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

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75839 of 2015

(Arising out of Order-in-Original No. 05/Commr/ST-II/Kol/2015-16 dated 22.05.2015 passed by the Commissioner of Service Tax-II, Kendriya Utpad Shulk Bhawan, 3rd Floor, 180, Santipally, Rajdanga Main Road, Kolkata – 700 107)

M/s. Ambey Mining Private Limited **: Appellant**
Circular Court, Block No. 92, 9th Floor,
8, A.J.C. Bose Road, Kolkata – 700 017

VERSUS

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

APPEARANCE:

Shri Kartik Kurmy, Advocate
Shri Debayan Dutta, Advocate
For the Appellant

Shri K. Chowdhury, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75611 / 2024

DATE OF HEARING: 06.03.2024

DATE OF DECISION: 22.03.2024

Order : [Per Shri K. Anpazhakan]

The present appeal has been filed against the impugned Order-in Original No. 05/Commr/ST-II/Kol/2015-16 dated 22.05.2015, passed by Commissioner, Service Tax, Kolkata - II, wherein the Ld. Commissioner has confirmed the demands of service tax under the category of 'Mining Services' and denied CENVAT Credit availed on certain inputs and input services.

2. The brief facts of the case are that the Appellant is engaged in providing Taxable Service under the category of "Mining Services" and "Business Auxiliary Services". The Appellant has executed contracts for transportation of Coal/Over Burden within the mines and also outside the mines. The department has demanded service tax on these Transportation contracts under the categories of "Mining Services". The following categories of services rendered by the Appellant are treated by the Department as 'Mining Services' and service tax has been demanded and confirmed under the category of 'Mining Services' in the impugned order:

(i) Transportation of Coal to destination outside mines with incidental Loading/unloading taxed under "Mining Service".
(ii) Transportation within mines taxed under Mining Service.
(iii) Contract for "Feeding Coal into Power Plant Hopper" Taxed under Mining Service.
(iv) Free Supply of Diesel Taxed under Mining Service.

2.1. In the impugned order demand of Service tax of Rs.8,53,102/- has been confirmed under Business Auxiliary Service on the amount of Rs.75,60,332 reported as 'Handling Charges' in their books of account.

2.2. CENVAT Credit of Rs.37,13,615/- disallowed on Tippers (CH.87) used for providing "Cargo Handling Service", as the same was not eligible as 'Capital Goods' at the time of its purchase.

2.3. CENVAT Credit of Rs.8,64,278/- availed by the Appellant on 217 MT of M.S. Channel and M.S. Angle used for repairing Body/Dallas of the Tippers/Dumper has been disallowed on the ground that the same was not input for the repair of the Tippers/Dumpers.

2.4. CENVAT Credit of Rs.6,14,095/- availed on the strength of invoices which are in the names of third parties (contractors) has been disallowed. Accepting this demand, the Appellant reversed the credit along with interest. However, the impugned order has considered reversal of only Rs.4,81,313/- along with interest.

2.5. The impugned order has dropped the demand of CENVAT Credit of Rs.27,44,920/- against availment of CENVAT Credit prior to payment but confirmed and appropriated the interest of Rs.57,575/- paid by the Appellant.

3. The Appellant made detailed submission in respect of each of the demands confirmed in the impugned order, which is summarized below:

3.1. The Appellant submits that the following categories of services rendered by them within the mining area were all considered by the Department as 'Mining Services' and demand of service tax has been confirmed under the 'Mining Services'.

(i) <u>Transportation of Coal to destination outside mines with incidental Loading/unloading taxed under "Mining Service'.</u>

In this case, the Appellant has executed several work orders for their clients for <u>"Transportation (with incidental loading) of Coal/Jhama Coal (i.e. partly burnt coal)from different mines of their clients to</u>

destinations located outside the mines". Under the contract, lump sum rate has been provided for Per metric tonne of coal transported depending upon the lead. For transportation of coal to destination outside the mines, service tax has been demanded under the category of **"Mining Services"**.

(ii) Transportation within mines taxed under Mining Service.

