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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 128 of 2009

(Arising out of Order-in-Original No. 55/Commr./ST/Kol/2008-09, dated 20-02-2009 passed by Commissioner of Service Tax, Kolkata.)

M/s. Saumya Mining Pvt. Ltd.
(Harikripa, CB-25, Sector-I, Salt Lake City, Kolkata-700064)

Appellant

VERSUS

Commissioner of Service Tax, Kolkata
(180, Shantipally, Rajdanga, Main Road, Kolkata-700107)

Respondent

With

Service Tax Appeal No. 208 of 2009

(Arising out of Order-in-Original No. 55/Commr./ST/Kol/2008-09, dated 20-02-2009 passed by Commissioner of Service Tax, Kolkata.)

Commissioner of Service Tax, Kolkata
(180, Shantipally, Rajdanga, Main Road, Kolkata-700107)

Appellant

VERSUS

M/s. Saumya Mining Pvt. Ltd.
(Harikripa, CB-25, Sector-I, Salt Lake City, Kolkata-700064)

Respondent

APPEARANCE :
Shri Aditya Dutta, Advocate for the Appellant/Assessee
Shri K. Chowdhury, Authorized Representative for the Respondent/Revenue

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

FINAL ORDER NO.76241-76242/2024

Date of Hearing : 19/06/2024
Date of Decision:09/07/2024

PER RAJEEV TANDON:

The Appellant M/s. Saumya Mining Pvt. Ltd., have filed the instant appeal assailing the Order-in-Original No. 55/Commr/ST/Kol/2008-09 dated 20/02/2009 whereby the Learned Commissioner has confirmed the demand of Service Tax amounting to Rs.6,13,94,354/- along with Education Cess of Rs. 12,27,887/- under the category Site Formation and Clearance, Excavation & Earth Moving & Demolition Service for the period 16.6.05 to 28.2.2007 against M/s. Saumya Mining Private Ltd. The Learned Commissioner has further demanded interest thereon and imposed penalty in terms of Section 78 and Section 77 on the appellant. Demand of Service Tax of Rs.14,26,631/- and Education Cess of Rs.28,533/- under the head of Business Auxiliary Service (BAS) for the period 01.04.2005 to 28.02.2007 has however been dropped. The Revenue has filed the cross appeal in the matter for non-imposition of penalty on the appellant under section 76 and 77 of the Act and seeking imposition of penalty on the Director of the firm Shri Ajay Jain. The instant appeal were dismissed on account of non-availability of live bank guarantee as was ordered to be kept pending disposal of the matter by this Tribunal at the time of Stay vide Order No. S/159/Kol/2010 dated 19/04/2010. The present appeal is now being heard in pursuance of the order of the Hon'ble High Court of Kolkata dated 31/01/2014 in CEXA/17/2023, IA No. GA/1/2023.

2. The case in brief is that the appellant provides 'open cast mining service' comprising of removal of overburden wherever required and subsequent extraction/mining of coal or uranium for their clients Bharat Coking Coal Limited (BCCL) and Uranium Corporation of India Ltd. (UCIL) and transporting the same from the pit head to storage place/railway siding. The Department issued Show Cause Notice dt. 7.11.2007 to the appellants demanding Service Tax as 'Site Formation and Clearance, Excavation and Earth Moving and Demolition services for the period 2005-2007, while the demand for the said period, under the head BAS was dropped by the Learned adjudicating authority.

3. The appellant submits that during the period 16/06/2005 to 28/02/2007 they were awarded three contracts (two by BCCL and one by UCIL) whereby nature of job execution was in the nature of mining service comprising of *"Excavation of all kinds of soils, rock, etc. and transportation and dumping outside the working zone (When carriage lid-face to dump). Next Winning/Extraction of coal in benches from available coal seams at any*

depth including drilling, blasting etc and thereafter mechanical loading of coal free from extraneous materials into tippers/dumpers and transportation and unloading of such coal into the washery hopper when the carriage-lid face to washery or at surface dump when carriage-lid face of surface". Likewise the nature of work given by UCIL was *"Removal of Overburden and incidental ore and transportation of ore to the ground hopper at Turamdih or any other specified area and overburden to the specified dump yard in compliance of all relevant status"*.

