IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.41583 of 2017

(Arising out of Order-in-Original No. CBE/ST/24-Commr. dated 29.3.2017 passed by the Commissioner of Customs, Central Excise and Service Tax, Coimbatore)

M. Palanisamy **Appellant**
107-A, Sengupta Street
Ramnagar, Coimbatore – 641 009.

Vs.

Commissioner of GST & Central Excise **Respondent**
6/7, A.T.D. Street, Race Course
Coimbatore – 641 018.

APPEARANCE:

Shri K. Sankaranarayanan, Advocate for the Appellant
Shri N. Satyanarayanan, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No.41060/2023

Date of Hearing : 11.09.2023
Date of Decision: 23.11.2023

Per M. Ajit Kumar,

This appeal is filed by the appellant against Order in Original No. CBE/ST/24-Commr. dated 29.3.2017 passed by Commissioner of Customs, Central Excise and Service Tax, Coimbatore.

2. Brief facts of the case are that the appellant is registered with the Service Tax Department for the categories of "Works Contract Services" and "Transport of goods by road/goods transport agency services'. Intelligence gathered by the Directorate General of Central Excise Intelligence, (DGCEI) indicated that the appellant had failed to

pay service tax on the services rendered by them under the categories of "Mining service", "Supply of tangible goods service" and "Site formation service". Based on the investigations conducted by the department, the Additional Director General (ADG), DGCEI, Chennai issued Show Cause Notice dated 9.10.2015 proposing to demand service tax from the appellant. After due process of law, the adjudicating authority confirmed the service tax of Rs.8,74,99,061/- with interest under the head 'Mining Service'; Rs.60,54,133/- with interest for the services 'Site Formation, Clearance, Excavation, Earth Moving and Demolition Service' and Rs.4,06,83,917/- with interest for 'Supply of tangible goods service'. The adjudicating authority also imposed penalty of Rs.13,42,37,111/- on the appellant under section 78 of the Act and under section 77(1)(a) and 77(2) of the FA 1994. Aggrieved by the above order, the appellant is before the Tribunal.

3. No cross-objection has been filed by the respondent-department.

4. We have heard learned counsel Shri K. Sankaranarayanan for the appellant and Shri N. Satyanarayanan, learned AR for Revenue.

4.1 The learned counsel for the appellant submitted that since the show cause notice was issued by the ADG DGCEI, Coimbatore Zonal Unit answerable to the Commissioner, Coimbatore, the adjudication could not be done by the Commissioner, Coimbatore. On a combined reading of sub section (1) and (2) of section 73 of FA 1994, it is seen that only 'the' Central Excise Officer who issued notice under section 73(1) alone is empowered to determine the amount of service tax under section 73(2) and it could not be entrusted to 'any' Central Excise Officer. There are three other issues involved in the appeal

relating to the taxable service i.e. (i) mining services (ii) leasing services and (iii) Site formation clearance excavation, earthmoving and demolition services for which service tax has been demanded from them. Quarrying of sand from river bed has not been defined as taxable service under Section 65 (105) (zzzy) and hence the section is applicable only to mining of mineral, oil or gas and not to sand. He submitted that sand is defined as minor minerals and not as mineral. And thus the MMDR Act, 1957 has specifically distinguished between mineral and the minor mineral in the definition clause, hence they are not covered by section 65(105)(zzy) of FA 1994. Further the appellant has not rendered services of supply of tangible goods. The transaction is the one of transfer of right to use goods, which is not leviable to service tax. He submitted that they have not rendered any service with respect to Site formation services. The issue pertained to sale of gravel /sand and no service is involved. Hence it is not chargeable to service tax. It is a settled issue that sale and service are mutually exclusive and hence the proposal to demand service tax will not sustain under Site formation services. He prayed that impugned Order-in-Original may be set aside in its entirety.

