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

Dated: **05/12/2012**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **ST/A/737-738/2012-CU[DB]** dated **30/11/2012**

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.**

Asstt. Registrar(CUSTOMS Appeal Branch)

	Application	Appeal	Name and Address of Appellant	
1	ST/Stay/3879/2010	ST/1824/2010 ST/9/2011	**ARVIND KUMAR & CO.** D.C.M. ROAD, NACHNA, JAISALMER. (RAJ.)	**ROHANI SHARMIK THEKA SAHAKARI SAMITI LTD.,** ROHINI P.O. BADWASI, NAGAUR (RAJ.)
			Name and Address of Respondent	
2			**C.C.E. JAIPUR II** N.C.R.Building, Statue Circle, "C" Scheme, Jaipur 302005.	

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Copy To
3Advocate(s) / Consultant(s):

Om. P. Agarwal & co.
56, Section - 7, N.P.H Road,
Jodhpur,
Rajasthan

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4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

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

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

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

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. III

Service Tax Appeal No. 1824 of 2010 and 9 of 2011

[Arising out of the Order-in-Appeal No. 338 (CB) ST/JPR-II/2010 dated 20/09/2010 and Order-in-Appeal No. 351 (CB) ST/JPR-II/2010 dated 04/10/2010 both passed by The Commissioner (Appeals-II), Customs & Central Excise, Jaipur.]

For Approval and signature :
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, 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 Arvind Kumar & Co.] Appellants
M/s Rohani Sharmik Theka Sahakari Samiti Ltd.]
Versus

CCE, Jaipur – II Respondent

Appearance

Shri O.P. Agarwal, C.A. – for the appellant.

Shri V.P. Batra, Authorized Representative (DR) - for the Respondent.

CORAM : **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Shri Mathew John, Member (Technical)

DATE OF HEARING : 09/10/2012.
DATE OF DECISION : 30/11 /2012.

Final Order No. ST/737-738/12-Del Dated : ___________

Per. Mathew John :-

The appellants in both the cases during the period from 2002-2003 to March 2006 were providing the following services to Rajasthan State Mines and Minerals Ltd. –

(a) removal of over burden, excavation of gypsum, loading of gypsum in trucks/tippers or any other means of transportation ;

(b) refilling of worked out area by overburden and loosening of earth pockets in the worked out area and its proper levelling after excavation of gypsum.

(c) construction of ramps and/ or access roads to working faces using excavator to facilitate movement of trucks/tippers and its maintenance including water sprinkling ;

(d) recovery of left out boulders of gypsum (ROM from the left out area and loading into trucks.

(e) providing and maintenance of mine approach/access road including cleaning of soil and sand on the road.

1.1 The department was of the view that during the period prior to 16/6/05 these activities were taxable as cargo handling service and from 16/6/05 these activities were taxable as "site formation and clearance excavation and earth moving and demolition services". The original Adjudicating Authority on this basis confirmed service tax demand of Rs. 11,73,036/- against M/s Arvind Kumar & Company and service tax demand of Rs.

23,43,881/- against M/s Rohani Sharmik Theka Sahakari Samiti Ltd. Besides the service tax demand, interest on the service tax was also demanded under Section 75 of the Finance Act, 1994 and penalties were imposed under Section 76 and 77 ibid. On appeals being filed against the orders of the original Adjudicating Authority, the Commissioner (Appeals) vide order-in-appeal No. 338/JPR-II/2010 dated 30th August 2010 in the case of M/s Arvind Kumar & Company and order-in-appeal No. 351/JPR-II/2010 dated 21/9/10 in the case of M/s Rohani Sharmik Theka Sahakari Samiti Ltd. held that while during the period prior to 16/6/05, the activity of the appellants was not taxable as Cargo Handling Service, w.e.f. 16/6/05, their activity was taxable under the heading "site formation and clearance excavation and earth moving demolition services". The Commissioner (Appeals), accordingly upheld the service tax demands w.e.f. 16/6/05 alongwith interest and also upheld the imposition of penalty on them under Section 76 and 77 of the Finance Act. Against these orders of the Commissioner (Appeals), these two appeals have been filed alongwith the stay applications.

