



**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066  
CUSTOMS APPEAL BRANCH**

Dated: 25/02/2014

To

Appellant as per address in table below

Respondent as per address in table below

**Final Order No. ST/A/50662/2014-CU[DB] dated 21/02/2014**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.

*br*  
Asstt. Registrar(CUSTOMS Appeal Branch)

| Application | Appeal      | Name and Address of Appellant                                                                                                                          |
|-------------|-------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1           | ST/430/2009 | <b>NATIONAL<br/>CONSTRUCTION<br/>COMPANY<br/>SAHAJANAND BHAWAN,<br/>STATION ROAD, BHUJ-<br/>KACHCH (GUJ.)</b><br><br>Name and Address of<br>Respondent |
| 1           | ST/430/2009 | <b>C.C.E. JAIPUR II<br/>N.C.R. Building, Statue Circle,<br/>"C" Scheme, Jaipur 302005.</b>                                                             |

Other Appellants and Respondents as per Annexure

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8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

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13 C.D.R.      14 Office Copy      15 Guard File

*br*  
Asstt. Registrar(CUSTOMS Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX  
APPELLATE TRIBUNAL  
West Block No. 2, R.K. Puram, New Delhi – 110 066.  
Principal Bench, New Delhi**

**COURT NO. 1**

**DATE OF HEARING : 30/01/2014.  
DATE OF DECISION: 21/2/2014.**

**Service Tax Appeal No. 430 of 2009**

[Arising out of the Order-in-Original No. 2/2009/ST/JP-II-Commissioner dated 03/03/2009 passed by The Commissioner of Central Excise, Jaipur.]

For Approval and signature :

**Hon'ble Shri Justice G. Raghuram, President**  
**Hon'ble Shri Rakesh Kumar, Member (Technical)**

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :
  2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
  3. Whether their Lordships wish to see the fair copy of the order? :
  4. Whether order is to be circulated to the Department Authorities? :
- 
- M/s National Construction Company Appellant

Versus

CCE, Jaipur

Respondent

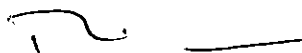
**Appearance**

Shri B.L. Narasimhan and Ms. Nupur Maheshwari, Advocates – for the appellant.

Shri Amresh Jain, Authorized Representative (DR) – for the Respondent.

**CORAM : Hon'ble Shri Justice G. Raghuram, President**  
**Hon'ble Shri Rakesh Kumar, Member (Technical)**

Final Order No. 50662/2014 Dated : 20/02/2014



**Per. Rakesh Kumar :-**

The facts leading to filing of this appeal are, in brief, as under.

1.1 The appellant are a partnership firm mainly engaged in business of mining and related works. They are registered with Service Tax Department since 06/4/09 for payment of service tax. The appellant also provide services to M/s Rajasthan State Mines and Minerals Ltd., a Government of Rajasthan Enterprise [hereinafter referred to as RSMML] in relation to mining of lignite. In this regard the appellant entered into an agreement with RSMML on 16/1/03. In terms of the agreement, the appellant's job was clearing the site for mining, excavation of top soil and its dumping at a specified place, removal of the over burden and raising of saleable lignite from Matasukh Mines located at Jayal Tehsil, Nagaur District, Rajasthan. The payment for the services provided by the appellant, in terms of Section VII of the agreement, was on the basis of per M.T. of saleable lignite mined by them. Inquiry in respect of their activity was initiated by the Department sometimes in the year 2007 and the appellant under their letter dated 09/3/07 informed the Department about their activity, pleading that the services provided by them were not taxable services. In their letter to the Department, they emphasized that they receive payment from RSMML in terms of their agreement for the quantity of lignite mined and not for other activities like removal of over burden or excavation of top



