

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

**Service Tax Appeal No. 50348 of 2017**

(Arising out of Order-in-Appeal No. UDZ-EXCUS-000-COM-0068-16-17 dated 18.11.2016 passed by the Commissioner, Office of the Commissioner, Central Excise Commissionerate, 142-B, Sector-11, HiranMagri Udaipur (Raj.))

**M/s Associated Soapstone Distributing  
Company Pvt. Ltd.**

24, Akashwani Marg, Madri Industrial Area,  
Udaipur (Raj.)

**..... Appellant**

VERSUS

**The Commissioner**

Office of the Commissioner,  
Central Excise Commissionerate,  
142-B, Sector-11, HiranMagri,  
Udaipur (Raj.)

**..... Respondent**

**WITH**

**Service Tax Appeal No. 50349 of 2017**

(Arising out of Order-in-Appeal No. UDZ-EXCUS-000-COM-0070-16-17 dated 18.11.2016 passed by the Commissioner, Office of the Commissioner, Central Excise Commissionerate, 142-B, Sector-11, HiranMagri Udaipur (Raj.))

**M/s Associated Soapstone Distributing  
Company Pvt. Ltd.**

24, Akashwani Marg, Madri Industrial Area,  
Udaipur (Raj.)

**..... Appellant**

Versus

**The Commissioner**

Office of the Commissioner,  
Central Excise Commissionerate,  
142-B, Sector-11, HiranMagri,  
Udaipur (Raj.)

**..... Respondent**

**AND**

**Service Tax Appeal No. 50350 of 2017**

(Arising out of Order-in-Appeal No. UDZ-EXCUS-000-COM-0069-16-17 dated 18.11.2016 passed by the Commissioner, Office of the Commissioner, Central Excise Commissionerate, 142-B, Sector-11, HiranMagri Udaipur (Raj.))

**M/s Associated Soapstone Distributing  
Company Pvt. Ltd.**

24, Akashwani Marg, Madri Industrial Area,  
Udaipur (Raj.)

**..... Appellant**

Versus

**The Commissioner**

Office of the Commissioner,  
Central Excise Commissionerate,  
142-B, Sector-11, HiranMagri,  
Udaipur (Raj.)

**..... Respondent**

**APPEARANCE:**

Shri Kunal Aggarwal, Advocate for the Appellant  
Shri Harshvardhan, Authorized Representative of the Department

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT  
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 50005-50007/2023**

**DATE OF HEARING/DECISION: January 02, 2023**

**JUSTICE DILIP GUPTA**

All the aforesaid Service Tax appeals assail the common order dated 18.11.2016 that adjudicates the show cause notice dated 21.05.2013 issued for the period October 2009 to June 2012, show cause notice dated 23.09.2014 issued for the period July 2012 to September 2013 and the show cause notice dated 10.04.2015 issued for the period October 2013 to September 2014. The demand raised in all the aforesaid three show cause notices has been confirmed for the reason that though diesel and explosives were supplied free of cost to the appellant by Rajasthan States Mines and Minerals Ltd<sup>1</sup>, but as these items were consumed during the mining process and without use of these items the appellant could not have provided mining services, the value of these items would be includable in the taxable value of mining services.

2. The appellant is engaged in providing mining services to Rajasthan Mines under Letters of Acceptance dated 25.07.2008, 21.05.2009, 19.06.2009 and 04.03.2010 (involved in Service Tax Appeal No. 50348 of 2017) and Letter of Acceptance dated 06.06.2011 (involved in Service Tax Appeal No. 50349 of 2017 and

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**1. Rajasthan Mines**

Service Tax Appeal No. 50350 of 2017). The aforesaid Letters of Acceptances provide the price payable to the appellant for the mining services and the appellant discharged service tax liability on the said amount. In terms of these acceptance letters, the appellant was required to mine saleable mineral (lignite) for Rajasthan Mines. For rendering such service, the appellant was to undertake the necessary activities such as excavation and removal of waste rock, drilling, crushing plants or ore respreading of top-soil etc. The appellant was also to arrange all resources including but not limited to heavy machines; Diesel Generator sets and pipes, except diesel and explosives, which were to be provided by Rajasthan Mines on free of cost basis to the appellant.

3. There is no dispute in the present appeals about the discharge of service tax on the consideration received by the appellant from Rajasthan Mines for provision of mining service. The dispute relates to the inclusion of the value of free items provided by Rajasthan Mines to the appellant in the total taxable value of mining services.