4. However, in order to appreciate the precise nature of work undertaken, it would at best be appropriate to go through the actual contracts. Thus in the case of BCCL- the scope of work was as indicated in Table I, while for UCIL, it was as per Table II below:-

TABLE-I **BCCL**

Item No.	Description of Item	Quantity	Rates	Amount
1.	Excavation in benches (in-situ) by Mechanical Means at any depth in all kinds of soils/Rock including mixed soil, mixed hard soil i.e. Clay soil mixed with pebbles/laterite/stone boulders, 2 soft or hard rock etc including drilling at any depth in starta, adequate cooling (By Sufficiency of water) of Blast holes and hot over Burden starta, before charging (of explosives) operation by Dept. removal of slushy earth, mud & slurry as required, transporting & unloading the excavated materials mechanically and disposed off out side the working zone in proper manner on the dumping yard including spreading, dozing all complete as per instruction of project officer, (Blasting will be done by department on cost recovery of Explosive, Detonators, fuse and all other related materials required for blasting from the on A/C Bills of the	24,10,700 cub.mtr	Rs.57.00/cu. M (rupees fifty seven only per cubic metre)	Rs. 13,74,09,900

	successful tenderer for removal of OB). Lead (9-1 Km) quantity-24,10,700 cub.mtr.			
2.	Winning/Extraction of Coal from available coal seam at any depth including drilling in heated coal seams, adequate colling (by sufficiency) of blast holes and heated coal seam before charging (of explosives), operation (By Dept) (Blasting will be done by department on cost recovery of Explosives, detonator, fuses and all related material required for Blasting operation from the on A/C Bill of the successful tenderer use of sufficient quantity of water art requisite pressure ect Mechanical Loading of coal in to tippers and transportation to Kankanee siding including Loading coal into wagons (Lead face to siding-4.5Km.) qty-531899	531899 MT	Rs. 52.00/- MT (Rupees fifty two only per Metric Ton)	Rs. 2,76,58,748
	TOTAL			Rs.16,50,68,648

TABLE-II **UCIL**

SI No.	Description of item	Quantity	Unit	Rate Rs. Ps.	Amount Rs. Ps.
01	Excavation per bank cubic meter for Overburden/waste. This will be inclusive of drilling, blasting, excavation, including Box-Cutting, loading transportation (Including cost of POL), dumping leveling, construction and maintenance of	1949400	Meter cube	117.00	22,80,79,800.00

	haul roads, dust suppression, mine water dewatering Illumination etc.				
	Rate in words:	(Rupees One Hundred Seventeen only)			
02.	Excavation per bank cubic meter for Ore. This will be inclusive of drilling, blasting, excavation including Box-Cutting, loading, transportation (including cost of POL), dumping leveling, construction and maintenance of haul roads, dust suppression, mine water dewatering, Illumination etc.	515700	Metre cube	117.00	6,03,36,900.00
	Rate in words:	(Rupees One Hundred Seventeen Only)			
	Total Amount:				28,84,16,700.00
	Total Amount in words:	(Rupees Twenty Eight Crores Eight Fourt Lakhs Sixteen Thousand Seven Hundred Only)			

This table above forms part of annexure of the main works order for the party, which reads as under:

Ref: UCIL/GM/BND/124/05 *Date- June 01, 2005*

<u>Work Order No.-691</u>

M/s. Saumya Mining Private Ltd. *Job Code-JB592*

Civil & Mining Contractors, *Party Code-NW0166*

CB-25, Sector-I, Salt Lake City,

Kolkata-700064

Sub: Removal of Overburden and incidental ore at Banduhurang Opencast Mines (NIT No. BND-124)

Name of the Work; Removal of Overburden and incidental ore and transportation of ore to the ground hopper at Turmadih or any other specified area and overburden to the specified dump yard in compliance of all relevant status.

