(2025) 05 CAL CK 0829

In the Calcutta High Court, Original Side

Case No : CEXA No. 9 Of 2025 IA NO: GA No. 2 Of 2025

Commissioner Of Service Tax Kolkata — APPELLANT

Vs

M/s Emta Coal Limited — RESPONDENT

Date of Decision : 14-05-2025

Acts Referred:
Central Excise Act, 1944 — Section 35G
Finance Act, 1994 — Section 65(105)(zzzza), 67

Citation : (2025) 05 CAL CK 0829

Hon'ble Judges : T.S. Sivagnanam, CJ;Chaitali Chatterjee (Das), J

Bench : Division Bench

Advocate : Manasi Mukherjee, Bijitesh Mukherjee, Dr. Samir Chowdhury, Abhijit Biswas, Bhaskar Sengupta

Final Decision : Disposed Of

Judgement

T.S. Sivagnanam, CJ

1. This appeal filed by the revenue under Section 35G of the Central Excise Act, 1944 (the Act) challenging the order passed by the Customs and Central Excise And Service Tax Appellate Tribunal, Kolkata Eastern Zonal Bench, Kolkata (the Tribunal) in Service Tax Appeal no.273/2012 dated 30.11.2023.

2. The revenue has raised the following questions of law for consideration.

"a. Whether the Learned Tribunal, while dropping of the demand of Service Tax Rs. 11,64,74,435/ on Site Formation and Clearance, Excavation and Earth Moving and Demolition Services for the period from 16.06.2005 to 31.05.2007, erred in not considering that, Circular No. F.No.B1/6/2005-TRU dated 27.07.2005 explains the scope of new services and proposed expansion in the scope of existing services w.e.f. 16.06.2005, in terms of Notification No. 15/2005-ST dated 07.06.2005.

b. Whether the Learned Tribunal has failed to consider, Paragraph 6 of the instant circular F.No.B1/6/2005-TRU dated 27.07.2005 takes up the scope of 'Site formation and clearance, excavation, earth moving and demolition services'. As mentioned at paragraph 6.2 of thereof, the definition of site formation and clearance, excavation and earthmoving and demolition is an inclusive one and the activities specifically mentioned are indicative and not exhaustive.

c. Whether the Learned Tribunal failed to consider that, as per the referred paragraph, prior to mining activities, preparation services, like that of site formation and clearance, excavation and earthmoving or levelling, such as, blasting and rock removal work, clearance of undergrowth, drilling and boring, overburden (OB) removal and other development and preparation services of mineral properties and sites, and other similar excavating and earthmoving services, would fall within the scope of 'Site formation and clearance, excavation, earth moving and demolition services'.

d. Whether while dropping the instant demand of Rs.2,09,43,980/-on mining service for 2008-09 raised on the differential amount between Balance Sheet & Service Tax return figure, the Learned Tribunal erred in considering that, while dropping the said demand, the adjudicating authority gave cognizance to the Chartered Accountant certificate furnished by M/s EMTA to the effect that the differential amount was attributable to the provision of closing stock of coal available at pithead stock of their mining clients/principals on the last day of the involved Financial Year 2008-09 for which no invoice/bill was raised during the Financial Year 2008-09 and also that the invoice/bills had been duly raised by the assessee on delivery of such coal to the power plants and as such included in the ST-3 returns for the subsequent Financial Year 2009-10.

e. Whether the Learned Tribunal erred in not appreciating that, the Adjudicating Authority gave no observation regarding verification of any documents, especially the invoices which, as certified by the Chartered Accountant, were issued in the subsequent financial year. It is to be mentioned here that, no verification regarding and discharge of the involved Service Tax liability was done by the adjudicating authority. The adjudicating authority appears to have also not offered any observation whether the relevant documents confirming reflection of realization of the involved amounts as income of M/s EMTA were at all verified.”

3. We have heard Ms. Manasi Mukherjee, learned advocate appearing for the appellant and Dr. Samir Chakraborty, learned senior advocate appearing for the respondent/assessee.

4. Though the revenue has raised the above substantial questions of law, there are only two issues involved in the instant appeal, namely – whether the learned Tribunal was right in confirming the order passed by the adjudicating authority dated 14.3.2012 with regard to the demand of service tax under ‘site formation and clearance, excavation and earth moving and demolition service’ for the period 16.6.2005 to 31.5.2007? The second issue is whether the learned Tribunal was right in dropping the demand of service tax amounting to Rs.2,09,43,980/- alleging short payment?

