CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL No. 52650 OF 2015-DB

(Arising out of order-in-Original No. 23/ST/D-I/2015 dated 29.05.2015 passed by The Principal Commissioner, Central Excise Delhi-I, New Delhi-110002)

Global Coal And Mining Pvt. Ltd. .... **Appellant**
(154, Vasant Enclave Rao Tula Ram Marg,
New Delhi-110057)

VERSUS

Commissioner of Service Tax, Delhi .... **Respondent**
(17-B, IAEA House, M.G. Road, I.P. Estate,
New Delhi-110002

APPEARANCE:
Sh. B.L. Narasimhan & Shri Narender Singhvi, Advocate for the Appellant
Shri Vivek Pandey, Authorized Representative for the Respondent

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

DATE OF HEARING/DECISION: 25 July, 2019

FINAL ORDER No. 51165/2019

JUSTICE DILIP GUPTA

This Appeal has been filed for setting aside the order dated 29 May, 2015 passed by the Principal Commissioner, Central Excise, Delhi[1] by which not only the demand of Service Tax has been confirmed but penalty and interest have also been directed to be paid.

1. The Principal Commissioner

2. The Appellant entered into an agreement with Karnataka Power Corporation Ltd[2] for washing of coal transported from mines to the washing facilities situated in the mining area. This is basically known as beneficiation of coal. The Appellant paid Service Tax on this activity w.e.f. 1 June, 2007 as the Appellant believed that it was providing a service 'in relation to mining' under section 65(105)(zzzy) of the Finance Act, 1994[3]. The Appellant did not pay Service Tax on reimbursements such as transportation as it felt that this did not form part of the value of taxable services provided by the Appellant.

3. A show cause notice dated 20 October, 2010 was, however, issued to the Appellant mentioning therein that the Appellant, in terms of the agreement with KPCL, while undertaking the work of washing/ beneficiation of coal, was processing goods for or on behalf of the client and such the service provided by the Appellant would fall under 'business auxiliary service"[4] and the Appellant would be liable to pay Service Tax from 16 June, 2005. The Appellant was, therefore, required to show cause within 30 days from the date of receipt of the notice as to why:-

> "(i) An amount of Rs. 7,27,31,082/- (including Education Cess and Secondary Higher Education Cess) as detailed in Annexure A attached with this demand cum show cause notice should not be demanded and recovered from them under proviso to Section 73 (1) of Chapter V of Finance Act, 1994 being the Service Tax on the amounts received by them from KPCL and Cement and Steel Companies on account of providing taxable service during the period 2005-06 (from 16-06-2005) to 31-03-2009.
> ii. Interest as applicable should not be paid by them on the amount demanded at (i) above under Section 75 of the said Act.;
> iii. Penalty should not be imposed on GCM under Section 76 of the Finance Act, 1994 for failure to pay the due tax.
> iv. penalty should not be imposed on GCM under Section 77 of the Finance Act, 1994 for not filing the ST-3 returns correctly.

2. KPCL
3. The Act
4. BAS

> v. penalty should not be imposed on GCM under Section 78 of the Finance Act, 1994 for suppression of facts and contravening the provisions of the said Act and Rules made thereunder with intent to evade payment of service tax. "

4. The Appellant filed a detailed reply to the aforesaid show cause notice pointing out that the activity of beneficiation of coal is an activity 'in relation to mining' and not 'in relation to processing of goods' under the category of BAS. It was also pointed out that the Service Tax on providing a service 'in relation to mining' was imposed from 1 June, 2007 and if this activity was covered under BAS, on which Service Tax was levied earlier, the legislature would not have introduced a separate category of taxable service under section 65 (105)(zzzy) of the Act without making any amendment in the definition BAS. The decision of the Tribunal in **Aryan Energy (P) Ltd v/s Commissioner of Customs and Central Excise, Hyderabad**[5] was also relied upon in the reply. During the course of hearing, the appellant also placed reliance upon the decisions of the Tribunal in **M/s Aryan Coal Beneficiations Pvt. Ltd. v/s Commissioner of Service Tax, New Delhi**[6] and **M/s Spectrum Coal and Power Ltd. v/s Commissioner of Central Excise, Raipur**[7]. It was also stated that cost of transportation of coal from mines to washery cannot be included in the value of taxable services as they were reimbursements and in support of this contention reliance was placed on the decision of the Delhi High Court in **Inter Continental Consultations and Technicians Pvt. Ltd. v/s Union of India**[8].