soil. Subsequently, the Department taking a view that the activity of the appellant was taxable as "cargo handling" service under Section 65 (105) (zr) of the Finance Act, 1994 till 15/06/05 and thereafter from 16/06/05 to 31/05/07 their activity was taxable as "site formation and clearance, excavation and earth moving service" under Section 65 (105) (ZZZa) ibid and w.e.f. 01/6/07 their activity was taxable as mining service under Section 65 (105) (ZZZy) ibid, issued a show cause notice dated 29/9/08 to them for demand of service tax amounting to Rs. 1,63,14,265/- alongwith interest for the period from 2003 to 31/3/08 alongwith interest thereon under Section 75 of Finance Act, 1994 and also for imposition of penalty on them under Section 76, 77 and 78 ibid. The show cause notice was adjudicated by the Commissioner, Central Excise, Jaipur - II vide order-in-original No. 2/2009/ST/JP-II/Commissioner dated 03/3/09 by which the Commissioner - (a) confirmed the service tax demand of Rs. 1,63,14,265/- under proviso to Section 73 (1) of Finance Act, 1994 alongwith interest thereon under Section 75 ibid ; (b) imposed penalty of Rs. 1,63,14,265/- on the appellant under Section 78 of the Finance Act, 1994 ; and (c) imposed penalty of Rs. 100/- per day upto 18/4/06 and @ Rs. 200/- per day or 2% of the tax amount not paid, whichever is higher, since 19/4/06 under Section 76 of the Finance Act, 1994 till the date of payment of the service tax, subject to the maximum of Rs. 1,63,14,265/-. The Commissioner in this order held that the appellant's activity was Cargo Handling Service during the period



till 15/6/05 and accordingly taxable under Section 65 (105) (Zr), was "site formation and clearance, excavation and earth moving service" taxable under Section 65 (105) (ZZZa) during the period from 16/6/05 to 31/5/07 and was mining of minerals service taxable under Section 65 (105) (ZZZy) since 01/6/07. Against this order of the Commissioner, this appeal has been filed.

2. Heard both the sides.

3. Shri B.L. Narasimhan and Ms. Nupur Maheshwari, Advocates, the learned Counsels for the appellant, pleaded that in terms of the appellant's agreement with RSMML, the appellant's job is hiring of machines like hydraulic excavators and ancillary equipment and also the staff for operation of the equipment, removal of top soil from the active mining area upto prescribed thickness and its stacking at a designated place, removal of over burden like soil, kankar, fuller's earth, clay, sandstone, shale etc. through blasting, if necessary, so as to expose the lignite seams, transporting the over burden to the designated place either within the mining area <sup>or</sup> ~~and~~ dumping it elsewhere, excavation of lignite seams exposed after removal of over burden and loading the lignite having calorific value more than 2500 kcal per kg. into trucks placed for transportation of the same, respreading the top soil removed on stabilised outside dumps, Allied and preparatory works, dewatering and pumping out of water from the pit, to keep the same dry, taking measures against fires and spontaneous heating of lignite and quality



control of the lignite, that from the scope of work as described in Section V of the appellant's agreement, it is clear that the agreement is for mining of lignite, that from Section VII of the agreement it will be seen that the appellant are paid on the basis of per M.T. of saleable lignite loaded, that the appellant's contract with their client - RSMML is for mining, that mining became taxable only w.e.f. 01/6/07 by insertion of Clause 65 (105) (ZZZy), that though the work of mining of lignite of the required calorific value also requires clearing the top soil and removing the over burden, the predominant feature of the appellant's contract with their clients is mining and hence the service ~~being~~ performed by them has to be treated as mining, that the appellant are not paid for clearing the top soil or removing of over burden separately and they are paid only on the basis of the quantity of lignite of the desired quality produced, that, therefore, during period prior to 01/6/07 i.e. from 16/6/05 to 31/5/07 their activity cannot be taxed as "site formation and clearance, excavation and earth moving service" under Section 65 (105) (ZZZa), that confirming service tax demand on the amount of remuneration received by the appellant for mining service for the period from 2003 to 15/06/05 by classifying the same as the Cargo Handling Service under Section 65 (105) (Zr) is absolutely without any basis, as the loading of the mined lignite into the trucks is a peripheral activity and in any case handling of mined lignite etc. within the mining area is not Cargo Handling Service, as held by the Tribunal in the case of **Sainik**

