OD-15

CEXA/11/2024
IA NO: GA/2/2024

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [CENTRAL EXCISE]
ORIGINAL SIDE

COMMISSIONER OF SERVICE TAX, KOLKATA

-Versus-

G.S. ATWAL AND CO. ENGINEERING PVT. LTD.

BEFORE :

THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATE : 9th JULY, 2024.

Appearance :
Mr. K.K. Maity, Adv.
Mr. Tapan Bhanja, Adv.
…for the appellant.

Mr. Satyaprem Majumder, Adv.
…for the respondent.

The Court :- This appeal by the revenue is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata Eastern Zonal Bench dated 6th June, 2023 in Service Tax Appeal No. 165 of

2008. The revenue has raised the following substantial questions of law for consideration:-

i) Whether the Learned Tribunal has committed gross error of law by considering the services rendered by the respondent is "Mining Service" for the period 16.08.2002 to 31.10.2006 though the "mining service" came into effect on 01.06.2007 ?

ii) Whether the services provided by the respondent prior to 01.06.2007 can be considered as Mining service or the said services would be considered as "(a) Business Auxiliary service; (b)"Cargo Handling Service;(c)"Site formation and clearance, excavation and earth moving and demolition services" ?

iii) Whether the contents of the Circular dated 12.11.2007 has been fully appreciated by the Learned Tribunal or not?

We have heard Mr. K. K. Maity, learned Counsel appearing for the appellant and Mr. Satyaprem Majumder, learned Counsel for the respondent.

The issue which arises for consideration in this appeal which has been suggested by the revenue in the aforementioned three substantial questions of law is, whether the respondent/assessee was liable to pay service tax in respect of the services rendered by him which are essentially mining activities for the services/activities prior to 1st June, 2007. The other issue

would be as to whether the Department could have invoked the extended period of limitation for issuing the show-cause notice and demanding service tax. The assessee had set out the factual background, namely, the nature of activities done by them, namely, the mining activity. It is the consistent case of the assessee that service tax in respect of mining activities was levied for the first time with effect from 1st June, 2007 and therefore they did not apply for registration in respect of mining services before 1st June, 2007. The assessee, therefore, contended that they were under the bonafide belief that the registration need not be taken in respect of the mining services as the services were not taxable prior to 1st June, 2007 and therefore, extended period of limitation cannot be invoked. That apart, the assessee had specifically contended that the Department was not justified in artificially bifurcating the nature of services under various categories, such as, cargo handling service, site formation and clearance service and business auxiliary services and demanding service tax. The assessee by placing reliance on the work orders had established before the Tribunal that the services rendered by them was composite service and the Department was not justified in creating an artificial bifurcation. Furthermore, the assessee's specific case was that they entered into contracts with different owners of the mines which are composite and inseparable; all the mining contracts specified composite rates for the mining process comprising excavation and haulage of excavated minerals, dumping of

hauled materials at specified locations and all inclusive rates were split up to identify cost for any specific activity along the mineral extraction chain. Further, the assessee contended that they are a mining contractor and is engaged in the mining operation as defined under the Mines and Minerals (Development and Regulation) Act, 1957 for extraction of minerals within the mining area. Thus, the assessee contended that in the light of the composite nature of work, and inasmuch as the assessee was engaged in mining activities, no service tax was payable prior to 1st June, 2007, when, for the first time, mining service was included by Notification no.23/2007-SD dated 22.05.2007 (effective from 01.06.2007). This factual matters were considered by the learned Tribunal and faulted the Department for creating an artificial bifurcation of the mining activity done by the respondent/assessee while noting that no such separate charges are payable to such service as per the work orders. This factual finding cannot be rebutted by the Department in this appeal. That apart, the learned Tribunal had also taken note of the circular issued by Central Board dated 12.11.2007 being Circular FL No. 232/2/2006-Cx.4, wherein it was clarified that no service is leviable on mining activity prior to 1st June, 2007. The relevant paragraph of the Circular is quoted hereinbelow:-

"*Coal cutting or mineral extraction and lifting them up to the pithead:-*

These activities are essential integral processes and are part of mining operations. As stated earlier, mining activity has been made taxable by legislation under the Finance Act, 2007(w.e.f.1.06.2007). Prior to this date, such activities, being part of mining operations itself are not subjected to service tax. Therefore, no service tax is leviable on such activities prior to the said date."