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5. 2009 (13) STR 42 (Tri.-Bang.)
6. 2012 (9) TMI 205- CESTAT, New Delhi
7. 2012-TIOL-1125-CESTAT-DEL
8. 2013 (29) STR 9

5. The Adjudicating Authority, however, did not accept the submissions made by the Appellant. After noticing that the Appellant was engaged in the washing of coal purchased by KPCL from M/s Singareni Collieries Company Ltd. in raw form, the Principal Commissioner observed that this activity was a service to KPCL covered under BAS since it would be an activity of 'processing of goods for or on behalf of the client' w.e.f. 16 June, 2005, but the Appellant did not pay any Service Tax for this activity from 16 June, 2005 to May, 2007. The submission of the Appellant that washing of coal is a part of mining process and would fall within the scope of service 'in relation to mining', which was a taxable service only from 1 June, 2007, was not accepted. The relevant portion of the order is reproduced below:-

> "On bare reading of aforesaid budgetary changes, it emanates that all allied activities which are used in relation to the exploration and exploitation of mineral etc. which were falling under any other taxable service prior to the introduction of the new entry before 01.06.2007 are consolidated under the new separate entity "Mining Service" and more importantly even when related services, obviously referring to the activities in relation to the exploration and exploitation of minerals, are outsourced, the same will be taxable under this category, i.e., new entry of "Mining Service". It clearly shows that other related services prior to the introduction of new entry, the same would be changed/merged and made taxable under the new entry of "Mining Service". This negates the claim of the party and if this activity was covered under the business auxiliary service, the legislature would not have introduced mining as a separate category of taxable service under Section 65(105)(zzzy) because it was categorically specified by the Government during budget changes 2007-08 to bring and club all allied activities & other outsourced services related to exploration and exploitation of mineral etc. which were falling in other heads of taxable services into a new entry of 'Mining Service'. In view of the above, it is abundantly clear that party's activity which is a outsourced service of beneficiation or washing of coal on behalf of KPCL as per the agreement entered by them aptly categorized as the processing of goods for, or on behalf of the client and well covered under the "Business Auxiliary Service' from the period 16.06.2005 to May' 2007 before the same made directly taxable under the new head of service "Mining Service" w.e.f. 01.06.2007."

6. The Principal Commissioner noted the observations made by the Tribunal in **Aryan Energy** that the beneficiation of coal would be a part of mining activity brought under the ambit of Service Tax w.e.f. 1 June, 2007 and such activity would not be taxable prior to 1 June, 2007 and the fact that the two decisions of the Tribunal in

Spectrum Coal and **Aryan Coal** relied upon the decision rendered by the Tribunal in **Aryan Energy**. The Principal Commissioner, however, observed that against the decision of the Tribunal in **Aryan Coal,** the Department had filed an Appeal in the Delhi High Court[9] which was dismissed on 12 February, 2014 as non-maintainable and though the Department had filed a Civil Appeal[10] in the Supreme Court which was dismissed on 13 May, 2015 on the ground of delay, but the question of law was kept open. It would be appropriate, at this stage, to reproduce the observations made by the Principal Commissioner on the aforesaid Judgment of the Supreme Court and they are as follows:-

> "After this, the department had filed a Civil Appeal D 37840 of 2014 before the Supreme Court of India against the said judgment of the Tribunal. **The Apex court had taken up the matter for hearing on 13.05.2015 and disposed of the said Appeal by making the order in one line that** "The appeal is dismissed on the ground of delay. However, the question of law is kept open. "
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> **"The order of the Apex court is a non-speaking one which can only be termed as a decision and not a judgment** as has been deliberated by Board's Circular NO. 494/60/99-CX dated 12.11.1999 and 897/17/2009-CX dated 03.09.2009 in similar cases reproduced below. **Thus, it is clear that the judgment of Tribunal is not final and also not approved by the Supreme Court because it is specifically stated by the Court that the question of law is kept open.** "
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> **(emphasis supplied)**

7. Thereafter, the Principal Commissioner referred to the Circular dated 12 November, 1999 issued by the Central Board of Excise and Customs. It is reproduced:

" **Circular No. 494/60/99-CX, dated 12-11-1999**

[From F.No. 387/44/99-JC]

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs

Subject:- Eligibility of Downtherm Heat Transfer medium & Tri-Ethylene Glycol used for cleaning spinnerets.
to Notifn. Nos. 116/88-Cus/159/90-Cus