4.2 The learned AR for the Revenue has reiterated the points given in the impugned order. He referred to the Tribunals judgment in Shreem Coal Carriers Pvt. Ltd. v. Commissioner [2015 (37) S.T.R. 1067 (Tribunal)], to state that though sand is a minor mineral, mining of sand from riverbed comes within the definition of mining service. He also referred to the Hon’ble Madras High Courts judgment in M/S. Redington (India) Limited vs Principal Additional Director, Directorate

General of Goods and Services Tax, Chennai [2022 (62) GSTL 406 (Mad)] and stated that no restriction can be inferred on the powers of the Board while appointing the officers of the DGCEI to act as "Central Excise Officers", and prayed that the impugned order be upheld.

5 We have gone through the appeal and heard the rival parties. The appeal raises a preliminary challenge to the jurisdiction of the adjudicating authority to adjudicate the matter. The other issues pertain to (i) quarrying of river sand, (ii) leasing services and (iii) site formation service. We shall take up these issues sequentially. All the issues taken up for consideration are listed below for ease of reference.

6. Jurisdiction of the Adjudicating Authority

6.1 The appellant is of the opinion that the Commissioner, Coimbatore, who has adjudicated this case, cannot adjudicate a matter where the show cause notice has been issue by the ADG, DGCEI, Coimbatore Zonal Unit in the light of section 73 of FA 1994. It is submitted by them that on a combined reading of sub section (1) and (2) of section 73 ibid only the Central Excise Officer who had issued notice under section 73(1) is empowered to determine the amount of service tax under section 73(2) and this work could not be entrusted to any 'Central Excise Officer'.

6.2 The impugned order on the other hand has examined the matter and stated as under:-

> “20.1, I find that SMP in their written submission have requested for adjudication of their preliminary objection regarding jurisdiction of the officers. In so far as to the averment regarding jurisdiction, I find that H. W. R. Wade in his "Administrative Law" EL-BS, 1984 edition, in Chap. 9: "Jurisdiction over fact and law at p. 250 describes the narrow meaning of the term with great clarity, simplicity and terseness thus: "In this area jurisdiction' is a hard workers word. Commonly it is used in its broadest sense, meaning simply 'power'. In some contexts it will bear the be technical difference.....". In this case, it would be necessary to apply the contours of jurisdiction to the "adjudicating authority". Chapter V and VA of the Finance Act, 1994, as amended does not define the term adjudicating authority. However, section 65 B ibid stipulates that the for words and definitions used but not defined in Chapter V ibid the meanings defined in the Central Excise Act, 1944 can be applied to. As per the Central Excise Act, 1944 "adjudicating authority" means any authority competent to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, (54 of 1963) Collector of Central Excise (Appeals) or Appellate Tribunal. Also, "Central Excise Officer means any officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs

> constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act. Notification 22/2014 S.T. dated 16.09.2014 appoints inter alia the Additional Director General as Central Excise Officers and invests them with all powers under Chapter V of the Finance Act, 1994, and rules made there under, as are exercisable by Central Excise Officers of the corresponding rank i.e., the Commissioner. As such, it is clear that the Additional Director General, DGCEI, has been vested with the necessary jurisdiction and therefore the argument that the subject Show Cause Notice has been issued without jurisdiction is not tenable. It is also clear from the above that the noticee's argument regarding the exercise of jurisdiction by the officer in the higher hierarchy and the likelihood of bias does not arise since both the officers are in the equivalent rank. As regards the powers of adjudication of the Commissioner, Notification 30/2005-S.T. dated 10.08.2005 as amended issued under the powers conferred by Section 83 A of the Finance Act, 1994 mandates that the Commissioner of Central Excise can adjudicate cases where the service tax is above Rs. 2 Crore and hence the jurisdiction in this regard is also beyond doubt."

6.3 We find that a Central Excise Officer, is defined in Section 2 (b) of Central Excise Act, 1944. It states:

> **[(b)** "Central Excise Officer" means the [Principal Chief Commissioner of Central Excise, Chief Commissioner of Central Excise, Principal Commissioner of Central Excise], Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, [Joint Commissioner of Central Excise] [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of Central Excise Officer under this Act.]
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> (emphasis added)

The definition makes it clear that the Board may also invest any other officer or person with any of the powers of Central Excise Officer. The appointment and jurisdiction of Central Excise Officers are as per Rule 3 of the Central Excise Rules, 2002. Rule 3 states:

> **RULE 3.** Appointment and jurisdiction of Central Excise Officers-
>
> (1) The Board may, by notification, appoint such person as it thinks fit to be Central Excise Officer to exercise all or any of the powers conferred by or under the Act and these rules.
>
> (2) The Board may, by notification, specify the jurisdiction of a Chief Commissioner of Central Excise or Commissioner of Central

Excise or Commissioner of Central Excise (Appeals) for the purposes of the Act and the rules made thereunder.