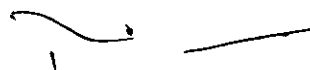


**Mining & Allied Services Ltd. vs. CCE, CUS & ST, BBSR** reported in **2008 (9) S.T.R. 531 (Tri. – Kolkata)**, wherein the Tribunal held that cargo, in commercial parlance, means as the one which is carried as freight in the ships, planes, rail or truck and movement of coal within the mining area is not handling of cargo meant for transportation, that in any case, just because of loading of mined lignite at the pit, into the trucks, which is a ~~very~~ peripheral activity, the entire activity of the appellant cannot be classified as mining service, that as regards the classification of the appellant's activity during period from 16/6/05 to 31/5/07 as site formation and clearance excavation and earth moving service taxable under Section 65 (105) (ZZZa), the Tribunal in the case of **M. Ramakrishna Reddy vs. CCE & CUS, Tirupathi** reported in **2009 (13) S.T.R. 661 (Tri. – Bang.)** has held that when as per the contract of M/s M. Ramakrishna Reddy with their client, which was for mining of ore, <sup>and</sup> site formation work was also undertaken as incidental to mining activity, the site formation work during the period prior to 01/6/07 could not be taxed under Section 65 (105) (ZZZa), as the contract for mining cannot be vivisected to ascertain the value of the work of removal of over burden and excavation, that in any case, <sup>for</sup> the demand for service tax on the appellant's activity as mining service w.e.f. 01/6/07, the extended limitation period cannot be invoked, as there is no positive Act of suppression of any relevant fact or withholding of relevant information or contravention of the provisions of the Finance Act, 1994 or the Rules made thereunder with intent to

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evade the duty and for the same reason, penalty under Section 78 of the Finance Act, 1994 would not be attracted, that in this regard mere failure to take registration or non-filing of return or non-payment of service tax cannot be treated as the basis for concluding deliberate withholding of information or deliberate contravention of the provisions of the law to evade the payment of service tax and that in view of the above, the impugned order is not sustainable.

4. Shri Amresh Jain, the learned DR, defended the impugned order by reiterating the findings of the Commissioner and emphasized that even for the period prior to 01/6/07, the activity of the appellant was taxable, that during period till 15/6/05, the appellant's agreement <sup>with</sup> RSMML refers to loading of lignite of the desired quality into the trucks placed for transporting the same, that this indicates that there was handling of the lignite in the mines, which was meant for transportation to its destination, that since separate value of the handling and movement of lignite within the mines was not given, the Commissioner has correctly demanded service tax on the entire amount of remuneration, that handling of coal within the mine was covered by cargo handling service and in this regard he relies upon the judgment of Hon'ble Orissa High Court in the case of **Coal Carriers vs. CCE, CUS & ST, Bhubaneswar** reported in **2011 (24) S.T.R. 395 (Ori.)** and also the judgment of the Tribunal in the case of **Gajanand Agarwal vs. CCE, BBSR** reported in **2009 (13) S.T.R. 138 (Tri. - Kolkata)**, that during the period from



16/6/05 to 31/5/07 since the new clause (ZZZa) had been inserted in Section 65 (105) which covered the activity of "site formation and clearance, excavation and earth moving and demolition service" and since the appellant's activity was more specifically covered by this clause, the Commissioner has correctly demanded service tax for this period under Section 65 (105) (ZZZa), that when w.e.f. 01/6/07 mining service became taxable by inserting clause (ZZZy) in Section 65 (105) and since this heading covered the appellant's activity more specifically, the demand for the period from 01/6/07 has been confirmed under Section 65 (105) (ZZZy), that through out during the period of dispute, the appellant have not taken service tax registration and not informed Department about their activity even though w.e.f. 01/6/07 mining service had become taxable and at least from 01/6/07 there could not be any doubt about the taxability of the appellant's activity, that in view of this, the extended limitation period under proviso to Section 73 (1) has been correctly invoked and penalty under Section 76 and 78 of the Finance Act, 1994 has been correctly imposed. He, therefore, pleaded that there is no infirmity in the impugned order.

