

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

REGIONAL BENCH - COURT NO.2

Service Tax Miscellaneous Application No.75081 of 2019 (AE)
(On behalf of Appellant)

And

Service Tax Appeal No.252 of 2009

(Arising out of Order-in-Appeal No.26-28/ST/BBSR-II/2009 dated 10.07.2009 passed by Commissioner(Appeals) of Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s. East India Minerals Limited

(At-Plot No.1038, Ward No.-IV, Near Barbil Municipal High School,
P.O.-Barbil, Dist.-Keonjhar (Orissa).)

...Appellant

VERSUS

**Commissioner of Central Excise, Customs & Service Tax,
Bhubaneswar-II**

.....Respondent

(C.R.Building, Rajaswa Vihar, Bhubaneswar-751007.)

WITH

Service Tax Miscellaneous Application No.75551 of 2019 (AE)
(On behalf of Appellant)

And

Service Tax Appeal No.253 of 2009

(Arising out of Order-in-Appeal No.26-28/ST/BBSR-II/2009 dated 10.07.2009 passed by Commissioner(Appeals) of Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s. East India Minerals Limited

(At-Plot No.1038, Ward No.-IV, Near Barbil Municipal High School,
P.O.-Barbil, Dist.-Keonjhar (Orissa).)

...Appellant

VERSUS

**Commissioner of Central Excise, Customs & Service Tax,
Bhubaneswar-II**

.....Respondent

(C.R.Building, Rajaswa Vihar, Bhubaneswar-751007.)

AND

Service Tax Miscellaneous Application No.75550 of 2019 (AE)
(On behalf of Appellant)

And

Service Tax Appeal No.254 of 2009

(Arising out of Order-in-Appeal No.26-28/ST/BBSR-II/2009 dated 10.07.2009 passed by Commissioner(Appeals) of Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s. East India Minerals Limited

(At-Plot No.1038, Ward No.-IV, Near Barbil Municipal High School,
P.O.-Barbil, Dist.-Keonjhar (Orissa).)

...Appellant

VERSUS

**Commissioner of Central Excise, Customs & Service Tax,
Bhubaneswar-II**

.....Respondent

(C.R.Building, Rajaswa Vihar, Bhubaneswar-751007.)

APPEARANCE

Shri S.C.Mohanty, Advocate for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P. K.CHOUDHARY, MEMBER(JUDICIAL)

HON'BLE SHRI C.J.MATHEW, MEMBER(TECHNICAL)

MISCELLANEOUS ORDER NO. 75224-75226/2020

FINAL ORDER NO. 75359-75361/2020

DATE OF HEARING : 23 September 2019

DATE OF DECISION : 17 March 2020

P.K.CHOUDHARY :

The present appeal has been filed by the appellant against the common Order-in-Appeal No.26-28/ST/BBSR-II/2009 dt.10.07.2009, passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Bhubaneswar. The said Order-in-Appeal disposed of three Orders-in-Original No.11/RKL-II/2008 dt.21.05.2008, No.23/RKL-II/2008 dt.06.11.2008 and No.25/RKL-II/2008 dt.18.11.2008 passed by the Asst. Commissioner, Central Excise, Customs & Service Tax, Rourkela-II Division, Rourkela rejecting the following three refund applications filed by the appellant.

S.N	Period	Amount	Filed on
1.	29.07.2005 to 05.10.2006	39,43,875	03/06.11.2006

2.	Sept,2006 to May,2007	18,20,711	26.04.2008
3.	June,2007 to Feb,2008	22,78,606	05.05.2008
		80,43,192	

2. The above refund applications were filed by the appellant under Sec.11B of the Central Excise Act,1944 as applicable to service tax vide Sec.83 of the Finance Act,1994. The appellant claimed refund of service tax, paid on transportation of iron ore, from the mining site to the appellant's crusher plant, located 6 km away from mining area. Transportation of ore is undertaken by third party contractors, on whom the appellant has placed orders, for raising and screening of iron ore and transportation of screened iron ore to the appellant's crusher plant. Transportation of ore is one of the items in the scope of work.

3. The raising contractors raised separate bills on the appellant on monthly basis, claiming transportation charges on the basis of number of trips and tonnage of ore transported. The appellant paid service tax on the transportation charges on reverse charge mechanism, and deposited the same with the Jurisdictional Central Excise authorities, Barbil, under the category of Goods Transport Agency (GTA) service, as defined under Sec.65(50b) read with Sec.65(105)(zzp) of the Finance Act,1994.