Ref:

1) *Notice inviting application for pre-Qualidfication tender No. UCIL/DGM/BND/124, dated 28/04/2004.*
2) *Xxxxx*
3) *xxxxx*

5. The Appellant submits that the nature of the services rendered by them during the material period by way of removal of overburden, excavation of coal or removal of incidental ore (both in case of UCIL/BCCL) was an activity pertaining to discharge of mining service. They contend that the activities were mainly an incidental and ancillary element but compulsorily required for the execution of the said service. As the removal of overburden is an essential pre-requisite for undertaking any mining activity and therefore, the appellants were of the considered view that the service rendered by them in respect of the aforesaid work orders was in the nature of mining service and was not leviable to Service Tax prior to 1 June 2007. They submit that this was thus the reason for non-seeking of service tax registration as also for non-payment of any service tax. On the other hand, the department for the said period has issued a Show Cause Notice referred supra demanding Service Tax by way of Site Formation and Clearance, Excavation and Earth Moving and Demolition Service, besides an additional

amount which has been dropped by the Learned Commissioner towards Business Auxiliary Services.

6. The Learned Authorized Representative for the Appellant takes us through the Works Order entered with BCCL and UCIL, as noted in Para 4 above, whereby the appellant were called upon for the excavation of coal and uranium ore respectively from the open cast mines besides undertaking ancilliary activities and payment whereof were prescribed therein. The discharge of the said activities, removal of slushy earth and over burden, excavation, blasting, loading, unloading and transportation of the overburden to the designated area are an integral part of the contractual agreement as well as any mining activity. The removal of over burden in a mining operation is a continuous process and is an imperative for the extraction/excavation of the mineral resources or the ore. The deposits (coal/uranium) are found under layers of earth which have to be removed before they can be excavated. It is so also clear, from the scope of the work awarded in favour of the appellant by the two public sector organizations that the nature of activity and work carrying out pertaining to extraction of coal in case of BCCL and that of uranium ore in case of UCIL as are indicated in the contracts entered with the two parties. The same is irrefutably covered under the category of mining services. We are therefore of the view that the activity undertaken cannot be levied to Service Tax prior to introduction of mining services with effect from June 2007.

7. We also note that the learned adjudicating authority has himself categorized the said part of the service as a part of the mining service, pursuant to the introduction of taxability of mining services. The reference to the said activity as site formation service and clearance excavation and earth moving and demolition services (prior to the introduction of mining services) has been done away with, thereby bringing the service rendered under the Service Tax net. This is despite the nature of activity undertaken and the contractual agreements continuing to be a constant, both prior and post the mining services being rendered taxable w.e.f. June 2007.

8. The nature of activity remaining unaltered and constant both prior and pursuant to introduction of levy of Service Tax on mining services, it comprehends logic, as to how the nature of activity can be categorized under two different heads. It can thus be nobody's case that without carrying out the activities aforesaid any mining activity can be undertaken. Since mining services were introduced vide clause zzy under Section 105 of Section 65 of the Finance Act with effect from 01/06/2007, it is a pradox for the department to change its stance for classification of the service without any change in actual operations undertaken.

9. We are of the considered view that the nature of activity carried out by the appellant was therefore non-taxable prior to the introduction of service tax on mining services. Therefore the appellant was not required to obtain Service Tax registration and discharge any Service Tax liability thereon. We further would derive support in our aforesaid submissions from the law as laid down by the Tribunal in the case of **Hazaribagh Mining & Engineering Pvt. Ltd. Vs. CCE & C&S-BBSR-I [2017 (49) STR-289 (T)**. The co-ordinate bench of the Tribunal while deciding an identical Question of law in a case where department wanted to levy tax by way of Site Preparation, observed:-

> ***5.*** *It is observed from the above clauses of the contract that appellant has to do site preparation, making holes for blasting, excavation of rejects; comprising of laterite, laterised Hard ore, Shale, Flaky Friable and incidental Hard Ore; and transportation of the same to the designated dump yard. Under the heading 'Scope of the work' while handling of Mixed ore/Hard ore, encountered during the course of excavation, appellant is required to make free the ore from contamination, like laterite/soil/waste and other inferior materials. The quality of ore so produced by the appellant is required to be certified by company's representative before the same is transported to the stockyard for crushing. From these clauses of the contract appellant is required to handle both the waste material (overburden) and the ore excavated during blasting. Clause 2(f) of this contract also talks of transporting Hard Sponge Ore boulders to the crusher. Clause 4 of this contract also convey that 75% of the materials to be removed will constitute soft rock consisting of Flaky/Friable ore, Soft Ore, etc. It is also observed from the Scientific literature relied upon by the appellant that laterised Hard ore, Flaky/Friable mixed ore and soft ore excavated and transported by the appellant are treated as categories of ore and not simply as overburden removal. Clause 8 of Annexure-3 regarding Additional*

