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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.273 of 2012

(Arising out of Order-in-Original No.84/Commr/ST/Kol/2011-12 dated 14.03.2012 passed by Commissioner of Service Tax, Kolkata.)

Commissioner of Service Tax, Kolkata
(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata.)

...Appellant

VERSUS

M/s. Emta Coal Limited

.....Respondent

(5B, Nandalal Basu Sarani, Kolkata-700071.)

APPEARANCE

Shri J.Chattopadhyay, Authorized Representative for the Revenue
Dr.Samir Chakraborty, Sr.Advocate & Shri Abhijit Biswas, Advocate for the Respondent

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

FINAL ORDER NO. 77640/2023

DATE OF HEARING : 30 November 2023
DATE OF DECISION : 30 November 2023

Per : R. MURALIDHAR :

The Revenue has filed the present Appeal being aggrieved by the dropping of the following demands by the Adjudicating authority:-

Sr. No.	Services	Demand as per SCN dated 21.10.2010	Demand as per Impugned Order dated 14.03.2012
1.	Site Formation & Clearance, Excavation & EarthMoving & Demolition Services (16.06.2005 to 31.05.2007)	Rs.11,64,74,435/-	Dropped.
2.	Mining Service (c) 2008-09 (difference between Balance Sheet & Service Tax Return figures)	Rs.2,09,43,980/-	Dropped Para 18, p37-38

2. They are also aggrieved by the fact that in respect of Service Tax of Rs.26,01,36,069/-, the adjudicating authority has dropped the proposed penalty under section 78 on the ground that this amount was paid along with interest before issuance of the show cause notice.

3. The learned DR reiterates the Grounds of Appeal and prays that the present Appeal may be allowed.

4. The learned Counsel appearing for the Respondent, takes us through the detailed findings given by the Adjudicating Authority in the Order-in-Original for dropping the demand and the proposed penalty under Section 78. He relies on the same to submit that the present Revenue's Appeal is required to be dismissed.

5. Heard both sides and perused the Appeal papers.

6. We find that the Adjudicating Authority has given detailed findings which are extracted below :-

(A) In respect of dropping of demand of Rs.11,64,74,435/-, he has given the following findings:-

> 14.6 I think that a careful perusal of the statute vis-à-vis the Board's Circular dated 27.5.07 is necessary to determine the instant issue. I would start my deliberation with the Circular. Going through the Circular it can be seen that during the material period Site formation etc. services were not considered as mining service. It is evident from the following line appearing in that Circular: Prior to construction of buildings, factory or any civil structure, activity of mining or laying cables or pipes, preparation services of site formation and clearance, excavation and earthmoving or leveling are normally undertaken which includes blasting and rock removal work, clearance or undergrowth, drilling services of mineral properties and sites, and other similar excavating and earth moving services. I have noted that the Circular has given the attribute 'inclusive' to the definition of the Site formation etc. Services. However, it is clear from the language/text of the Circular that in no way this inclusive nature would consider services related to mining in it; rather it included all such activities those are needed prior undertaking mining. In fact the Circular remains in corformity with the statute.

14.8.6 In the final decision related to the above case of M.Ramakrishna Reddy Versus Commr. of C. Ex & Cus., Tirupathi 2009 (13) S.T.R. 661 (Tri.-Bang.), hon'ble Tribunal observed the following :-

> ***10.2*** *If the above provision is applied, the services rendered would amount to only mining services. As the contract is a comprehensive one for mining, it cannot be vivisected for levying service tax on that portion of the activity relating to "Site Formation" in the light of the decision of the Tribunal in the case of Daelim Industrial Company v. CCE, Vadodara [2006 (3) S.T.R. 124 (Tri.-Del.) = 2003 (155) E.L.T. 457 (Tri.-Del.)] upheld by the Apex Court [2007 (5) S.T.R. J99 (S.C.) = 2004 (170) E.L.T. A181 (S.C.)]. Consequently, we hold that the services rendered by the appellant are classifiable only under the category of "Mining Services" and therefore they would not be liable to service tax prior to 1-6-2007. In the light of the above finding, there is no justification for imposition of any penalty. Hence, we allow the appeal with consequential relief.*

14.9 From the above case laws it is quite clear that the issue has been consistently settled by looking into the purpose for which the contract/agreement was made. In all such cases where the agreement/contract was made in relation to mining the services which otherwise would fall under Site formation etc. Services would not be taxable up to 31.5.07. I have noted that the SCN itself contains the relevant portions of the agreement between the said assessee and BECML and PANEM.

14.13 Both the agreements, as is evident from the text, were executed for the purpose of mining coal. In fact, the arguments put forth in the SCN in support of the allegation has in fact weakened the allegation. The services rendered by the assessee both in terms of the scope of the relevant statute as well as judicial pronouncements cannot be considered as Site Formation and Clearance, Excavtion and Earth Moving and Demolition Services for the period from 16.6.05 to 31.5.07. According to me the valuation against Site formation etc. arrived at by ICWAI does not affect this inference because determination of value of a part of a service in no way affects the character of the service as given under agreements. The agreements do not mention any separate *consideration for overburden removal or site formation. The payments are received by the assessee only on basis of removal of coal only.*

(B) In respect of dropping of demand of Rs.2,09,43,980/-, he has given the following findings:-

18.1 In the said context, the noticee has placed on record a certificate issued by C.Ghatak & Co. Chartered Accountants, wherein they have inter alia certified that the noticee is not permissible to invoice the joint venture companies i.e. the power utility companies towards mining services rendered to facilitate extraction of quality of coal lying at stock of mine pit head and/or loading point but not delivered to the power plants. <u>However, under the mercantile system of accounting the expenditures incurred on account of extraction of such quantity of coal lying at the mine stock as on the date of Balance Sheet are chargeable to Profit & Loss Account and therefore provision shall also require to be made in the Annual Accounts as "income from mining services" against the value of such coal stock at the mine site not eligible for invoicing by the firm to the respective Joint Venture Companies.</u>

*<u>18.3 I am inclined to give due cognizance to the certificate issued by the statutory auditor of the company C.Ghatak & Co which in effect had completely reconciled the difference of **Rs.19,32,74,085/-** by which the balance sheet figure exceeds the figure covered under bills raised on mining clients, and on which service tax demand of **Rs.2,09,43,980/-**has been raised in the impugned SCN</u>.*

[Emphasis supplied]

(C) In respect of dropping of penalties under Section 78, he has given the following findings:-

17.5 Keeping in view the observations of various Tribunals and Court cited above, and following the ratio of the judgments respectively, <u>and in consonance with the Board's Circular No.137/167/2006/CX-4 dated 03/10/2007 read with provisions of Section 73(3) of the said Act, I find the issues of the instant case are squarely covered by such provisions and clarifications in so far as the demand of Rs.26,01,36,069/- is concerned. As a sequel to the above reasons, I am of firm opinion for conclusion of all proceeding in respect of the demand for the aforesaid period against the assessee in terms of Section 73(3) of the Act read</u>

with Board's Circular and judgements cited above. In the circumstances, I find no justification for imposing penalties against this amount. *[Emphasis supplied]*

7. We find that the Adjudicating authority has considered all the factual details and statutory provisions and case law for coming to his considered decision. We do not find any reasons to differ with his findings.

8. Accordingly, we dismiss the Revenue's Appeal.

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

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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