9. CE A C26/2013
10. Civil Appeal D 37840 of 2014

A reference is invited to CEGAT Final Order No. C-II/2999/98/WRB, dated 28-12-1998 passed by West Regional Bench, Mumbai in the case of Reliance Industries Ltd. v. Commissioner of Customs, Mumbai reported at 1999 (108) E.L.T. 236 (Tribunal). The brief issue involved in this case was whether Dowtherm Heat Transfer medium, required for heat transfer application in the plant can be treated as "material" for manufacture of the Polyester Staple Fibre / Polyester Filament yarn and entitled for duty exemption under Notification No. 116/88-Cus. dated 29/3/1988 or 159/90-Cus. dated 30/3/1990. Another issue was whether Tri-Ethylene Glycol (TEG) used for cleaning spinnerets after manufacture of PSF/PFY and entitled for duty exemption under Notification No. 116/88-Cus. dated 29/3/1988 and 159/90-Cus. dated 30/3/1990. The CEGAT in its order mentioned above held both the above items to be materials required for manufacture of resultant products, viz. PSF/PFY and set aside the order of Commissioner of Customs denying duty exemption. Commissioner of Customs, Mumbai recommended for filing Civil Appeal against the said order of the Tribunal. The matter was referred to the Ministry of Law and the 1d. ASG advised filing of civil appeal in respect to both items with particularly emphasis on TEG.

Accordingly a Civil Appeal was filed before the Hon"ble Supreme Court. The Court was pleased to pass a one line order "The Civil Appeal is dismissed".

A reference was, therefore, made to the Ministry of Law, Advice B Section for examining the feasibility of filing a review petition in this case. The issue was examined by the Law Ministry and it was inter alia observed :-

> "The Hon"ble Apex Court has not indicated any reason for dismissal of the civil appeal and, therefore, apparently there are no grounds for review of the order by the Apex Court. The impugned order of the Apex Court does not imply that the order of the CEGAT stands merged with the order of the Supreme Court. In the case of Indian Oil Corpn. Ltd. v. State of Bihar – AIR 1986 SC 1780, the Apex Court has held that when Special Leave Petition is summarily rejected, it occasions no merger of the order of the lower court in the order of the Supreme Court. These views have been reiterated by the Apex Court in the case of Udai Pratap Singh v. State of Bihar – 1994 Suppl. (3) SCC 451 wherein it has been held that dismissal of SLP by non-speaking order does not imply approval of the impugned judgment."

The file was also placed before the learned Attorney General for India and he observed as given below:

"In my opinion, there are no grounds for review. The issue involved in CA No. 6645/99 which was dismissed by the Supreme Court by its order dated 13-5-1999, may be agitated in other cases".

The above noted learned opinion of Law Ministry and the Advice of the Attorney General for India are bought to your notice so that similar other cases, if any, could be contested in future. **It may be noted that mere dismissal of our CA/SLP does not mean that Supreme Court approved the impugned judgement or order of CEGAT stand merged with the order of the Apex Court and in similar other cases we can still agitate the same issue**."

(emphasis supplied)

8. The Principal Commissioner also referred the Circular dated 3 September, 2009 issued by the Central Board of Excise and Customs and it is as follows:

"Further, in circular No. 897/17/2009-CX dated 03.09.2009 issued by the CBEC, New Delhi, again the same point is affirmed by the Board. The relevant Para 2 of the quoted Circular is:
"2. The matter has been examined. It is seen that the Tribunal decision and the High Court judgment referred to above, was delivered in the context of erstwhile Rule 57-I of the Central Excise Rules, 1944 and that the Supreme Court order under reference is only a decision and not a judgment. Since, the Rule 14 of the CENVAT Credit Rules, 2004, is clear and unambiguous in the position that interest would be recoverable when CENVAT credit is taken or utilized wrongly, it is clarified that the interest shall be recoverable when credit has been wrongly taken, even if it has not been utilized, in terms of the wordings of the present Rule14."

9. The Principal Commissioner, thereafter, concluded as follows:

"Thus, it is safely concluded in the case of Commissioner of Service Tax, New Delhi V.s M/s Aryan Coal Beneficiations Pvt. Ltd. as disposed of by the Apex Court, the judgment of Tribunal reported in 2013 (29) STR 74 (Tri.-Del) does not find any approval by the Supreme Court in its order dated 13.05.2015 because it is only a decision and not a judgment, and also at the same time the order of the Tribunal cannot be treated as merged with the order of the Supreme Court. It, therefore, is crystal clear that the matter in dispute is still open and has not attained any finality yet. **Thus, for the reasons as above, I reach at the conclusion that the ratio of the case i.e. Aryan Coal Beneficiations Pvt. Ltd. V.s CST, New Delhi-2013 (29) STR 74 (Tri.-Del) cited by the party, in which earlier two cases were also followed need not to be taken up for any discussion in the instant case as it becomes irrelevant since the judgment of Tribunal is in jeopardy and the question of law is still open.**
"

(emphasis supplied)

10. The Principal Commissioner, therefore, held as follows:-

(i) Service Tax amounting to Rs. 7,27,31,082/- (Seven Crores Twenty seven Lacs thirty one thousand eighty two only including Education Cess & Secondary & Higher Education Cess) is recoverable from the party under Section 73(1) of the Finance Act, 1994. An amount of Rs. 22,312/- already deposited stands appropriated towards payment of service tax;
(ii) Interest on the service tax recoverable as above is liable to be paid by them under Section 75 of the Act ibid.
(iii) Penalty in terms of Section 76 of the Finance Act, 1994, is imposable on them.
(iv) Penalty in terms of Section 77 of the Finance Act, 1994 is imposable upon them for failure to observe the statutory responsibilities.
(v) Penalty in terms of Section 78 of the Finance Act, 1994, is imposable on them.

