree Minerals Ltd. The amount of service tax deposited by the assessee to the tune of Rs. 20,80/178/- alongwith the interest of Rs. 3,72,238/- vide GAR 7 challan dated 29/12/2007, 31/12/2007, 01/01/2008, 28/01/2008, 29/01/2008 and 31/01/2008 stands appropriated to the government account.
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> (ii) I impose no penalty on M/s Shree Minerals Ltd. under Section 76, 77 and 78 of Finance Act, 1994 as assessee has correctly deposited their accrued liability prior to the issue of Notice showing their bonafide intent for compliance of law and as the issue involves technical interpretation which is subsequently clarified by the Board".

3. Against the above-mentioned impugned order–in–original, the Department preferred an appeal before the Commissioner (Appeals) on the ground that the Additional Commissioner had wrongly dropped the demand of Rs. 9,66,504/- and the

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1. the Act.

adjudicating authority should have confirmed the service tax leviable on the value the free supplies made by the recipient of the service considering the same as part of taxable value as per provisions of Section 67 of Act and penalty should have been imposed under Section 76, 77 and 78 of the Finance Act, 1994. The learned Commissioner (Appeals) in his order-in-appeal dated 22 November 2013 held as follows :-

> "6. … On going through the Order-in-Original it is seen that the Adjudicating authority had mentioned that the respondent had received explosives free of cost from M/s J.K. White Cement during the period July 2005 to 2006-07 worth Rs. 9,66,504/- (Rs. 4,88,952/- + Rs. 4,77,552/-) which he held to be not includible in value on the ground that the Assistant Commissioner, Central Excise Division, Ajmer had already decided that issue in earlier proceedings. However, rather than dropping the demand of service tax payable on this value calculated at the applicable rate, he dropped demand equivalent to the value itself i.e. Rs. 9,66,504/- obviously it was legally as well as factually incorrect and the departmental objection is well founded. Accordingly, the appeal on the ground is allowed and service tax leviable on the difference between Rs. 9,66,504/- and service tax leviable on the amount is to be recovered from the respondent alongwith interest in terms of Section 75 of the Act. Since the service tax leviable on this value i.e. Rs. 9,66,504/- has not been separately given in the show cause notice, the Deputy/Assistant Commissioner Division would calculate this as per the rate applicable and recover the same. Since the appeal does not challenge exclusion of the value of free supplied explosives, this issue needs no discussion.
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> 7. The departmental appeal also challenges the decision of the Adjudicating authority not to impose penalty under Section 76, 77 and 78 of the Act. It is seen that the Adjudicating authority has given in the order portion itself the reason for not imposing penalty. He has held that since the assessee had deposited the tax before issue of show cause notice the issue involved interpretation which was clarified by Board penalty under Section 76, 77 and 78 was not imposed. Though he has not explicitly quoted Section 80 of the Act but it is obvious that he has cited reasonable cause for not paying tax by the respondent. Therefore, I think the decision of the Adjudicating authority on the issue of penalty needs no modification".

4. It is seen that the Commissioner (Appeals) observed that the Additional Commissioner took the value of the free supply of the explosives as amount of the service tax and dropped the same. Feeling aggrieved by the order passed by the Commissioner (Appeals), this appeal has been filed.

5. The learned Counsel appearing on behalf of the appellant has taken us through the record of the appeal and a chart attached to the show cause notice to substantiate that the amount of Rs. 9,66,504/- is the total value of the explosives supplied free of cost by M/s J.K. White Cement Ltd. for providing the taxable service, during the period spanning between September 2004 to March 2007. The learned Counsel contended that the Commissioner (Appeals) committed an error in holding that the service tax leviable on the difference between Rs. 9,66,504/- and the service tax leviable on this amount is to be recovered from the respondent alongwith the interest. The learned Counsel has also contended that whole demand is barred by period of limitation as none of the element of fraud, collusion, mis-representation or suppression of the facts with an intend to evade tax are present. He has relied upon the decision of Supreme Court in the case of **Continental Foundation Jt. Venture versus Commissioner of Central Excise, Chandigarh – I** reported in **2007 (216) E.L.T. 177 (S.C.)** and **M/s Uniworth Textiles Ltd. versus Commissioner of Central Excise, Raipur** reported in **2013 (288) E.L.T. 161 (S.C.)**.

6. The learned Departmental Representative has supported the findings given in the impugned order.

7. The only issue that needs to be decided is whether service tax confirmed by the Commissioner (Appeals) on the value of free supply of the explosives by J.K. White Cement to the appellant is includable in the assessable value of the taxable service or not in terms of the provisions of the Act. In this regard, we find that the issue at hand has already been decided by Supreme Court in **Commissioner of Service Tax versus Bhayana Builders (P) Ltd.** reported in **2018 (10) G.S.T.L. 118 (S.C.)** wherein it has been held that for levy of the service tax as per the provision of Section 67 of the Act the gross amount charged by the service provider from the service

recipient means the amount which is billed by the service provider on the service recipient in the invoice and, therefore, the free supplies provided by service recipient to the service provider cannot form part of the taxable value of service. The relevant extract of the above-mentioned judgment is reproduced below :-

> "13. A plain meaning of the expression 'the gross amount charged by the service provider for such service provided or to be provided by him' would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words 'for such service provided or to be provided' by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider/assessee. Though, sub-section (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.
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> 14. We may note at this stage that Explanation (c) to sub-section (4) was relied upon by the learned counsel for the Revenue to buttress the stand taken by the Revenue and we again reproduce the said Explanation hereinbelow in order to understand the contention :
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> > "(c) gross amount charges" includes payment by cheque, credit card, deduction from account and *any form of payment* by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called 'suspense account' or *by any other name,* in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]"
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> > [emphasis supplied]
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> 15. It was argued that payment received in 'any form' and 'any amount credited or debited, as the case may be...' is to be included for the purposes of arriving at gross amount charges and is leviable to pay service tax. On that basis, it was sought to argue that the

> value of goods/materials supplied free is a form of payment and, therefore, should be added. We fail to understand the logic behind the aforesaid argument. A plain reading of Explanation (c) which makes the 'gross amount charges' inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words 'in any form of payment' are by means of issue of credit notes or debit notes and book adjustment. With the supply of free goods/materials by the service recipient, no case is made out that any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, 'any amount credited or debited, as the case may be', to any account whether called 'suspense account or by any other name, in the books of accounts of a person liable to pay service tax' would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider.
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> 16. In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider".

8. In view of above observation, it has to be held that the value of the free supplies of the explosives by the service recipient to the appellant is not includable in the taxable value and, accordingly the impugned order deserves to be set aside and is set aside.

9. The appeal is, accordingly, allowed.

(Order pronounced in open court on 07/11/2019.)

(Justice Dilip Gupta)
President

(C.L. Mahar)
Member (Technical)

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