5. We have considered the submissions from both the sides and perused the records.

6. The appellant had entered into agreement with RSMML on 16/1/03 for mining of lignite in Matasukh Mines area in District Nagaur of Rajasthan. In terms of the appellant's agreement with



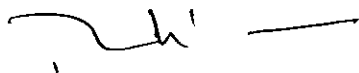
RSMML, they were to hire all the required machines like Hydraulic ~~excavation~~ <sup>excavators</sup>, dumpers and others ancillary equipment for mining work, engage the required staff for this job, remove the top soil from the active mining area upto a specified thickness and stack the same at a designated place in the mining area, remove the over burden soil, kankar, fullers earth, clay, sandstone, shale etc. and transport and dump the same at the designated places, excavation of lignite seams exposed after removal of over burden, loading of lignite having calorific value more than 2500 kilo per kg. into the trucks placed near the pits for transporting the same, other allied work, quality control of the mined lignite etc. and for this job, they were to be paid on the basis of the quantity of the lignite of the desired quality produced. The rate at which the remuneration was payable to the appellant was on the basis of per M.T. of the lignite of the desired quality produced. The mining service became taxable w.e.f. 01/6/07 by insertion of (ZZZy) to Section 65 (105) and therefore we have no doubt that w.e.f. 01/6/07 the appellant's activity was taxable under Section 65 (105) (ZZZy). In fact, the levy of service tax for the period from 01/6/07 is not disputed and the dispute is only for the period prior to 01/6/07.

7. According to the department, during period upto 15/6/05 the appellant's activity was taxable as cargo handling service under Section 65 (105) (Zr) and during period from 16/6/05 to 31/5/07 the same activity of the appellant was taxable as "site formation and clearance and excavation of earth under Section



65 (105) (ZZZa)<sup>as</sup>, according to the Department during the later period, on account of the new Clause (ZZZa) of Section 65 (105), the appellant's activity was more specifically covered under this Clause. The appellant's contention is that their contract with RSMML is for mining of lignite and the payment by RSMML to them is also on the basis of the quantity of the lignite<sup>of</sup> the desired quality produced and the<sup>loaded</sup> into the trucks and site clearance, and removal of top soil<sup>and</sup> over burden are incidental activities for which they are not even paid separately and hence, on the basis of the activities which are incidental to the mining activity, their contract cannot be treated as a contract for site formation, excavation etc.

8. As regards <sup>the</sup> Department's plea that during period prior to 15/6/05, the appellant's activity was taxable as cargo handling service under Section 65 (105) (Zr), we find that except for mention of loading of the mined lignite of the desired quantity into the trucks in Clause 4.2.1 (c) of the agreement, there is absolutely no mention of any handling or transportation of coal by the appellant within the mining area. As held by the Tribunal in the case of **Sainik Mining & Allied Services Ltd. vs. CCE, CUS & ST, BBSR** (supra), cargo in commercial parlance means the goods which are to be carried as freight in ships, planes, rail or trucks and cargo handling service is handling of such goods meant for transportation and it is on this basis that the Tribunal in this case held that handling and movement of coal within the mining area is not taxable as cargo



handling service under Section 65 (105) (Zr). We also find that Hon'ble Orissa High Court in the case of **Coal Carriers vs. CCE, CUS & ST, Bhubaneswar** (supra) in para 22 of the judgment, has held that the goods which are meant for transportation from one place to another by any mode of transport are known as cargo and that cargo handling, that is, loading of the goods meant for transportation into the trucks, railway wagons, ships, aircraft and unloading of the goods on arrival at the destination is an adjunct service to the actual transportation of the goods. Hon'ble High Court in this para observed that the pre-transportation activities like packing/loading and post-transportation activities like unloading and impacking are covered under cargo handling service. Therefore, when in this case, in the entire contract, there is no mention of the appellant being engaged in loading of the mined lignite on to the trucks or railway wagons : <sup>for</sup> ~~transportation~~ transportation of the lignite to the destination, just loading of the mined lignite within the mining area into the trucks would not make this activity cargo handling service covered under Section 65 (105) (Zr). Moreover, the loading of mined lignite of the desired quality into the trucks referred to in Clause 4.2.1 (c) of the agreement is a very small peripheral activity for which there is no separate payment and in the entire agreement, the thrust is on mining activity and the payment is also on the basis of the quantity of the lignite of the desired quality produced. Therefore, from the nature of the contract also, it cannot be said to be a contract for handling



cargo and, hence, it would be absurd to classify the appellant's activity during the period prior to 16/6/05 as cargo handling service and charge service tax on the entire remuneration being received by the appellant on that basis. Therefore, service tax demand for the period prior to 16/6/05 is not sustainable at all. In this regard, the judgment of the Tribunal in the case of **Gajanand Agarwal vs. CCE, BBSR** (supra) cited by the learned DR is not applicable to the facts of this case as in that case loading of the coal into the railway wagons was also involved.