Terms & Conditions to the contract convey that all material/ore arising, occurring, excavated, lying in stock etc. shall always be the property of the company (Tata Steel). In view of the above facts on record it cannot be said that appellant is mainly undertaking site preparation and no activity relating to Ore Mining is done. In the absence of break up of charges recovered for each activity it can also not be said that site preparation is the essential character of the composite service rendered by the appellant. C.B.E. & C. Circular F. No. 232/2/2006-CX-4, dated 12-11-2007 does not prescribe that composite services should also be taxed individually even if no separate consideration for each activity is available/contracted. Rather Para 6 of this Circular convey that these are general guidelines for settlement of pending disputes and should be applied to individual cases keeping in view the facts and circumstances of each case. Para 4 of this Circular is categorical that no Service Tax on mining activities/operations is leviable before 1-6-2007. Further C.B.E. & C. vide Circular No. 123/5/2010-TRU, dated 24-5-2010; while deciding the aspect of 'site formation and clearance, excavation earthmoving and demolition services' and laying of cable under the roads and similar activities; clarified as follows :-

> *"(iv) 'Site formation and clearances, excavation, earthmoving and demolition services' are attracted only if the service providers provide these services independently and not as part of a complete work such as laying of cables under the road."*

10. It need to be understood that for open cast mining operations to be carried out removal of overlaying soil and rocks is essential. Therefore, as such no mining activity can be executed either without removal of overburden (open cast minerals) or making a shaft (for underground mines). In any mining operations to be carried out for Open Cast Mines, removal of overburden and cutting of minerals continue successively in sequence and removal of overburden will necessarily have to proceed excavation and extraction of minerals. Since the two activities have to co-exist, in the case of mining service when there is a composite contract, introduction of the concept of site preparation does not therefore arise.

11. It can be nobody's case that Open Cast Mining working could not be a mining activity. It would thus be appropriate to invite attention to the

definition of the mines under the Mines Act, 952. Thus section 2(j) of the Mines Act defines "Mine" as under:-

> *"Mine means any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on an includes-*
>
> *(i) …………………*
>
> *(ii) ……………….*
>
> *(iii) ………………………*
>
> *(iv) All open cast working*
>
> *(v) ……………………………….*
>
> *C;aise (kk) of Section 2 of the Mines Act, 1952 has defined "open cast working" in the following words:-*
>
> *"open cast working means a quarry, that is to say, an excavation where any operation for the purpose of searchings for or obtaining minerals has been or is being carried on……………………*

(12.) From the above statutory provisions it is manifestly clear that an open cast mine cannot be conceived without removal of the overlaying soil and rocks so that one can reach to the layers of minerals below for recovery thereof. In both the cases of BCCL as well as UCIL, the appellant were entrusted with the job of mining, although the Work Orders had fixed different rates for the removal of overburden and other allied activities and extraction/winning of minerals. That simply is a mechanism for fixing of rates for different activities, but by no means the activity of removal of overburden can be taken out of context so as to charge service tax under a different head of 'site formation and clearance, excavation and earthmoving and demolition' as defined under clause 97(a) of Section 65 of the Finance Act, 1994 and to declare the remaining portion of the activities undertaken as mining activity on which there was no service tax prior to 01.06.2007.

Even if, no coal or uranium is found while removing the overburden, there is no escape from holding that still this is nothing but mining. For mining minerals particularly through the process of open cast mines, it is essential that the overlaying soil and rocks, i.e. overburden are to be removed and then only can the activity of extraction/winning of mineral/ore continue.

(13.) As can be noted from the foregoing paras, the contracts were awarded to the appellant not only for site preparation alone but also included a host of other activities from site formation, excavation of overburden, extraction of ore, transportation of overburden to a specific location, drilling, blasting, construction & maintenance of haul roads, dust suppression etc. The present contract are therefore a composite contract and not a site formation contract simpiliciter, leviable to charge as a separate service (mining service), which was rendered chargeable to service tax w.e.f. 1.06.2007. Thus prior to 1.6.07, the operations undertaken on part of the appellant, under a composite contract cannot be treated/charged under site formation service. The Tribunal in the case of **Hazaribagh Mining & Engineering P. Ltd. v. CCE & ST, BBSR-I [2017 (49) STR 289 (T-Kol)]** had held that to invite levy to tax as site formation service, it was required to be a service contract simpliciter to the said effect. We are of the view that the composite contract, referred to in earlier paras is an indivisible one and in this context it would be appropriate to invite reference to the Hon'ble apex court's decision in the case of **Commissioner of C.Ex. & Cus., Kerala V. Larsen & Toubro Ltd.- 2015 (39) STR 913 SC**, wherein while deliberating on the issue of indivisibility of works contract, it distinguished contracts simpliciter and composite works contract in para 24 of its order and had the following to observe:-