4. Subsequent to deposit of service tax, the appellant entertained a bonafide belief that the service tax on the impugned transportation services, is not payable in terms of the Exemption Notification No.34/2004-ST dt.03.12.2004 and consequently filed three refund applications, mentioned above, under Sec.11B of the Central Excise Act,1944 relating to the period July,2005 to February,2008. The refund claims were rejected by the Jurisdictional Asst. Commissioner, Central Excise, Rourkela-II Division, vide three separate Orders-in-Original

mentioned above, holding that the Exemption Notification No.34/2004-ST dt.03.12.2004, claimed by the appellant, is not applicable in the present case.

5. Appeals filed by the appellant against the three adjudication orders referred to above, passed by the Asst. Commissioner, were disposed of by the Commissioner (Appeals) vide common Order-in-Appeal bearing No.26-28/ST/BBSR-II/2009 dt.10.07.2009, upholding the orders passed by the Asst. Commissioner, Central Excise Rourkela-II Division. The said Order-in-Appeal dt.10.07.2009 is the subject matter of challenge before the Tribunal.

6. During pendency of the appeals before the Tribunal, the appellant filed three misc. applications, bearing MA Nos.75081, 75550 & 75551/2019 seeking to incorporate additional grounds, in terms of Rule 10 of CESTAT (Procedure) Rules,1982. The additional grounds sought to be urged by the appellant, are as under.

a) For that the activity of transportation of iron ore lumps from the mines site to the appellant's crusher plant does not constitute GTA service in terms of Sec.65(105)(zzp) read with Sec.65(50b) of the Finance Act,1994.

b) For that the appellant is legitimately entitled for refund of the amount paid as service tax in terms of Section 11B of the Central Excise Act,1944, read with Section 83 of the Finance Act,1994.

7. For seeking incorporation of the additional grounds, the appellant vide its misc. applications has contended as under:

(i) The appellant is engaged in the activities of mining iron ore, in the mines leased by the Govt. of Odisha. For raising,

screening and transportation of iron ore from the mining area to the appellant's crusher plant, the appellant engaged raising contractors. Transportation of iron ore from the mining area to the appellant's crusher plant located 5-6 km away, is one of the items in the scope of the contract, entered into between the appellant and the raising contractors, copies of which are placed at pages 11 – 23 of the appeal paper book. The iron ore raised from the mines are weighed at the mining site, by the representatives from the Department of Mines, Govt. of Odisha. After the weight of the material is accepted, the said Government authorities issued documents known as Transit Pass in 'Form-G', containing all relevant particulars. Basing on the Form-G, royalty amount payable to the Government is determined. After completion of procedural formalities and payment of royalty, the iron ore is transported from the mining site to the appellant's crusher plant, accompanied by 'Form-G'. It is pertinent to note that no document, other than the transit pass in 'Form-G' accompanied with the consignment, during the transportation from the mines site to the crusher plant. At the end of the month, the third party raising contractors raised their bills on the appellant, on the basis of number of trips/quantity of goods transported during the period. Sample copies of invoices/bills raised by third party contractors are placed in the paper book at pages 17-23. Copy of the transit pass in Form-G is enclosed to the misc. application.

(ii) It is submitted that the raising contractors do not at all issue any document or consignment note, for the goods transported from the mining site to the appellant's crusher plant.

(iii) It is further submitted that the activities of transportation of iron ore by the third party contractor do not fall under the definition of GTA service, in terms of Sec.65(105)(zzp) of the Finance Act,1994, read with Sec.65(50b) of the said Act. As per

Sec.65(105)(zzp) of the Finance Act, any service provided to any person, by a goods transport agency, in relation to transport of goods by road in a goods carriage is a taxable service. Sec.65(50b) of the Finance Act defines, 'Goods Transport Agency' to mean, any person who provides service in relation to transportation of goods by road and issues consignment note by whatever name called.

(iv) In the present case, as stated above, the raising contractors, carrying the iron ore in their trucks from mining site to the appellant's crusher plant, did not issue any consignment note, or any other documents in the name of the appellant. The only document which accompanied the goods during transit, is the Transit Pass in 'Form-G' issued by the Mining Department, Govt. of Odisha.

(v) It is also submitted that as per the trade practices, consignment note is a document of title, when a person deposits the goods with the transporter for the purpose of transportation to the destination, for which the transporter issues a Lorry Receipt (LR), which is called a consignment note. The said LR/Consignment note, in original, is sent by the consignor to the consignee, either directly or through the authorized bank. The consignee, on the strength of the consignment note, collects the goods from the transporter. In view of the position stated above, it is respectfully submitted that the activities of transportation of iron ore from the appellant's mining site to its crusher plant is not a GTA service, in terms of Sec.65(105)(zzp), read with Sec.65(50b) of the Finance Act, 1994. In support of its above contention, the appellant placed reliance on three decisions of the Hon'ble CESTAT, Delhi Bench in the case of South Eastern Coalfields Ltd. Vs. CCE, Raipur reported in 2017 (47) STR – 93, 2018 (10) GSTL – 22 & 2018 (10) GSTL – 51.

