IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Service Tax Appeal No.75388 of 2014

(Arising out of Order-in-Original No.38/Commr./BOL/13 dated 19.12.2013 passed by Commr. of Central Excise & Service Tax, Bolpur)

Commr. of Central Excise & S.Tax, Bolpur
Nanoor Chandidas Road, SIAN, Bolpur, Dist, Birbhum

Appellant

VERSUS

M/s Integrated Coal Mining Ltd.
6, Church Lane, 1st Floor, Kolkata-700001

Respondent

Appearance :
Shri K.Chowdhury, Authorized Representative for the Appellant
Dr.Samir Chakraborty, Sr.Advocate, Shri Arnab Chakraborty, Advocate and Shri Abhijit Biswas, Advocate for the Respondent

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.75012/2021

DATE OF E-HEARING : 15.10.2020
DATE OF PRONOUNCEMENT : 05 January 2021

Per P.K.Choudhary :

1. This appeal filed by the Revenue is against the Order-in-Original No.38/Commr/BOL/13 dated December 19, 2013 passed by the Commissioner of Central Excise and Service Tax, Bolpur, whereby the Commissioner was pleased to drop the proceedings initiated against Integrated Coal Mining Ltd. ("ICML") vide show cause notice dated 23.08.2012. The Commissioner held that sized coal is an excisable product and sizing operation is an activity incidental and ancillary to the completion of a manufactured product and since the value of sizing is includible and has been included in the assessable value of coal sold to the customers, CESC Ltd. and Cresent Power Ltd. by ICML, sizing of coal cannot be termed as a service taxable under the heading 'Business Auxiliary Service' in terms of the Finance Act, 1994 ("the Act").

2. The facts of the case in brief are:

(a) ICML is engaged in the business of mining and sale of coal classifiable under Chapter Heading 27011200 of the Central Excise Tariff. Pursuant to allocation of a coal mine block by the Government of India, Ministry of Coal, for mining of coal, ICML was granted mining leases by the Government of West Bengal, in accordance with the relevant statutory provisions in this regard, for extraction of coal from the said block, known as the Sarshatali Coal Mine.

(b) On August 14, 2002 ICML entered into an agreement with CESC Ltd., Kolkata, to mine coal from the said mines and to sell the same to CESC Ltd. ("CESC") for use in its power projects on terms and conditions specified in the agreement.

(c) Similar agreement was subsequently entered into by ICML with Crescent Power Ltd. ("CPL"), a wholly owned subsidiary of CESC on March 30, 2010, for sale of certain inferior quality coal, commonly known as "carbonaceous shale" or "shaly coal" (hereinafter referred to as "carbonaceous shale") from the said coal mine to CPL, on terms and conditions specified in the said agreement dated 30.03.2010.

(d) The coal that comes directly from mines, after blasting, known as the run-of-mine coal ("ROM"), are of irregular sizes, including large fragments. In terms of the abovestated agreements, ICML has to supply coal of specifications and quality, depending upon the intended use thereof, as specified. Since the ROM coal does not conform to the size and specification required to be delivered to the buyers and cannot be sold and transported as such, the said ROM coal has therefore to be prepared. Such preparation includes segregation of the coal from the

stones, whereupon they are crushed/sized as per the desired requirement of the purchasers concerned in the mine area itself, through deployment of workers and using pay loaders and dozers. According to ICML the manufacturing job is only then completed and the coal becomes ready for sale and, hence, sizing of coal is an integral part of coal manufacturing or production.

(e) Central excise duty was paid by ICML on the assessable value of coal determined by including the crushing and sizing charges, with effect from 24.03.2011, prior to which coal was subjected to zero excise duty.

(f) In addition, since inception, on the sale price of the coal including the said sizing charges, Value Added Tax ("VAT") and Central Sales Tax have been deposited as per the relevant statutes of the State and Central Governments respectively, by ICML.