9. As regards the service tax demand for the period from 16/6/05 to 31/5/07, the service demand for this period has been confirmed by classifying the appellant's activity under Section 65 (105) (ZZZa) as "site formation and clearance, excavation, earth moving and demolition service". Here also from the appellant's contract it is clear the contract is for mining of lignite of the required quality and in course of mining, while the appellant are also required to clear the site and remove the top soil and over burden, there is no separate payment for this activity. The activity of site formation and clearance, excavation of top soil and over burden, therefore, has to be treated as <sup>an</sup> activity ancillary to mining and since the overall contract is for mining and as such it is an indivisible contract, the entire contract has to be treated as a mining <sup>contract</sup> and not a contract <sup>for</sup> site formation, clearance, excavation and earth moving. Therefore, for this period also, the appellant's activity cannot be subjected to service tax under Section 65 (105) (ZZZa). We find that same view has been taken by the

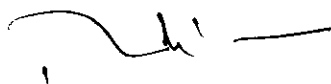


Tribunal in an identical issue involved in the case of **M. Ramakrishna Reddy vs. CCE & CUS, Tirupathi** reported in **2009 (13) S.T.R. 661 (Tri. - Bang.)**.

10. Moreover, when w.e.f. 01/6/07 the activity of the appellant has been accepted by the Department as mining service, for the period prior to 01/6/07, the same activity cannot be classified as site formation and clearance, excavation and earth moving or as cargo handling service.

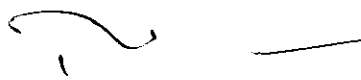
11. As regards the service tax demand for the period from 01/6/07, as discussed above, their activity was taxable as mining service under Section 65 (105) (ZZZy) and this has not even been disputed by the appellant. For service tax demand w.e.f. 01/6/07 the only plea of the appellant is of limitation, as the show cause notice had been issued on 29/9/08.

12. The service tax demand under mining service is from 01/6/07 to 31/3/08, that is for the six monthly periods ending 30/9/07, and October 2007 to 31/3/08. The show cause notice for service tax demand for the period from October 2007 to March 2008 could be issued upto 24/4/09, that is one year from the relevant date, as the last date for filing of ST-3 return for October 2007 to March 2008 period was 25/4/08. Since, the show cause notice has been issued on 29/9/08, the same is within time. Similarly, the last date for filing of ST-3 return for the six monthly period ending 30<sup>th</sup> September 2007 was 25/10/07 and the show cause notice for demand of short paid



service tax for this period could be issued upto 24/10/08, while the show cause notice had been issued on 29/9/08. Thus the show cause notice for 29/9/08 for both the periods had been issued within the normal limitation period. Accordingly, the service tax demand for the period from 01/6/07 to 31/3/08 has to be upheld.

13. As regards, penalty on the appellant under Section 76, 77 and 78, it is seen that even after the mining service becoming taxable w.e.f. 01/6/07 they did not take registration, which was taken only in 2009. The appellant are not an illiterate or semi-illiterate individual in respect of whom it could be said that they were not aware of the provisions of the law. When from 01/6/07 there was no doubt about the appellant's activity having become taxable, in order to escape from the penal provisions of Section 76, 77 and 78, the appellant in terms of the provisions of Section 80 of the Finance Act, 1994 have to prove that there were bonafide reasons for their failure to comply with the provisions of the law. Since, no such convincing reason has been given, we are of the view that penalty under Section 76, 77 and 78 would be attracted. Accordingly, the service tax demand for the period from 01/6/07 to 31/3/08 is upheld alongwith interest and also the penalty under Section 78 of an amount equal to the service tax demand is also upheld. Similarly, the penalty @ Rs. 200/- per day under Section 76 for the period from 01/6/07 to 31/3/08 is also upheld. The service tax demand for the period prior to



01/6/07 and also the penalty under Section 78 to that extent is set aside. The appeal is partly allowed.

(Order pronounced in the open court on 21/2/2014)



**(Justice G. Raghuram)**  
**President**



**(Rakesh Kumar)**  
**Member (Technical)**

21/2/2014

PK