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

Appeal No. ST/97/2008

Arising out of Order-in-Appeal No. 04/ST/B-II/2008 dated 12.03.2008 passed by the Commissioner (Appeals), Central Excise & Service Tax, Bhubaneswar.

Commissioner of Central Excise, Customs & S. Tax, BBSR-II
….Appellant (s)

Vs.

M/s Sudesh Bhardwaj.

….Respondent (s)

Appearance:
Shri S. Mukhopadhyay, Suptd. (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: - 09.07.2018

ORDER No…FO/A/77220/2018

Per Bench:

The Respondent assessee is engaged in various activities/job such as raising, sorting, picking of iron ore at the mining site, loading the ores on dumper and transporting the same to the desired destination and unloading the same and hiring of HEMM for removal of mining rejects by mechanized operation at Thakurani Mines.

2. The Adjudicating Authority confirmed the demand of Service Tax alongwith interest and imposed penalty under Section 76, 77 and 78 of the Finance Act, 1994. The demand has been made under the category

Of "Business Auxiliary Services" and "Cargo Handling Services" during the period 10.09.2004 to 31.3.2006. On appeal, the Ld. Commissioner (Appeals) allowed the appeal and set aside the adjudication order.

3. Being aggrieved by the impugned order, Revenue is in appeal before the Tribunal.

4. Heard both sides and perused the appeal records.

5. We find that the Lower Appellate Authority has discussed the issue and passed a detailed order. The same is reproduced below:-

> "The appellants have been providing mining and transportation of ore services to their principal, M/s East India Mineral Limited. The service was provided between 11.3.2002 and 1.1.2005 in terms of a composite contract where rates were fixed on per metric tonne basis for three grades of ore for their mining, loading, transportation and unloading at the factory site of the principal. Transportation, loading and unloading charges were not separately billed. With effect from 1.5.2005, the work contract was bifurcated showing separate rates for two services involved, namely, mining of ore and its transportation upto the factory. Now the two services became liable to separate classification and valuation.
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> The appellants obtained service tax registration on 21.2.2006 under the category of Site Formation and Clearance, Excavation and Earth Moving and Demolition Services and started discharging their service tax liability with effect from 16.6.2005.
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> The appellants were issued a Show Cause cum demand notice following investigation by DGCEI. The notice demanded service tax under the classification of Business Auxiliary Services for the period 10.09.2004 to March, 2006 and Cargo Handling Services for the period 1.7.05 to August '06. Attendant penal and interest liabilities were also proposed for imposition. These

proposed actions were fully confirmed by the adjudicator in the order presently impugned.

A Personal hearing was fixed on 10.3.2008. Sri K. K. Acharya, Advocate appeared for the appellants. Department was represented by Sri H. S. Sahoo, Superintendent. Sri Sahoo reiterated the grounds adopted by the adjudicator for confirming the demand and other attendant liabilities. Sri Acharya took the plea that since mining services were categorized with effect from 22.05.2007, the service rendered by the appellants being classifiable as mining services could not have been classifiable under any other category prior to this date. Alternatively he pleaded that department having accepted the classification under the category of Site Formation Service & collected tax under that classification could not demand tax by classifying the same services under other categories. He laced reliance an Honourable Tribunal's decision as reported in 2007 (7) ELT 230 (Tri.) in support of his plea.

The issue at dispute is therefore one of classification. A pe;rusal of work contract applicable with effect from 1.1.2005 reveals that two distinct services separately billed & valued are being provided by the appellants. One is mining of ore and the other is transportation of ore from mine site to factory site.

The adjudicator has held that all mining related services amount to business auxiliary service of production of goods for and on behalf of the principal. In a wider sense, 'production' can be treated as inclusive of mining also but the very fact that a separate classification for mining services was provided in 2007 shows that production of goods appearing under the classification of Business Auxiliary Services did not include mining of ore. Had that been the case, there would have been no need to provide for a separate classification of mining services for taxing the activity. I therefore hold that services relating to mining activity could not have been classified as business auxiliary service during the period of demand or at any other point of time. These services would attract classification under mining services only for purpose of service tax.

The adjudicator has classified transportation of ore from mine to factory as cargo handling services and confirmed demand, which pertains to period after 1.1.05 when new contract had come into operation. The new contract talks of transportation of ore from mine to factory and does not refer to any handling activity such as loading/unloading etc. the rate fixed for transport of ore on per metric ton basis may be inclusive of loading/ unloading involved. There is however no evidences that any handling charges are being collected separately in addition to the service charge for transportation. Under the circumstances it is not clear as to why this service has been done as cargo handling service on the basis of presumption and without any supporting evidence brought on record in the shape of relevant contract, bills etc. It appears that the adjudicator presumed existence of certain elements of earlier contract in the new one and proceeded to confirm its classification as cargo handling, ignoring the fact that ingredients which are essential for categorizing a service as cargo handling, namely, loading/unloading of cargo are not even mentioned in the contract. The adjudicator also appears to have ignored the fact that the service receiver had already obtained service tax registration under the classification of goods transport by road & had discharged the duty liability for the period covered in the impugned order. There is no evidence to support a view that value of "handling" has been suppressed, is being received separately or is not included in the rate contracted for transportation of ore. I therefore hold, keeping in mind provisions of new contract and absence of any other evidence supporting a different view, that the service of transport of ore from mine to factory is appropriately classifiable under goods transport by road category as has already been permitted by the department to the recipient of this service.

I accordingly hold that services classifiable as mining services, all activities relating to excavation, lump breaking, grading, waste removal etc., are liable to service tax only with effect from 01.06.2007. These services cannot be classified as business auxiliary service or production or site formation service. Services relating to transportation of ore are appropriately classifiable under the category of goods transport services. Thus, the impugned order confirming the demand and attendant liabilities is liable to be set aside on account of its being based on incorrect classification.

I accordingly set aside and allow the appeal."

6. We also find that the Division Bench of the Tribunal vide its Final Order No. 76824-76825/2018 dated 23.10.2018 on similar facts, allowed the assessee's appeal and rejected the Revenue's appeal.

7. We find that the above decision of the Tribunal is squarely applicable to the facts of the present case. The relevant paragraph of the above decision of the Tribunal is reproduced below:-

"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."

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."

8. In view of the above discussions, we do not find any occasion to interfere with the impugned order and accordingly, the same is sustained. The appeal filed by the appellant revenue is rejected.

(Dictated and pronounced in the open court.)

(Bijay Kumar)
Member (Technical)

(P. K. Choudhary)
Member (Technical)

Tushar Kr.