(g) On 23.08.2012 a show cause notice was issued by the Commissioner requiring ICML to show cause as to why a sum of it under the Proviso to Section 73(1) of the Act, along with interest thereon under Section 75 of the Act and as to why penalties should not be imposed upon ICML under Sections 76, 77(2) and 78 of the Act, on the allegation that during the period from 2007-08 to 2011-12 ICML was engaged in providing the services of sizing of coal to its customers for which ICML recovered additional amount of money as consideration and since the said sizing of coal did not amount to "manufacture" within the meaning of Section 2(f) of the Central Excise Act, 1944 and Section Note I of Section V of the First Schedule to the Central Excise Tariff Act, 1985, the activity of sizing of coal was covered by the expression "production or processing of goods for or on behalf of the client" in the category of "Business Auxiliary Service" under Section 65(19) of the Act, which was applicable during the period from 2007-08

to 2010-11 and hence was chargeable to service tax as per Section 66 of the Act, as then in force.

(h) On ICML submitting its reply by a letter dated December 6, 2012 and a personal hearing being held thereafter, the Commissioner passed the impugned order dated 19.12.2013 dropping the proceedings.

3. Shri K. Chowdhury, Ld. A.R. appears on behalf of the Revenue in support of the appeal. Dr. Samir Chakraborty, Senior Advocate, along with Shri Arnab Chakraborty and Shri Abhijit Biswas, Advocates appear on behalf of the Respondent, M/s ICML.

4. Shri K. Chowdhury Ld. A.R. reiterates the grounds of appeal and contends that the Adjudicating Authority had erred in holding that sizing of coal is a process incidental and ancillary to manufacture of coal and that coal is a manufactured product and thereby dropping the demand of service tax made in the show cause notice. In support of his contention the Ld. A.R. has relied upon the observations of the Review Committee, set out in the appeal petition. According to the Review Committee:

(i) Coal, produced or mined or raised, is not a product that comes into being after manufacture;

(ii) Since Section 3 of the C.E. Act provides for levy of excise duty on goods either manufactured or produced, excisability of coal is not affected for it being produced and not manufactured;

(iii) There is no proof regarding the necessity of sizing to be an essential precaution to render coal marketable. Beneficiation of coal, which includes washing and sizing/crushing, does not amount to production of coal, it only enhances the quality of coal. Moreover this job can be done by independent operators. Therefore, the Commissioner's finding that sizing of coal was necessary to render the coal marketable is based on wrong ground.

(iv) Relying upon the decision of the Apex Court in the case of *Delhi Cloth Mills, 1997 (1) ELT 599 (SC)*, since the process of

sizing of coal does not change the character of the coal, the said process cannot amount to manufacture and therefore the clause "production or processing of goods for or on behalf of clients not amounting to manufacture" in Section 65(19) of the Finance Act, 1994, defining "Business Auxiliary Service", is applicable and, therefore, service tax is payable as per Section 66 of the Finance Act, 1994.

5. On behalf of the respondent, M/s ICML, it is contended by Dr. Samir Chakraborty, Sr. Advocate that the issue involved in the instant case stands settled by decisions of the Tribunal, including of this Bench, that the contentions of the Revenue have no substance or merit whatsoever and there is no infirmity in the adjudication order. In this respect he has placed reliance upon the following decisions:

(i) *Commissioner of Central Excise & Service Tax Vs. Mahanadi Coalfields Ltd*. – Final Order No. F/O 76585/2017 dated August 21, 2017 passed in Service Tax Appeal No. ST/75816/2014 by this Bench of the Tribunal.

(ii) *Northern Coalfields Ltd. Vs. Commissioner of Central Excise & Service Tax, 2020-TIOL-338-CESTAT-DEL*

(iii) *South Eastern Coalfields Ltd. Vs. Commissioner of Central Excise & Service Tax, Raipur, 2018-TIOL-1691-CESTAT-DEL*

(iv) *Northern Coalfields Ltd. Vs. CGST, CC&CE, 2018 (8) TMI 1742 (CESTAT Delhi)*.