4. The appellant believed that the value of free items provided by Rajasthan Mines to the appellant for the provision of mining service was not to be included in the total value of taxable service and, therefore, did not pay the service tax. However, show cause notices were issued to the appellant mentioning therein that non inclusion of the value of free items provided by Rajasthan Mines had resulted in short payment of service tax since it was an additional commercial consideration flowing directly from the recipient to the appellant in relation to service provided. The appellant filed a reply to the three show cause notices, but by a common order dated 22.11.2016 the

Commissioner confirmed the demand of service tax. The relevant portion of the order is reproduced below:-

"15. In the instant case, the assessee have provided mining services which, it is obvious, cannot be completed without the use of the material i.e. diesel and explosives. It is also obvious that these two ingredients are essential components for completion of mining services, irrespective of the fact whether the same are used by the service provider or supplied by the service recipients. Both these items are consumables and are actually consumed while carrying out the activities of mining. If this was not the case, a Government organization like M/s RSMML would not have agreed to supply the same to the service providers. It follows that for the provision of services of mining these two materials are essentially required and are consumed during the course of provision of service and thus, in this case the diesel and explosives are forming part of expenses which are incurred by the service provider during the provisions of mining services, therefore, the cost of such diesel and explosives are required to be included in the value of taxable services in terms of rule 3 & 5 of Service Tax Rules, 1994 read with Section 67 of Finance Act 1994. I find that the above provisions are very relevant and have a bearing on the issue before me. The fact is that it is not only the supplies made by the service provider or consumable used by him which will form a part of the consideration for service, but also other considerations which are non-monetary in nature are also required to be taken into account for computation of taxable value of particular service."

5. The decision of the Larger Bench of the Tribunal in **Bhayana Builders (P) Ltd. v/s Commissioner of Service Tax, Delhi<sup>2</sup>** was distinguished by the Commissioner for the following reason :-

" 26. xxxxxxxxxx Notwithstanding the fact that the case of Bhavana Builders has not attained finality as an appeal against the same is pending before the Hon'ble Apex Court, I find that the case of Bhayana Builders is on an entirely different footing and relates to an entirely different taxable service, that of construction services. In terms of the provisions contained wider the Finance Act, 1994, the scheme of levy of service tax on construction services envisages abatement to such service providers on various aspects including cost of land, cost of goods supplied / sold during the provision of the said service, etc. The provisions relating to Mining services as contained under the Finance Act do not contain any such express or implicit provisions relating to providing abatement to goods used / consumed for provision of the Mining Services. Thus, the ratio emerging from the decision in the case of Bhayan Builders does not apply to the facts of the instant case where the question for decision is valuation of the taxable services of Mining Service provided by the assessee. More so, when there is no sale or supply of goods by the service provider to the service recipient in the instant case, on the contrary there is a clear case of additional consideration being flowing from the service recipient to the service provider by way of free supply of diesel and explosives which have admittedly been used and consumed during the course of provision of taxable services."

6. Shri Kunal Agarwal, learned counsel appearing for the appellant submitted that the Commissioner committed an illegality in confirming the demand of service tax. Learned counsel submitted that in view of the decision of the Larger bench of the Tribunal in **Bhayana Builders (P) Ltd v/s Commissioner of Service Tax, Delhi**, which was affirmed by the Supreme Court in **Commissioner of Service Tax v/s Bhayana Builders (P) Ltd.**<sup>3</sup>, the value of free of cost items could not have been included in the taxable value of services.

7. Shri Harshvardhan, learned authorized representative appearing for the Department, however, supported the impugned order.

8. The submissions advanced by the learned counsel for the appellant and the learned Authorized Representative of the Department have been considered.

9. The issue involved in this appeal is as to whether the value of items supplied free of cost by service recipient to the appellant have to be included in the value of mining services provided by the appellant.

10. This precise issue came up for consideration before the Supreme Court in **Bhayana Builders** as the issue before the Supreme Court was also whether the value of goods/material supplied or provided free of cost by a service recipient and used for providing the taxable service of construction or industrial complex is to be included in the computation of gross amount for valuation of the taxable service under section 67 of the Finance Act. The Supreme Court observed that a plain reading of the expression "the gross

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amount charged by the service provider for such service provided or to be provided by him” would lead to the conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the “gross amount” for the reason that no price is charged by the assessee/ service provider from the service recipient in respect of such goods/materials.

11. It needs to be noticed that the appellant had also placed the decision of the larger bench of the Tribunal in **Bhayana Builders** before the Commissioner, which decision, as noticed above, was affirmed by the Supreme Court. The larger bench of the Tribunal had concluded that the value of goods and materials supplied free of cost by a service recipient to the provider of the taxable construction service, being neither monetary or non-monetary consideration, would be outside the taxable value of the “gross amount charged” within the meaning of section 67 of the Finance Act.

12. The decision of the larger bench of the Tribunal in **Bhayana Builders** and the decision of the Supreme Court in **Bhayana Builders** are clearly applicable to the facts of the present case inasmuch as the charge in the show cause notice is that the cost of material supplied free of cost should be included in the gross value of the taxable service provided by the appellant.

13. The Commissioner was not justified in distinguishing the decision of the Larger Bench of the Tribunal in **Bhayana Builders** for the reason that it related to a different construction service and not mining service. The Commissioner should have followed the law laid down by the Supreme Court.

14. The order dated 18.11.2016 passed by the Commissioner cannot, therefore, be sustained and is set aside. Service Tax Appeal No. 50348 of 2017, Service Tax Appeal No. 50349 of 2017 and Service Tax Appeal No. 50350 of 2017 are, accordingly, allowed.

(Order pronounced in the open Court)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(P.V. SUBBA RAO)**  
**MEMBER (TECHNICAL)**

Rekha