The Appellant has executed several Work Orders from their clients for "Transportation of Coal (with incidental loading) within the Mines". The said transportation activities were carried out within the mines of their client and service tax has been confirmed under the category of 'Mining Services'

(iii) Contract for "Feeding Coal into Power Plant Hopper" Taxed under Mining Service.

The Appellant has executed several Work Orders from their clients for **"Feeding of Coal into the Hoppers of Power Plants"** by deploying Pay-Loaders and Dumpers. Under the contract the Appellant was obliged to shift and feed raw coal from the coal yards etc. to different hoppers of the Power Plant round the clock in the process of generation of electricity. The activities of the Appellant of "Shifting and Feeding of Coal into the Hoppers" round the clock was carried out inside the Power Plants i.e. Mezia Thermal Power Station (MTPS) and Chandrapura Thermal Power Station (CTPS) of Damodar Valley Corporation (DVC). These contracts are taxed under the category of "Mining Services" as provided under section 65(105)(zzzy)/Section 65A of the Finance Act, 1994.

(iv) Free Supply of Diesel Taxed under Mining Service.

Under composite contract dated 27/08/2010 awarded by Calcutta Industrial Supply Corporation (CISC) for mining, it was agreed upon that the said client would supply the Diesel (HSD) free of cost for running of Tippers, Excavators, HEMM etc. for providing the **"Mining Services"**. Free supply of HSD valued **Rs.3,97,69,281/-** during **2011-12** against the said work order has been taxed under the category of **"Mining Services"**.

3.2. SERVICE TAX DEMAND OF RS.7,78,714/- (Rs.8,53,102/- MINUS Rs.74,388/-) UNDER THE CATEGORY OF "BUSINESS AUXILIARY SERVICES" .

Service tax of Rs.7,78,714/- has been confirmed on the value of Rs.75,60,332/- under the category of "Business Auxiliary Service" for the year 2010-11, on the basis of the figures appearing in the balance sheet/profit and loss account. According to the Appellant the said amount of Rs.75,60,332/- represents **"discounts received"** from vendors for purchase of Spares, Tyres, Lubricants etc. and not for provision of any service. The discount amount received has been credited by the Appellant in their books of accounts under the head of "Handling Charges. The department has considered this receipts as taxable value received and demanded service tax. The Appellant submits that merely because the amount is accounted for under the Account Head "Handling Charges", it would not make it taxable under "Cargo Handling Services". They submit that a perusal of the journals, invoices and CA Certificates submitted by them would make it evident that the Handling Charges of Rs.75,60,332, received was not for providing any taxable services but the said amount represents the amount of discounts allowed by the vendors and received by the Appellant. Accordingly, they contended that the demand of service tax on this count is not sustainable.

3.3. CENVAT Credit of Rs.37,13,615/- disallowed on Tippers (CH.87) used for providing "Cargo Handling Service".

The Appellant received Work 01-02-2010 from M/s AMPL-CISC (JV) for provision of "Cargo Handling Services". For providing the said Cargo Handling Services, the Appellant purchased **five nos. of "Tippers"** falling under (SH 87) from M/s Volvo India Pvt. Ltd during August 2008 and claimed CENVAT Credit of **Rs.37,13,615/-** thereon. The said five Tippers were used in the provision of the services under the work order dated 01-02-2010 under the category of "Cargo Handling Services" on which service tax is paid by the Appellant and disclosed the same in the ST-3 returns which facts are not in dispute in the instant case. The department alleged that they were not eligible for the credit on the Tippers as Capital Goods., as the same were purchased in the year 2008, much before the provision of ,Cargo Handling service, by the Appellant, on the ground that the date of Registration is not relevant for availing CENVAT Credit. The Appellant submits that on 01-02-2010, they applied for registration of the said Tippers under the Motor Vehicle Act, 1988 and the said Tippers were registered on 12-10-2010. After registration of the said vehicles the same were put to use for providing Cargo Handling Services under the aforesaid work order. Accordingly, they submitted that the CENVAT Credit has been rightly availed by them.

