CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

SERVICE TAX Appeal No. 51767 of 2016

(Arising out of Order–in-Original No. ALW-EXCUS-O-I-O-COM-34/2015-16/1654 dated 15.03.2016 passed by Commissioner Of Central Excise and Service Tax, New Alwar)

M/s. Continental Petroleum Ltd **...Appellant**
Plot No. A-166 & F-162-165
RIICO Industries Area, Behror,
Rajasthan-301701

Versus

Commissioner of Central Excise, **....Respondent**
And Service Tax, Alwar
A Block, Surya Nagar,
Alwar- 301001

APPEARANCE:
Mr. B.L.Narasimhan, Advocate for the Appellant
Mr. Vivek Pandey, Authorised Representative for the Respondent

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

Date of Hearing/ Decision: **01.09.2020**

FINAL ORDER No.: 51581 / 2020

JUSTICE DILIP GUPTA

The order dated March 15, 2016 passed by the Commissioner, Central Excise and Service Tax, Alwar[1] has been assailed in this appeal filed by M/s. Continental Petroleum Ltd. The demand of service tax proposed in the show cause notice dated October 16, 2015 has been confirmed with interest under section 75 of the Finance Act 1994[2] and penalty under section 78 of the Finance Act.

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1. the Commissioner
2. the Finance Act

2. The Appellant is engaged in the manufacture of lubricating oil/ grease and break oil and also in the refining of waste oil. The Appellant has also set up a plant for incineration of hazardous waste arising out of the refining process of waste oil. Incineration is the process of treating the hazardous waste so that it can be disposed off in a manner least affecting the environment. The process of incineration involves the burning of hazardous waste upto a certain temperature and then disposing off the ash to the statutory landfill site. It is stated that the said plant was set up by the Appellant to comply with the guidelines issued by the Ministry of Environment and Forest.

3. Initially, the plant was set up for captive use by the Appellant, but the Appellant subsequently started incinerating the waste generated by other industries. For this purpose, the Appellant entered into agreements with companies whereby it agreed to receive the hazardous waste, which would be treated in compliance with the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 at the incineration plant of the Appellant. Under the agreements, the companies package the waste and deliver it to the premises of the Appellant.

4. The Department, however, formed a view that by incinerating the waste of other industries, the Appellant was rendering 'cleaning activity' services in terms of section 65(24b) of the Finance Act, which is taxable under section 65(105)(zzzd) of the Finance Act.

5. Accordingly, a show cause notice dated October 16, 2015 was issued to the Appellant. The Appellant filed a detailed reply to the show cause notice. The Commissioner, by the impugned order dated March 15, 2016, has confirmed the demand with interest and penalty.

6. Shri B.L.Narasimhan learned counsel appearing for the Appellant has made the following submissions:

i) The show cause notice was issued to the Appellant on the basis of an audit objection dated November 27, 2013 for the period April 1, 2011 to March 31, 2013 on the amount received by the Appellant towards incineration. As the said audit objection was dropped by the Superintendent, Central Excise by letter dated January 20, 2016, the impugned order confirming the demand of service tax could not have been issued. To support this contention, reliance has been placed on the decisions of the Tribunal in **M/s. Kalyan Projects Construction Co. vs. Commissioner of Central Excise and Service Tax, Chandigarh**[3] and **Hindustan Zinc Limited vs. Commissioner of Central Goods and Services Tax, Udaipur**[4];

ii) The Appellant is not liable to pay service tax under "cleaning activity" services as defined under section 65(24b) of the Finance Act and taxable under section 65 (105) (zzzd) of the Finance Act;

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3. 2019 (9) TMI 464- CESTAT Chandigarh
4. 2019 (370) ELT 1582 (Tribunal Delhi)

iii) Incineration of waste cannot be read as extermination. For this contention, reliance has been placed on the clarification issued by Circular dated July 27, 2005 issued by the Board;

iv) Incineration of waste cannot be held as taxable under business auxiliary services or any other taxable service in view of the Circular dated July 13, 2007; and

v) The extended period of limitation could not have been invoked in the present case since the Department has not been able to prove any positive fact on the part of the Appellant which may indicate an intent to wilfully evade payment of service tax.

7. Shri R.K. Majhi learned Authorised Representative of the Department has however supported the impugned order and has contended that it does not call for any interference in this Appeal.

8. The submissions advanced by the learned counsel for the Appellant and the learned Authorised Representative of the Department have been considered.

9. The issue that arises for consideration in this appeal is as to whether the Appellant rendered "cleaning activity" services in terms of section 65 (24b) of the Finance Act taxable under section 65(105)(zzzd) of the Finance Act by incinerating the waste of other industries.

10. The aforesaid two sections are reproduced below:

> **(i)** "**Section 65 (24b)** "cleaning activity" means cleaning, including specialised cleaning services such as disinfecting, exterminating or sterilising of objects or premises, of -
>
> (i) commercial or industrial buildings and premises thereof; or

(ii) factory, plant or machinery, tank or reservoir of such commercial or industrial buildings and premises thereof,

but does not include such services in relation to agriculture, horticulture, animal husbandry or dairying.

