CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Service Tax Appeal No.ST/941/2010-ST [DB]

[Arising out of Order-in-Original No. COMMISSIONER/ RPR/26/ De-NOVO/2010 dated 31.03.2010 passed by the Commissioner of Central Excise and Customs]

M/s.Surendra Singh Chhatwal & Co …Appellant

Vs.

C.C.E. & Customs, Raipur … Respondent

Present for the Appellant : Mr.Ruchir Bhatia, Advocate
Present for the Respondent: Mr.Sanjay Jain, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. ASHOK K. ARYA, MEMBER (TECHNICAL)

Date of Hearing : 28/04/2017

Pronounced on : 25/08/2017

FINAL ORDER NO. 56262/2017

PER: S.K. MOHANTY

This appeal is directed against the impugned order dated 31.03.2010 passed by the Commissioner of Central Excise & Customs, Raipur, wherein Service Tax demand of Rs.1,59,68,674/- and Rs.6,72,143/- along with interest were confirmed under Site Formation and Clearance Service and Cargo Handling Service respectively. Besides, penalty of Rs.1,66,40,817/- was also imposed under Section 78 of the Finance Act, 1994. The break-up of demand raised in the impugned order is as under :-

S.No.	Serviced Recipient	Description of Services Provided	Period Covered	S.Tax Demand
1.	SECL	Hiring of HEMM for excavation	21.01.06-30.06.06	80,66,261/-
2	JPL	Transport Services		6,72,143/-
3	JPL	Construction of Ash Dyke	25.11.05–03.06.06	79,02,503/-
Total				**1,66,40,907/-**

2. The ld. Advocate for the appellant submitted that in respect of the demand indicated at Sl. No. 1 and 2 in the above table, the appellant had deposited the service tax liability and challenged the impugned order against imposition of penalty only. He further submitted that the issue regarding payment of service tax by M/s. South Eastern Coalfields Ltd. (SECL) was under consideration by the Ministry of Coal and Ministry of Finance and upon receipt of confirmation regarding payment of service tax, the same was deposited by SECL on behalf of the appellant. With regard to imposition of penalty, the submissions of the ld. Advocate are that there was reasonable cause for delay in payment of service tax, and thus, the appellant should be allowed waiver of penalty under

Section 80 *ibid*. The ld. Advocate has relied on the decisions of this Tribunal in the case of Ramesh Construction Company Vs. CCE, Raipur-2017 (2) TMI 1173-CESTAT, New Delhi, Gangadhar Bulk Movers Pvt. Ltd. Vs. CCE, Nagpur-2012 (27) STR 258 (Tri.-Mumbai), R.K. Transport Company Vs. CCE, Raipur-2012 (27) STR 496 (Tri.-Delhi) and Jai Jawan Coal Carriers Pvt. Ltd. Vs. CST, New Delhi-2015 (37) STR 509 (Tri.-Del.), to support the case of appellant that the benefit of Section 80 *ibid* should be available. With regard to construction of 'ash dyke' appearing at Sl. No. 3 above, he submitted that the scope of work as per the contract was composite in nature, involving both supply of goods as well as service and therefore, to be liable for service tax only with effect from 01.06.2007 under the taxable entry of Works Contract Service. In this context, the ld. Advocate has relied on the decision of this Tribunal in the case of National Projects Construction Corporation Ltd. Vs. CCE & ST, Raipur - 2016 (10) TMI 621-CESTAT, New Delhi.

