

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,  
KOLKATA  
EASTERN ZONAL BENCH: KOLKATA**

**Service Tax Appeal No. 165 of 2008**

(Arising out of Order-in-Original No. 01/Commr/ST/Kol/2008-09 dated 29.05.2008 passed by Commissioner of Service Tax, Kolkata.)

**M/s G. S. Atwal & Co. Engineers Pvt. Ltd.,**  
4B, Nandalal Bose Ssarani, Kolkata-700071.

**....Appellant (s)**

*VERSUS*

**Commissioner of Service Tax, Kolkata.**  
4, K.S Road, Raja Chamber, 3<sup>rd</sup> Floor, Kolkata-700001.

**....Respondent(s)**

**APPERANCE :**

Shri S. P. Majumdar, Advocate for the Appellant  
Shri A. Roy, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MR. ASHOK JINDAL MEMBER (JUDICIAL)**  
**HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)**

**FINAL ORDER No...75533/2023**

DATE OF HEARING : 29.05.2023  
DATE OF PRONOUNCEMENT: 06.06.2023

**PER K. Anpazhakan:**

The appellant provided 'Mining Services' to the service recipients during the period 16.08.2002 to 31.10.2006 , but did not pay service tax on such activities and also did not take any service tax registration till 01.06.2007.

2. The appellant received a Show Cause Notice vide DGCEI F No. 206/KZU/KOL/ST/06/1757 dated 14.03.2007, demanding service tax for the period 16.08.2002 to 31.10.2006. The demand of service tax was made under the following heads:-

Sl. No	Items of Services	Commence ment of levy	Amount of ST* Edu Cess (Rs.)
1.	Cargo Handling Service [Section 65 (23)]	16.08.2002	18,32,45,744/-
2.	Business Auxiliary Service [Section 65(19)(v)]	01.07.2003	2,03,98,752/-
3.	Site Formation and Clearance, excavation and Earth Moving and Demolition services [Section 65(97a)]	16.06.2005	12,73,55,773/-
	Total demand of Serviced Tax including Edu. Cess.		33,10,00,270/-

3. The Notice was adjudicated vide Order-in-Original No. 01/Commr./ST/Kol/2008-09 dated 25.09.2008, wherein the demand of service tax with Education Cess amounting to Rs.33,10,00,270/- was confirmed under the three different heads as demanded in the Show Cause Notice. Aggrieved against the impugned order, the Appellant is before us.

4. In their submissions, the Appellant stated that it is a well settled position in law that when a particular levy was introduced for certain activities with effect from a particular date, it evident that such

activities were not taxable to service tax prior to that date. In the present case 'mining services' were brought under service tax with effect from 01/06/2017. Hence, for the period prior to 01/06/2007 the said activities cannot be bifurcated under different heads for the purpose of demanding service tax. In support of their contention, they relied on the decision of the Hon'ble Supreme Court in the following cases:-

Sl. No.	CITATIONS	CAUSE TITLES
1	2015 (39) STR 913 (SC)	CCE&C. Vs. Larsen & Toubro Ltd.,
2.	2011 (21) S.T.R. 3 (S.C.)	UOI Vs. Indian National Ship-owners Assn.

5. The appellant further relied on the following decisions, wherein it has been held that mining services cannot be levied under different heads prior to 01.06.2007:-

Sl. No.	CITATIONS	CAUSE TITLES
1.	2017 (49) (STR) 289 (Tri.-Kolkata).	Hazaribagh Mining & Engineering P. Ltd., Vs. CCE, C. & ST, BBSR-I.
2.	2022 (63) GSTL 250 (Tri.-Ahmd.)	Associated Shop Stone Distributing Co. Pvt. Ltd., Vs. Commissioner of Service Tax, Ahmedabad.
3.	2019 (24) GSTL 602 (Tri.-Hyd)	M. Ramakrishna Reddy Vs. Commissioner of CUS, C.Ex. & ST, Tirupati.
4.	2019 (25) GSTL 43 (Tri.-Kolkata)	Tuli Construction Co. Vs. Commr. Of C.Ex, Cus, & ST, BBSR-II.
5.	2019 (24) GSTL 565 (Tri.-Kolkata)	Ripley & Company Ltd., Vs. Commissioner of CEX & ST, Jamshedpur.
6.	2022 (67) GSTL 324 (Call)	Commissioner of Service Tax Vs. Naresh Kumar & Company Pvt. Ltd.,
7.	2019 (31) GSTL 487 (Tri.-	Calcutta Industrial Supply

