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

Appeal Nos.ST/55/2009 & ST/70/2009

(Arising out of Order-in-Original No.172008 dated 19.12.2008 passed by the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-II)

1. Commissioner of Central Excise & Service Tax, BBSR-II
2. M/s Thriveni Earthmovers (P) Ltd.

…APPELLANT(S)

VERSUS

1. Commissioner of Central Excise & Service Tax, BBSR-II
2. M/s Thriveni Earthmovers (P) Ltd.

…RESPONDENT (S)

APPEARANCE

Shri K.Choudhari, Suptd.(AR) for the Appellant
Shri G.Natarajam, Advocate & Shri N.K.Dash, Advocate for the Respondent

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing/Decision : 23.10.2018

ORDER NO.FO/76824-76825/2018
Per Bench :

These two appeals are cross appeals filed by the assessee as well as revenue, challenging the Order-in-Original No.17/2008 dated 19.12.2008 . The disputes are centered around two contracts awarded to the assessee by M/s. TISCO as well as M/s. B.K.Coalfields Ltd.

1.1. The salient features of the contracts awarded by M/s. TISCO are extracted below:

"*Article 2.Scope*

1.1 The agency (TEPL) shall do the following.
1.1.1 Excavate and transport Run of Mine (ROM) to the crushing plant.

1.1.2 Sub-grade Ore (which may be encountered during normal course of mining) to the designated stock yard at an average distance of 1.0 KM.

1.1.3 Reject material (which may be encountered during normal course of mining) to the designated dump yard at an average distance of 2.5 KM.

1.1.4. Crushing and screening of ROM to finished product of desired sizes.

1.1.5. Transportation of finished product to stack yards of Tata Steel at an average distance of 3 KM.

Article 8. PRICE

1.	*Excavation of ROM*	*54,00,000 MT*	*@Rs.53.99 Per MT*
2.	*Crushing*	*54,00,000 MT*	*@Rs.80.01 Per MT*
3.	*Transportation of stock*	*54,00,000 MT*	*@Rs.17.58 Per MT*
4.	*Sub-grade*	*15,00,000 MT*	*@Rs.45.75 Per MT*
5.	*Rejects removal*	*18,00,000 MT*	*@Rs.48.91 Per MT "*

1.2. Likewise the details of the contract with M/s. B.K.Coalfields Ltd. are as follows:

"Scope of work

Includes, Excavation and transportation of
a) Run of Mine to static Grizzly
b) Overburden material/rejects to the designated stock yard
c) Segregated lumps to the crushing plant
d) Segregated lumps to the labour yard.

For carrying out the above mentioned work you will be paid as under

Sl.No.	*Description*	*Unit*	*Rate (Rs.Ps)*
1.	*Drilling, loosening, excavating, loading and transportation to dump yard at a distance of 1.5 KM (overburden and rejects)*	*Per Tonne*	*40.00*
2.	*Processing of lumps +40 – 400 mm after screening through static grizzly and storing the same at a distance of 1 KM at the place specified for this purpose. Storing of -40 mm material at a separate place for processing in future*	*Per Tonne*	*150.00 on finished size of +40 mm*
3.	*Processing of lumps to size +12 – 22 mm or other specified size*	*Per Tonne*	*128.00 on finished size of +12 mm – 22 mm*

1.3. After perusal of the relevant contracts, revenue authorities were of the view that in respect of the work awarded by M/s. TISCO, the activity of crushing undertaken by the assessee is in the nature of service falling under the category of "Business Auxiliary Service". Further, the activity of transportation of finished product to the stock yard of Tata Steel was liable to payment of service tax under the category of "Cargo Handling Service".

1.4. The analysis of the contract with M/s. B.K.Coalfields resulted in the revenue taking the view that the activities of Drilling, loosening, excavating etc. of the Overburden was liable to service tax under Site Formation Service and the activities of Transportation of the mined materials as well as overburden to designated points were covered by "Cargo Handling Service".

