CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAI
KOLKATA

REGIONAL BENCH – COURT NO.II

Service TaxAppeal No. 298 of 2012

AND

Cross Objection No. 67 of 2012

In Service Tax Appeal No. 298 of 2012

(Arising out of Order-in-Original No. 90/Commr/ST/Kol/2011-12 dated 26.03.2012 passed by the Commissioner of Service Tax, KendriyaUtpadShulkBhawan (3rd Floor), 180, Santipally, Rajdanga Main Road, Kolkata – 700 107)

The Commissioner of Service Tax, **: Appellant**
Kendriya Utpad Shulk Bhawan (3rd Floor),
180, Santipally, Rajdanga Main Road,
Kolkata – 700 107

VERSUS

M/s. Mackintosh Burn Limited, **: Respondent**
D-1/1, Gillander House,
8, N.S. Road, B.B.D. Bagh,
Kolkata – 700 001

WITH

Service TaxAppeal No. 304 of 2012

(Arising out of Order-in-Original No. 90/Commr/ST/Kol/2011-12 dated 26.03.2012 passed by the Commissioner of Service Tax, KendriyaUtpadShulkBhawan (3rd Floor), 180, Santipally, Rajdanga Main Road, Kolkata – 700 107)

M/s. Mackintosh Burn Limited, **: Appellant**
D-1/1, Gillander House,
8, N.S. Road, B.B.D. Bagh,
Kolkata – 700 001

VERSUS

The Commissioner of Service Tax, **: Respondent**
Kendriya Utpad Shulk Bhawan (3rd Floor),
180, Santipally, Rajdanga Main Road,
Kolkata – 700 107

APPEARANCE:

Shri. A. Roy,Authorized Representative (A.R.)for the Appellant

Shri. K. Kurmy,Advocate for the Respondent-Assessee

(& vice versa)

CORAM:

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NOs.76613-76614 2019

DATE OF HEARING: 29.08.2019

DATE OF DECISION:29.08.2019

PER P. DINESHA :

Service Tax Appeal No. 298 of 2012 is filed by the Revenue and Service Tax Appeal No. 304 of 2012 is filed by the assessee. Against the Revenue's appeal, the assessee has also filed a Cross Objection in Service Tax Cross Objection No. 67 of 2012. All the above appeals being filed against a common Order-in-Original passed by the Ld. Commissioner of Service Tax, Kolkata dated 26.03.2012, the same are taken up together for common disposal.

2. Today when the matter was taken up for hearing, Shri. A. Roy, Ld. Departmental Representative, appeared for the Revenue and Shri. K. Kurmy, Ld. Advocate, appeared for the assessee.

3.1 Brief facts required for adjudication of the present appeals,*inter alia,* are that the assessee was alleged to have rendered a host of services as given in the Demand-cum-Show Cause Notice dated 12.10.2010, had received payments from its clients which were alleged to be liable to Service Tax; that no Service Tax was paid on such payments received from their clients viz. M/s. Bharat Coking Coal Limited (hereinafter referred to as 'M/s. BCCL') and M/s. Eastern Coal Fields Limited (hereinafter referred to as 'M/s. ECL') for the services rendered to them under the category of "Site Formation and Clearance, Excavation and Earth Moving and Demolition Services" ('Site Formation Services' for short)effective from 16.06.1005 and "Mining of Mineral Oil or Gas

Services" ('Mining Services' for short) effective from 01.06.2007 and also from M/s. Uranium Corporation of India Limited (hereinafter referred to as 'M/s. UCIL') under the category of "Commercial or Industrial Construction Service"effective from 10.09.2004.

3.2.1 The Show Cause Notice reflects that intelligence was gathered by the Directorate General of Central Excise Intelligence (DGCEI), who thereafter has issued summons under Section 14 of the Central Excise Act, 1944. The Show Cause Notice also contains the appearance of the Accounts Officer of the assessee on 18.05.2007 in response to the summons and on one of the subsequent appearances of the said Accounts Officer, i.e., on 15.06.2007, his statement was also recorded; that thereafter, a number of correspondences were exchanged which required the production of various documents by the assessee before the DGCEI, which was complied with; that thereafter, the Manager of the assessee-company was summoned on 14.09.2009 and even his statement was recorded; that the Revenue entertained a doubt after going through various communications from the assesseethat the assessee had taken centralized accounting system and one registration with the Service Tax Department and that though the assessee was providing both taxable as well as non-taxable services as per their ST-3 returns, they had not furnished the details of the payments received by them against such services which were considered as non-taxable; that a brief description of the contracts and the rates specified are given in tabular form at page number 17 in paragraph numbers 3.1, 3.2 and 3.4. It was summarized that the assessee had provided the services in the manner described at various paragraphs in the Show Cause Notice and thus the assessee was alleged to have not only suppressed but also mis-stated the facts with an intention to evade Service Tax, etc.

