IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No.ST/35/2008

(Arising out of Order-in-Original No.02/Commr/ST/ADJ/DIB/07 dated 11.12.2007 passed by the Commissioner of Central Excise, Dibrugarh)

Commissioner of Central Excise, Dibrugarh

Applicant (s)/Appellant (s)

Vs.

M/s National Mining Company Ltd.

Respondent (s)

Appearance:

Shri H.S.Abedin, AC(AR) for the Appellant (s)
None for the Respondent (s)

CORAM:
Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)
Hon'ble SHRI Bijay Kumar, Member (Technical)

Date of Hearing/Decision:- 15.05.2018

ORDER NO.FO/76397/2018

Per Shri P.K.Choudhary

1. None appeared on behalf of the respondent assessee despite notice. No request for adjournment has been received. The matter is being taken up for hearing as the appeal is an old one, pertaining to the year 2008.

2. Briefly stated the facts of the case are that the respondent assessee M/s National Mining Company Ltd., having its Head Office at Tinsukia, Assam has provided services to M/s Coal India Ltd., Margherita, for excavation of coal during the period from 01.04.2006 to 31.08.2006. Show Cause Notice dated 08.03.2007 was issued alleging non-payment of service tax for the

aforesaid period. The assessee entered into a contract/agreement with M/s North Eastern Coal Fields Ltd., Coal India Limited, Margherita, Tinsukia, Assam vide Work Order dated 20.08.2005 for production of Carbonaceous Shale (CS) and removal of Hard Shale (HS) and transportation of coal to the railway siding. It is the case of the Revenue that removing of Hard Shale is nothing but Site formation for coal extraction by way of earthmoving and clearance and production of carbonaceous shale by way of drilling, boring, excavation, core extraction, earthmoving upto the pit area. The adjudicating authority vide Order-in-Original No.02/Commr/ST/ADJ/DIB/07 dated 11.12.2007 passed the following order:-

"O R D E R

In view of the above discussion and findings, I pass the following order:
(i) I confirm the demand of Service Tax of Rs.8114904.00 and Education Cess of Rs.162299.00 total being Rs.82,77,203.00 (Rupees Eighty Two lakhs Seventy Seven thousand Two Hundred Three) only under Section 73 of the Finance Act 1994.

(ii) I also order for recovery of interest on the said amount of Rs.82,77,203.00 (Rupees Eighty Two lakhs Seventy Seven thousand Two Hundred Three) only, at appropriate rate, for the period from the due date of payment to the actual date of payment, under Section 75 of the Finance Act, 1994.

(iii) I refrain from imposing any penalty on M/s National Mining Co. Ltd as the case is a bona fide legal dispute involving interpretation of provisions of law and as also they have paid the Service Tax and filed the ST-3 return with the Central Excise & Service Tax Department.

(T.HAOKIP)
Commissioner"

Revenue is in appeal before the Tribunal being aggrieved by the impugned order.

3. Heard the ld. D.R. and perused the appeal records.

4. We find from the records that the assessee in reply to the show cause notice has submitted as under:

> *"From the above, it is apparent that even if our activities are supposed to be covered under the taxable services, the tax liability will arouse amounting to Rs.81,14,904/- towards the service tax and Rs.1,62,299/- towards the Education Cess only and against which, we are entitled to avail the Cenvat Credit amounting to Rs.86,32,119/- towards service tax and Rs.1,20,917/- towards education cess, hence the demand made in the Show Cause Notice is not correct. Hence, there is no such actual tax liability for payment in cash either on account service tax or on education cess as demanded.*
>
> *8. That since the question as to whether our activities falls within the definition of Sec. 65(97a) of the Finance Act, 1994, is wide open for proper interpretation, we hereby, to avoid further complicacy prepared to make the payment of service tax including education cess from 16/6/2005 and onwards "Under Protest" obviously after availing the benefit of Cenvat Credit and we shall submit the Form ST-3 Return "under protest' before the concerned Range Officer, within a short period after making the payment of required tax Challan. Copies of Returns are enclosed herewith for your kind perusal and consideration.*
>
> *9) Assuming but not admitting that the liability for payment service tax can be attracted in the instant case, then also we cannot be made liable to pay the penalty in as much as we have not acted deliberately or in defiance of law and since there is no deliberate or contumacious or dishonest or willful intention on our part. Moreover the question of its applicability is still in doubt. Hence, the attraction of penal provisions may not be desirable in the instant case.*
>
> *Therefore, your Honour may be pleased to desist from imposing any penalty as proposed by you."*

5. We also observe that the show cause notice was issued for the period from 01.04.2006 to 31.08.2006 and the Adjudicating Authority has also adjudicated the demand for the period 01.04.2006 to 31.08.2006. But in the

appeal before us, in Form ST-5, the period of dispute has been mentioned as 01.04.2007 to 31.08.2007 and it is also repeated in the Statement of Facts. There seems to be some discrepancies and misstatement of facts on the part of appellant revenue in drafting and filing this appeal before the Tribunal.

6. We find that the issues in dispute before the Bench as per the grounds of appeal are as under:

(i) The adjudicating authority re-calculated the amount of service tax payable by the assessee from Rs.99,56,185/- to Rs.82,77,203/- thereby reducing the service tax liability by Rs.16,78,982/- considering the plea of the assessee that the billed amount is inclusive of service tax.

(ii) The adjudicating authority considered the assesssee's plea and calculated the service tax @10% for the period from 01.04.2006 to 17.04.2006 on the amount of Rs.2,34,75,693/- after deducting Rs.1,20,93,539/- as received prior to 17.04.2006, whereas the department's contention is that the entire amount was received by the respondent assessee on 12.05.2006 and accordingly the rate of service tax applicable on that date should have been applied.

(iii) The adjudicating authority has refrained from imposing any penalty by relying on the cases where bonafide doubt of applicability of service tax is involved.

(iv) The charge of service tax on the amount of Rs.42,69,063/- kept as security deposit which was deducted from the gross bill from time to time.

7. In the facts and circumstances of the case, it is our considered view that penalty is not imposable in this case as the dispute involves interpretation of provisions of law and in view of the various decisions of the Tribunal, Hon'ble High Courts and Hon'ble Supreme Court, this part of the order is sustained.

8. In our considered view, since the respondent assessee has neither filed any cross objection against the grounds of appeal nor have appeared before the tribunal, it would be appropriate to remand the matter to the adjudicating authority to consider the grounds of appeal filed by the Revenue and to pass the order in accordance with law. Needless to mention that a reasonable opportunity of hearing be granted to the respondent.

9. The appeal is allowed by way of remand.

(Operative Portion of the Order already pronounced in the Open Court)

S/d. S/d.

(Bijay Kumar)
Member (Technical)

(P.K.Choudhary)
Member (Judicial)

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