11. Shri B.L. Narasimhan, learned counsel for the Appellant submitted that the activities of the Appellant cannot be classified under BAS prior to 1 June, 2007 as the activity, being a service in relation to mining, was made taxable only from 1 June, 2007. Thus, the confirmation of demand prior to 1 June, 2007 under BAS is liable to be set aside. Learned Counsel also submitted when a new category of service is introduced without any amendment/change in the existing

entries, the service covered under such a new category cannot be taxed under any of the earlier existing categories. Learned counsel pointed out that as the service 'in relation to mining' under section 65(105) (zzzy) of the Act was made taxable from 1 June, 2007, the Appellant has been paying Service Tax on this activity and that the Principal Commissioner was not justified in ignoring the binding decisions of the Tribunal in **Aryan Energy, Aryan Coal** and **Spectrum Coal.** The submission is that the Principal Commissioner committed judicial impropriety in not following the binding decisions and this would be against judicial discipline as was observed by the Supreme Court in **Union of India v/s Kamlakshi Finance Corporation Ltd[11].** Learned Counsel also submitted that in any case, reimbursement amount cannot be included in the value of services and the extended period of limitation could also not have been invoked.

12. Shri Vivek Pandey, learned Authorized Representative of the Department, however, supported the impugned order and submitted that the activity conducted by the Appellant prior to 1 June, 2007 would fall under BAS.

13. The submissions advanced by learned counsel for the Appellant and the learned Authorised Representative of the Department have been considered.

14. The period in dispute is from 16 June, 2005 to 31 March, 2009 and the issue is about the classification of the activity of beneficiation of coal. According to the Department this would fall under the category of BAS prior to 1 June, 2007, while according to the Appellant it is 'in relation to mining' and, therefore, taxable with effect from 1 June, 2007 only. The activity of beneficiation of coal involves

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11. 1991 (55) ELT 433 (SC).

washing of coal with a view to remove the high ash contents and to make it fit for use in the generation of power. The demand has been confirmed under BAS, which was introduced as a taxable service with effect from 16 June, 2005 for the reason that the said activity involves 'processing of goods for and on behalf of the client'. The Appellant has been paying service tax on the beneficiation charges received for the said activity under the category of mining services w.e.f. 1 June, 2007, when this service was for the first time subjected to levy of Service Tax. The impugned order has confirmed the demand of Service Tax from 16 June 2005 upto 31 May, 2007 under BAS. The period from 1 June, 2007 to 31 March, 2009 was included in the show cause notice though the Appellant had deposited Service Tax under mining related service, only for the reason that it was alleged the Appellant had not paid Service Tax on reimbursements received from customers during the period. According to the Appellant, this amount was not included in the value of services as reimbursements do not form part of value of taxable services.

15. The first issue that needs to be decided is as to whether the activity of beneficiation of coal carried out by the Appellant would fall under BAS. According to the Appellant, the said activity will be covered under the scope of mining related services under section 65 (105)(zzzy) of the Act w.e.f. 1 June, 2007. The contention is that on introduction of such a service from 1 June 2007, there was no amendment in the definition of BAS under section 65 (19) readwith 65(105)(zzb) of the Act and, therefore, the activity covered under a new category of mining related services cannot be classified under the existing category of BAS prior to 1 June, 2007.

16. This issue was examined at length by a Division Bench of the Tribunal in **Aryan Energy**. The Appellant therein was also engaged in the activity of beneficiation of coal on behalf of the KPCL. The Adjudicating Authority classified the said activity under BAS. The Division Bench of the Tribunal observed that the said activity would be covered under mining services with effect from 1 June, 2007 and Service Tax could not be levied under BAS for any period prior to 1 June, 2007. The relevant portion of the order of the Division Bench is reproduced below:-