8. The appeals, along with the misc. applications containing the additional grounds were taken up for hearing on 23.09.2019. Shri S. C. Mohanty, learned Advocate appeared on behalf of the appellant and reiterated the contentions vide the misc. applications and submitted that the activities of transportation of iron ore being one of the conditions in the contract with the raising contractors, who do not issue any document/consignment note, cannot be treated as GTA service, as defined under Sec.65(105)(zzp) read with Sec.65(50b) of the Finance Act,1994. In addition to the submissions and case was cited in the misc. application, the learned Advocate also filed a brief written submission, relying upon the following decisions of the Tribunal:

1. Lakshminarayan Mining Co. Vs. Commissioner, Central Tax, Bengaluru = 2019 (27) GSTL – 745 (Tri-Bang)
2. Bhima SSK Ltd. Vs. CCE, Pune = 2019 (22) GSTL – 200 (Tri-Mum)
3. Commissioner of Customs, Central Excise & S. Tax, Raigad Vs. JWC Logistics Pvt. Ltd. = 2019 (22) GSTL – 237 (Tri-Mum).
4. Shreenath Mhaskoba Sakhar Karkhana Ltd. Vs. CCE, Pune = 2017 (3) GSTL – 169 (Tri-Mum).
5. Commr. Of C. Ex & S. Tax, Aurangabad Vs. Jaikumar Fulchand Ajmera = 2017 (48) STR-52 (Tri-Mum).

9. The learned Advocate submits that in all the above cases, it was held that transportation of goods, without issue of any consignment note, in terms of Rule 4B of Service Tax Rules,1994, will not come under definition of GTA service, in terms of Sec.65(105)(zzp) read with Sec.65(50b) of the Finance Act,1994.

10. In view of the above position of law, the learned Advocate prayed for allowing the misc. application and decide the main appeals in the light of the law laid down by the Tribunal.

11. Shri S.S.Chattopadhyay, learned Authorized Representative appeared on behalf of the Revenue and reiterated the findings of the learned Commissioner (Appeals) contained in the impugned Order-in-Appeal dt.10.07.2009. The learned AR pointed out that an amount of Rs.15,40,021/- claimed by the appellant vide its letter dt.27.12.2005 has been rejected by the Asst. Commissioner, against which no appeal was filed by the appellant. The learned advocate for the appellant fairly conceded that he is not pressing for the above refund, and is confining himself to the three refund applications, mentioned above, totaling Rs.80,43,192/-

12. Heard both sides and perused the appeal records.

13. We have carefully gone through the submissions made by the learned advocate for the appellant for allowing the Misc. Applications, seeking incorporation of additional ground. The misc. applications have been filed by the appellant in terms of Rule 10 of CESTAT Procedure Rules,1982 which, for the sake of convenience, is reproduced below:

Rule 10: Grounds which may be taken in appeal – The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any grounds not set forth in the memorandum of appeal or those taken by leave of the Tribunal under these rules:

Provided that the Tribunal shall not rest its decision on any other grounds unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.

In this connection, we take note of the decision of the Hon'ble Supreme Court (Three Member Bench), in the case of National

Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, reported in 1998 (99) ELT – 200 (SC), which is to the effect that the Tribunal has jurisdiction to examine the question of law which arises on facts, as found by the authorities below, and having bearing on tax liability of assessee, even though said question was neither raised before the lower authorities nor in appeal memorandum before the Tribunal, but sought to be added later as an additional ground by a separate letter.

14. In view of the specific provision under Rule 10 of the CESTAT Procedure Rules and the law laid down by the Hon'ble Supreme Court in the aforesaid case, we are inclined to entertain the misc. applications, seeking incorporation of additional grounds. The misc. applications are allowed, which have substantial bearing on the main appeals.

15. We have carefully gone through the relevant documents, such as, the contract between the appellant and the raising contractors, the monthly bills raised by them on the appellant, the transit pass in 'Form-G', issued by the mining authority for the purpose of payment of mining royalty, and transportation of iron ore from the mines site. The raising contractors have not issued any other document in the name of the appellant, for the purpose of transportation of iron ore, which can be termed as a consignment note, as stipulated under Rule 4B of the Service Tax Rules, 1994, as amended. As per the legal principles decided by different benches of Tribunal and relied upon by the appellant, the activities of transportation of iron ore in the present case, do not fall under the GTA service in terms of Sec.65(105)(zzp) of the Finance Act, 1994, nor the raising contractors fall under the definition of 'GTA' as defined under Sec.65(50b) of the said Finance Act.

16. In view of the above discussions, the impugned orders are set aside. The appeals filed by the appellant are allowed with consequential relief, as per law.

(Order pronounced in the open court on 17 March 2020.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(C.J.MATHEW)
MEMBER (TECHNICAL)

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