3.4. Denial of CENVAT Credit of Rs.8,64,278/- on the 217 MT of M.S.Channel and M.S.Angle used for repairing Body/Dallas of the Tippers/Dumper

During the period from April, 2012 to November, 2012, the Appellant purchased **217 MT of M.S.Channel and M.S.Angle** for **repairing Body/Dallas of the Tippers/Dumper** used for providing taxable services under the category of "Cargo Handling Services" and claimed CENVAT Credit of **Rs.8,64,278/-** thereon treating the said items as 'input'/capital goods. The Appellant submits that that during the period under dispute, they had **140 nos. of Tippers/Dumpers** registered in their names and the said **M.S.Angle/M.S.Channel** were used for repairing the said Tippers/Dumpers. The department considered this claim of the appellant as a sham and denied this CENVAT Credit availed on the MS Channel and MS Angles.

3.5. Denial of CENVAT Credit of Rs.6,14,095/- availed on the strength of invoices which are in the names of third parties (contractors)

The Appellant submits that they had claimed CENVAT Credit of **Rs.6,14,095/-** on the strength of invoices in the names of third parties (contractors) which were reversed by them along with interest They had reversed CENVAT Credit of Rs.4,81,313/- and Rs.1,32,782/- vide Challan dated 27-04-2013 and Challan dated 29-07-2013 aggregating to **Rs.6,14,095/-** along with interest of Rs.1,36,728/- (i.e. Rs.12,000/- vide challan dated 13-06-2013, Rs.24,728/- vide Challan dated 29-07-2013 and Rs.1,00,000/- vide challan dated 27-04-2013). However, in the Show Cause Notice/Impugned Order only payment of Rs.4,81,313/- towards CENVAT Credit and Rs.1,12,000/- towards interest is considered.

4. The Ld. Authorized Representative for the respondent reiterated the findings in the impugned order. He submits that the Appellant has performed all services in connection with mining activities in the mining area and hence the demand has been rightly confirmed under mining services. Regarding the availment of CENVAT Credit on Tippers, he submits that the appellant has used the Tippers for providing services under the category of "Cargo Handling Services" as per the work order dated 01-02-2010. However, the Tippers were purchased in the year 2008 and hence the credit has been rightly denied. Regarding the CENVAT Credit availed on 217 MT of MS Channel and MS Angles which has been used for repairing Body/Dallas of the Tippers/Dumper, he submits that the Tippers/Dumper are not capital goods and the MS Channel/MS angles are not inputs used for repairing. Accordingly, he submits that the credit has been rightly denied.

5. Heard both sides and perused the appeal documents.

6. Regarding the demand of service tax under the category of 'Mining Services' we observe that the following categories of services rendered by the Appellant within the mining area were considered by the department as 'Mining Service' and demand of service tax has been confirmed under the 'Mining Services'.

6.1. We observe that the Show Cause Notice dated 17-07-2014 demanded Service Tax of **Rs.25,40,27,845/-** during the period from **2008-09 to 2012-13.** on the following activities:-

CALCULATION OF SERVICE TAX NOT PAID ON INCOME SHOWN AS NON TAXABLE						
F.Y.	Overburden & Coal Transportation	Exclusively Coal Transportation	Ash Transportation	Diesel Reimbursement	Total No Taxable Value	S.Tax (incl. Cess) not paid
2008-09	2,99,69,017	9,49,70,249	3,89,32,019	-	16,38,71,285	2,02,54,491
2009-10	11,56,86,927	8,59,78,483	30,63,845		20,47,29,255	2,10,87,113
2010-11	51,03,94,688	12,72,91,904	5,84,20,447		69,61,07,039	7,16,99,025
2011-12	38,96,98,628	3,68,84,132	5,96,86,800	3,97,69,281	52,60,38,841	5,41,82,001
2012-13	22,63,18,080	3,00,40,610	44,59,48,881	0	70,23,07,571	8,68,05,216
				GRAND TOTAL	**2,29,30,53,990**	**25,40,27,845**

6.2. We observe that from the above, Rs. 6,63,71,235/- pertaining to Ash transportation has been dropped by the adjudicating authority and the balance demand of Rs.18,76,33,250/- has been confirmed under the category of 'Mining Services'.

