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

REGIONAL BENCH - COURT NO.1

Service Tax Appeal No.75292 of 2014

(Arising out of Order-in-Appeal No.04/SH/CE (A)/GHY/14 dated 06.01.2014 passed by Commissioner, Customs & Central Excise (Appeals), Kolkata.)

Shri Sanjay Kumar Binani
(Ram Kumar's Archade, 3rd Floor, Chetribari Road, Guwahati-781005.)
...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Guwahati
.....Respondent
(Nilmoni Phukun Path, Christian Basti, Guwahati-781005.)

APPEARANCE

Shri Alok Kumar Ghosh & Shri Nilesh Kumar Kundu, both Advocates for the Appellant (s)

Shri J.Chattopadhyay, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. 75008/2024

DATE OF HEARING : 3 January 2024
DATE OF DECISION : 3 January 2024

Per : R. MURALIDHAR :

The Appellant is providing 'Mining Services' to their client MCCN. The client has issued an work order on 06.06.2005 wherein excavation work in lime-stone mines, transportation of the same and all other related jobs are given to them on a composite contract basis. The department undertook a detailed investigation and issued show cause notice on 10.03.2011 for the period 11.08.2006 to 18.11.2009 on the ground that upto 30.06.2007, the appellant is required to pay Service

Tax under different headings like 'Cargo Handling Services', 'Site Formation Services' and after 01.07.2007 under 'Mining Services'. The appellant after receipt of the show cause notice admitted that from 01.07.2007, they are liable to pay Service Tax under the heading of 'Mining Service' and calculated and paid Rs.18,10,214/- as Service Tax and Rs.36,203/- as Education Cess and Rs.18,101/- as SHE Cess. They also paid the interest of Rs.4,35,975/- towards the same. The adjudicating authority has confirmed the entire demand and also appropriated the Service Tax, Education Cess and SHE Cess along with interest paid the appellant. Being aggrieved, the appellants have filed their appeal before the Commissioner(Appeals), who has upheld the Order-in-Original. Being aggrieved, the appellant is before the Tribunal.

2. The Ld.Advocate submits that the work order awarded by the client is for various jobs, involved in the mining activities. He takes us through the work order dated 06.06.2005 and the payment terms wherein it is clearly specified that they would pay Rs.91/- per cubic meter for over-burden cleared. Therefore, he submits that the department is in error in bifurcating the consideration amount into different categories of over-burden clearing, drilling and 'Cargo Handling Services' prior to 01.06.2007. He submits that this bifurcation has been done only in order to fasten the Service Tax burden on the appellant. He further submits that after the appellant admitted that the services fall under 'Mining Services', the department has issued Service Tax registration under this heading and they have also allowed the appellant to pay the past dues during the period 01.06.2007 to 18.11.2009. He further points out that from the tables given in the show cause notice it can be seen that this bifurcation/vivisection of service has been done by the department for the period till 30.05.2007 and then demand has been raised under two different headings and subsequent to 01.06.2007, the entire demand is on account of 'Mining Service'. Therefore, he submits that the Department could not have confirmed their demands under different headings when they themselves have quantified the demand for the period 01.06.2007

onwards under 'Mining Services'. He also takes us through Para 9 of the Order-in-Appeal wherein it is noted that on similar issues the Tribunals have held that a composite contract cannot be vivisected into 'Site Formation' and 'Cargo Handling Services' in order to fasten the Service Tax liability on the assesse. In view of these submissions, he submits that the appeal is required to be allowed on merits.

3. The Ld.AR reiterates the detailed findings of the adjudicating authority. He submits that only after detailed investigation and verification of facts, the department came to know that the appellants were not discharging Service Tax burden. Only in view of their investigation the appellant has finally accepted that they are liable to pay Service Tax and they have discharged most of the Service Tax demand in 2010 for the period 01.07.2007 to 18.11.2009. Therefore, he justifies the confirmed demand.

4. We have heard both sides and perused the documents.

5. On going through the contract awarded by the client MCCL on 06.06.2005, we find that the scope of work given therein consists of various connected activities with the 'Mining Services' pertaining to lime-stone mining. The consideration given is on a lump sum basis without any specific bifurcation towards site formation, excavation, over-burden charges, cargo handling charges etc.. Therefore, we do not see any justification on the part of the Department to arrive at and assume vivisection and bifurcation of the rates, to issue the demand notice. From the show cause notice itself it is seen that for the period till 31.05.2007 they have vivisected the contract and issued the show cause notice under the heading 'Cargo Handling Service' and 'Site Formation Service' and after 01.06.2007 they have no qualms to accept that the same composite service falls under category of 'Mining Service' heading only and demand is made under that heading. Since the Department itself admits that the above carried out by the appellant is that of 'Mining Services' w.e.f. 01.06.2007, we hold that the demand for the earlier period has been made only to fasten excess Service Tax demand on the appellant.

6. We have also gone through the case law cited by the appellant. In the case of M. Ramkrishna Reddy Vs. Commissioner of C.Ex. & Cus., Tirupathi [2009 (13) S.T.R. 661 (Tri.-Bang.)], the Tribunal has clearly held that when there is a composite contract, the same cannot be vivisected in order to confirm the demand of Service Tax. Similarly in the case of Commissioner of C.Ex. & Cus Vs. B.K.Thakkar [2008 (9) S.T.R. 542 (Tri.-Kol.)], the Tribunal has held that such vivisection is not permissible. Hence, we allow the Appeal on merits.

7. On going through the Order-in-Appeal we find that the Commissioner(Appeals) in para 9 noted that relevant case laws have been cited by the appellant and has held as under:-

> *"9. I have also gone through the judgments of the higher forums cited by the appellant and observe that in the case of M. Ramkrishna Reddy vs. CCE, Tirupathi – (2009) 13 STR 661 (Tri-Bang), the Hon'ble CESTAT observed that 'Site Formtion and Clearance, Excavation and Earthmoving and Demolition services – Mining of ores-Removal of overburden is incidental to mining activity – Entire activity not covered under Site Formation service – Contract being comprehensive not to be vivisected for leaving Service Tax on portion relating to Service Formation Service – Essential character of work under taken is mining or winning of minerals and impugned activity classifiable under Mining Service – Mining Service brought under Service Tax from 01.06.2007 – Period in impugned case prior to 01.06.2007 – Demand and penalty set aside-'. In the case of CCE, Bhubaneswar vs. K. Thakka (2008) 9 STR 542 (Tri-KOL) the Hon'ble CESTAT held that Cargo Handling Service, Excavation and earthmoving to crusher plant and processing is incidental to mining Service and the same cannot be classified and taxed under the head of Cargo handling Service. I find that the ratio of these judgements is squarely applicable in the instant appeal. The department case is breaking the Mining Service into several services does not appear to be proper and legal."*

8. But, surprisingly after clearly holding that the Department's case of breaking of Mining Service into several services is not legal, still he has gone ahead and held that they are liable to pay Service Tax prior to 06.06.2007 under the category of 'Cargo Handling Services'.

9. In view of the foregoing, we set aside the impugned order and allow the appeal. The appellant would be eligible for consequential benefits, if any, as per law.

(Dictated and pronounced in the open Court.)

Sd/

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/

(RAJEEV TANDON)
MEMBER (TECHNICAL)

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