1.5. On the above lines show cause notice was issued covering the period February, 2005 to June, 2007 proposing demand of service tax under the categories as above. Upon completion of adjudication, the impugned order was passed by the Adjudicating Authority in which he ordered as follows:

i) Upheld the demand of service tax under the categories of "Business Auxiliary Service" as well as "Cargo Handling Service" as proposed in the show cause notice, for the work executed for M/s. TISCO is concerned.

ii) In respect of the activities carried out for M/s. B.K.Coalfields Ltd., he dropped the demand of service tax raised under the category of 'Site Formation Service" as well as "Cargo Handling Service".

1.6. The Adjudicating Authority was of the view that these activities were part of the comprehensive activity of mining, which was included as a separate taxable service only w.e.f. 01.06.2007. It is also pertinent to record that the demands raised in the show cause notice, all pertain to the activities carried out by the assessee during the period prior to 01.06.2007.

1.7. Revenue has filed the present appeal challenging the dropping of demand for service tax in respect of M/s. B.K.Coalfields Ltd. The assessee has challenged the demand for service tax raised in respect of the contract with M/s. TISCO under the categories of "Business Auxiliary Service" and "Cargo Handling Service". Both the appeals originate out of the same Order-in-Original and are being disposed of with this common order.

2. With this background we heard G.Natarajam & Shri N.K.Dash, Advocates for the assessee and Shri K.Choudhari for the Revenue.

3. Ld.DR justified the upholding of the demand of service tax for TISCO Contract by the ld. Adjudicating Authority. But he submitted that the Adjudicating Authority has erroneously dropped the demand for service tax in respect of M/s. B.K.Coalfields Ltd. and in this regard he relied on the grounds advanced by the revenue in the appeal filed by the them.

4. Ld. Advocate on the other hand, submitted that the Commissioner has rightly dropped the demand for service tax in respect of M/s. B.K.Coalfields Ltd. He emphasized the fact that the contract executed with M/s. B.K.Coalfields Ltd. was a consolidated contract and the activities in the nature of mining. This aspect has been appreciated by the adjudicating authority and he has dropped the demand for service tax made after designated such contract.

Ld. Advocate further submitted that the contract with M/s. TISCO was also for consolidated mining activities. He submitted that even though separate rates have been mentioned in the contract for various items of work indicated therein, the scope of the contract should be considered as a whole and it can be appreciated that all activities are carried out within the mine and are in the nature of mining activity. He submitted that mining activity has been included as a separate service only w.e.f. 01.06.2007. From that date, he submitted that assessee has already started discharging the service tax on such contracts under the category of mining. He also relied on the following case laws in which such consolidated contracts have been held by the Tribunal to be not chargeable to service tax for individual activities. The Tribunal has consistently taken the view that such contracts are liable to service tax only under mining service and w.e.f. 01.06.2007.

a) Kanak Khaniz Udyog vs. CCE [2017(52) STR 46 Tri.-Del]
b) Hazaribagh Mining & Engineering P Ltd.vs. CCE [2017(49)STR 289 Tri.-Kol]
c) National Construction Company vs. CCE [2014(34) STR 739 Tri.Del.]
d) Associated Soapstone Distributing Co. Pvt. Ltd. Vs. CCE [2014(34) STR 865 Tri.Del.]
e) Spectrum Coal & Power Ltd. vs. CCE, Raipur [2012(28) STR 510 Tri.Del]
f) CCE vs. Ores India Pvt. Ltd. [2012(27) STR 188 Tri.Kol]
g) CCE vs. Vijay Leasing Co. [2011(22) STR 553 Tri. Bang]
h) Thriveni Earthmovers P Ltd. vs. CCE [2009(15) STR 393 Tri-Chennai]
i) Avian Overseas P Ltd. vs. CCE [2009(15) STR 540 Tri.Kol]
j) M.Ramakrishna Reddy vs. CCE [2009 (13) STR 661 Tri.Bang.]
k) Aryan Energy P Ltd. vs. CC & C.Ex [2009(13) STR 42 Tri.Bang]

5. Heard both sides and perused the appeal records as well as case laws cited.

6. The dispute covers two contracts executed by the assessee with M/s. TISCO as well as M/s. B.K.Coalfields Ltd. As per the terms of the contract

with M/s. TISCO, the assessee is required to all of the following activities at Banspani Section of Joda East Iron Mine.

i) Excavation and transportation of excavated materials from mines to the crushing plant.

ii) The overburden, sub-grade ore, as well as rejected materials are to be transported to designated stock yard/dump yard within the mine.

iii) Crushing and screening of the excavated materials

iv) Transportation of finished products to stock yard of Tata Steel within the mine.

