IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. I

Appeal No. ST/1638/2010-Cu[DB]
ST/COD/ 421/11 for CO/219/11

[Arising out of Order-in-Appeal No. 52(ST)/RPR-I/2010 dated 18.8.2010, passed by the Commissioner of Central Excise, Raipur]

M/s NTPC Ltd. **....Appellant**

Vs.

CCE, Raipur **....Respondent**

Appearance:
Sh. B.L. Narsimhan and Sh. Karan Sachdev, Advocate for the Appellant
Ms. Neha Garg, DR for the Respondent

CORAM:
Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 15.02.2017
Date of Pronouncement: 10.03.2017

Final ORDER NO. 52483 /2017-CU[DB]

Per V. Padmanabhan

The present appeal is directed against the order in appeal no. 25/2010 dated 18.08.2010 passed by the Commissioner (Appeals) Raipur. The appellant is a PSU engaged in the business of generation of electricity and provision of consultancy services. The dispute has arisen in the agreement entered into by the appellant with M/s Bharat Aluminum Company Limited (BALCO), Korba, Bilaspur. In terms of the agreement dated 20.06.2002, the appellant was required to execute various services to BALCO for its captive power plant at its Korba Aluminum Complex, since they did not have facilities for transportation, handling and storage of coal etc. Clause 3 of the agreement requires the appellant to carry out the following services:

i. Transportation of coal from Gevra silo loading point up to Korba STPS unloading point using existing MGR system.

ii. For coal crushing and conveying using existing coal handling plant facilities.

iii. Supply of the clarified water and DM water to BCCP using pre-treatment and DM plants along with associated pumping and piping facilities.

iv. Supply of raw and drinking water.

v. Services for township infrastructure for drinking water, electricity, sewerage, drainage and shopping facilities for BCCP employees.

vi. Use of common approach road to BCCP and Korba STPS township.

2. The dispute is with reference to the consideration received by the appellant. For carrying out the activities mentioned at serial no. (i) and (ii) above, Clause 12(b)(i) of the agreement provides for payment of Rs. 175/- per MT to appellant. The appellant discharged

the service tax liabilities during the disputed period - September, 2004 to June, 2005 to the extent of Rs 145/- (Out of Rs 175/- per MT) towards coal handling and crushing. There is no dispute on this account. The balance amount of Rs 30/- was claimed to be attributable to the cost of transportation of coal within the factory premises. The appellant claimed that the cost of transportation was not to be included for purposes of payment of service tax under "Business Auxiliary Service". Revenue was of the view that appellant was liable to pay service tax on the full consideration received and accordingly Service Tax, totally amounting to Rs 41,75,688/- was ordered to be paid along with interest and penalties under various Sections of the Finance Act, 1994. Aggrieved by the impugned order, the present appeal has been filed.

3. With the above background, we heard Shri B.L. Narsimhan, Karan Sachdeva, ld. Advocates for the appellant as well as Dr. Neha Garg, ld. DR for the respondent.

4. To challenge the impugned order, the appellant agitated the following grounds:

i. Even though the appellant has paid service tax on the consideration of Rs 145/- per MT under "Business Auxiliary Service", they have contended that the contract with NTPC is for crushing coal and this activity is not covered under the scope of "Business Auxiliary Service" during the period September, 2004 to June, 2005. During this period, "Business Auxiliary Service"

(BAS) was applicable only for production of goods on behalf of the client. The word "Processing" was included in "BAS" only after the above period. Since, the activity of crushing of coal does not amount to production of goods on behalf of the client, there can be no Service Tax liability.

ii. The impugned order has gone beyond the scope of SCN. Whereas the Show Cause Notice has made generalized allegation that the appellant is rendering BAS, there was no allegation that the appellant is procuring inputs for the clients.

iii. The entire demand is time barred and no penalties can be imposed. The appellant had bonafied belief that its activities are not covered under the scope of BAS. The Revenue has failed to establish any positive act of suppression and hence the extended period of time limit cannot be invoked. In this regard, they relied upon the following case laws:

- CCE & ST v. Triveni Engineering & Industries Ltd. 2015 (317) ELT 408 (All.).
- CCE, Chennai-I v. Chennai Petroleum Corporation Ltd. 2007 (211) ELT 193 (SC).

5. Ld. Counsels for the appellant reiterated the above grounds and pleaded that the impugned order may be set aside. They also raised the ground of time bar against the SCN. The appellant has already informed the audit party about exclusion of Rs 30/- per MT by their letter dated 8.12.2007, which was in response to letter dated 2.11.2007 from the Audit. Inspite of the above, the department issued a Show Cause Notice only on 11.08.2009, which

is beyond the period of 1 year from the date of knowledge of the short payment and hence, the demand is time barred.

