IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Service Tax Appeal No. 98/2008, C.O.-112/08

(Arising out of Order-in-Original No.CCE/BBSR-II/S. Tax/No.3-Commr./08 dated-25.02.2008 passed by the Commissioner of Central Excise, Customs & Service Tax, BBSR-II)

Commissioner of Central Excise-BBSR-II

Applicant (s)/Appellant (s)

Vs.

M/s. R.K. & Sons

Respondent (s)

Appearance:

Shri S. Mukhopadhyay, Supdt. (A.R.) for the Appellant (s)

Sri J. Nagarajan, Advocate for the Respondent (s)

CORAM:

Hon'ble Shri P.K.Choudhary, Member (Judicial)
Shri Bijay Kumar, Hon'ble Member (Technical)

Date of Hearing/Decision:- 04.06.2018

ORDER NO. : F/O 76204/18

Per Shri Bijay Kumar

Being aggrieved by the impugned order, the Revenue has filed the present appeal. In the impugned order, the Ld. Adjudicating Authority has dropped the demand raised vide show cause notice C. No. IV (6) 18/CE/CPU/B-II/2006/18993A dated-08.12.2006 amounting to Rs.63,53,,687/- for the period September, 2005 to June, 2006.

2. Brief facts of the case are that the Respondent, M/s. R.K. & Sons, are engaged in the service of providing composite Mining Services comprising of ;

> "Excavation/Raising or Iron Ore and associated ejects/spoils/spurious materials, segregation, sizing into iron ore lump manually or/and by crusher below 180 mm size, stacking thereof, crushing or lump ore to 5-18 mm, cleaning of quary faces, loading to tippers/dumpers other means of transport, transporting of the above materials to the specified yards".

The Mining service was not under the purview of Service Tax prior to 01/06/2007. However, for the relevant period (Sept. 2005 to June 2006) the show cause notice was issued is September, 2008 for not getting registered for payment of Service Tax under Finance Act, 1994, under the provisions of Section 69 of Finance Act, 1994 and also Rule 6 of Service Tax Rule, 1994. It is the contention of Respondent that they were under the bonafide belief that they are not liable for payment of Service Tax.

3. Vide the impugned order, the Ld. Adjudicating Authority has held that the classification of the service being performed by the respondent will not fall under the ambit of Service Tax considering the contract as a whole but it will be falling under the "Mining services". The Mining services were not there in the statute before 18/06/2007 and hence dropped the entire demand.

4. Ld. Advocate on the other side has cited so many judgments and also the decision of this Tribunal in the case of Hazaribagh Mining & Engineering Pvt. Ltd. Vs. CCE, C&ST, BBSR-I reported in 2017 (49) S.T.R. 289 (Tri.-Kolkata) wherein it has been held;

> ".....6.1 In view of the above ratio laid down by Apex Court Service Tax as 'Site formation Service' could be levied if there is a 'Service Contract Simplicitor' to that effect. However, once the contract is a composite contract for the entire

> activities from Site formation to segregation of Ores then the same has to be charged as a separate service (Mining Services), which was made chargeable to Service Tax w.e.f. 18-06-2007 only. Such operations under a composite contract cannot be treated as 'Site formation' or 'Cargo Handling Service' before 18-06-2007.
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> 7. In view of the above observations and settled proposition of law appeal filed by the appellant is allowed by setting aside the Order-in-Original dated-10-10-2011 passed by the adjudicating authority, holding that activities undertaken by the appellant under a composite contract will amount to providing 'Mining Services' which were made chargeable to Service Tax only with effect from 18-06-2002. We have not gone into the time bar aspect of the demand as on merits the appeal has been allowed in favour of the appellant."

5. Heard both sides and perused the fact of the cases alongwith the review order No. 01/2008-CC (Bhubaneswar Zone) dated-22/05/2008.

6. Being aggrieved by the impugned order, the Department is before us to allow the services performed by the Respondent as the site formation service. We feel that permitting this appeal will tantamount to substitution of charge in the show cause notice itself which intended to classify the activities being done by the Respondent as Business Auxiliary Service which cannot be permitted at this juncture. While holding so, we rely upon the following case laws:

i) Marubeni India Pvt. Ltd. Vs. CST-2016 (45) STR 549 Tri-Del.
ii) Balaji Contractors Vs. CCE-2017 (52) STR 259 Tri-Del.
iii) Prabhudas Kishoredas Vs. CST-2011 (24) STR 711 Tri.-Ahmd.
iv) ISE Securities & Services Vs. CST-2013 (32) STR 442 Tri-Mum.
v) JSEL Securities Vs. CST-2017 (4) GSTL 8 Tri-Del.
vi) CCE Vs. R.K. Constructions-2016 (41) STR 879 Tri-Mum.
vii) Deepak & Co. Vs. CCE-2015 (38) STR 1010 Tri-Del.
viii) Varsed Detective and Security Vs. CCE-2017 (5) GSTL 327 Tri-Del.

It is the settled law that the show cause notice cannot be permitted to be changed at the stage of Adjudication/Appellate proceeding, which is required to be adjudicated for the charges in the show cause notice and nothing beyond.

7. In view of above, we are of the view that there is no infirmity order passed by the Ld. Adjudicating Authority and therefore, we upheld the same. Accordingly, we dismiss the appeal. C.O. disposed off.

(Dictated and Pronounced in the Open Court)

Sd/- 6/6/18	**Sd/-**
(P.K.Choudhary) **MEMBER(JUDICIAL)**	**(Bijay Kumar)** **MEMBER(TECHNICAL)**

k.b/-