5. With regard to the first issue namely, site formation and clearance, excavation and earth moving and demolition service, the adjudicating authority has taken note of the notification no.15/2005-ST dated 7.6.2005 and took note of the reference made in the show-cause notice with regard to the services needed for coal mining/extraction and held that the scope of the service has been explained in the Board's circular dated 27.7.2005 and this taxable service covers certain activities like site formation and clearance, excavation and earth moving and demolition. The adjudicating authority thereafter proceeded to take note of the definition of open cast working and held that during the material period site formation etc. services were not considered as mining services which was evident from the circular dated 27.5.2007. Noting the language and the text of the circular, the adjudicating authority held that in no way this inclusive nature would include services related to mining in it; rather it included all such activities those are needed prior undertaking mining and, therefore, the circular remains in conformity with the statute.

6. The next aspect which was dealt with is with regard to the mining services and what does it comprise of and after noting the facts the adjudicating authority pointed out that site formation services have all the ingredients to be included in the scope of mining services but it can never be a substitute of mining services. After recording various decisions of the Co-ordinate Benches of the learned Tribunal it was pointed out that it has been consistently settled that by looking into the purpose for which the contract/agreement was made and in all the decided cases the agreement/contract was made in relation to mining the services which otherwise would fall under site formation etc. services would not be taxable upto 31.5.2007. The adjudicating authority examined the agreement dated 14.3.1997 executed by the respondent/assessee with M/s. BECML and noted the scope of service and, more particularly, that the assessee shall get payment on the volume of coal production from the mines at a base price calculated by reducing the prevailing base price on the date of supply of coal of respective grades by 21% per ton as per clause 8 for the services rendered by them as detailed in the agreement. Therefore, the adjudicating authority confirmed that the assessee was entrusted to undertake raising of coal and to effect delivery to the power plant of the principals and the raising of coals carried out by the assessee on contract basis are of composite nature and it does not consist of several independent services like site formation etc. and the same cannot be vivisected.

7. Thereafter, the adjudicating authority examined the terms and conditions of the agreement dated 21.1.2002 executed by the assessee with M/s. PANEM which also provided that the entire gamut of services which were encompassed in the mining activity. Thus, on going through both the agreements it is evidently clear that they were executed for the purposes of mining of coal and, therefore, the services rendered by the assessee cannot be considered as site formation and clearance, excavation and earth moving and demolition services for the period from 16.5.2005 to 31.5.2007. Furthermore, it is clear from both the

agreements that there was no mention of any separate consideration for overburden removal or site formation and the payments were received by the assessee only on basis of the removal of coal. This finding rendered by the adjudicating authority while dropping the demand vide order dated 14.3.2012 was examined for its correctness by the learned Tribunal and the facts of the case were re-appreciated, more particularly, the terms and conditions of the agreement and the learned Tribunal agreed with the adjudicating authority. The law on the subject has been well settled and this court had an occasion to consider more or less same identical issue in the case of Commissioner of Service Tax Kolkata vs. M/s. Engineering Projects India Ltd., 2025 (4) TMI 773 – Calcutta High Court, wherein reference was made to the decision of the Hon'ble Supreme Court in the case of M/s. Larsen & Toubro, reported in 2015 (39) STR 913 (SC), wherein it was held as follows:

"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.

We are afraid that there are several errors in this paragraph. The High Court first correctly holds that in the case of composite works contracts, the service elements should be bifurcated, ascertained and then taxed. The finding that this has, in fact, been done by the Finance Act, 1994 Act is wholly incorrect as it ignores the second Gannon Dunkerley decision of this Court. Further, the finding that Section 67 of the Finance Act, which speaks of "gross amount charged", only speaks of the "gross amount charged" for service provided and not the gross amount of the works contract as a whole from which various deductions have to be made to arrive at the service element in the said contract. We find therefore that this judgment is wholly incorrect in its conclusion that the Finance Act, 1994 contains both the charge and machinery for levy and assessment of service tax on indivisible works contracts."