There is also no dispute that in the instant case also on the gross value of the coal, including sizing charges, excise duty as well as VAT/CST, as applicable and clean energy cess has been paid by ICML.

5.1 It is further contended that:

(i) The contention that the sizing of coal as per specification contained in the relevant contracts is production or processing of goods for and on behalf of the clients under Section 65(19)(v) of the Act as misconceived and untenable.

(ii) Works relating to mining of coal is manufacture within the meaning of the Central Excise Act and coal is an excisable product. Sizing of coal is a part of such manufacture of coal within the meaning of the Central Excise Act and, hence, Section 65(19(v) of the Finance Act is inapplicable. In support of this, reliance has been placed on the order passed by this Bench of the Tribunal in *Avian Overseas Pvt. Ltd. Vs. Commr. of C.Ex., Cus & S.T., 2009 (15) STR 540 (T-Kol)*.

Reliance in this regard has also been placed on Review Committee's observation contained in the Revenue's appeal petition as under:

> "So far as inclusion of sizing charges into the gross value of the product on which excise duty is paid, it is observed that for a major part of the period for which the demand is raised, coal though excisable, was subject to zero excise duty".

It is contended that there is thus acknowledgement on the part of the appellant that coal is an excisable product on which excise duty is payable since, as per settled law, nil rate of excise duty is also a duty.

(iii) It is a settled principle that if certain activity amounts to "manufacture" it cannot become or be contended to be "service", and vice versa, scheme of taxation under the Constitution providing for mutually exclusive levies. In this respect reliance was placed upon the following decisions:

(a) *Sri Rama Vilas Service Ltd. Vs. Commissioner of C.Ex., 2019 (25) GSTL 117 (T)*

(b) *Osnar Chemical Pvt. Ltd. Vs. CCE, 2009 (240) ELT 115 (T)*, para 5 [affirmed by Supreme Court in *CCE Vs. Osnar Chemical Pvt. Ltd., 2012 (276) ELT 162 (SC)*]

(c) *CCE Vs. Spectron Engineers Pvt. Ltd., 2020 (33) GSTL 223 (T)*, para 4.

(iv) Without prejudice, demand pertaining to the period 01.04.2007 to 31.03.2011 is barred by limitation.

(v) The appeal is therefore liable and should be dismissed.

6. We have heard the parties through video conferencing and have carefully perused the records of the proceedings.

7. We find that under the Agreement dated August 14, 2002 between ICML and CESC, there is binding obligation upon ICML part to sell and CESC to purchase coal in the quantities and having the qualities specified on the terms and conditions set forth therein. It is further seen that in terms thereof:

(a) ICML is responsible for delivery and loading of coal into the railway wagons at the railway siding, which is to be considered as the delivery point. The alternative route is by road, in which case the delivery point is the mine end and the delivery would be completed by loading the coal into the trucks after weighment at that point. Both these situations arise after completion of sizing of coal.

(b) The title/ownership of the coal and risk of loss of the coal sold and purchased would pass on from ICML to CESC at the said delivery point and, hence, property in the coal remains with ICML until the same get passed on at the delivery point.

(c) ICML is required to supply crushed coal of size not exceeding 100 mm.

(d) The contracted price comprises of five elements, one of which is sizing charges. Sizing charges, therefore, forms a part of the price of the coal.

(e) The contract is therefore for supply of sized coal, all processes undertaken on such coal prior to delivery thereof as sized coal as per the specification in the Agreement is at all material point of time on ICML's account as owner of the said goods and not for and on behalf of CESC or anybody else.

7.1 Similarly in the case of sale of carbonaceous shale (inferior quality of coal) by ICML to CPL under the Agreement dated March 30, 2010, it is seen that the sale and purchase of carbonaceous shale takes place on delivery of the goods at the designated place within the power plant premises of CPL, when title/ownership and risk of loss passes from ICML to CPL. Until then ICML continues to be responsible for transportation and delivery of the goods to the said designated place. The contracted price in this case also includes sizing charges.