	Kolkata).	Corpn. Vs. Commissioner of C. Ex., Cus & ST, BBSR.
8.	2008 (9) GSTL 531 (Tri.-Kolkata)	Sainik Mining & Allied Services Ltd., Vs. Commissioner of Central Excise, Customs & S. Tax, BBSR.
9.	2009 (15) STR 393 (Tri.-Chennai).	Thriveni Earthmovers Pvt .Ltd, Vs. Commissioner of C.Ex, Salem.
10.	2009 (15) STR 540 (Tri.-Kolkata)	Avian Overseas Pvt Ltd, Vs. Commissioner of C. Ex. Cus & ST, BBSR-II,
11.	2012 (27) STR 258 (Tri.-Mumbai).	Gangadhar Bulk Movers Pvt. Ltd., Vs. Commr. Of C. Ex, Nagpur,
12.	2018 (19) GSTL 462 (Bom.)	Commr. Of C. Ex, Nagpur Vs. N. P. Earth Movers Ltd.,
13.	2008 (9) STR 542 (Tri.-Kolkata)	Commissioner of C.Ex. Cus., & ST, BBSR-II Vs. B.K. Thakkar.
14.	2021 (44) GSTRL 297 (Tri.-Kolkata).	Faridabad Curgaon Minerals Vs. Commr. Of C. Ex. Cus & ST, BBSR-II.

6. The Appellant contended that the Ld. Commissioner has erred in not following the Board CBEC Circular F. No. 232/2/2006-Cx.4 dated 12.11.2007 which categorically states that no service tax on mining activities is leviable before 01.06.2007. The relevant para 4 of the Circular is reproduced below:

*"4 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."*

7. The Appellant stated that in the present case the contracts were not restricted to site formation, Cargo Handling and Business Auxiliary Service, but also included a host of other activities associated with mining activities viz. removal of over burden, extraction and segregation of coal/ores. Thus, the contracts, as a whole, has to be considered and not in parts and in a disjointed manner.

8. Regarding the limitation issue, the Appellant stated that service tax in respect of mining activities was levied for the first time with effect from 01.06.2007. Accordingly, they did not apply for registration in respect of mining services before 01.06.2007. They were under the bonafide belief that registration need not be taken in respect of 'Mining services' as the said services were not taxable prior to 01.06.2007. Hence, notice cannot be issued by invoking extended period. In support of their contention they relied on the following decisions:-

(i) 2013 (32) S.T.R. 756 (Tri.-Ahmd.), Atwood Oceanics Pacific Ltd., Vs. Commissioner of Service Tax, Ahmedabad.

**12.4** No doubt, the analysis made by us can be questioned and we are aware of limitations since we are not experts in the field of oil exploration, drilling or survey etc. but the analysis made above with the help of Wikipedia, letters issued by the Ministry and definitions of service would show that it is possible to entertain an opinion that the activity of the M/s. Atwood cannot be considered as a service covered by the definition of service 'Exploration of Mineral, Oil and Gas Service'. It is also settled law that if two views are possible and if an assessee entertains a belief that he is not liable to pay duty or tax, intention to evade duty, suppression/mis-declaration cannot be attributed and

therefore, extended period of limitation for demanding duty/tax cannot be invoked. Therefore, even if our finding on classification aspect turns out to be incorrect, extended period of limitation could not have been invoked. In this case, the period is prior to 1-6-2007 and the show cause notice was issued in April 2009. Therefore, the demand for service tax treating the services provided as service of Survey/Exploration of Minerals cannot be sustained."

(ii) 2022 (67) GSTL 324 (Cal) Commissioner of Service Tax, Vs. Naresh Kumar & Company Pvt. Ltd,

**"14.** *The second issue was as to whether the extended period of limitation could have been invoked. If the issue is answered in favour of the writ petitioner, there may not be a necessity to go into the third issue. As rightly pointed out by the Learned Writ Court, the proviso to Section 73(1) of the Act can be invoked only when there is an allegation of fraud or collusion or wilful mis-statement or suppression of facts or contravention of the provisions of the Act or the Rules with intent to evade payment of service tax. Therefore, the show cause notice should clearly indicate the wilful mis-statement or suppression of facts or fraud or collusion as done by the assessee with an intention to evade payment of tax. On a careful reading of the show cause notice, it is evidently clear that there is absolutely no whisper of any allegation of wilful mis-statement or suppression of facts or fraud or collusion as committed by the respondent assessee with an intention to evade payment of service tax. In the absence of such factual finding, the extended period could not have been invoked. .... "[Emphasized]*

(iii) 1995 (78) E.L.T. 401 (SC), Pushpam Pharmaceuticals Company Vs. CCE, Bombay.

