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

Appeal No.	Appellant	Respondent	Impugned Order No. & Date
ST/492/2009	ESSAR Constructions (India) Limited	CCE C&ST, Visakhapatnam-I	O-I-O No. 08/2009 (RS), dated 27.02.2009 passed by CCEC&ST, Visakhapatnam.
ST/585/2010	ESSAR Projects (India) Limited	.do.	O-I-O No. 22/2009 (RS), dated 23.11.2009 passed by CCEC&ST, Visakhapatnam.
ST/1817/2010	CCE C&ST, Visakhapatnam-I	ESSAR Constructions (India) Limited	O-I-O No. 24/2010 (RS), dated 11.05.2010 passed by CCE&C&ST, Visakhapatnam
ST/2395/2010	ESSAR Projects (India) Limited	CCE C&ST, Visakhapatnam-I	O-I-O No. 24/2010 (RS), dated 11.05.2010 passed by CCE&C&ST, Visakhapatnam.

Appearance
Shri Vishal Agarwal, Advocate for the Appellant .

Shri Pawan Kumar, Asst. Commissioner } /ARs for the Respondent.
Shri Dass Thavanam, Superintendent

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 25.10.2018
Date of Decision: 25.10.2018

FINAL ORDER No. A/31364 – 31367/2018

[Order per: Mr. P.V. Subba Rao]

1. All these appeals pertain to the same issue with respect to the same assessee and hence are being disposed of together. Appeal Nos. ST/492/2009, ST/585/2010 and ST/2395/2010 are filed by the assessee

contesting the demands confirmed and penalties imposed while ST/1817/2010 is a departmental appeal challenging the non-imposition of penalty under section 77 of Finance Act, 1994. The appellant assessee constructed “Tailing Dams” and had undertaken desilting of Tailing Dam for their clients who recover iron ore which gets washed before being transported and sold. The Tailing Dams in question collect the washed water along with other debris and slime. This dam can take 10 lakh cu. Mt. Of iron ore slime. Revenue sought to charge from the appellant service tax under the head “Site Formation and Clearance, Excavation, Earthmoving and Demolition Services”, on the ground that the appellant undertook the activity in open and excavated clearing it of jungle and removing the rocks, made pits before laying foundation, providing of graded crushed rock filter and building the dam. Revenue also raised a demand under the same head for the service of desilting of the tailing dam. Show cause notices were issued and demands were confirmed along with interest and penalties were imposed. The appellant assessee is contesting the taxability of these services under the head of “Site Formation Services”. It is the contention of Ld. Counsel that with respect of appeal No. ST/492/2009, the period of dispute is 01.10.2006 to 31.03.2007 & the dispute is two fold – (a) whether the tailing dam constructed by them for M/s Essar Steel is exigible to service tax and (b) whether the service of desilting of tailing dam which they did for NMDC is exigible to service tax. In the remaining two appeals ST/585/2010 and ST/2395/2010, only the issue of construction of tailing dam was in question. As far as construction of Tailing Dam is concerned, he would argue, as is evident from the contract, their contract involved both providing services and also transfer of materials and thus they provided a composite works contract service. Works contract service was not chargeable to excise duty prior to 01.06.2007 as has been held by Hon'ble Apex Court in the case of Larsen & Toubro [2015(39)S.T.R 13 (S.C)]. Therefore, no tax is leviable on them for the perod prior to 01.06.2007 which is the period in Appeal ST/429/2009. He also argued that the same classification should also hold good for the remaining period and hence tax if any chargeable cannot be under the head of "site formation and Clearance, Excavation and Earth Moving and Demolition Services" under which the demand has been raised. Therefore the demands are liable to be set aside on this ground alone. As far as the service of desilting of Tailing Dam is concerned, he submits that even if these services were considered as "Site Formation and Clearance, Excavation, Earth Moving and Demolition Services", these services are related to repairing, renovating and restoring of water body clearly get excluded from the definition. The Dam in question is clearly water body although it may not store as much as a large multi purpose dam. Therefore, these services are not exigible.

2. The Ld. Counsel also relies on the Board Circular No. 123/5/2010-TRU, dated 24.05.2010 in which the scope of site formation and clearance, excavation, earthmoving and demolition services are attracted only if the service providers provide these services independently and not as part of a

complete work such as laying of cables under the road. It is his submission that even though their work involved clearance of site and its preparation for construction of the dam, it cannot be charged to service tax, in view of aforesaid CBEC circular. Regarding the work done in removing 10.00 lakh cu. Mt of iron ore slime at Kandampal Tailing Dam of NMDC and transportation of the same to fine ore dump at MV siding kirandul for NMDC, it is his argument that the site formation services do not apply although the work involved excavation and moving of earth only in this case and no construction work was involved as renovating and storing of water bodies was specifically excluded from the definition of "Site Formation Services".

3. Ld. DR reiterates the impugned order and asserts that the only error is in the impugned order dated 11.05.2010 in which no penalty was imposed under section 77 of Finance Act. He forcefully argued that the dam in question is not a dam in the normal sense but only a structure to store the slime etc. Therefore, both services of construction of tailing dam by the assessee for Essar Steel and desilting of Tailing Dam of NMDC undertaken by the appellant ar exigible to service tax.

4. We have considered the arguments on both sides and perused the records. The two services which are provided by the assessee appellant are - (a) construction of Tailing Dam for M/s Essar Steel and (b) desilting of a tailing dam for M/s NMDC. The first work involved both supply of material

as well as provision of service. The services on this account are clearly not liable to Service Tax before 01.06.2007 in view of the Hon'ble Apex Court judgment in the case of Larsen & Toubro (supra). Therefore, the demand on this account needs to be set aside and we do so. As far as the services related to construction of Tailing Dam post 01.06.2008 are concerned, the demands are not made under the head "Works Contract Service" but are under the head of "Site Formation and Clearance, Excavation and Earth Moving and Demolition Service" and hence they need to be set aside as well. The second service provided by the appellant was desilting the tailing dam of NMDC and transporting the silt to their dump which involved excavation of the material and moving it. This could have been covered by the definition of site formation services as there was no composite works contract and excavation was clearly covered within the meaning of site formation services. However, excavation and earth moving work related to renovating or restoring of water bodies are specifically excluded by the definition of site formation services. Since these services are rendered with respect to the dam in question which is a water body, they get excluded and no service tax is payable on these services. We also find force in the argument of Ld. Counsel that the Board circular itself has clarified that the site formation services are liable to service tax only if they are provided independently and not as a part of complete work. In respect of the Tailing Dam constructed by the appellant assessee, the work was not carried out in isolation but as part of the composite contract for construction of the dam.

Therefore, the service tax under the head of site formation services cannot be levied even on this ground.

5. In view of the above, we find that the demands in appeal Nos. ST/492/2009, ST/585/2010 and ST/2395/2010 need to be set aside along with interest and we do so. Consequently, no penalties are imposable. As a result, the impugned orders need to be set aside and we do so.

6. Appeal Nos. ST/492/2009, ST/585/2010 and ST/2395/2010 filed by the assessee are allowed and the Department's appeal No. ST/1817/2010 is rejected.

(Operative portion of the order pronounced in open court on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

vrg