(ii) **Section 65 (105) (zzzd)** "taxable service" means any service provided or to be provided to any person, by any other person, in relation to cleaning activity."

11. As noticed above, the Appellant has set up an incineration of hazardous waste plant. The Appellant incinerates its own waste arising out of the refining process of waste oil and also incinerates the waste generated by other industries. The dispute is confined to the incineration of waste generated by other industries. The Appellant claims that under the agreements, the companies are required to safely package the waste and deliver it to the premises of the Appellant for incineration.

12. The first contention of learned counsel for the Appellant is that since an audit objection for the period April 1, 2011 to March 31, 2013, regarding the issue raised in the show cause notice, was dropped by the Superintendent by a letter dated January 20, 2016, the Commissioner could not have confirmed the demand. It has also been pointed out by learned counsel for the Appellant that an audit objection was at earlier raised on April 8, 2011 for the period March 2009 to December 2010, but this audit objection was subsequently dropped by the Commissioner by letter dated May 16, 2012. Thus, not only was the show cause notice liable to be withdrawn on the dropping of the relevant paragraphs of the audit objections, but the impugned order is also liable to be set aside on this ground.

13. In this connection, it would be relevant to refer to reproduce the communication dated November 27, 2013 sent by the Superintendant, Central Excise Range to the Appellant regarding the Audit objection;

> "To,
> M/s. Continental Petroleum Ltd.,
> Behror..
> Sir,
> Subject:- LAR No. CE-17/13-14.- reg.
>
> On the captioned subject, it is to inform you that A.G. Audit has raised objections vide above mentioned audit report; copies of the same are enclosed. You are requested to submit your reply/explanation immediately."

14. Part-II (A) of the enclosure deals with non-payment of service tax on 'cleaning service'. The relevant portion is reproduced below;

> "In test check of the service tax records and relevant accounts of the M/s. Continental Petroleum Limited, Behror, manufacturing Lubricating oil, Grease, Base oils and Further **?** under chapter heading 27 and also providing service of incineration of hazardous waste to the manufacturers, it was noticed that during the years 2010-11 to 2012-13 the assesee received charges of Rs. 3,46,42,827; Rs. 4,34,94,231 and Rs. 3,29,46,173 respectively under the head 'other income' for the service of incineration of hazardous waste **?** service falls under the ambit of exterminating of objects because the hazardous material was incinerated in the plant of the assessee and charges were taken from the **?** whose material was incinerated. Such activity appears to be covered under exterminating of objects as defined in the definition of the cleaning activity. The total service including cess of Rs.1,21,20,262/- was payable on the aforesaid."

15. The letter dated January 20, 2016 by the Superintendant seeks to record that the audit objections.

16. The Appellant informed the Commissioner, in response to the show cause notice, by a letter dated February 3, 2016 that the demand should be dropped or the show cause notice should be withdrawn since the audit objection itself had been dropped. The relevant portion of the letter is reproduced below;

> "In continuation to our reply vide our letter no. CPL/2015-16/CE-AG/3010 dated 17-11-2015 in response to your aforesaid SCN, we further bring to your kind notice that aforesaid SCN has been issued to us on the basis of Part II(A) of Para 1 of LAR No. CE-17/13-14. Now the AG audit has settled the above para vide their letter No. RAINDT.II/I-13011/CE-17/2013-14 dated 20-01-2016 (copy enclosed). In view of above position, we pray your honour to kindly drop or withdraw the SCN as referred above as issued to us under intimation to us.
>
> We have also received your letter no. V(H)Adj/CE-27/ALWAR/130/2015/676 dated 27-01-2016 from the Office of Dy.Comm. (Adj.) fixing the personnel hearing in the matter relating to above SCN on 16/17/18 February 2016 at 12.30 Hrs in your kind office, You are requested to kindly confirm as to whether should we present personally on above hearing in the above matter in view of the position as explained above. However, even if required we shall visit your office on any one the above dates for personal hearing as granted to us vide letter dated 27-01-2016."

17. The Commissioner, however, did not accept this plea of the Appellant and the relevant portion of the order is reproduced below;

> "The noticee in their reply has submitted that the SCN covers the audit period from April 2010 to March 2013 for computing the demand of service tax of Rs.1.21 Crores in which the period from April 2010 to December 2010 is already included by the audit team and the Para has been settled. **I find that the internal audit was conducted on 31.01.2011 and 01.02.2011 for the period 2009 to December 2010** and the Section 65(24b) of the Act defining **'Cleaning Activities" came into existence w.e.f. 01.05.2011** wherein it is specifically mentioned that 'Cleaning Activity' means cleaning, including specialized cleaning services such as disinfecting, exterminating or sterilizing of objects or premises, of – factory, plant or machinery. The activity of incineration of hazardous waste undertaken by the noticee is well covered as specialized cleaning by way of exterminating of objects under the ambit of 'Cleaning Service"
>
> **[emphasis supplied]**

18. In the first instance, the Commissioner committed an error in noting that section 65 (24b) of the Finance Act, which defines 'cleaning activity', was inserted w.e.f. May 1, 2011 since it was actually inserted by Finance Act 2005 w.e.f. June 16, 2005. The audit period was after section 65(24b) was inserted and not before it.

