CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court - I

Appeal No. ST/1707/2010

(Arising out of Order-in-Appeal No.52/2010 (H-II) ST, dated 11.05.2010 passed by CCCE & ST (Appeals-II), Hyderabad)

M Subhas Reddy ….. **Appellant(s)**

Vs.

CCCE & ST, Hyderabad-II ….. **Respondent(s)**

Appearance
Shri Y. Sreenivasa Reddy, Advocate for the Appellant.
Shri B. Guna Ranjan, Superintendent/AR for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 21.08.2018
Date of Decision: 21.08.2018

FINAL ORDER No. A/31095/2018

[Order per: M.V. Ravindran]

1. This appeal is directed against the Order-in-Appeal No.52/2010 (H-II) S.Tax dated 11.05.2010.

2. The relevant facts that arise for consideration, after filtering out unnecessary details are the appellant is a mines contractor and is into drilling and blasting work in mines; was awarded winning of iron ore by drilling and blasting in mines; the said activity was conducted for a consideration during the period 16.06.2005 to 31.12.2008. Revenue authorities were of the view that the activities conducted by the appellant and the consideration received thereof are taxable under the category of

"Site formation and clearance services" and they are liable to pay the service tax, interest thereof and are to be penalised under appropriate sections. The show cause notice was adjudicated after following due process of law and the demands raised were confirmed along with interest and penalties were imposed.

3. Learned counsel appearing for the appellant draws our attention to the work order issued by the various mines and the terms and conditions thereof. It is his submission that appellant is not engaged in site formation and clearance or any other services but is only specialised in drilling and blasting work in mines which can be done so only when the mine is functioning which is after the activity of site formation and clearance services. It is his submission that the period involved in this case can be bifurcated i.e., from 16.06.2005 to 31.05.2007 and from 01.06.2007 to 31.12.2008. It is his submission that the activity undertaken by the appellant of drilling and blasting in the mines is covered under mining services which came into service tax net with effect from 01.06.2007. Prior to that the said services were not covered under any services and revenue's contention to put the same under site formation and a clearance service is incorrect. It is his submission that the law is now settled on this point by the judgment of Hon'ble High Court of Bombay in the case of Indian National Ship Owners Association [2009 (14) STR 289 (Bombay)] where in it was held that if a specific heading is covered under the statute from a particular date, the said activity cannot be categorized as taxable for the period earlier to that. He also submits that similar view was taken by the Tribunal in the case of Shipping Corporation of India Ltd [2016 (46) STR 835 (Mumbai)]

which has been upheld by the Apex Court on an appeal filed by the Revenue as reported at [2018 (8) GSTL J-68].

4. Learned departmental representative on the other hand submits that the activity undertaken by the appellant would fall under the category of site formation and clearance services. He draws our attention to the definition of the said activity as per Sec.65(97)(a) and Sec.65(105)(zzza). He would submit that the definition of site formation and clearance services specifically include drilling, boring and core extraction services for construction, geophysical, geological and similar purposes. He would submit that the Tribunal in the case of RS earth movers P Ltd [2016 (46) STR 544) has specifically held that activity of mining under the contract is taxable for the period prior to 01.06.2007 under site formation services. He produced a copy of the said order and also relies upon the judgment of the Tribunal in the case of Lonestar engineers [2017 (47) STR 133) on the similar activity undertaken by the appellant therein. He also relies upon CBEC Circular No.232/2/2006-C.Ex-4 dated 12.11.2007 regarding the clarification on excavation and removal of over burdens and submits that the activity was covered under site formation and clearance services.

5. We have considered the submissions made by both sides and perused the records.

6. The issue is correctly stated by both sides as to regarding demand of service tax on amount received as consideration for drilling and blasting the mines for the period in question.

7. For the period from 16.06.2005 to 31.05.2007, the department wants to tax the amounts received by appellant under the category of site

formation and clearance services holding that drilling and blasting in the mines get covered under the said heading. The adjudicating authority has also recorded findings on the same lines. We have perused the work order issued to the appellant by such mines. On perusal of the said work order it transpires that activity undertaken by the appellant is regarding drilling and blasting of sufficient quantity as and when required of iron ore in the mines; the said work order also specifies about the drilling pattern and explosive for such drilling will be given by the mine owners; the bills which have been raised by the appellant for payment also indicates that consideration is towards the gross quantity which has been blasted in the mines or winning of the iron ore. We have also perused the meaning of the words "blasting for mining" as understood by the people engaged in mining activity and find that the word "blasting and drilling" are understood as under:

> *"2.1 Drilling and Blasting:*
>
> *There are two basic operations that are necessary to achieve success in mining. One operation is drilling and the other one is blasting. Drilling is mainly done for three reasons. The first reason is to investigate the depth-wise distribution of minerals during prospecting. The second reason is to create the blast-holes for rock blasting. The third reason is to drill for dislodging the soft and friable minerals like magnesite with shallow depth drills."*

8. This is as per technical report on rock blasting for mining as published by Prof. A. Balasubramanian, Advanced Studies in earth science, University of Mysore. From the mere reading of the said activity and the activity undertaken by the appellant, it can be seen that the appellant is engaged only in drilling and blasting in the mines and the definition of site formation and clearance services will not get attracted to the activity undertaken by the appellant. We find that Hon'ble High Court of Bombay in the case of Indian National Ship Owners Association (supra) has considered the effect of

services covered by specified entries in the Finance Act whether can relegate the said activity to any other services prior to the date of such activity being brought under service tax net. In Para 38, Lordships held as under:

> *"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 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. 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."*

9. It is noted further, a similar issue came up before the Bench in the case of Shipping Corporation of India Ltd (supra) and following the ratio of the Hon'ble High Court, the Bench held that the service tax liability on the entries which have been inserted from a specific date cannot be taxed under any other entry prior to such date. It is to be noted that the judgment of the Tribunal in the case of Shipping Corporation of India Ltd was upheld by the Apex Court on an appeal filed by the revenue against the order of the Tribunal. In view of the authoritative judicial pronouncement on the issue we hold that the activity undertaken by the appellant i.e., drilling and blasting in the mines cannot be taxed under site formation and clearance services prior to 01.06.2007. In view of foregoing, demands raised are unsustainable and liable to be set aside and we do so. Consequently interest and penalty also needs to be set aside.

10. As regards the activity of drilling and blasting post 01.06.2007, it is seen from the records that appellant is not contesting the tax liability of such services. It is conceded before the lower authorities that the services

rendered by the appellant of drilling and blasting is covered under mining services, plea put forth was the demand which has been confirmed by the lower authorities is being challenged on the ground that the correct demand needs to be worked back based upon amounts received by the appellant as cum tax value. The adjudicating authority has not recorded any findings on this issue. Since law is settled on this point there being no findings recorded by the adjudicating authority on this point, while upholding the taxability of the services of drilling and blasting post 01.06.2007, under mining services, we remand matter back to the adjudicating authority to recompute the tax amount by considering the amounts received by appellant as cum tax value and the interest liability thereof. As regards penalty on this amount of tax liability, since the issue is of interpretation and the classification, we hold that there is no necessity to visit the appellant with any penalty.

11. In view of the foregoing, in the facts and circumstances of this case, the appeal stands disposed of as indicated herein above.

(Operative part of this Order was pronounced in the Open Court
on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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