3. On the other hand, the ld. D.R. appearing for the Revenue, reiterated the findings recorded in the impugned order.

4. Heard both sides and perused the case records.

5. In relation to the services provided by the appellant to SECL, the matter was under consideration by the Ministry of

Coal and Finance and upon confirmation of the position that Service Tax is liable to be paid under the taxable service, SECL has accepted its liability and paid the Service Tax on behalf of the appellant. The said fact has been stated by the adjudication authority in the impugned order at paragraph 4.1 (xiii). Further, with regard to the demand of Service Tax of Rs.6,72,143/- on transportation service, the appellant had deposited the entire amount alongwith interest, the fact of which has also been acknowledged vide paragraph 16 in the impugned order. Non-payment of Service Tax within the stipulated time as stated by the appellant are that there was confusion with the trade with regard to proper classification of service, whether to be classified under transport of goods by road service or cargo handling service. On perusal of the case records, we do not find any specific allegations being made by the Department showing any malafide motive of the appellant for non-payment of Service Tax within the stipulated time frame. Thus, we are of the view that the benefit of Section 80 *ibid* can be invoked in this case for non-imposition of penalty under Section 78 *ibid*. We also find that this Tribunal in the decisions cited by the ld. Advocate has waived the penalty by invoking the provisions of Section 80 *ibid* in almost in the identical set of facts. Therefore, the adjudication order imposing penalty under Section 78 *ibid* is set aside and the appeal is allowed in favour of the appellant.

6. With regard to construction of "Ash Dyke" by the appellant for Jindal Super Thermal Power Plant, the show cause notice dated 04.12.2006 has recorded the scope of work assigned to the appellant, which are as under:-

> *"The scope of work include construction and erection of the complete work for Ash Dyke including providing all oabour, materials, equipments, transportation and all other items actually required or necessary for successful completion of Ash Dyke for 4 x 250 MW O.P. Jindal Super Thermal Power Plant".*

7. On perusal of the above work order issued in favour of the appellant, it reveals that the construction of the Ash Dyke in the premises of the service receiver was a composite contract, involving supply of goods as well as execution of the assigned task. We also find that the adjudicating authority has recorded the submissions of the appellant vide paragraph 4.1 (xi) that the construction of Ash Dyke was awarded on turnkey basis and the client has deducted work contract tax as per Chhattisgarh Value Added Tax Law. However, he has not specifically dealt with the issue raised by the appellant at the time of adjudication proceedings. In view of the fact that the essence of contract is construction of Ash Dyke, involving supply of goods on payment of appropriate VAT, splitting of the said contract to classify the service under site formation and clearance service in the adjudication order is not legally

sustainable. Scope of work pursuant to the above work order should appropriately be classifiable under works contract service, leviable to service tax with effect from 01.06.2007. In the present case, since the period involved is from 25.11.2005 to 03.06.2006, which is prior to the effective date of levy of service tax on works contract service, in our considered view, the Service Tax demand of Rs. 79,02,503/- cannot be confirmed against the appellant. We find that this Tribunal in the case of National Projects Construction Corporation Ltd. (supra), by relying on the judgement of Hon'ble Supreme Court in the case of Commissioner of Central Excise, Kerala vs. L & T Ltd. – 2015(8) TMI- Supreme Court, has held that construction of Ash Dyke for thermal power plant of NTPC for the period upto 31.05.2007 cannot be classified under any service, other than works contract service and will not be liable to payment of Service Tax. Accordingly, the impugned order confirming such demand is set aside and the appeal is allowed in favour of the appellant.

8. We find that the ld. Adjudicating Authority vide the Corrigendum dated 17.05.2010, has amended the impugned order to read as follows:-

> *"On the services rendered by them to M/s.Jindal Power Limited and M/s. South Eastern Coalfields Limited under Site Formation and Clearance Service, and order for appropriation of amount of Service Tax of Rs.80,66,281/-, already paid by the Noticee,*

> *subject to the verification of their submission by the jurisdictional authorities dealing in the Service tax matter."*

9. In view of the fact that the ld. Adjudicating Authority has already referred the matter to the Jurisdictional Service Tax Authorities for verification of the payment particulars of Rs.80,66,281/- as claimed by the appellant, we are not interfering with such findings of the Adjudicating Authority at this juncture.

10. The appeal is disposed of in above terms.

[Pronounced in the open Court on 25/08/2017)

(ASHOK K. ARYA) **MEMBER (TECHNICAL)**	**(S.K. MOHANTY)** **MEMBER (JUDICIAL)**

Anita