2. Heard both the sides in respect of stay applications.

2.1 Shri O.P. Agarwal, C.A., the learned Counsel for the appellant pleaded that, the activities of the appellants were mining services which became taxable w.e.f. 1/6/07, that w.e.f. 1/6/07, the appellant are being charged service tax by treating their activity as mining service, that it is settled law that when a new taxing entry is introduced from a particular date, during the period prior to that date, that item would not be taxable, that Tribunal in the case of **Thriveni Earthmovers Pvt. Ltd. vs. CCE, Salem** reported in **2009 (92) RLT 676 (CESTAT - Che.)** has held that Loading, unloading, transportation of limestone and rejects within mining area is mining service and not transportation service, that Tribunal in the case of **M. Ramakrishna Reddy, Civil Contractors vs. CCE & C, Tirupathi** reported in **2009 (92) RLT 551 (CESTAT - Ban.)** has held that excavation and removal of over burden and barites ore loading, transportation and unloading of ore are mining services, as essential character of these services is mining and not site formation, that same view has been taken by the Tribunal in the case of **CCE, Hyderabad vs. Vijay Leasing Company** reported in **2011 (22) STR 553 (Tri. - Bang.)**, that in view of this, the impugned order is not correct, that the appellant have a strong prima facie case and, hence, the pre-deposit of service tax demands, interest and penalty may be waived for hearing of these appeals and recovery thereof may be stayed till the disposal of these appeals.

2.2 Shri V.P. Batra, the learned Departmental Representative, opposed the stay application and reiterating the findings of the Commissioner (Appeals) in the impugned orders-in-appeal, pleaded that the activity of the appellants had been correctly classified as "site formation and demolition service", which was taxable during the period of dispute w.e.f. 16/6/05. In support of his contention, he also cited the Board's Circular No. 232/2/2006-

CX.4 dated 12/11/2007 wherein it had been clarified that excavation/drilling and removal of the overburdens are taxable under the category of "site formation and clearance, excavation and earth-moving and demolition service" w.e.f. 16/6/05. He also cited the Tribunal's stay order in the case of **Associated Soap Stone Distributing Co. P. Ltd. vs. CCE, Jaipur** reported in **2009 (14) STR 112 (Tri. - Del.)**, wherein it was held that though the appellant's agreement with M/s Rajasthan State Mines & Minerals Ltd. was for mining of rock phosphate, which also involved removal of overburden, waste rock and secondary ore, their activity of removal of over burden, waste rock or secondary ore was taxable as "site formation and clearance, excavation and earth-moving and demolition" service during the period from 16/6/05.

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

4. From perusal of the work order No. RSMM/SBK&PC - GYD/Cont/11/2003-912 dated 14/10/03 placed on the appellant by RSMML it is seen that the contract the work order is essentially for mining of the gypsum and other activities - removal of over burden, loading of gypsum in trucks and levelling of mine/area, maintenance of the ramps and/or access roads etc. are ancillary or incidental to the main area of the mining. The contract does not show any payments to be made for removal of over burden, loading of excavated gypsum, maintenance of mine approach road etc. though these activities are also mentioned

alongwith "excavation of gypsum". The essential character of the work covered by the contract is that of "excavation of gypsum" and the other activities are just incidental to the main activity. Payment is made per metric tonne of gypsum excavated and given to Rajasthan State Mines and Minerals Ltd. We do not see any merit in the argument that excavation of gypsum should be categorised as "cargo handling" or as "site formation" and subjected to service tax as ordered by the lower authorities. Further, we do not find it proper to split this contract into various components of work to be done and subject it to service tax by artificially splitting the value of the service rendered. Of course there has been no such proposal from the Revenue.

5. So we set aside the impugned orders and allow the appeals.

(Pronounced in the open court on 30/11/12.)

(Archana Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

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