IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

Service Tax Appeal No. 51253 of 2014

[Arising out of Order in Appeal 204 (ST)/RPR-1/2013 dated   passed by the Commissioner (Appeal), Customs & Central Excise, Raipur]

M/s.Navbharat Explosives Co. Ltd. **...Appellant**
Abhanpur, Raipur (D.G.)

Versus

Commissioner of Customs &
Central Raipur (C.G.) **.... Respondent**

APPEARANCE:
Shri.Jitin Singhal, Advocate for the Appellant
Shri. G.R. Singh, Authorised Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR.BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing : 26/02/2019
Date of Decision :26/02/2019

FINAL ORDER NO.50747/2019

PER JUSTICE DILIP GUPTA:

This appeal seeks to challenge the order dated 06 December 2013 passed by the Commissioner (Appeals) by which the order passed by the Assistant Commissioner confirming the demand of Service tax with interest and penalty has been upheld.

2. The appellant is a manufacturer of Explosives & Detonating F use and is also registered under taxable category of "Goods Transport Agency Service". A show cause notice dated 20 September, 2011 was issued to the appellant mentioning therein that during the course of audit of the accounts of the appellant by the internal audit team of the Central Excise Department, it was revealed that in the year 2006-07, the appellant had entered into an agreement with one Shir P.Ramaiah of Khammam (AP) for providing work of de-silting of iron ore slimes including loading and transportation of the same at Kadampal Tailing Dam to the fine ore dump at M.V. Siding, Kirandul of Bailadila Iron Ore Project, which will fall under the category of "Site Formation and Clearance, Excavation & Earth Moving and Demolition" (hereinafter referred to as "the Site Formation"). It was further mentioned that the appellant did not disclose this fact in writing to the Department with an intent to evade service tax.

3. The appellant submitted a detailed reply that the activity carried out by the appellant would not fall under the category of 'Site Formation'.

4. The Assistant Commissioner by order dated 14 March, 2013 confirmed the demand and also ordered for recovery of interest and imposed penalty also. This order of the Assistant Commissioner was assailed by the appellant before the Commissioner (Appeals), who by order dated 6 December, 2013 dismissed the appeal. The

Commissioner (Appeals) examined the agreement entered with the parties and concluded that the activities carried out by the appellant were in the nature of Site Formation, which were taxable w.e.f. 16 June, 2005.

5. Shri Jitin Singal, learned Counsel for the appellant has submitted that the Commissioner (Appeals) fell in error in holding that the activity carried out by the appellant would fall under the category of Site Formation and in this connection, not only placed the definition of Site Formation contained in Section 65 (97a) of the Finance Act, 1994, but also the Budget Letter dated 27 July, 2005 of the Government of India, Ministry of Finance (Department of Revenue), Central Excise Board and Excise and Customs, New Delhi pertaining to the Budget 2005-06.

6. 'Site Formation' defined in clause (97a) of Section 65 of the Finance Act, 1994 is as under:-

[95][(*97a*) "Site formation and clearance, excavation and earth moving and demolition" includes,—

(*i*) drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or

(*ii*) soil stabilization; or

(*iii*) horizontal drilling for the passage of cables or drain pipes; or

(*iv*) land reclamation work; or

(*v*) contaminated top soil stripping work; or

(*vi*) demolition and wrecking of building, structure or road,

but does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies;]

7. 'Site Formation' is also mentioned in paragraph 6 of the Budget Letter dated 27 July, 2005 and relevant portion is reproduced below:-

> "6. ***Site formation and clearance, excavation, earth moving and demolition services***
>
> 6.1 Any service provided or to be provided to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities is leviable to service tax under sub-clause (zzza) of section 65(105) of the Finance Act, 1994. "Site formation and clearance, excavation and earthmoving and demolition" has been defined in clause (97a) of section 65 of the Finance Act, 1994.
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> 6.2 The definition of site formation and clearance, excavation and earthmoving and demolition is an inclusive definition and the activities specifically mentioned are indicative and not exhaustive. Prior to construction of buildings, factory or any civil structure, activity of mining or laying of cables or pipes, preparation services of site formation and clearance, excavation and earthmoving or leveling are normally undertaken for a consideration to make the land suitable for such activities. Such services include blasting and rock removal work, clearance of undergrowth, drilling and boring, overburden removal and other development and preparation services of mineral properties and sites, and other similar excavating and earthmoving services. Demolition of structures, buildings, streets or highways is also undertaken for a consideration as a preparatory activity for subsequent construction activity or for clearing the site for any other purpose. All such activities fall within the scope of this service."

8. A bare perusal of paragraph 6.2 quoted above indicates that the activities mentioned for site formation are prior to construction

of buildings, factory or any civil structure, activity of mining or laying cables or pipes, and they are in the nature of preparation services of Site Formation to make the land suitable for such activities.

9. To appreciate whether the activity carried out by the appellant would fall under the category of 'Site Formation', it would be necessary to reproduce the relevant portion of the Agreement dated 21 March, 2006, and it is as follows:-

> "Whereas the first party has got the work of "Desilting of Slimes at Kadampal Tailing Dam and transportation of these Slime to fine ore dump at M.V. Siding, Kirandul of Bailadila Iron Ore Project, Deposit – 14, NMDC Ltd., Karandul, Distt. Dantewada South Bastar (CG), vide NMDC's Project agreement No.SRMGRO/D-14/6612/2005 dated 28.07.2005 of NMDC."
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> ....
> ....
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> "(5) In consideration of the work to be executed by the party of second part on behalf of the first party, the first party shall pay to the party of second part @ Rs.110 M3 (Rupees One Hundred Ten per Cubic Meter) after making TDS deduction from Rs.110/ M3 for De-silting of Slimes including loading and transportation of the same from the Kandampal Tailing Dam to M.V. Siding, Kirandul at the distance of 6.5 Kilometers. The party of Second part shall also maintain the road and manage the dumb yard. The first party shall authorised Bailadila Iron Ore Project, deposit – 14, NMDC Ltd. to make direct payment for work done by the second party on account of "providing equipments" for execution of work."

10. A perusal of the agreement indicates that the work that has to be performed by the appellant is "de-silting of slimes at Kadampal Tailing Dam and transportation of the slimes to fine ore dump at M.V. Siding, Kirandul". It is, therefore, apparent that the Dam is in existence and only the work of de-silting of slimes has to be carried out by the appellant. Thus, any activity prior to the construction of Dam, would fall under the category of "Site Formation", as has been clarified in the Budget Letter dated 27 July, 2005. Any activity of de-silting of slimes after the construction of the Dam would, therefore, not fall in the category of "Site Formation". The Commissioner (Appeals) failed to appreciate this aspect of the matter and committed an error in holding that the activity carried out by the appellant would fall under the category of "Site Formation".

11. Such being the position, it is not possible to uphold the order passed by the Commissioner (Appeals). It is, accordingly, set aside. The appeal stands allowed.

(Dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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