(3) Any Central Excise Officer may exercise the powers and discharge the duties conferred or imposed by or under the Act or these rules on any other Central Excise Officer who is subordinate to him.

Vide **Notification No. 39/2001-Central Excise (N.T.) G.S.R. 468(E)** Dated 26/06/2001, the Central Board of Excise and Customs in exercise of powers conferred by sub-rule (1) of rule 3 of the Central Excise (No.2) Rules, 2001, has appointed officers of Central Excise and invested them with all the powers of Central Excise Officers as specified in the Table given in the notification, to be exercised within such jurisdiction and for such purposes as specified with effect from 1st July, 2001. By the said Notification all the Commissioners of Central Excise have been given the powers of Adjudication and investigation of such cases, as may be assigned by the Board.

26th June, 2001 Notification No. 39/2001-Central Excise (N.T.) G.S.R. 468(E).

In exercise of powers conferred by sub-rule (1) of rule 3 of the Central Excise (No.2) Rules, 2001, the Central Board of Excise and Customs appoints the officers of Central Excise specified in Column (2) of the Table below, and invests them with all the powers of Central Excise Officers specified in column (3) of the said Table, to be exercised within such jurisdiction and for such purposes as specified in columns (4) and (5) of the said Table respectively with effect from 1st July, 2001

TABLE

S. No.	Central Excise Officers	Central Excise Officers whose powers are to be exercised	Jurisdiction	Purposes
(1)	(2)	(3)	(4)	(5)
1.	All the Commissioners of Central Excise	The Commissioners of Central Excise	Throughout the territory of India	Adjudication and investigation of such cases as may be assigned by the Board
2.	Commissioners of Central Excise (Adjudication)	The Commissioners of Central Excise	Throughout the territory of India	Adjudication and investigation of such cases as may

	Chennai, Delhi and Mumbai			be assigned by the Board
3.	Customs Preventive Officers at the Airports of Mumbai, Kolkata, Delhi and Chennai	The Central Excise officers in charge of a warehouse	Jurisdiction of such Central Excise Officer who is in-charge of a warehouse under the Central Excise Act, 1944 (1 of 1944) and rules made thereunder	To exercise all the powers exercisable by the Central Excise Officer who is in-charge of a warehouse under the Central Excise Act, 1944 (1 of 1944) and rules thereunder

Further vide **Notification No. 38/2001-Central Excise (N.T.)** GSR 467 (E) dated 6th June, 2001 and in exercise of powers conferred by clause (b) of section 2 of the Central Excise Act, 1944 read with sub-rule (1) of rule (3) of the Central Excise (No.2) Rules, 2001, the Central Board of Excise and Customs appointed and invested DGCEI officers (among others) as Central Excise Officers with all the powers, to be exercised by them throughout the territory of India, of an officer of Central Excise of the rank specified in the table to the said notification, with effect from 1st July, 2001.

Notification No.38/2001-Central Excise (N.T.)
26th June, 2001

In exercise of powers conferred by clause (b) of section 2 of the Central Excise Act, 1944 read with sub-rule (1) of rule (3) of the Central Excise (No.2) Rules, 2001, the Central Board of Excise and Customs appoints the officers specified in column (2) of the Table below as Central Excise Officers and invests them with all the powers, to be exercised by them throughout the territory of India, of an officer of Central Excise of the rank specified in the corresponding entry in column (3) of the said Table, such powers being the powers of a Central Excise Officers conferred under the said Act and rules made thereunder with effect from 1st July, 2001.

