**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA**

REGIONAL BENCH – COURT NO.2

**Service Tax Appeal No. 01 of 2012**

(Arising out of Order-in-Original No. COMMR./B-I/ST-13/2011 dated 11.10.2011 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneshwar-I)

**M/s. Arun Udyog**
(Dahanigadia, Charampa, Dist. Bhadrak-756101 (Odisha))

**Appellant**

*VERSUS*

**Commr. of Central Excise, Customs & Service Tax, Bhubaneswar-I**
(Central Revenue Building, Rajaswa Vihar, Bhubanesar-751007 (Odisha)

R**espondent**

**APPEARANCE :**
Mr. Tarun Kumar Agarwalla, CA for the Appellant
Mr. K. Chowdhury, Authorized Representative for the Respondent

**CORAM:**
**HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)**
**HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)**

**FINAL ORDER NO.77577/2023**

Date of Hearing : 17 November 2023
Date of Decision: 17 November 2023

**PER R. MURALIDHAR:**

The Appellant was providing various services connected to Mining Service to M/s FACOR since 1986. After coming to know that mining service has been brought under the Service Tax, the Appellants have got themselves registered with the Central Excise Department obtaining Service Tax Registration No. AAFFA7486HST001 with effect from 03/10/2007. They have been filing the Returns from 01/06/2007 onwards with their Jurisdictional authorities. After investigation, the Department issued Show Cause Notice on 12/10/2010 by invoking the extended period provisions demanding the Service Tax under the following Headings:-

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| SI No. | Name of the Service | Para | Service Taxpayable | E. Cess Payable | Total |
|---|---|---|---|---|---|
| 1. | Manpower Recruitment or Supply Agency | 6.3 | Rs.2,22,874/- | Rs.4,465/- | Rs.2,27,339/- |
| 2. | Commercial and Industrial Construction | 7.3 | Rs.24,90,866/- | Rs.49,817/- | Rs.25,40,683/- |
| 3. | Cleaning Activity | 8.2 | Rs.47,40,691/- | Rs.94,814/- | Rs.48,35,505/- |
| 4. | Business Auxiliary | 9.3 | Rs.48,041/- | Rs.960/- | Rs.49,001/- |
| 5. | Cargo Handling | 10.3 & 10.5 | Rs.64,60,852/- | Rs.1,29,217/- | Rs.65,90,069/- |
| 6. | Total | | Rs.1,39,63,324/- | Rs.2,79,273/- | Rs.1,42,42,597/- |

2. The Appellant contested the Show Cause Notice both on merits as well as on account of limitation. After due process, the Adjudicating Authority confirmed the demand along with interest and penalties. Being aggrieved, the Appellant is before the Tribunal.

3. The Learned Chartered Accountant submits that the activities under the above five Headings are basically pertaining to Mining Services which was being provided by the Appellant to FACOR since 1986. He takes us through the Works Contract issued for these services. In respect of the Cleaning Activity, he submits that the tank in question is located in the mining area and the job is for removal of silt gathered which is deposited in the tank from the wastage water coming from the COB Plant. He submits that it cannot be treated as cleaning services under Section 65 (24) of the Finance Act, 1994. He relies on the case law of Purba Medinipur Jilla Parishad Vs. CCE, Haldia vide Final Order No.

FO/77330/2018 dated 13.12.2018. The Hon'ble Kolkata Tribunal has held as under:-

*8.4 It is seen from the letter dated 03.02.2004 of DVC that the appellant was awarded tender for excavation of Ash from different field of Ash ponds of DTPS, DVC, Waria, Nuisance free transportation and disposal of Ash DTPS, DVC, Waria, Nuisance free transportation and disposal of Ash in abandoned mines of ECL. <u>It appears that the purpose of the tender is for disposal of Ash in the abandoned mines of ECL. The appellant is engaged for transportation and disposal of Ash in the abandoned mines. The letter does not show that the appellant was engaged for cleaning of the premises. Therefore, the demand of Service Tax under the category of cleaning service is not justified</u>.*

*[Emphasis supplied]*

4. Accordingly, he submits that the confirmed Service Tax of Rs.48,35,505/- on this account, is required to be set aside.

5. In respect of "Cargo Handling Services" he submits that the activity pertains to movement of mined Chrome Ore within the mining premises from one place to another by way of excavators.