3.2.2 In view of the above, Service Tax was quantified under various services, as under :

(a) Site Formation Service as well as Mining Service – As per Annexures - 50A, 50B and 50C respectively to the Show Cause Notice;

(b) Commercial or Industrial Construction Service – As per Annexure - 50E to the Show Cause Notice;

(c) 'Site Formation and Clearance, Excavation and Earth Moving and Demolition Service', 'Mining of Mineral Oil or Gas Service' and 'Commercial or Industrial Construction Service'prepared on the basis of Annexure 50A to 50F and enclosed as Annexures - 51A, 51B and 51C respectively to the Show Cause Notice;

(d) 'Site Formation and Clearance, Excavation and Earth Moving and Demolition Service' as detailed in Annexure – 51A; , 'Mining of Mineral Oil or Gas Service' as detailed in Annexure – 51B and 'Commercial or Industrial Construction Service as detailed in Annexure – 51C to the Show Cause Notice;

(e) A statement showing total liability of Service Tax during the period in dispute is prepared and enclosed as Annexure – 52 to the Show Cause Notice.

3.2.3 Accordingly, Service Tax of Rs. 1,67,88,903/- was proposed to be demanded along with applicable cesses as per Annexure - 52 for the period from June 2005 to August 2008. Out of the aboveproposed Service Tax, Service Tax of Rs. 70,87,866/- under the category of 'Site Formation and Clearance, Excavation and Earth Moving and Demolition Service' was also proposed to be demanded and Service Tax of Rs.83,91,412/- under the category of 'Site Formation and Clearance, Excavation and Earth Moving and Demolition Service' proposed to be recovered and appropriated, along with applicable penalties and interest.

3.4 The assessee filed a detailed reply denying the above allegations and also on the legal grounds as to the very taxability itself prior to 01.06.2007 under Site Formation Services mainly on the ground that the execution of contract/work order was completed much prior to 01.06.2007. The assessee also relied on the decision of the Co-ordinate Bangalore Bench of the Tribunal in the case of ***M/s.M. Ramakrishna Reddy Vs. Commr. ofC.Ex. &Cus.,Tirupathi***reported in ***2009 (13) S.T.R. 661 (Tri. – Bang.)***

3.5 The Adjudicating Authority viz., the Commissioner of Service Tax, Kolkata took up the case for adjudication and after a very detailed analysis of the facts *vis-à-vis* the law in force as applicable to the period under dispute, held as under :

(i) Demand against 'Site Formation and Clearance, Excavation and Earth Moving and Demolition Services' dropped;

(ii) Demand against 'Mining of Mineral Oil or Gas Services sustained;

(iii) Demand in respect of contracts with M/s. UCIL for extraction of uranium ores under the category of 'Commercial or Industrial Construction Service' dropped; and

(iv) With regard to the penalties, the proposals were dropped on the ground that the assessee remained a Government controlled entity i.e., a public sector enterprise because of which no element of *mensrea* would be found and also since the entire payment was made at least one year before the issuance of the Show Cause Notice.

4. Aggrieved by the demands dropped, the Revenue has come in appeal, and being aggrieved by the demands sustained, the assessee has come in appeal. In their cross objection against the Revenue's appeal, the assessee have challenged the maintainability of the very appeal filed by the Revenue.

5. We have heard both sides, considered the rival contentions and perused the documents placed on record.

6. Facts are not in dispute.

7.1 The various contracts entered into by the assessee with its clients, are as under :

(i) Ref. No. GM: SA/Plg/05/4926 dated 30th September, 2005 entered with M/s. BCCL for hiring HEMM for removal and transportation of overburden and extraction and transportation of coal from Patch-II of Nichitpur OCP of Sijura areas.

(ii) Ref. No. BCCL/KA-IV/AGM/04-05/9304 dated 28th December, 2004 entered with M/s. BCCL for hiring HEMM for removal of overburden and removal of and transportation of coal at abandoned Salanpur OCP Patch of Katras areas.

(iii) Ref. No. BCCL/CGM/LOD/HEMM-Hiring/2004/416 dated 21st December, 2004 entered with M/s. BCCL for hiring of HEMM for removal of overburden and removal and transportation of coal at Jeenagora path 'E at Lodna area.