It is obvious that all these activities are required to be carried out within the mine and in relation to mining activities. It is also to be recorded that all the activities outlined are within the scope of a single contract, even though different prices have been indicated in the contract itself for various activities which are required to be performed.

7. The adjudicating authority has picked up two of the activities for charging service tax under the categories of "Business Auxiliary Service" for crushing of ore lumps as well as "Cargo Handling Service" for transportation of stock. It is to be noted that the contract is not a service contract simplicitor either for crushing or for transportation of material. It is a composite contract encompassing all the activities listed therein. When the entire scope of the contract is considered, it is evident that this will be covered only within the category of mining which has been included as a separate service w.e.f. 01.06.2007. The Tribunal in the case of the appellant reported in Thriveni Earthmovers Pvt. Ltd. vs. Comm. Of C.Ex. [2009(15) STR 393 (Tri.-Chennai)] has observed that movement of limestone and rejects within the mining area is covered by the entry

'mining of mineral, oil, gas' and cannot be taxed under 'Cargo Handling Service' prior to 01.06.2007. It was also recorded that when the activity was brought under the service tax net with effect from the particular date, the same activity cannot be subjected to tax under pre-existing tax entry unless the scope of pre-existing categories of services is simultaneously modified.

8. The Tribunal in the case of Hazaribagh Mining & Engineering P. Ltd. vs. C.C.E., C. & ST, BBSR-I [2017 (49) STR 289(Tri.-Kolkata) have considered a similar composite mining contract which was made chargeable to service tax under different categories. The Tribunal held that 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 01.06.2007 only. The observations of the Tribunal in that case are extracted below:

> *" **6.**Hon'ble Apex Court in the case of Commissioner of C.Ex. & Cus., Kerala v. Larsen & Toubro Ltd. (supra), while deliberating on the issue of indivisibility of Works Contract, distinguished between 'Contracts Simplicitor' and 'Composite Works Contracts' in Para 24 of this case law as follows :-*
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> *A close "24. look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be*

> *noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract."*
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> ***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. 01-6-2007 only. Such operations under a composite contract cannot be treated as 'Site formation' or 'Cargo Handling Service' before 01-6-2007."*

9. In view of the above decisions we are of the considered view that vivisecting the composite contract and charging service tax on different components of the contract individually under different services is not justified. Consequently, we set aside the demand in respect of M/s. TISCO contract and allow the appeal of the assessee.

10. Next we turn to contract with M/s. B.K.Coalfields . The scope of the work to be carried out in respect of Chenagoda Mines in Gaului, Orissa includes;

i) The excavation and transportation of the mined material and overburden/rejects to the designated places.

ii) Transportation of Segregated lumps to the crushing plant and to the labour yard.

iii) The contract has different prices for various activities to be carried out.

The show cause notice demanded service tax under "Site Formation Services" in respect of the activities, such as Drilling, loosening, excavating of overburden and under 'Cargo Handling Service" for transportation to dump yard. The Adjudicating Authority himself, after carefully examining all the contracts came to the conclusion, that the activities rendered by the assessee are to be considered as 'Mining Service" . He particularly referred to and considered the invoices issued by the assessee which designated the activity undertaken as "Mining and Extraction of Songe Grade Calibrated Iron Ore of and of 10 MM – 22 MM". After perusal of such documents, he has concluded that the activities are nothing but mining services which are chargeable to service tax only w.e.f. 01.06.2007.

11. The various case laws cited by the appellant including the one extracted herein above, will be squarely applicable to the facts of the M/s. B.K.Coalfields Ltd. contract also. We are of the view that there is no infirmity in the view taken by the adjudicating authority that the activities carried out under M/s. B.K.Coalfields Ltd contract also will not be liable to vivisected and charged to service tax under individual categories.

12. In the light of the above discussions we reject the appeal filed by the revenue and at the same time allow the appeal filed by the assessee.

(Dictated and pronounced in the open court.)

S/d. S/d.

(P. K. CHOWDHARY)
MEMBER (JUDICIAL)

(V. Padmanabhan)
MEMBER (TECHNICAL)

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