6.3. Regarding the demand of service tax under 'Mining Services', the Appellant submits that the Service Tax demand has been raised by merely comparing ST-3 returns with Balance Sheet/Profit & Loss A/c without any investigation. They further submit that the activity of transportation of Coal outside the mines and also within the mines cannot be classified under the categories of Mining Services, as defined under Section 65(105)(zzzy) of the Finance Act, 1994. We also observe that he activities of the Appellant "Shifting and Feeding of Coal into the Hoppers" round the clock inside the Power Plants, were also categorized under 'Mining Service". We have perused the scope of works under all these contracts. We observe that the activity undertaken by the Appellant is mainly transportation of Coal, within the mining area and out side the mining area. The activity of transportation is most appropriately classifiable under "Goods Transport Agency Services" and the liability to pay Service Tax on the transportation service lies on the service receiver under the reverse charge mechanism. Accordingly, we hold that the transport services provided by the Appellant cannot be classified under the category of "Mining Services". We observe that this view has been taken by the Hon'ble Supreme Court in the case of **CCE Vs. Singh Transporters reported in 2017 (4) G.S.T.L. 3 (S.C.).** Relying on the said decision, this tribunal has taken the same view in the case of **MaaKalika Transport Pvt. Ltd. Vs. Commissioner of CGST & CE reported in (2023) 8 Centax 273 (Tri.-Cal)** wherein it has been held that transportation of coal within the mines is liable for service tax under the category of "Goods Transport Agency Services" and therefore the liability to pay service tax under the reverse charge mechanism lies on the service receivers.. Accordingly, we hold that the transportation service rendered by the Appellant within the mines and outside the mines are not chargeable to service tax under the category of 'Mining Services'. Similarly, the activities of Shifting and Feeding of Coal into the Hoppers" has been carried out in the Power Plants and hence the same cannot be categorized as 'Mining Service'. Accordingly, we set aside the demand of service tax confirmed in the impugned order on this count.

6.4. Regarding the demand of service tax on diesel supplied free of cost by the client under the category of 'Mining Service, we observe that under the composite contract dated 27/08/2010 awarded by Calcutta Industrial Supply Corporation (CISC) for mining, it was agreed upon that the said client would supply the Diesel (HSD) free of cost for running of Tippers, Excavators, HEMM etc. for providing the **"Mining Services"**. We observe that during the relevant period, there is no provision in the valuation rules to include the value of free supply material in the assessable value for the purpose of levy of service tax. Accordingly, we hold that the cost of HSD valued **Rs.3,97,69,281/-** supplied free of cost by the client cannot be included in the assessable value during **2011-12** for the purpose of demanding service tax under the category of **"Mining Services"**. Accordingly, we hold that the demand of service tax in the impugned order on this count is not sustainable.

6.5. In view of the discussions, we hold that the demand of service tax of Rs.18,76,33,250/- confirmed in the impugned order along with interest and penalty, under the category of 'Mining Services' is not sustainable and accordingly, we set aside the same.

7. Regarding the demand of Service tax of Rs.8,53,102/- confirmed in the impugned order, the Appellant submits that they have received Rs.75,60,332/- as discounts from vendors for purchase of Spares, Tyres, Lubricants etc. The discount amount received has been credited in the books of accounts under the head of "Handling Charges. We observe that the Department has considered these receipts as taxable value received and demanded service tax under the category of "Business Auxiliary Service". A perusal of the journals, invoices and CA Certificates submitted by the Appellant reveals that the Handling Charges of Rs.75,60,332/- received them was towards 'Discounts' only and not for providing any taxable services. Merely because the amount is accounted for under the Account Head "Handling Charges", it would not make it taxable under category of "Business Auxiliary Services". Accordingly, we hold that the service tax confirmed in the impugned order on this count is not sustainable.