> **14. On going through the contract with the KPCL, we are satisfied that the dominant activity of the appellant is beneficiation/washing of coal**. The appellant has been associated in the meeting of expert Committee (Thermal and coal mining) held on 19th and 20th December, 2000 on coal mining projects. The Coal Mines (Nationalisation) Act, 1973 defines under Section 2(h) 'Mine' 'Mine' means any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on, and includes (i) all borings and bore holes; (ii) all shafts, whether in the course of being sunk or not; All lands, buildings, and equipments belonging to the owner of the mine, and in, adjacent to or situated on the surface of, the mine where the washing of coal obtained from the mine or manufacture, therefrom, of coke is carried on. Similar definition is appearing in Section 2(g)(x) of the Coal Mines (Taking over of Management) Act, 1973. The Coking Coal Mines (Emergency Provisions) Act, 1971 has also defined 'mine' in similar manner. **In all the enactments relating to coal mining, washing of coal has been treated as part of the mining activity**. As laymen we tend to think that mining means only digging deep into the earth and extracting the minerals. However, in the statutory provisions the definition of mining appears to be very wide. In the Colliery Control Order Section 2(c) defines 'Colliery.' 'Colliery' means any mine or open working where winning or extraction of coal is the principal object of the mining, quarrying or any other operation carried on therein, and includes a plant for the production of coke or for the *washing of coal*. When the ash content of the coal is very high, the quality is poor. The Mines and Minerals (Development and Regulation) Act, 1957 in the Second Schedule gives the different gradations of coal. Among the gradation, washery grade is clearly indicated. **From all this, it is clear that washing of coal is also a part of mining activity.**
>
> **15. --------------**
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> **16. Once it is established that the activity of the appellant is mining,, it cannot be taxed under the Business Auxiliary Service for the period prior to 1-6-2007**. Even when we examine the definition of business auxiliary service, it is seen that production which does not amount to manufacture comes under business auxiliary service. The beneficiation of coal does not amount to production of coal because beneficiation is a process, which enhances the quality of the coal. However, in the definition of business auxiliary service, an amendment was carried out to include process also w.e.f. 16-6-2005. The appellant has made an alternative submission that if the activity carried out by them is not considered as mining activity the demand can be sustained only from 16-6-2005 to 31-8-2005 only. There are sufficient grounds to hold that the activities carried out by the appellant amounts to mining

> service. When such a view is taken, the appellant would not at all be liable to service tax for a period prior to 1-6-2007.

(emphasis supplied)

17. The Division Benches of the Tribunal in **Aryan Coal** and **Spectrum Coal** took the same view after following the decision of the Tribunal in **Aryan Energy**.

18. In this connection it will also be pertinent to refer to the decision of the Bombay High Court in **Indian National Shipowners' Association v/s Union of India**[12]**.** It was held that introduction of a new entry and inclusion of certain services in that entry would pre-suppose that there was no earlier entry covering the said services. It was also observed that creation of the new entry was not by way of amending the earlier entry and it was not carved out of any earlier entry. The relevant portion of the judgment of the Bombay High Court is reproduced below:-

> **37. Entry (zzzzj) is entirely a new entry**. Whereas entry (zzzy) covers services provided to any person in relation to mining of mineral, oil or gas, services covered by entry (zzzzj) can be identified by the presence of two characteristics namely (a) supply of tangible goods including machinery, equipment and appliances for use, (b) there is no transfer of right of possession and effective control of such machinery, equipment and appliances. According to the members of the 1st petitioner, they supply offshore support vessels to carry out jobs like anchor handling, towing of vessels, supply to rig or platform, diving support, fire fighting etc. Their marine construction barges support offshore construction, provide accommodation, crane support and stoppage area on main deck or equipment. Their harbour tugs are deployed for piloting big vessels in and out of the harbour and for husbanding main fleet. They give vessels on time charter basis to oil and gas producers to carry out offshore exploration and production activities. The right of possession in and effective control of such machinery, equipment and appliances is not parted with. Therefore, those activities clearly fall in entry (zzzzj) and the services rendered by the members of the 1st petitioner have been specifically brought to the levy of Service Tax only upon the insertion of this new entry.
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> **38.** If the Department's contention is accepted that would mean that the activities of the members of the 1st petitioner are covered by entry (zzzy) and entry (zzzzj). Such a result is difficult to comprehend because entry (zzzzj) is not a specie of what is covered by entry (zzzy). **Introduction of new entry and inclusion of certain services in that entry would presuppose that there was no earlier entry covering the said services.**

12. 2009 (14) STR 289 (Bom.)