6. Ld. DR on the other hand supported the impugned order. She submitted that the appellant has classified its activities under "Business Auxiliary Service" and has already been paid service tax on a part of the consideration received to the extent of Rs 145/- per MT out of total Rs 175/- per MT received for the activities carried out at BALCO. They have excluded an amount of Rs 30/- per MT from payment of Service Tax without any basis. It can only be an afterthought. The non-payment of service tax would have gone completely unnoticed but for the detection of the same by the audit party. Accordingly, she prayed that the demand may be upheld.

7. Heard both sides and perused the records. The appellant's agreement that BALCO was for carrying out the activities of transportation of coal from one point to another within the factory and further for carrying out the process of crushing of coal for both the activities together. The agreement specified, in Clause 12 B1, a payment of Rs 175/- per MT for these activities. We note that the appellant was already making payment of service tax for the consideration received from BALCO at the rate of Rs 145/- per MT under BAS in Section 65(19)(iv). The claim of the appellant now is that the above sub-heading will not cover the activity undertaken by the appellant for BALCO.

8. Section 65 (19) of the Act as substituted by the Finance (No. 2) Act, 2004 w.e.f 10.09.2004, the definition of Business Auxiliary Service terms as under:-

"Business Auxiliary Service" means any service in relation to:-

i. Promotion or marketing or sale of goods produced or provided by or belonging to the client; or

ii. Promotion or marketing of services provided by client, or

iii. Any other customer care service provide on behalf of the client, or

iv. Procurement of goods or services, which are inputs for the client, or

v. Production of goods on behalf of client, or

vi. Provision of service on behalf of client; or

vii. A service incidental or auxiliary to any specified in sub clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of account and remittance, inventory management, evaluation or development of prospective customer or vendor. Public Relation Service, management or supervision, and includes services as a commission agent but does not includes any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) or Section 2 of Central Excise Act, 1944.

9. BALCO has outsourced the activity of movement of coal within its plant and undertaking crushing thereof to the appellant for want of such facilities within their captive power generating plant. The

appellant contented that the activity of crushing of coal is in the nature of processing of goods, which were brought within the Section 65(19) only from 16.06.2005. In serial no. (v) above the words by "Production" has been replaced "Production or Processing of goods". In the light of the amendment as above, the submission of the appellant is that the activity carried out by them can at best be covered within the definition only w.e.f. 16.06.2005; for the period prior to this date and their activity is not covered by any of the sub-clauses of BAS.

10. After considering the relevant agreements entered into by the appellant with BALCO, outlining the nature of the activities, we note that the activity of crushing of coal cannot be covered within any of the sub-clauses of BAS until its amendment w.e.f 16.06.2005. After the said amendment, the activity can be brought within the term of "processing" and hence, liable to Service Tax under BAS. Consequently, there can be no demand for Service Tax prior to this date.

11. The appellant has excluded an amount of Rs 30/- per MT from the consideration received from BALCO at the time of payment of Service Tax. The basis for exclusion is that this amount is attributable to the transportation of coal within the factory premises. We find that this contention of the appellant is unacceptable. The contract with BALCO provides for the consolidated payment of Rs 175/- for the entire activities of coal

handling at the power generating plant of BALCO. We find no basis for the claim of the appellant for such exclusion. In the definition of BAS, any service provided to a client in relation to the "Business Auxiliary Service" is covered within the definition. If the crushing of coal is considered as the activity covered under BAS, transportation of coal for such purpose would also be included since it is intimately connected with crushing. In any case, the contract for activity includes both. Hence, we find no basis to exclude Rs 30/- from payment of service tax.

12. The appellant has claimed that the Show Cause Notice is time barred. Since, the same has been issued more than one year from the date in which the appellant intimated the audit party vide their letter dated 08.12.2007 giving the details of the activity undertaken by them for BALCO. **Hon'ble Gujarat High Court in the case of Neminath Fabrics (P) Ltd vs. Commissioner of Central Excise, Surat-I 2010 (256) ELT 369 (Gujarat)** has clearly held that date of knowledge was of no significance. The Hon'ble Court has held that once the suppression of facts is established, then the Show Cause Notice may be issued within the extended period of time provided. The **Hon'ble Supreme Court has held in the case of Mehta and Company reported in 2011 TIOL 17-SC-CX** that Show Cause Notice can be issued within a period of 5 years from the date of knowledge if the suppression of facts is established. The case laws cited by the appellant are on different facts hence not applicable to the present facts and circumstances.

13. We note that the activity undertaken by the appellant has become taxable only as a consequence of the amendment carried out in the definition of BAS w.e.f. 16.06.2005. The levy of Service Tax under BAS has seen repeated amendments to enlarge the scope of this service. Hence, we consider this to be a fit case to waive the penalties imposed in the impugned order under Section 80 of the Finance Act, 1994. However, the Service Tax liability for the period w.e.f 16.06.2005 is upheld along with payment of interest thereon.

14. In view of the above discussions, the impugned order is modified as above. The original adjudicating authority is directed to re-quantify the demand w.e.f. 16.06.2005.

[Pronounced in the open court on 10.03.2017]

(Justice (Dr.) Satish Chandra)
President

(V. Padmanabhan)
Member(Technical)

Ritu S.