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HIGH COURT OF CHHATTISGARH, BILASPUR

TAX CASE NO. 02 OF 2013

Union of India, through Commissioner, Central Exicse & Customs, Central Excise Building, Dhamtari Road, Tikrapara, Raipur (C.G.)

---- Appellant

Versus

M/s. Spectrum Coal & Power Ltd., Village Ratiza, Taluka-Katghora, Distt. Korba.

---- Respondent

For Appellant : Mr. Maneesh Sharma, Advocate
For Respondent : Mr. Kishore Bhaduri and Mr. Amrito Das, Advocates

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HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE SHRI JUSTICE PRITINKER DIWAKER

ORDER ON BOARD

Per Navin Sinha, Acting CJ

24.02.2015

We have heard Learned Counsel for the Appellant and the Respondent.

2. The present appeal under Section 35G of the Central Excise Act, 1944, read with Section 83 of the Finance Act,1994, arises from order dated 5.7.2012 passed by the Customs, Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi, (hereinafter referred to as 'the Tribunal') in Service Tax Appeal No. ST/461/2007-CU[DB].

3. A show cause notice was issued to the Respondent on 30.8.2006 raising demands for service tax *inter alia* with regard to services rendered by it to its clients for washing of coal purchased by the latter from South Eastern Coalfields Limited (hereinafter referred to as 'SECL'). The Respondent submitted its reply to the show cause notice after which liability was affirmed by the Commissioner by order dated 24.5.2007 for Rs.5,57,81,545/-. Aggrieved, the Respondent preferred an appeal before the Tribunal. The Tribunal held that washing of coal was a mining activity amenable to service tax with effect from 1.6.2007 after amendment and not earlier.

4. Learned Counsel for the Appellant submitted that washing of the coal by the Respondent on behalf of its clients who were the owners of the coal after purchase from the SECL amounted to a Business Auxiliary Service in relation to production of goods on behalf of their clients under Section 90 of the Finance (No.2) Act, 2004, after inclusion of Business Auxiliary Service in Clause-19 of Section 64 of the Finance Act. It was submitted that washing of the coal resulting in reducing the ash content, increasing the calorific value of coal, amounts to a Business Auxiliary Service in relation to production of goods on behalf of their clients. The Commissioner therefore rightly held that the activity carried on by the Respondent was amenable to service tax. The fact that by amendment on 16.6.2005 'processing' may have also been added to the definition of Business Auxiliary Service along with 'production' does not take away the liability of the Respondent to pay service tax prior to 16.6.2005, for the period 10.9.2004 to 15.6.2005 also.

5. It was next submitted that the issue before the Tribunal was the correctness of the order of the Commissioner, whether washing of the coal amounted to Business Auxiliary Service in relation to production of goods on behalf of the clients. The Tribunal exceeded its jurisdiction in deciding the appeal on a completely different issue not urged by the parties before it. The Respondent had admitted liability at least from 16.6.2005 after inclusion of the word 'processing', after the word 'production' in the definition of Business Auxiliary Service. The order of the Tribunal therefore calls for interference as naturally the Respondent will now claim refund for the period that it voluntarily paid service tax from 16.6.2005 to 1.6.2007.

6. Learned Counsel for the Respondent submitted that in their objection they had taken a definite stand that washing of coal on behalf of their clients did not amount to a Business Auxiliary Service in relation to production of goods on behalf of their clients relying on 2003 (154) ELT 343 SC (CCE v. Tata Iron and Steel Co. Ltd.). The Respondent had further relied on a clarificatory letter dated 27.7.2005 of the department that in view of the amendment including the word 'processing' after the word 'production' with effect from 16.6.2005, there was no liability prior to that date. The Commissioner did not consider this question and therefore the order affirming liability deeming the activity for washing of coal by the Respondent as a Business Auxiliary Service related to production of goods on behalf of its clients stands vitiated on the face of it. With regard to the order of the Tribunal that liability to service tax arose from 1.6.2007 only, it was submitted that the Respondent has already paid service tax dues with effect from 16.6.2005 to 1.6.2007 and it shall not seek any refund for payments made during this period as it has already passed on the liability to its customers also.

7. We have considered the submissions on behalf of the parties.

8. The issue that washing of coal to remove the ash content does not amount to 'production' stands fully considered in Tata Iron and Steel Co. Ltd. (supra) observing at para-10 as follows:-

> "10. Learned Counsel appearing for the Department, however, submitted that in imported coal ash is removed by washing process and, therefore, it would amount to manufacturing process. In our view, this submission is also without any substance because washing of coal would not amount to production or manufacture of a new item. Section 4 of the Coal Act also provides that for the purpose of conservation of and for development of coal, the Central Government may require the agent or manager of all coal mines to take measures which may include washing of coal with a view to reducing the ash contents of the coal. Washing of coal or reducing the ash content of the coal was not considered by the Parliament as a manufacturing activity. Even if coal is washed and ash contents are reduced, Section 6 uses the phraseology ("of all coal raised") and "on all coke manufactured and dispatched", which would mean that coke

> is manufactured while coal is only raised. It is not manufactured. In this view of the matter, there is no substance in the argument raised by the learned Counsel of the appellant."

9. The Commissioner was exercising quasi judicial powers deciding a lis. Any order to the prejudice of the assessee had to be reasoned and considered. It was the foremost duty of the Commissioner to deal with all issues raised before him and more importantly if they were based on judicial precedents delivered by the Supreme Court. It is trite law that justice must not only be done but it must also appear to be done. Fairness in action by a quasi judicial authority must be apparent on the face of the order. If a relevant ground taken by the assessee is not considered by the quasi judicial authority, it not only violates the principles of natural justice by lack of fairness in the decision making process, but renders the order completely arbitrary. The only possible conclusion is that since the quasi judicial authority had no answer and found it difficult to deal with the objection raised, he preferred not to deal with it and decide the case sans the same. The aforesaid ground is sufficient to hold that the order of the Commissioner dated 24.5.2007 is not sustainable.

10. The further issue whether the liability would be from 16.6.2005 after inclusion of the word 'processing' in the definition of Business Auxiliary Service after the word 'production' or will it be 1.6.2007 pursuant to inclusion of mining activity by clarification dated 12.11.2007 or that the Tribunal erred in deciding the same before it but by raising a third question not urged by the parties is not required to be decided by us as it has become academic in the facts of the case and is left open for consideration in an appropriate case in view of the specific submission on behalf of the Respondent that the Tribunal has not directed refund of service tax paid from 16.6.2005 till 1.6.2007 and neither will they seek refund for the period having already passed the liability to their customers.

11. We therefore find no merit in the appeal.

The appeal is dismissed.

Sd/-
ACTING CHIEF JUSTICE

Sd/-
JUDGE

Anu