7.2 Section 65(19)(v) of the Finance Act includes, as "Business Auxiliary Service", production or processing of goods "for and on behalf of client". The requirement for application of this clause is that the goods in question has to belong to the client of the appellant assessee, on which production or processing which does not amount to manufacture of goods within the meaning of Section 2(f) of the Central Excise Act is carried out by the appellant assessee. This requirement is not satisfied in the instant case. At the time when the sizing of coal takes place, they continue to remain ICML's property and not that of either CESC or CPL. The sale of coal and consequently the title thereof passes on to CESC/CPL only at the delivery point specified in the respective agreements, which is after completion of sizing of the coal. There is therefore no production or processing of goods for and on behalf of any client or customer, as required under Section 65(19)(v) of the Act.

8. In terms of Section 65(19) of the Finance Act, 1994 any activity that amounts to "manufacture" within the meaning of Section 2(f) of the Central Excise Act is excluded therefrom. Section 2(f) of the Central Excise Act defines the term "manufacture" to include, inter alia, any process "incidental or ancillary to the completion of a manufactured product". This Bench of the Tribunal in the case of *Avian Overseas Pvt. Ltd. Vs. CCE,C&ST, BBSR-II, 2009 (15) STR 540 (T-Kol)* has held that activity of mining and producing coal is covered under the definition of "manufacture" under Section 2(f) of the Central Excise

Act and demand of service tax thereon under the Act is not sustainable.

8.1 Sizing of coal is an incidental and ancillary process to make coal marketable and thus complete "manufacture" of coal and to make it into "excisable goods" as per Section 2(d) of the Central Excise Act. The process of sizing of coal is also therefore outside Section 65(19) of the Act since it is a process in the manufacture of the final product, sized coal.

8.2 We also find from the records of the present proceedings that in respect of exactly the same work undertaken by ICML at the said mines, right from the beginning when central excise duty became payable, ICML has been paying central excise duty on the coal manufactured/produced in the mine, upon determination of assessable value/transaction value by including all expenses incurred, including sizing and transportation right up to the place of removal, as per the provisions of the Central Excise Act, for which it was duly registered under the provisions of the Central Excise Act with the jurisdictional Central Excise authorities. Returns under the Act have also been submitted by ICML, which have been finally assessed and differential duty, if any assessed, have also been paid by ICML.

8.3 Further, in case of the period from March 24, 2011 to April 24, 2015 proceedings by issuance of show cause notices were initiated by the jurisdictional Commissioner/Principal Commissioner of Central Excise against ICML alleging undervaluation of the transaction values declared for the said period, of bituminous coal manufactured and cleared from the mine, by non-inclusion of elements, namely, royalty, stowing excise duty, primary education cess, rural employment cess, public works cess, road cess and AMBH fees and thereby short paying "central excise duty" to the extent contained in the show cause notices. The proceedings under the said show cause notices have resulted in adjudication orders, passed by the Commissioner of Central Excise, Kolkata-I Commissionerate/Principal Commissioner of Central Excise, Kolkata-I, dated 16.12.2014, 14.10.2015 and 27.05.2016

respectively. There the stand of the Central Excise Department is that ICML is engaged in the manufacture of bituminous coal classifiable under Chapter Sub-Heading 27011200 of the First Schedule to the Central Excise Tariff Act, 1985, for which it is holder of central excise registration number, and that ICML had manufactured and cleared the said goods on payment of central excise duty computed on the assessable value/transaction value that included the base price, sizing charges, washing charges and transportation charges, but had not paid central excise duty by not including cesses/fees, royalty and stowing excise duty, resulting in short payment of excise duty payable of amounts confirmed by the respective adjudication orders. Even for the periods pertaining to years 2015-16, 2016-17 and 2017-18 (upto June 30, 2017) the assessments under the Central Excise provisions have been finalised by the jurisdictional proper officer and differential central excise duty, as finally assessed, along with interest, were demanded and paid by ICML.

9. It is also not disputed that all along ICML has paid value added tax or Central Sales Tax on the coal and shale sold by it to CESC and CPL respectively.

