IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

S.T.Appeal No.128/08

(Arising out of Order-in-Original No.97/ST/Commr./2008 dt.31.03.2008 passed by Commissioner of Central Excise , Ranchi)

Commr. of Central Excise & S.Tax, Ranchi

Applicant (s)/Appellant (s)

Vs.

M/s SAIL

Respondent (s)

Appearance:
Shri K. Chowdhury, Supdt. (A.R.) for the Revenue (s)
Shri Ravi Raghvan, Advocate and Shri H. Shukla, C.A. for the Appellant (s)

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI BIJAY KUMAR, TECHNICAL MEMBER

Date of Hearing : 18.05.2018
Date of Decision : 18.05.2018

ORDER NO.FO/76444/2018

Per Shri P. K. Choudhary :

The present appeal is filed by the Revenue against the Order-in-Original No.97/ST/Commr./2008 dt.31.03.2008 passed by Commissioner of Central Excise & Service Tax, Ranchi.

2. Briefly stated the facts of the case are that the respondents, M/s Bokaro Power Supply Corporation Ltd., (in brief M/s BSPCL) were engaged in the production of electricity and steam. M/s Steel Authority of India Limited (in brief SAIL) with a view to strengthen its core business of steel manufacturing, transferred its entire business and undertaking of 302 MW power plant having additional steam generation capacity of 660 tonnes/hour at Bokaro Steel Plant to its

subsidiary Company, M/s BSPCL for consideration and entered into a Power and Steam Purchase Agreement (PSPA), between M/s BPSCL & M/s SAIL. It was agreed to supply the steam and electricity to M/s SAIL as per their requirement. M/s BPSCL are producing electricity and steam on behalf of M/s SAIL, Bokaro Steel Plant and supplied the same to M/s SAIL on receipt of raw materials either free of cost or bearing all actual expenses. Show-cause notice dated 19.09.2006 was issued to M/s BPSCL for payment of service tax under Section 66 of Chapter V of the Finance Act, 1994 read with sub-clause (zzb) of Clause (105) of Section 65 ibid for the period from 10.09.2004 to 28.02.2005 under the category of "Business Auxiliary Service". The Adjudicating Authority dropped the proceedings initiated by the show-cause notice dated 19.09.2006 by observing as under :

> *"13. The invoices raised in this regards by the notice on M/s SAIL Bokaro inter-alia reveal that they are registered with Sales Tax having Regn.No.as CST No.3394C & JST No.3424 R. Such invoices also reveal that they are charging sales tax on sale of goods involved in the case from M/s SAIL, Bokaro. In view of the above, generating electricity and steam amounts to manufacture within the meaning of Clause 9 (f) of Section 2 of C.E.A., 1944 and therefore, exempted from BAS in terms of S.S 19 (vii) of Section 65 of Chapter V of F.Act, 1994 as amended."*

Hence the present appeal before the Tribunal.

3. The ld.A.R. appearing for the Appellant-Revenue reiterates the grounds of appeal and prays for setting aside the impugned order.

4. The ld.Advocate appearing on behalf of the Respondent, submits written submissions and compilation of statutory provisions and the case laws. The ld.Advocate submits that during the relevant period,

coal was being supplied by M/s SAIL since the Coal Linkage was available to M/s SAIL and in terms of the Power and Steam Purchase Agreement, the supply of coal by SAIL was only a temporary arrangement till the coal is available to the Respondent. The ld.Advocate further submits that to qualify for exclusion, the process must amount to manufacture, and generation of electricity does not amount to "manufacture" and is covered by Entry 84 of List I (Union List) of Schedule VII to the Constitution. It is also the submission of the ld.Advocate that the issue is covered by the decision of the Tribunal in the following cases :

(i) CMS (India) Operations & Maintenance Co. P.Ltd. Vs. CCE : 2007 (7) S.T.R. 369 (Tri.-Chennai) ;

(ii) NTPC SAIL Power Co.Pvt. Ltd. Vs. CCE, Bolpur : 2012 (277) ELT 221 (Tri.-Kol.).

5. Heard both sides and perused the appeal records.

6. We find that the issue is no more *res-integra* in view of the decision of the Tribunal in the case of CMS (India) Operations & Maintenance Co. P.Ltd. (supra). The relevant para of the said decision is reproduced below:

> *"**27.** The order impugned in Appeal No. S/143/06 found the services rendered by CMS to be also Business Auxiliary Service and Maintenance or Repair service. As per the definition in the Act, 'Business Auxiliary Services' means any service in relation to :-*
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> *"(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*

(ii) promotion or marketing of services provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

(v) production of goods on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customers or vendor, public relation services, management or supervision and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944."

As per this definition, any activity involving manufacture of any goods within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944 is not subject to tax under the head Business Auxiliary Service. It is a settled position that electricity is goods manufactured in the sense envisaged in clause (f) of Section 2 of the Central Excise Act, 1944. The Hon'ble High Court of Orissa in Orient Paper & Industries Ltd. v. Orissa State Electricity Board (supra), had upheld imposition of Central Excise duty on electricity, electricity being manufactured goods as defined in the Central Excise Act '44. Therefore, we find that the argument of the appellants that the services involved are not *liable to tax as Business Auxiliary Service has to be accepted. Such an activity is not covered bys Business Auxiliary Service.*

7. Further, we find that this Tribunal in the case of NTPC SAIL Power Co.Pvt. Ltd. (supra), has allowed the appeal filed by the Appellant-Assessee by relying on the earlier decision of the Tribunal in the case of CMS (India) Operations & Maintenance Co. P.Ltd. (supra). The relevant Para 7 of the said judgement in the case of NTPC SAIL Power Co.Pvt. Ltd. (supra), is reproduced below :

"***7.*** *After hearing both sides and perusal of the cited decisions, we are of the view that it is a settled position of law that "electricity" is manufactured goods. The cited decision of the Tribunal in the case of CMS (I) Operations & Maintenance (cited supra) clearly brings out this position in paragraph 27 of its Order citing a decision of the Hon'ble High Court of Orissa. No contrary decision rendered by any superior Court, has also been brought to our notice. Further, a definition of manufacture under Section 2(f) of the Central Excise Act, 1944 is an inclusive definition and therefore, it is very clear that it is not necessary that all the inclusive definitions should be satisfied together in any particular case. The request of the learned Jt. C.D.R. to defer the decision in respect of the Appeals for a future date, is also not acceptable in view of the settled position of law and precedent decision of the Tribunal on the same, which has not been reversed by any higher judicial forum. Accordingly, applying the ratio of the decision of the Tribunal in the case of CMS(I) Operations & Maintenance Co. (cited supra), we hold that the Appellants have manufactured "electricity" which is a manufactured product and have therefore, satisfied the definition of Section 2(f) of the Central Excise Act, 1944. Hence, they are not liable to pay any Service tax under the category of 'Business*

Auxiliary Service'. Hence, the impugned Order is set aside and the Appeals are allowed."

8. In view of the aforesaid decisions of the Tribunal, we do not find any reason to interfere with the impugned order and the same is hereby sustained.

9. In the result, the appeal filed by the Revenue is accordingly dismissed.

(Operative part of the order was pronounced in the open Court.)

Sd/	Sd/
(BIJAY KUMAR) **MEMBER (TECHNICAL)**	**(P. K. CHOWDHARY)** **MEMBER (JUDICIAL)**

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