19. This apart, the issue as to whether demand can be confirmed, if for the same issue the audit objection had been dropped, was considered by a Division Bench of the Tribunal in **M/s. Kalyan Poject Construction** and it was held that in such a situation the demand cannot be confirmed. The relevant paragraph of the decision is reproduced below;

> "7. As the audit objection raised by the revenue has already been settled by them on 18.05.2007, in that circumstances, on the same audit objection, show cause notice cannot be issued to the appellant on 28.07.2009. Therefore, the whole of the demand on the basis of said objection is not sustainable and is also time barred."

20. In **Hindustan Zinc Ltd.**, a Division Bench of this Tribunal also took the same view:

> "8. Moreover, on being enquired about the status of the audit para, the Ld. Departmental Representative has placed the correspondence between the jurisdictional Commissioner and Deputy Director, Central Revenue in respect of audit memo bearing No. SOF-08/ST/2014-15 on record in the course of hearing. The show cause notice dated 3-3-2017 was issued to the appellant on the basis of said audit para. From the perusal of these documents, we have noticed that the Deputy Director, CRA-II has communicated to the jurisdictional Commissioner through its letter dated 8-5-2018 that the audit para has been dropped. When the audit memo itself has been dropped, the present proceeding which has been originated from the said audit memo has become non est."

21. Thus, as the audit objection had been dropped, the demand confirmed in the impugned order has to be set aside.

22. This apart, the Commissioner also committed an error in holding that the activity of incineration of hazardous waste is covered under 'exterminating' of objects, in the definition of 'cleaning activity'.

23. The scope of 'cleaning activity' under Section 65(245) of the Act provides for:

> **i.** Cleaning or disinfecting or exterminating or sterilizing of objects of a commercial or industrial building or factory or plant or machinery;

> **ii.** Cleaning or disinfecting or exterminating or sterilizing of the premises of a commercial or industrial building or factory or plant or machinery.

24. A reading of the scope of cleaning activity under section 65(24b) of the Finance Act would indicate that the essence of the activity is to clean either an object which is present within the premises or the premises itself of a commercial building/factory/plant or machinery. These services are rendered by the service provider at the premises of the recipient, where the intended objects or premises are required to be sanitized. Thus, the taxable service of 'cleaning' would include only those services wherein the cleaning activity has been undertaken at the premises of the service recipient.

25. Incineration of waste is a process involving destruction of waste/residue at high temperatures, which has been undertaken by the Appellant at its own plant. The waste of other industries which is intended to be incinerated by the Appellant is delivered by the industries to the premises of the Appellant. It is not a case where the Appellant goes to the premises of the industries to perform any cleaning activity. Instead, the waste is delivered to the site of the Appellant in safe leakage proof bags by the industries for proper disposal. The industries are not concerned with the waste thereafter.

26. The impugned order holds that the activity of the incineration of hazardous waste is covered under 'exterminating of objects' under the definition of 'cleaning activity'.

27. The Dictionary meanings of the terms **incineration** and **exterminate** are as follows:

Dictionary	Incineration	Exterminate
(i) Cambridge Advance Learner's Dictionary (Fourth Edition)	"To burn something completely"	"To kill all the animals or people in a particular place or of a particular type"
(ii) Oxford Dictionary of English (Third Edition)	"Destroy (something, especially waste material) by burning"	-"killing, especially of a whole group of people or animal".
(iii) Webster's Comprehensive Dictionary,	"To consume with fire, reduce to ashes"	"The act of process of exterminating or annihilation" "The term 'exterminate' is applied to groups or masses of men or animals".
(iv) Collins Advance Lear - ner's English Dictionary	"When authorities incinerate rubbish or waste material, they burn it completely in a special container"	"To exterminate a group of people or animals means to kill all of them."

28. It is, therefore, clear that 'exterminating of objects' covers destroying insects, rodents and other pests in respect of objects/premises. Hence, the term 'extermination' has to be in connection with activities such as fumigation; pest control or other such activities which are in the form of treatment of premises / objects against animal or pest infestation. The impugned order, therefore, erred in treating the term 'extermination' as being equivalent to 'incineration'.

29. It would be also be pertinent to refer to the CBEC Circular dated July 13, 2007 which specifically provides that

incineration of waste is not taxable under business auxiliary service or any other taxable service. The relevant portion of the Circular is reproduced below:

> "03. The matter has been examined by the Board. The view of the Board is that the incineration/ shredding of bio-medical waste can, no stretch of imagination, be called as 'processing of goods', even if in certain cases the shredded materials may be used as fillers etc. Further, the activity also does not qualify to be called as provision of service on behalf of the client. This is because the taxable activity envisaged under this category of business auxiliary service' is that while the 'client' is obliged to provide some service to a 3rd person but instead of the client providing such service, the service provider provides the such service to the 3rd person, on behalf of the client i.e. acting as an agent of the client. Admittedly, in the instant case, there is no 3rd person. Thus, the activity as undertaken does not fall under business auxiliary service or any other existing taxable services."

30. Thus, for all the reasons stated above, the demand confirmed under the impugned order cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

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