The Hon'ble Supreme Court in this case at para 3 has held as under:-

**"3.** *Law about excisability of exempted goods was settled by this Court in Wallace Flour Mills Co. Ltd. v. Collector of Central Excise, Bombay, Division III - [1989 \(44\) E.L.T. 598 \(SC\)](#) = (1989) 4 SCC 592. Till then conflicting decisions were rendered by different High Courts and Tribunal and it was not settled whether the turnovers of assessable and exempted goods were liable to be clubbed for determining liability. Therefore, two questions arise whether the appellant was bound in the state of uncertainty in law to include the turnover of the two items and if it failed to do so then it amounted to suppression of fact and second whether it was the duty of appellant to keep the Department informed about the turnover of the goods which were not liable to any duty. No rule could be pointed out requiring a manufacturer to disclose the turnover of exempted goods. Even assuming it was, the appellant could not be held guilty of suppression when the law itself was not certain."*

VI. Having regard to the above, it is clear that major portion of the demand is patently time-barred.

9. Regarding penalty imposed, the Appellant contended that the instant issue being a predominantly legal issue, extended period of limitation under proviso to Section 73(1) of the Act and penal provisions under Section 78 *ibid* would not get attracted. They cited the decision of the Hon'ble Madhya Pradesh High Court, in the case of S.N. Sunderson (Minerals) Ltd., Vs. Suptd. (Preventive), C. Ex., Indore reported in 1995 (75) ELT 273 (M.P.), wherein it has been held that penalty is not imposable where the act of omission and commission on the assessee's part were due to bonafide belief.

10. The Ld Departmental Representative reiterated the findings of the adjudicating authority in the impugned order.

11. Heard both sided and perused the appeal records. 12. We observe that the Appellant has got a composite contract for undertaking 'mining activities'. From the work orders, it is evident that the activities were to be performed entirely within the mining area, for a lump sum price. The Department has artificially bifurcated the services under the categories of Cargo Handling Services, Site Formation services and Business Auxiliary Services and demanded service tax. In fact there is no separate charges payable to such services as per the work orders. In the Notice, the taxable value under each category of service has been arrived at artificially without any basis.

13. We also observe that CBEC has issued Circular F. No. 232/2/2006-Cx.4 dated 12.11.2007, which categorically states that no service tax leviable on mining activities prior to 01.06.2007. However, the adjudicating authority failed to appreciate the clarification and went ahead to confirm the demand made in the Notice. The relevant para 4 of the Circular is reproduced below:

*"4 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."*

14. The Appellant cited a plethora of decisions of the Hon'ble Supreme Court, High courts and Tribunals, which are listed in paras 4 and 5 above, in support of their claim that 'mining services' were not leviable to service tax prior to 01/06/2007. We find that the decisions cited by the Appellant are squarely applicable in this case. In the case of CCE Vs. Larsen & Toubro Ltd., the Hon'ble Supreme Court has held that when a particular levy was introduced for certain activities with effect from a particular date, it is to be construed that such activities were not liable to service tax prior to that date. In the present case 'mining services' were brought under service tax only with effect from 01/06/2017. Hence, for the period prior to 01/06/2007, there was no liability of service tax on 'mining services'.

15. We also find that Board has issued a Circular in F. No. 232/2/2006-Cx.4 dated 12.11.2007 clarifying the issue. The Circular cited above categorically clarifies that 'mining services' were not leviable to service tax prior to 01/06/2007. Accordingly we hold that the artificial bifurcation of the services rendered by the Appellant into Cargo Handling Service, Site Formation Service and Business Auxiliary Service and demanding service tax in the impugned order is not sustainable and hence it is liable to be set aside.

16. The Appellant raised the issue of 'limitation'. We observe that there is no evidence brought on record to establish that the Appellant has intentionally evaded service tax. Since 'mining services' were liable for

service tax only with effect from 01/06/2017, demand of service tax by invoking extended period is not sustainable. Accordingly, the demands confirmed in the impugned orders are liable to be set aside on the ground of limitation also.

17. Regarding penalty imposed in the impugned order, we observe that the demands confirmed in the impugned are are not sustainable. when the demand itself is not sustainable on merit as well as on limitation, the question of imposing penalty does not arise.

16. In view of the above findings, we set aside the impugned order and allow the appeal filed by the Appellant.

(Pronounced in the open court on.....06.06.2023....)

Sd/-  
**(Ashok Jindal)**  
**Member (Judicial)**

Sd/-  
**(K. Anpazhakan)**  
**Member (Technical)**

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