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

CEXA/50/2024
IA NO: GA/2/2024
COMMISSIONER OF SERVICE TAX KOLKATA
VS
M/S ENGINEERING PROJECTS INDIA LTD

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
THE HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)
Date : 4th April, 2025.

Mr. B. P. Banerjee, Adv.
Mr. Tapan Bhanja, Adv. …for appellant.
Mr. Sumit Ghosh, Adv.
Mr. Sourodeep Majumder, Adv. …for respondent.

The Court : This appeal filed by the Central Excise Department under section 35G of the Central Excise Act, 1944 (the Act) challenging the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata (Tribunal) in Service Tax Appeal Nos.223 of 2010 and 228 of 2010 dated 3.8.2023.

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

"a) Whether the Learned Tribunal has committed gross error of law by not considering Services relating to mining for the period 16.06.2005 to 31.03.2008 as being already included as Service Tax under the category of Site Formation and Clearance, Excavation and Earth Moving and demolition Services as envisaged in [97a] respectively of Section 65 of chapter V of the Finance Act, 1994?

b) Whether the Learned Tribunal has committed gross error of law by not considering that the services of construction of residential building rendered by the Respondent is already falling under the purview of Service Tax as construction of complex services within the meaning of Section 65[30] of the Finance Act 1994 as amended and becomes chargeable to Service Tax with *effect from 16.06.2005?*

c) Whether the inclusion of the term Mining Service and Works Construction Service with effect from 1.06.2007 clarifies the ambiguity created in respect of chargeability of services rendered under the category of mining and construction of residential building?

d) Whether the Learned Tribunal committed gross error of law by not considering the contents of the Circular dated 12.11.2007 relied upon by the adjudicating authority which clarifies that 'service provided by any person to any other person in relation to mining of minerals, oil or gas' was brought under the ambit of Service Tax w.e.f. 01.06.2007 and there was no bar in taxing the said services provided to mining sector prior to 01.06.2007. "Site Formation Service" is also a service provided to mining sector and taxable effective from 16.06.2005?

We have heard learned advocates on either side.

The issue which falls for consideration in this appeal is whether the demand of service tax from the respondent/assessee under the category “Site Formation Services” and “Construction of Industrial and Commercial Services” for the period from 16.6.2005 to 31.3.2008 was justified? and whether the department could have invoked the extended period of limitation? The respondent/assessee is a Public Sector Undertaking and during the period in question executed the contract for extraction of coal from the mines of the Eastern Coalfields Limited (ECL).

The contract being a composite contract, the assessee did not pay service tax nor collected the same from ECL. With regard to construction of residential complexes which includes supply as well as the services, the assessee paid Sales Tax and Value Added Tax under the provisions of West Bengal Sales Tax Act, 1944/West Bengal Value Added Tax, 2003. The show-cause notice dated 16.12.2008 was issued to the assessee demanding service tax under the head “Site Formation Services”. The assessee contended that the contract is a comprehensive contract and the department will not be justified in bifurcating this thing. The matter was adjudicated and the demand made in the show-cause notice was affirmed and penalty was also imposed.

Challenging the said order, the assessee preferred appeal before the learned tribunal. The learned tribunal examined the facts of the case and found that the contract is clearly a comprehensive contract for the purposes mentioned above and the activity done by the assessee is in relation to commissioning of coal and not for site formation. The learned tribunal also referred to two decisions of the Co-ordinate Bench of the learned tribunal. Reference has been made to the decision of the Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. , reported in 2015 (39) STR 913 (SC) wherein the Hon'ble Supreme Court 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."*

With the above reasoning, the tribunal accepted the case of the assessee and held that no service tax is payable and the question of imposing penalty also does not arise. At this juncture, we refer to the decision in the case of Commissioner of Service Tax, Kolkata vs. G.S. Atwal Engineering Pvt. Ltd., CEXA/11/2024 dated 9.7.2024 wherein more or less identical issue arose for consideration in the said appeal whether the respondent/assessee therein was liable to pay service tax in respect of services rendered by him which was essentially commissioning activities for the services, activities prior to 1.6.2007. The court noted the factual background namely, the activity done by the assessee therein which is also similar to that of the assessee in this appeal and it was held as follows :

> *"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 1 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."

Apart from that, we find that while invoking the extended period of limitation the only allegation made against the respondent/assessee is that they have submitted ST-3 return for the two services. The question would be whether this could be a sole reason for invoking the extended period of limitation. The department is required to show that there was omission and failure and suppression of material fact with an intent to evade payment of service tax. This having not been clearly spelt out in the show-cause notice, the case of the department cannot be improved at the stage of adjudication, nor has it been done so in the instant case. Therefore, we find that this is a case where the extended period of limitation could not have been invoked by the department.

Thus, for the above reasons, the order passed by the learned tribunal requires to be affirmed and, accordingly, the appeal stands dismissed and the substantial questions of law are answered against the appellant/department.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(CHAITALI CHATTERJEE (DAS), J.)

Pkd./S.Das
AR[CR]