10. In such circumstances, applying the principle laid down by the Supreme Court in *Bharat Sanchar Nigam Ltd. Vs. UOI, 2006 (2) STR 161 (SC)*, since scheme of taxation under the Constitution of India provides for mutually exclusive levies, if certain activity amounts to "manufacture", it cannot become or be contended to be service. This issue is no more res integra.

10.1 In the case of *Commr. of CE&ST Vs. Mahanadi Coalfields Ltd.*, Final Order No. 76585/2017 dated 21.08.2017 passed in Appeal No. STA/75816/2014, this Bench of the Tribunal, dealing with the self same issue, has held as follows:

> "*2. Brief facts of the case are that during the period under consideration, the appellant was engaged in the crushing/sizing of the coal in its own mines. While receiving the consideration*

from the buyer in addition to the base price, the department is of the view that the crushing/sizing of the coal by the respondents for sale attracts the service tax under the business auxiliary service as per Section 65(19) of the Finance Act, 1994. But by the impugned order, the Commissioner dropped the demand. Being aggrieved, the Department has filed the present appeal.

3. ……

4. After hearing both the parties it appears that the appellants had paid the sales tax/vat and total amount of sale includes crushing charges as well as other charges e.g. silo loading charges and the same was shown in the profit and loss account. The Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. Vs. UOI reported in 2006 (2) STR 161 (SC) observed that sales tax and service tax cannot be made applicable on the same transaction as the same is includible to each other.

5. In the instant case undisputedly, the appellant has paid the sales tax/vat when it is so crushing charges are not leviable. Regarding the payment of sales tax/vat, the Ld. Counsel for the appellant has shown proof to the Ld. Counsel for the Department.

6. By following the ratio laid down by the Hon'ble Supreme Court, we find no reason to sustain the impugned order."

10.2 This decision has since been followed by the Principal Bench of the Tribunal, in cases involving the same issue:

(i) *Northern Coalfields Ltd. Vs. Commissioner, CGST, CE&C, 2020-TIOL-338-CESTAT-DEL*

(ii) *South Eastern Coalfields Ltd. Vs. CCE&ST, 2018-TIOL-1691-CESTAT-DEL*

(iii) *Northern Coalfields Ltd. Vs. CGST, CC&CE, 2018 (8) TMI 1742 - CESTAT - DELHI*.

11.3 In this regard reference is also made to the decision of a coordinate bench of the Tribunal in *CCE Vs. Spectron Engineers Pvt. Ltd., 2020 (33) GSTL 223 (T)*. In para 4 of the order it has been observed as follows:

> "*4. Having heard both sides, we find ourselves confronted with a dispute in which the jurisdictional central excise authorities seek to levy duties under Central Excise Act, 1944 while respondent claims leviability under Finance Act, 1994. That the respondent had been discharging service tax liability on 'job work' and had been paying VAT on the material component is not in doubt. The original authority has placed reliance on the decision of the Tribunal in Osnar Chemical Pvt. Ltd. V. Commissioner of Central Excise, Bangalore-II [2009 (240) ELT 115 (Tri-Bang.)] to hold that discharge of tax liability under one law precludes the invoking of another law merely for garnering revenue that has thereby escaped one of the jurisdictions. By discharging the tax liability on the job work charges as well as by discharge of VAT liability on 'brought out' items used for fabrication at site, the scope for considering the activity as manufacture is eclipsed entirely. In this context of mutually exclusive levies under the scheme of taxation in the Constitution, the activity of the respondent is works contract and hence not leviable to duty under Central Excise Act, 1944*."
>
> (emphasis added)

10.4 Respectfully following the abovestated decisions, which also apply fully to the instant case, we find no infirmity with the impugned order of the Commissioner. The appeal of the Revenue against the same has no merit.

11. The impugned order dated 19.12.2013 of the Commissioner is therefore upheld and the Department's appeal is dismissed.

(Pronounced in the open court on **05.01.2021**)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(P. Anjani Kumar)
Member (Technical)

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