Thus, on facts that Tribunal has rightly appreciated the case of the assessee and granted relief with regard to invoking the extended period of limitation. We have seen the allegation in the show-cause notice and we find that except for the use of the words "omission and failure", "suppression of material facts", "with an intent to evade payment of service tax", the adjudicating authority has not brought out any facts to substantiate as to how there was an act of omission and failure on the part of the assessee to disclose the correct facts and that it was with an intent to evade payment of service tax. In the absence of these essential elements, it is a settled legal position that the extended period of limitation cannot be invoked. Further, the assessee on facts had further stated that on and from 1st June, 2007 they have been paying service tax and earlier there was a doubt as regards the leviability of the service tax prior to 1st June, 2007, that too, by artificially bifurcating the composite services rendered by the assessee and therefore, the extended period of limitation cannot be invoked. That apart, the assessee had pointed out that they entered into contracts with reputed companies like TISCO Ltd. and ICML

etc. and in the contracts which they have entered into with these listed companies there was no provision for service tax as there was no service tax on mining service during the material period. Furthermore, all the details were reflected in their books of account and balance-sheet and also where all the facts and figures have been explicitly brought on record and, therefore, the question of suppression of facts would not arise. Thus, the specific submission of the assessee could not be shown to be wrong by the department before the Tribunal. Thus, the Tribunal has rightly held that the extended period of limitation cannot be invoked. While on this issue, it will be beneficial to refer to the decision of the Hon'ble Supreme Court in *Commissioner of Central Excise & Customs (Kerala) vs. Larsen & Toubro Limited* reported in 2015 (39) STR 913 (SC). In the said decision, the Hon'ble Supreme Court referred to the decision in the case of *Sabina Abraham. & Ors. Vs. Collector of Central Excise & Customs* reported in 2015 (322) ELT 372 (SC). In this decision reliance was placed in the decision in the case of *Partington vs A.G.,* (1869) LR 4 HL 100 at 122 wherein Lord Cairns stated: "If the person sought to be taxed comes within the letter of law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable,

construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute."

As could be seen from the above decision, if the State seeking to recover tax, cannot bring the subject within the letter of law, then it goes without saying that the subject is free. The Hon'ble Supreme Court held that since the Finance Act lays no charge or machinery to levy and assess service tax on indivisible composite contracts, the argument of the revenue must fail. Further, it was pointed that this is also for a simple reason that there is no subterfuge in entering into composite works contract containing element both of transfer of property and goods as well as labour and service.

In *Union of India vs. Indian National Shipowners Association* reported in (2011) 11 STR 3 (SC), the appeal was filed by the Union of India against a judgment of the High Court of Bombay quashing the notice issued by the appellant therein to the members of the Indian National Shipowners Association (respondents therein) by holding that the entry contained in Section 65(105)(zzzy) of the Finance Act, 1994 does not include service provided by the members of the association. The Union of India, appellant therein contended that such service which were provided by the members of the association, have by then, subjected to the payment of service tax by virtue of the amendment brought in Section 65(105) by way of amendment in Finance Act, 1994 with effect from 16.05.2008 by inserting a fresh entry namely Section

65(105)(zzzzj). Further, it was contended by the Union of India that the period relevant in the said case was from 01.06.2007 to 15.05.2008 and that the amendment was brought in subsequently but yet, by taking recourse to Section 65(105) entry No.zzzy, the members of the association are still liable to pay service tax. The contention was resisted by the respondent association therein contending that the service rendered by their members cannot be said to be any service in relation to mining of minerals, oil or gas and have placed before the Hon'ble Supreme Court the nature and scope of work which were required to be done by the members. The High Court of Bombay held that the nature of work done by the members cannot be said to be work in relation to mining of mineral, oil or gas. The Hon'ble Supreme Court, after considering the relevant provision and the nature of work that was carried out by the members of the respondent association therein, in terms of the contract entered into by them with ONGC held that none of them could be strictly stated by the service rendered in relation to mining of minerals, oil or gas and that the nature of work which has been placed before the Court cannot be said to be even remotely connected and included within the ambit of the provision as found in Section 65(105), entry no.zzzy and, accordingly, the order passed by the High Court of Bombay was affirmed. This decision also lends support to the case of the respondent/assessee.

Thus, for the above reasons, we are satisfied that the appellant was rightly granted relief by the learned Tribunal and the order does not call for any interference.

Accordingly, the appeal filed by the revenue (CEXA/11/2024) is dismissed. Consequently, the substantial questions of law are answered against the revenue.

The application for stay (IA No.GA/2/2024) also stands dismissed.

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(T.S. SIVAGNANAM, CJ.)

(HIRANMAY BHATTACHARYYA, J.)

SN/mg./As.