> **Therefore, prior to introduction of entry (zzzzj), the services rendered by the members of the 1st petitioner were not taxable. Creation of new entry is not by way of amending the earlier entry.** It is not a carve out of the earlier entry. Therefore, the services rendered by the members of the 1st petitioner cannot be brought to tax under that entry.
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> **(emphasis supplied)**

19. Reference can also be made to the decision of the Tribunal in M/s **Malviya National Institute of Technology v/s Commissioner, Service Tax, Jaipur**[13] wherein it was observed that:-

> 14. ------The definition of 'CE' services as it stood prior to 16 July, 2001 was not amended when a new service namely, 'STC' was inserted on 16 July, 2001. It cannot, therefore, be alleged that 'STC' service had been carved out from 'CE' Services. In fact, the definition of 'CE' services continued to remain the same, till it was amended in 2006. Thus, the Show Cause Notice proceeded on an incorrect premise that even prior to 16 July 2001, the nature of service provided in 'STC' services was the same as 'CE' Services.

20. The same view was taken by the Tribunal **in M/s Hal Offshore Ltd. v/s Commissioner of Service Tax, Delhi**[14] wherein it was observed that:-

> 9. --------**The same service cannot be taxed under two different tax entry for different periods. Admittedly, the taxing scope of business support service did not undergo in the statue by change or amendment during the material time. A new service tax entry for supply of tangible goods was introduced w.e.f. 16/05/2008**. It is not the case of the Revenue that the said tax entry is not applicable to the appellant. The only contest is that prior to 16/05/2008 the same service should be taxed under different entry, namely, BSS. We find no legal support for such assertion. In this connection we refer to decision of the Tribunal in Deibold Systems (P) Ltd. vs CST, Chennai-2008 (9) STR 546 (Tri.-Chennai) 2008-TIOL-489-CESTAT-MAD. **The Tribunal held that in case of introduction of new tax entry without amending the pre-existing tax entry it cannot be said that the same activity will be liable to tax under pre-existing as well as new entry**. Following the said ratio, which has been adopted in many other cases by the Tribunal, we hold that there is no merit in the contention of the Revenue for the tax liability of the appellant in respect of supply of tangible goods prior to 16/05/2008.
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> **(emphasis supplied)**

21. In the instant case, the definition of BAS did not undergo any change when a new service 'in relation to mining' was introduced with effect from 1 June, 2007. The Department admits that with effect from

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13. 2019 (6) TMI 127-CESTAT NEW DELHI
14 2018-TIOL-1631-CESTAT-DEL

1 June, 2007, the activity carried out by the Appellant is covered under the category of service in relation to mining. This activity could not, therefore, have been categorized under BAS prior to 1 June, 2007.

22. Thus, the demand of Service Tax in the impugned order under BAS from 16 June 2005 to 30 May, 2007 is not justified.

23. What is, however, disturbing is the manner in which the three binding decisions of the Tribunal, on which reliance was placed by the Appellant, were not followed by the Principal Commissioner. After noticing the decision of the Tribunal in **Aryan Energy** and the fact that the position of law was reiterated by the Tribunal in **Spectrum Coal** and **Aryan Coal**, the Principal Commissioner ignored the binding decisions for the reason that the Department had filed an Appeal against the decision of the Tribunal in **Aryan Coal** before the Delhi High Court and though the Appeal filed by the Department was dismissed by the Delhi High Court on 25 February, 2014, but the Civil Appeal filed by the Department was dismissed by the Supreme Court on 13 May, 2015 on the ground of delay leaving open the question of law. The Principal Commissioner observed that the "**one line**" order of the Supreme Court "**is a non-speaking one which can only be termed as a decision and not a judgment" and that "the judgment of the Tribunal is not final and also not approved by the Supreme Court because it is specifically stated by the Court that the question of law is kept open"**.

24. The Principal Commissioner further observed:

> **"I reach at the conclusion that the ratio of the case i.e. Aryan Coal Beneficiations Pvt. Ltd. V/s CST, New Delhi**-2013 (29) STR 74 (Tri.-Del) cited by the party, in which earlier two cases were also followed **need not to be taken up for any discussion in the instant case as it becomes irrelevant since the judgment of Tribunal is in jeopardy and the question of law is still open."**

25. The Supreme Court had dismissed the Civil Appeal filed by the Department to assail the decision of the Tribunal in **Aryan Coal**. It was also observed by the Supreme Court that the question of law was kept open. The decision of the Tribunal in **Aryan Coal** had not been set aside and, therefore, the Principal Commissioner could not have ignored the binding decisions of the Tribunal by observing that the order of Supreme Court was a non-speaking one line order and that the question of law had been kept open by the Supreme Court.