8. Following the above decision, the appeal filed by the revenue was dismissed as composite contract should not be artificially bifurcated for service tax purposes and no service tax was payable for mining related services prior to 1.6.2007. The correctness of the decision in the case of M/s. Larson & Toubro (supra) was argued before the Hon'ble Supreme Court in the case of Total Environment Building Systems Pvt. Ltd. vs. Deputy Commissioner of Commercial Taxes, 2022 63 GSTL 257 (SC) wherein the Hon'ble Supreme Court held that the review of the case law in M/s. Larson & Toubro cannot be entertained as the said judgment stood the test of time and has never been doubted earlier and followed consistently by the Hon'ble Supreme Court as well as the various High Courts and Tribunal, wherein the Hon'ble Supreme Court held as follows :

“22. As already noted, the definition of works contract was brought under the service tax net as per Section 65(105)(zzzza) of the Finance Act, 1994 by the insertion of the said definition. The said introduction was made pursuant to the Finance Act, 2007, which expressly made the service element in such works contract liable to service tax w.e.f. 1st June, 2007. By the said amendment, works contract which were indivisible and composite could be split so that only the labour and service element of such contracts would be taxed under the heading "Service Tax”.

23. It is in the above backdrop that the definition of Works contract inserted for the first time by virtue of Section 65(105)(zzzza) under the Finance Act. 2007 assumes significance and has to be applied w.e.f. 1st June 2007. Thus, on and from the enforcement of the amendment in the Financial Year 2007, i.e.,1st June, 2007 the tax on the service component of works contract became leviable. Therefore till then it was not so leviable as there was no concept of works contract under the said Act.

24. Recognising this aspect of the matter in Larsen and Toubro Ltd. (supra), this Court held that Service Tax on works contract was not leviable, meaning thereby, that such tax on the service component of works contract as defined above did not attract Service Tax prior to the amendment.”

9. In the light of the above, the finding rendered by the learned Tribunal was fully justified.

10. The next issue is with regard to dropping of the demand to the tune of rs.2,09,43,980/- which related to short payment of service tax. The defence raised by the assessee was that this short payment is attributable to the provision of closing stock of coal value on the last day of the financial year ending 31.3.2009 at pithead stock of mining clients, the principle of the assessee for which no invoice/bill was raised during the respective financial years. Further, the assessee contended that the figures of closing stock have been taken in the profit and loss account and the balance-sheet for the financial year 2008-09 as the accounting is done under the mercantile system. Further, it was contended that since neither any invoice/bill was raised nor any payment was raised for the said closing stock of coal available at pithead as on 31.3.2009, no service tax was, therefore, payable in respect of the said coal during the year 2008-09. The assessee placed reliance on a certificate issued by the statutory auditor, wherein it was seen that the assessee is not permissible to raise invoice to the joint venture companies, i.e., the power utility companies towards the mining services rendered to facilitate extraction of quantity of material lying at stock of mines pit head and/or loading point but not delivered to the power plant. Further, under the Mercantile System of accounting the expenditure incurred on account of extraction of such quantity of material lying at the mine stock as on the date of balance-sheet are chargeable to the profit and loss account and, therefore, provision was also required to be made in the annual accounts as ‘income from mining services’ against the value of such coal stock at the mine site not eligible

for invoice by the firm to the respective joint venture companies. The adjudicating authority noted that the statutory auditor have also certified to the effect that the decisions between income of the firm from mining services during the period from 1.4.2008 to 31.3.2009 as per the service tax return and the amount received in the annual accounts of the year ended 31.3.2009 is attributable to the said provision of income from mining services made in the annual accounts on stock of material not delivered to the power plant and not invoice to the joint venture companies. Thus, the adjudicating authority gave due regard to the certificate issued by the statutory auditor and found that the matter has been completely reconciled and, consequently, set aside the demand of Rs.2,09,43,980/-. The learned Tribunal examined the correctness of the finding recorded by the adjudicating officer and also the fact that the statutory auditor have given a certificate which is completely reconciled the differences, affirmed the order of the adjudicating authority. We find that the tribunal rightly concurred with the finding rendered by the adjudicating authority, who had rightly taken note of the fact of the certificate issued by the statutory auditor. Thus, we find that the learned Tribunal was right in rejecting the revenue’s appeal.

11. For the above reasons, this appeal is dismissed and the substantial questions of law are answered against the revenue.

12. The stay application, GA/2/2025 stands disposed of accordingly.