8. Regarding the disallowance of CENVAT Credit of **Rs.37,13,615/-** , we observe that the appellant purchased five Tippers in the year 2008 and used the same for providing "Cargo Handling Services" as per the work order dated 01-02-2010. The appellant submits that Tippers are eligible as capital goods for providing the services of Cargo Handling Services. However, the department alleged that the Tippers were purchased in the year 2008 and they were not eligible 'capital goods' as on the date of receipt. The contention of the Appellant is that on 01-02-2010, they applied for registration of the said Tippers under the Motor Vehicle Act, 1988 and the said Tippers were

registered only on 12-10-2010. After registration of the said vehicles the same were put to use for providing Cargo Handling Services under the aforesaid work order. Accordingly, they submitted that the CENVAT Credit has been rightly availed by them. We observe that the date of registration of the vehicle is not the relevant criteria for availing the credit. The date of invoice is the criteria for availing the credit. The vehicle was purchased in the year 2008 and it was not used for providing 'Cargo Handling service' at that time. Tippers are eligible as 'Capital Goods' only in respect of certain category of services such as 'Cargo Handling service'. We observe that the CENVAT Credit in the instant case was claimed in the year 2008, when the Appellant was not rendering 'Cargo handling service'. The Appellant took registration of the vehicle under the Motor Vehicles Act on 12-10-2010. This date has no relevance for availing the credit on the Tippers as 'Capital goods'. As the Tippers were not used for providing Cargo Handling Service for which they are eligible as 'Capital Goods', at the time of receipt of the goods in the year 2008, we hold that the credit availed by the Appellant on this count has been rightly denied in the impugned order. The Appellant has not intimated the availment of capital goods credit on the Tippers. Hence, extended period has been rightly invoked to disallow the credit. For the same reason, the appellant is also liable for penalty. Accordingly, we uphold the demand of service tax along with interest. As the irregular credit availed by the Appellant has been established, we hold that the Appellant is liable for interest and penalty under Rule 15(2) of the CENVAT Credit Rules 2004.

9. Regarding the disallowance of CENVAT Credit of **Rs.8,64,278/-,** we observe that during the period

from April 2012 to November, 2012, the Appellant purchased **217 MT of M.S. Channel and M.S.Angle** and claimed that they have used the same for **repairing Body/Dallas of the Tippers/Dumper** which were in turn used for providing taxable services under the category of "Cargo Handling Services". This fact needs to be verified. In the impugned order, the adjudicating authority observed that a 'Dumping Truck' normally weighs 4-6 MT. The claim of consuming 217 MT angle/Channel for repairing work in one year for making 'Body/Dallas' appears nothing but a sham. We observe that the adjudicating authority has not given any finding as to whether the Tippers/Dumpers for which the 217 MT of MS Angle and MS Channel were said to have been used qualify as capital goods first. The Appellant has also not submitted any evidence to support their claim that the 217 MT of MS angle and MS Channel has been used in repairing the Tippers. Accordingly, this matter needs to be remanded back to the adjudicating authority to examine the eligibility of this credit, on the basis of the above observations.

10. Regarding disallowance of CENVAT Credit of **Rs.6,14,095/-** availed on the strength of invoices which were in the names of third parties (contractors), we observe that the Appellant had already reversed the CENVAT Credit of Rs.4,81,313/- and Rs.1,32,782/- vide Challan dated 27-04-2013 and Challan dated 29-07-2013 aggregating to **Rs.6,14,095/-** along with interest of Rs.1,36,728/-. However, we find that the Impugned Order has only considered the payment of Rs.4,81,313/- and appropriated the same. Since the Appellant has already reversed the entire credit of Rs.6,14,095/- we appropriate the same.

11. In view of the above discussions, we pass the following order:

(i) The demand of service tax of Rs.18,76,33,250/- confirmed in the impugned order along with interest and penalty, under the category of 'Mining Services' is not sustainable and accordingly, we set aside the same.

(ii) The service tax demand of Rs.8,53,102/- confirmed in the impugned order under category of "Business Auxiliary Services" is not sustainable and accordingly, we set aside the same.

(iii) We uphold the disallowance of CENVAT Credit of Rs.37,13,615/-, availed by the appellant on Tippers, along with interest and equal amount of tax as penalty under Rule 15(2) of the CENVAT Credit Rules, 2004.

(iv) We set aside the demand of recovery of irregular credit of Rs.8,64,278/- confirmed in the impugned order and remand the matter back to the adjudicating authority to examine the issue afresh on the basis of our observations at paragraph 9 (*supra*).

(v) The amount of CENVAT Credit of Rs.6,14,095/- being already reversed by the appellant, is appropriated.

(vi) The appeal filed by the appellant is disposed on the above terms.

(Order pronounced in the open court on **22.03.2024**)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sdd