6. In respect of "Manpower Supply, he submits that the Manpower was deployed by them for mining activity and hence the services provided by the appellant will not fall under the category of "Manpower Recruitments and Supply Services."

7. In respect of confirmed demand under "Commercial and Industry Construction Services", he submits that the work undertaken was in respect of fortifying the embankment by constructing the wall within the mining area. Therefore, he submits that the activity will not fall under the category of "Commercial and Industrial Construction Services".

8. In view of foregoing, he submits that the confirmed demand is required to be set aside on merits. He further submits that right after obtaining the Service Tax Registration, they have been regularly filing the ST-3 Returns from October 2007 onwards. In respect of all these activities, they have carried bonafide belief that no service Tax is required to be paid. In respect of the demand under "Cleaning Activity and Cargo Handling Services", the cited case laws are in their favor

because of which they have carried bonafide belief that no Service Tax is required to be paid by them. He submits that Show Cause Notice has been issued for the period 16/06/2005 to 31/05/2007 on 12/10/2010 because of which the entire demand should be treated as time barred. Accordingly, he submits that the Appeal may be allowed even on account of limitation.

9. The Learned AR takes us through the Work Order issued towards Manpower Recruitment and Supply Services, he points out that this Work Order clearly states that the Appellant would be paid Rs.65 per day plus commission of 40% making it clear that the service has to be classified under "Manpower Services''.

10. In respect of "Commercial and Industrial Construction", he submits that the civil work undertaken and the wall constructed is for commercial purpose only, as the mining activity is the business activity.

11. In respect of "Cargo Handling Services, he submits that the case law relied upon by the Appellant i.e. Sainik Mining has been overturned by the Orissa High Court. He submits that the demands confirmed are in order and the present Appeal is required to be dismissed.

12. Heard both sides and perused the documents placed before us.

13. On going through the Work Order relating to deployment of Manpower, we are in agreement with the Learned AR that the Work Contract clearly speaks of 'Manpower Supply' only. Therefore, on merits, the submissions made by the Appellant are rejected.

14. In respect of confirmed demand on Commercial and Industrial Construction, we find that the civil work has been undertaken for the embankment within the mining premises. The mining activity is undertaken for commercial purposes by FACOR. Therefore, on merits, the submissions made by the Appellant are dismissed.

15. In respect of Cleaning Activity, we find that the issue is no more *res integra*. As per the decision of this Bench, in Purba Medinipur Jilla Parishad Vs. CCE, Haldia, case law cited supra, following the ratio, the confirmed demand of Rs. 48,35,505/-, under Cleaning Activities, is not legally sustainable. We set aside the same.

16. In respect of Cargo Handling Service, the issue is covered by the Sainik Mining & Allied Services Ltd. Vs. Commr. of C. Ex., Customs & Service Tax, Bhubaneswar-II[2008 (9) S.T.R. 531 (Tri.-Kol) which has also been followed by this Bench in Faridabad Gurgaon Minerals Vs. Commr. of C. Ex., Cus. & S.T., Bhubaneswar-II. Coming to the point raised by the AR that Sinik Mining & Allied Services Ltd. has been overturned by the Orissa High Court, we find that during the period under dispute, the appellants were covered by the case of Sainik Mining and Allied Services Ltd. and could hold bonafide belief that no Service Tax is payable towards internal movement of material under the Cargo Handling Services. Therefore, we set aside the demand of Rs.65,90,069/- confirmed under 'Cargo Handling Services.

17. Now coming to the issue of time bar raised by the Appellant, it is an admitted fact that immediately after the Mining services has been brought under the Service Tax, the Appellant has obtained the Service Tax registration and has been filing their ST-3 Returns Regularly. Therefore, we do not see any reason for the Department to delay the issue of Show Cause Notice by about three years to issue the Show Cause Notice on 12/10/2010. Therefore, though we have held that on merits the Appellants do not succeed in case of 'Manpower Supply Services' and 'Commercial Construction Services', we hold that in view of the delayed issue of SCN, the entire confirmed demands are required to be set aside on account of limitation.

18. The Appellant would be eligible for consequential relief, if any, as per law.

(Dictated and pronounced in the open court.)

Sd/-
**(R. Muralidhar)**
**Member (Judicial)**

**Sd/-**
**(K. Anpazhakan)**
**Member (Technical)**

Pooja