> *"24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been*

pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract."

14. To the effect of our findings above, are also the views expressed by the Tribunal in a slew of cases. Thus the case of **M. Ramakrishna Reddy V. Commissioner of CCE & Cus, Tirupathi (2009)13 STR 661 (Tri.),** where it has been held as under:-

"10.1 From the above, it is very clear that the salient feature of the services rendered by the appellant is mining. In other words, the appellant is expected not only to remove the overburden but also to excavate the Barytes Ore. <u>We cannot say that the appellant is not undertaking site formation work, but site formation work undertaken by the appellant is incidental to the mining activity. To put it in different words, the essential character of the work undertaken by the appellant is mining or winning of minerals.</u> The mining services became taxable only with effect from 1-6-2007. The period in the present case is prior to 1-6-2007. It cannot be said that the entire service rendered by the appellant comes under the category of site formation. If that were so, one cannot say that it also falls under "Mining Services." In any case, Section 65A(2) of Chapter V of the Finance Act, 1994 reads as follows :

"When for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of clause (105) of Section 65, classification shall be effected as follows :

> *(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;*
>
> *(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, insofar as this criterion is applicable;*
>
> *(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration".*

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."*

[Emphasis supplied]

14.1 To the said ratio are also the decisions of the Tribunal in the case of:

(i**) Associated Soapstone Distributing Co. Pvt. Ltd. V. Commissioner-2014 (34) S.T.R. 865 (Tribunal).**

(ii) **CCE, Hyderabad V. Vijay Leasing company 2011 (22) S.T.R. 553 (Tribunal)** also held similar views in the matter.

wherein the activities undertaken of both excavation and removal of overburden/waste and mining ore were clearly identified as one composite act and cannot be split into two separate parts for purpose of levy of service tax. The primary activity is thus necessarily to be considered as "winning of minerals" which undoubtedly is a mining activity.

15. Reliance by the learned AR to the case laws of M/s **Rashleela Enterprises Pvt. Ltd. Vs. Commr. of Central Excise Commissionerate, Alwar-(2023 (7) TMI 201-CESTAT New Delhi**) & that of **M/s Jain Carrying Corporation V. CCE, Jaipur-2014 (12) TMI-506, CESTAT, New Delhi** is of no avail to the department, because of the difference in the factual matrix of those cases. We would also add that the facts of the case cited by the ld. AR for Revenue, in the case of **Hanumant Construction Pvt. Ltd. V. CCE & ST, Raipur, (Final Order No. 52288/2018, in Appeal No. ST/56566/2013-DB of the New Delhi Bench)** are not in sync with the present matter as the terms of contract therein were limited to activity of removal of overburden only, as itself held by the Tribunal in para 8 thereof, and as such activities undertaken, did not relate to mining. Similarly, in the case of **M/s Faridabad Gurgaon Minerals V. Commr. of Central Excise, Customs & Service Tax, Bhubaneshwar-II-2023 (9) TMI-568 CESTAT-Kolkata,** it was a categoric finding of the Tribunal that the appellant had not undertaken any activity relating to coal cutting or

mineral extraction. Hence, the ratio of these decisions, does not come to the aid of the department.

16. In view of the aforesaid as no tax was leviable on mining activity during the material period, we are of the view that the appellants cannot be subjected to any tax liability in the matter. The order of the lower authority is thus set aside and appeal filed by M/s. Saumya Mining Pvt. Ltd. is allowed with consequential relief, if any, as per law. The Revenue's appeal seeking imposition of penalty in the matter is dismissed.

(Pronounced in the open court on 09/07/2024)

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

Sd/-
(Rajeev Tandon)
Member (Technical)

Pooja