26. When the Supreme Court observed that the question of law had been kept open, it is obvious that the question of law would be considered by the Supreme Court in future. This certainly did not give liberty to the adjudicating officer to determine afresh the legal issue. Dismissal of a Civil Appeal by the Supreme Court would result in the merger of the order of the Tribunal in the order of the Supreme Court and it is for this reason that the Supreme Court specifically observed that the question of law was kept open. The Principal Commissioner should have realized that there were at least three binding decisions of the Tribunal on the point and, therefore, had no option but to decide the matter in the light of the law laid down in these three decisions. The Principal Commissioner, however, not only exceeded his jurisdiction in taking a view contrary to the three binding decisions of the Tribunal but even went to the extent of making observations on the order passed by the Supreme Court in the Appeal that had been filed by the Department as he observed that the order of the Supreme Court is a **'one line' 'non-speaking'** order. Judicial discipline and propriety demands that the Adjudicating Authority or the first Appellant Authority should follow the binding decisions and not make uncalled for comments.

27. The Supreme Court had not made any observation that the order of the Tribunal had not been approved, but still the Principal Commissioner observed that the decision of the Tribunal was put 'in jeopardy' by the Supreme Court. The Principal Commissioner, in the present case, clearly crossed all limits of judicial discipline and propriety.

28. It has been considered necessary to examine the aforesaid approach of the Principal Commissioner as Orders of the Adjudicating Authorities or the first Appellate Authority are coming before the Tribunal in which the binding decisions of the Tribunal are being ignored and a contrary view is taken either for the reason stated in the aforesaid Order of the Principal Commissioner or for the reason that the Department '**has not accepted the decision of the Tribunal'** as it had filed an Appeal before the High Court or the Supreme Court.

29. In this connection it will be appropriate to refer to the decision of the Supreme Court in **Kamlakshi Finance Corporation Ltd**. The Supreme Court noticed that the order passed by the Assistant Collector not only ignored the order of the Collector (Appeals) remanding the matter, but also distinguished the decision of the Tribunal by observing that the decision of the Tribunal had not been agreed to by the Department as an Appeal had been filed in the Supreme Court. The assessee filed a writ petition in the Bombay High Court to challenge the said order of the Assistant Collector. The High Court not only quashed the order passed by the Assistant Collector but also directed the Department to allocate the matter to a competent officer for passing a proper order. It is against this decision of the Bombay High Court that the Union of India preferred an Appeal before the Supreme Court. The Supreme Court observed as follows:-

> "The High Court has, in our view, rightly criticized this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher

> to them in the appellate hierarchy. It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. **The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following** it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws."
>
> **(emphasis supplied)**

30. The Principal Commissioner relied upon two Circulars of the Board dated 12 November, 1999 and 3 September, 2009. These two Circulars have been reproduced in earlier paragraphs 7 and 8 of this Order. These two Circulars also could not have come to the aid of the Principal Commissioner in making such strong comments.

31. The **first Circular dated 12 November, 1999** was issued in connection with the eligibility of Dowtherm Heat Transfer Medium for claiming the benefit of duty exemption notification. The issue was whether this product required for heat transfer application in the plant could be treated as 'material for manufacture of Polyester Staple Fiber Yarn and thus entitled for duty exemption. The Tribunal decided the issue in the favour of assessee. The Civil Appeal filed by the Department in the Supreme Court was dismissed. Opinion was sought by the Department for filing a review petition. In response to it, it was stated that since the Supreme Court had not given any reason for dismissing the Civil Appeal, there was no ground for filing a review. It was also stated that mere dismissal of a Civil Appeal/ Special Leave Petition by the Supreme Court does not mean that Supreme Court had approved the impugned order or that the order of the Tribunal merged

with the order of the Supreme Court and in similar other cases, this matter could still be agitated.

32. This Circular does not give liberty to an officer of the Department exercising quasi judicial powers to ignore the binding decisions of the Tribunal or the High Court if the Civil Appeal filed by the Department to assail the decision of the Tribunal is dismissed by the Supreme Court. The Principal Commissioner was not justified in taking shelter of this Circular to ignore the binding decisions of the Tribunal, more particularly when the Writ Petition filed by the Department had been dismissed by the High Court and the Civil Appeal had also been dismissed by the Supreme Court.

33. The statement in the aforesaid Circular that dismissal of a Civil Appeal by the Supreme Court does not mean that the order of Tribunal merged in the order of the Supreme Court is also not correct in view of the judgment of Supreme Court in the **Kunhayammed & Ors. Vs State of Kerala & Anr.**[15]. The Supreme Court held that once a Civil Appeal is dismissed by the Supreme Court, the doctrine of merger will apply. The observations of the Supreme court are:

> **"27.** From a cumulative reading of the various judgments, we sum up the legal position as under :
>
> (a) **The conclusions rendered by the three Judge Bench of this Court in Kunhayammed and summed up in paragraph 44 are affirmed and reiterated.**
>
> (b) We reiterate the conclusions relevant for these cases as under:
>
> xxxxxxx xxxxxxx xxxxxx
>
> (iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order

15. 1991(55) ELT 433 (SC)

under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) **Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.**

(vii) **On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.”**

(c) Once we hold that law laid down in Kunhayammed is to be followed, it will not make any difference whether the review petition was filed before the filing of special leave petition or was filed after the dismissal of special leave petition. Such a situation is covered in para 37 of Kunhayammed case.”