(iv) Ref. No. ECL/HQ/SC/WO/802 dated 9th July, 2004 entered with M/s. ECL for reclamation of old abandoned working and subsided areas in and around old Egara village to prevent illegal mining in Kugisteria area by hired HEMM.

(v) Ref No. UCIL/TMD/MILL/CIVIL/TO/2006 dated 20th April, 2006 with M/s. UCIL for construction of Decanted Water Monitoring Pond and allied works at ETP area of Turamdih.

7.2 The agreements entered by the assessee with M/s. BCCL and M/s. ECL are for two different services viz., overburden removal and extraction and transportation of coal. Further, it is also a fact that in all the contracts with M/s. BCCL and M/s. ECL, which are mainly for excavation in benches by mechanical means in all kinds of soil/rock and thereafter winning/extraction of coal in benches including drilling and blasting; that the words “hiring of” have been used which in effect indicate that the scope of work is not for supplying of HEMM viz. pay loaders/dippers/Service Miners or other allied equipments, but for execution of the job, for which the payment is made not on the basis of supplying the equipment but on the quantum of job executed. Further, the above agreements also indicate that the contracts are essentially for overburden removal, excavation of earth moving.

7.3 At this juncture, we find it very useful to refer to the *C.B.E.C. Circular in F. No. B1/6/2005-TRU dated 27.07.2005* relied on by the Ld. Advocate for the assessee wherein it has been clarified that such an activity like overburden removal or excavation and earth moving would fall under the category of Site Formation and Clearance, Excavation and Earth Moving and Demolition Services, which was also further clarified by other clarifications/Circulars vide TRU letter D.O.F. No. 334/1/2007-TRU dated 28.02.2007 and C.B.E.C. Circular in F. No. 232/2/2006-CS.4 dated 12.11.2007 and also to the effect that ‘Site Formation and Clearance, Excavation and Earth Moving and Demolition Services’ and the part of services representing coal extraction would fall under the category of ‘Mining of Mineral Oil or Gas Services’, taxable with effect from 16.06.2005 and 01.06.2007 respectively.

7.4 Thus, clearly the contracts/work orders have been executed much earlier, as noted by us elsewhere in this Order, prior to the introduction of taxability on the services involved in this case and also with no retrospective effect. It is also forthcoming from the agreements that the equipments/machines hired from the assessee by M/s. BCCL and M/s. ECL were to be deployed for removal of overburden and coal and for transportation of the same under the supervision of Officers of M/s. BCCL and M/s. ECL, as the case may be, and the hiring charges for the same are also as specified in the respective contracts on the basis of the work done. It is also undisputed that even the invoices raised by the assessee which were duly honoured by the assessee's clients, were on the basis of quantity of work done as per the rates specified in the contract only and that incidentally, the same were used in the removal of overburden and mining. The consideration flowing from the composite contracts was for the entire work since the same would not amount to rendering of job work service and hence, the taxability would only be from 01.06.2007 and not for the period prior to that since the taxability on Site Formation Services was introduced effective from 01.06.2007.

7.5 In this connection, we note that the reliance placed by the assessee on the decision of the Co-ordinate Bench of the Tribunal in the case of *M/s.M. Ramakrishna Reddy (supra)*applies wherein it has been held that if the essential character of contracts is mining, any site formation work undertaken which is incidental to the mining activity and such services rendered would only amount to Mining Services taxable under the category of Mining of Mineral Oil or Gas Services effective from 01.06.2007. The relevant portions of the order have been extracted by the Ld. Commissioner in the impugned order. Therefore, we are of the view that the ratio of the above decision squarely applies to the case on hand and accordingly, the demand on Site FormationServices that are dropped by the Adjudicating Authority, is upheld.

7.6 The Revenue has not been able to make out a case to dislodge the conclusion reached in the impugned order and therefore, we do not see any reason to interfere with the findings arrived at by the Commissioner.

