IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing/Decision: 14.03.2017

Service Tax Appeal No.56272/2013-DB

[Arising out of Order-in-Original No.48/2012-13(ST) dated 14.12.2012 passed by the Commissioner of Customs & Central Excise, Jaipur-I]

M/s.Sihag Gysum Udyog — Appellants

Vs.

CCE, Jaipur-I — Respondent

Appearance:

Rep by Shri Alok Kothari, Advocate for the appellant.
Rep. by Shri R.K. Mishra, DR for the respondent.

Coram: Hon'ble Shri S.K. Mohanty, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No.52410/2017

Per B. Ravichandran:

The appeal is against order dated 12.12.2012 of Commissioner of Central Excise, Jaipur. The appellants were engaged in various activities like extraction of gypsum, shifting of gypsum from mine faces to grinding site, grinding, filling into bags, loading into trucks etc. These activities are with reference to contract entered into with M/s. FCI Aravali Gypsum & Minerals India Ltd., Jaipur.

2. The dispute in the present case relates to liability of the appellant for service tax in respect of some of these activities carried out, on which full tax liability has not been discharged by them. Proceeding initiated against the appellant concluded in the impugned order, wherein the ld. Commissioner (Appeals) confirmed the service tax liability of Rs.50,53,444/- and imposed penalty of equivalent amount

under Section 78 of the Finance Act, 1994 and further penalty under Section 76 and 77 of the Act.

3. Ld. Counsel appearing for the appellant submitted that originally demand is for tax amount of Rs.85,88,193/- under various categories of taxable service. They have discharged an amount of Rs.55,30,529/- towards service tax demand for the relevant period. A part of this amount has been paid during the course of investigation. They are not contesting the already paid service tax.

4. Ld. Counsel submitted that the dispute is relating to three components viz. (a) tax liability under the category of "GTA Services" amounting to Rs.21,54,622/- , (b) service tax liabilility under the category of "Site formation and clearance" for the period prior to 1.6.2007 of Rs.4,66,993/- and; (c) the excess demand of service tax of Rs.4,36,049/- on account of wrong valuation. This excess is due to calculation of service tax liability based on the bills raised by the appellant, whereas they have not received an amount of Rs.37,69,684/- during the impugned period.

5. On the first issue, ld. Counsel submitted that the show cause notice demanded service tax under "GTA Service" whereas the Original Authority confirmed the service tax demand under "Cargo Handling Service". The demand is not sustainable on this ground alone. However, he further submitted that the various amounts now demanded from the appellant have already been paid under "GTA Service" by the owner of the mines as consignor/consignee on reverse charge of service tax on transport of gypsum. As such, no tax liability rests with the appellant. On the second issue, ld. Counsel submitted that the Department admitted the activities of the appellant as taxable under mining service after 1.6.2007. On the same activities, for the period prior to1.6.2007, the service tax

was sought to be confirmed under a different service viz. site formation and clearance. This is not legally tenable. He relied on the various decided cases to support his contention.

6. Ld. AR reiterated the findings in the impugned order. He submitted that the appellant did not produce supporting evidence regarding payment of Rs.50,30,529/-. The Original Authority considered only regular payments made during the relevant time, in the absence of verification of other payments.

7. We have heard both the sides and perused the appeal records.

8. On the first issue regarding appellant's liability for tax under GTA service, we notice while the demand has been made under GTA, the confirmation of tax liability has been made under the new category of "Cargo Handling Service". This confirmation is legally not sustainable. We also note that on the transport of gypsum, the owner of the mines, M/s. FCI have paid service tax and the certificate to that effect has been produced by the appellant. If required, the jurisdictional officer can call for document for necessary verification to confirm the facts. In any case, there will be no liability on the appellant on this category.

9. We note that the appellants are engaged in various activities in terms of the contract with mine owner. Admittedly, extraction of gypsum is one of the activities in the composite contract. The activities carried out by the appellant in the mining area has been correctly categorized as mining service w.e.f. 1.6.2007. The Department accordingly confirmed the tax liability on the appellant. However, the same activity was sought to be classified as "Site Formation and Clearance" , prior to that date. We find such proposition is legally not sustainable. In this connection, we refer to the decisions of the Tribunal in **Sadbhav Engineering Ltd. – 2016 (43) STR 288 (T-Ahmd.), CCE, Hyderabad Vs. Vijay Leasing Company –**

2011 (22) STR 553 (Tribunal –Bang.), M. Ramakrishna Reddy - 2009 (13) STR 661 (Tribunal-Bang.), R.K. Transport Company – 2012 (27) STR 496 (Tribunal-Delhi), Rungta Projects Ltd. – 2013 (29) STR 254 (Tribunal-Delhi) and Arvind Kumar & Company – 2013 (31) STR 567 (Tribunal-Delhi). As such, we find that the appellants are not liable to service tax for mining activities prior to 1.6.2007.

10. On the third issue regarding wrong quantification of taxable value, we note that the appellant's claim needs to be cross verified by the jurisdictional officers for correctness. The claim of the appellant is that they have not received an amount of Rs.37,69,684/- as a consideration for taxable service. In the absence of receipt of consideration, no tax liability arises during the relevant period. This requires factual verification with the connected documents. Considering the facts above and legal issue, we find penalties imposed on the appellant are not sustainable. It is also a fit case for invoking provisions of Section 80.

11. In view of the above discussion and findings, we hold that the appellant's liability as demanded under GTA service and Site formation & clearance service is not sustainable. The correctness of value of taxable service requires to be re-verified by the jurisdictional officer. The appeal is disposed of in the above terms.

[Order dictated & pronounced in open court]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.