(emphasis supplied)

34. The **second circular dated 3 September, 2009** also could not have been relied upon by the Principal Commissioner in the facts and circumstances of this case, as the judgment of the High Court was

delivered under the erstwhile Central Excise Rule and the matter related to the existing Rule 14 of the Cenvat Credit Rules, 2004.

35. The second issue that arises for consideration is as to whether the reimbursements received by the Appellant from the customers towards transportation charges, railway freight can be included in the taxable value. The Principal Commissioner held that for the period from 1 June, 2007 to 31 March, 2009, the activity would be in relation to mining and though the Appellant had deposited service under this category but had not included the reimbursement charges in the taxable value. It is this demand made for reimbursement amount that has been confirmed in the impugned order.

36. The submission of learned Counsel for the appellants is that the amount received towards reimbursement cannot be treated as a consideration for provision of service in terms of Section 67 of the Act.

37. Section 67 of the Act was considered and explained by the Supreme Court in **Union of India and others v/s Intercontinental Consultants and Technocrats Private Limited**[16]. The appellant therein was providing consulting engineering services. It received payment not only for the services provided by it but was also reimbursed for the expenses incurred by it on air travel, hotel stay, etc. It paid service tax on the amount received by it for services rendered to its clients but did not pay any service tax in respect of expenses incurred by it which were reimbursed by the clients. A show cause notice was issued to it to explain why service tax should not be charged on the gross value including reimbursable and out of pocket expenses. The provisions of Rule 5(1) of the Rules were resorted to for this purpose by the Department.

16. (2018) 4 SCC 669

38. A Writ Petition was filed before the High Court challenging the vires of Rule 5 as being unconstitutional as well as ultra vires the provisions of Section 66 and 67 of the Act. The High Court of Delhi accepted the said contention and declared Rule 5 to be ultra vires the provisions of Section 66 and 67 of the Act. The High Court noted that both the amended and unamended Section 67 authorised the determination of value of taxable services for the purpose of charging service tax under Section 66 as the gross amount charged by the service provider for such services provided or to be provided by him in a case where consideration for such service is money. The High Court placed emphasis on the words "**for such service**" and took the view that the charge of service tax under Section 66 has to be on the value of taxable service i.e. the value of service rendered by the assessee and the quantification of the value of service can, therefore, never exceed the gross amount charged by the service provider for the service provided by him. On that analogy, the High Court opined that the scope of Rule 5 goes beyond the scope of Section 67 which was impermissible as rules could be framed only for carrying out the provisions of the Act. In taking this view, the High Court observed that the expenditure or cost incurred by the service provider for providing the taxable service can never be considered as the gross amount charged by the service provider "for such service" provided by him.

39. The Supreme Court noticed the various reimbursable claims which were included in the gross value. The Supreme Court noted that Rule 5 does bring within its sweep the expenses which are incurred while rendering the service and are reimbursed and, therefore, what was required to be decided was whether Section 67 of the Act permits subordinate legislation to be enacted as done by Rule 5. It needs to be

noted that prior to 19 April, 2006, in the absence of a Rule, the valuation was required to be done as per the provisions of Section 67 of the Act. The Supreme Court noticed that the charging Section 66 provides that there shall be levied service tax @ 12% of the value of taxable services referred to in the sub-clauses of Section 65 and collected in such manner as may be prescribed. Thus, the service tax is on the "value of taxable services" and, therefore, it is the value of the services which are actually rendered which has to be ascertained for the purpose of calculating the service tax. It is for this reason that the Supreme Court observed that the expression "such" occurring in Section 67 of the Act assumes importance. It is in this context that the Supreme Court observed in paragraph 26 that the authority has to find what is the gross amount charged for providing "such" taxable services and so any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as the amount is not calculated for providing "such taxable service". This according to the Supreme Court is the plain meaning attached to Section 67 either prior to its amendment on 1 May, 2006 or after this amendment and if this be so, then Rule 5 went much beyond the mandate of Section 67. The Supreme Court, therefore, held that the value of material which is supplied free by the service recipient cannot be treated as "gross amount charged" as that is not a "consideration" for rendering the service.

40. Thus, the reimbursement charges could not have been included in the taxable value. The order passed by the Principal Commissioner confirming the demand for the reimbursement charges, therefore, needs to be set aside.

41. Thus, for all the reasons stated above, the impugned order dated 29 May, 2015 cannot be sustained and is set aside. The Appeal is, accordingly allowed.

(Operative portion of the order pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

Rekha