8. We also take on record the contentions of the Revenue that in respect of some of the contracts, the consideration was received later. We find that the Hon'ble High Court of Delhi in the case of ***M/s. Vistar Construction (P) Ltd. Vs. Union of India*** reported in ***2013 (31) S.T.R. 129 (Del.)*** has *inter alia* held that the taxable event for Service Tax was the rendition of service, in the following words :

> ***"7.*** *On going through the said instruction and particularly para 3 thereof it appears that the view of the respondents is that service tax becomes chargeable on receipt of payment for the service whether or not the services are performed. This view is clearly wrong. We say so because the Supreme Court in the case of Association of Leasing & Financial Service Companies v. UOI :2010 (20) S.T.R. 417 (S.C.) has categorically held as under :*
>
> > *"Thus, the impugned tax is levied on these services as taxable services. It is not a tax on material or sale. The taxable event is rendition of service."*
>
> ***8.*** *Therefore, the taxable event, in so far as service tax is concerned, is the rendition of the service. That being the position, the taxable events in the present writ petition had admittedly occurred prior to 1-3-2008. At that point of time the rate of service tax applicable in respect of the services in question was 2% and not 4%, which came into effect only on or after 1-3-2008. In both the writ petitions the date of receipt of payments was subsequent to 1-3-2008 but that would not make any difference because it is not receipt of payment which is the taxable event but the rendition of service. In WP (C) 5636/2010 the relevant period is March, 2008 and in WP (C) 3632/2012 the relevant period is April, May and July, 2008."*

It is clear from the above that it is the rendition of service alone which is required to be considered.

9.1 With regard to the demand under Commercial or Industrial Construction Service, we find that the construction of Decanted Water Monitoring Pond and allied works was undertaken for the exclusive use of M/s. UCIL in connection with the extraction of uranium ore for nuclear research and development activities. The uranium extracted by M/s. UCIL, which is a Government of India undertaking, has not marketed the same or rather, it has no market in India and that M/s. UCIL is neither a commercial entity nor an industrial organization. The Revenue has not placed on record any material evidence to prove that the extraction of uranium is a commercial/industrial activity. The initial burden is always on the Revenue and apparently, that has not at all been discharged.

9.2 Further, we note that it has not been brought on record anywhere that the uranium thus extracted by M/s. UCIL has been used in any of the industrial processes of manufacture or production and finally, the distribution of products by M/s. UCIL. Hence, mere allegation with absolutely no document in support of the same would not suffice, more so in the case of a Government organization like M/s. UCIL. It is quite clear that the extraction of uranium ore is for the Union of India and the same is a restricted activity. Therefore, by no stretch of imagination can we accept the contentions of the Ld. Departmental Representative for the Revenue that the same would amount to an activity of commerce or industry. No doubt, the uranium ores are sold exclusively to the Department of Atomic Energy, Union of India, but that alone would not paint the character of commerce or industry. In this regard, we fully approve the findings of the Ld. Commissioner.

10. In view of the above, the above pleas of the Revenue cannot be entertained.

11.1 The assessee in its appeal has challenged the demand of Service Tax under the category of Mining Services. We note that though the Ld. Commissioner has accepted the contentions urged by the assessee, mainly that the contracts/work orders were executed prior to 1st June, 2007, but the authority has held that in some cases bills were raised after 01.06.2007, which has prompted the lower authority to sustain the demand in respect of the bills raised after 01.06.2007 since the assessee was unable to produce any documentary evidence; but it is not the case of the Revenue that the rendition of service itself was post 01.06.2007.

11.2 After hearing both the sides, we deem it proper to remit this issue to the file of the Adjudicating Authority for the limited purpose of verifying the relevant contracts/agreements entered into for Mining of Mineral Oil or Gas Services and to ascertain the date of completion/rendition of service, thereafter apply the decision of the Hon'ble Delhi High Court in the case of *M/s. Vistar Construction (P) Ltd. (supra)* and then adjudicate in the light of the directions laid down by the Hon'ble High Court.This issue is therefore allowed for statistical purposes by way of remand.

12. Further, on penalties and interest deleted by the Ld. Commissioner, there is also no dispute that the assessee is a Government organization and hence, there cannot be any scope to allege suppression, mis-statement, etc. This fact coupled with the action of the assessee in remitting the payment at least one year before the issuance of the Show Cause Notice establishes the *bona fides* of the assessee, which *per se* makes out a case for invoking Section 80 of the Finance Act, 1994 for dropping the penalty and interest.The Ld. Commissioner himself having dropped the penalties and interest, we uphold the same and dismiss the grounds-of-appeal against the same by the Revenue.

13. We therefore do not see any merit in the Revenue's appeal, for which reason the same is dismissed.

14. In view of the above, the appeal filed by the Revenue is dismissed and the appeal filed by the assessee is partly allowed. The cross objection filed by the assessee is disposed of accordingly.

(Operative part of the order pronounced in open court)

SD/
(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

SD/
(P. DINESHA)
MEMBER (JUDICICAL)

Sdd