TABLE

Sl. No.	Officers	Rank of Officer of Central Excise
(1)	(2)	(3)
1.	Officers of the Director General of Central Excise Intelligence, namely: 1. Director General 2. Additional Director General 3. Additional Director 4. Joint Director 5. Deputy Director or Assistant Director 6. Senior Intelligence Officer	1. Chief Commissioner 2. Commissioner 3. Additional Commissioner 4. Joint Commissioner 5. Deputy Commissioner or Assistant Commissioner 6. Superintendent

	7. Intelligence Officer	7. Inspector
2.	Officers of Directorate General (Vigilance), namely:- 1. Director General (Vigilance) 2. Additional Director General 3. Additional Commissioner (Vigilance) 4. Joint Commissioner (Vigilance) 5. Deputy Commissioner or Assistant Commissioner (Vigilance)	1. Chief Commissioner 2. Commissioner 3. Additional Commissioner 4. Joint commissioner 5. Deputy Commissioner or Assistant Commissioner
3.	Officers of Directorate General of Revenue Intelligence, namely:- 1. Director General 2. Additional Director General 3. Additional Director 4. Joint Director 5. Deputy Director or 6. Senior Intelligence Officer 7. Intelligence Officer	1. Chief Commissioner 2. Commissioner 3. Additional Commissioner 4. Joint Commissioner 5. Assistant Commissioner 6. Superintendent 7. Inspector
4.	Officers of Directorate General of Central Economic Intelligence Bureau, namely:- 1. Deputy Director General 2. Assistant Director General 3. Senior Technical Officer 4. Intelligence Officer	1. Commissioner 2. Joint Commissioner 3. Assistant Commissioner or Deputy Commissioner 4. Inspector
5.	Officers of Directorate General of Inspection (Customs and Excise), namely:- 1. Director General 2. Additional Director General 3. Additional Director 4. Joint Director 5. Deputy Director or Assistant Director 6. Senior Intelligence Officer (Class – I & II)	1. Chief Commissioner 2. Commissioner 3. Additional Commissioner 4. Joint Commissioner 5. Assistant Commissioner or Deputy Commissioner 6. Superintendent
6.	Officers of Directorate of Statistics and Intelligence, namely:- 1. Director 2. Joint Director 3. Deputy Director 4. Senior Research Officer and Senior Analyst 5. Assistant Director Research and Junior Analyst 6. Statistical Investigator (Senior Grade) 7. Statistical Investigator (Ordinary Grade)	1. Commissioner 2. Joint Commissioner 3. Assistant Commissioner or Deputy Commissioner 4. Assistant Commissioner or Deputy Commissioner 5. Superintendent 6. Inspector 7. Inspector
7.	Officers of Customs in Export Processing Zones, Free Trade Zones or Special Economic Zones, namely:- 1. Commissioner 2. Additional Commissioner 3. Joint Commissioner 4. Assistant Commissioner or Deputy Commissioner	1. Commissioner 2. Additional Commissioner 3. Joint Commissioner 4. Assistant Commissioner or Deputy Commissioner

	5. Appraiser 6. Examiner 7. Preventive Officer	5. Superintendent 6. Inspector 7. Inspector
8.	Assistant Director (Cost) in Central Excise Commissionerate	Assistant Commissioner or Deputy Commissioner

6.4 The above provisions make it clear that Central Excise Officers include officers specified by section 2(b) of the Central Excise Act 1994 or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs with any of the powers of Central Excise Officer under the Act. Rule 3 (1) of the Central Excise Rules 2002 empowers the Board in this regard. The officers may be appointed to exercise all or any of the powers conferred by the Act or Rules. Section 73 (1) of FA 1994 as it stood at the relevant time empowers the Central Excise Officer to issue a notice on the person chargeable with service tax, requiring him to show cause why he should not pay the amount specified. Section 73 (2) ibid empowers the Central Excise Officer to determine the amount of service tax due, or erroneously refunded. Vide **notification No. 38/2001 (supra)** the Central Board of Excise and Customs has appointed and invested DGCEI officers powers of Central Excise Officers. It is hence clear that the DGCEI officer who issued the notice is a Central Excise Officer empowered to issue a show cause notice.

6.5 Relevant portions of Section 73 of FA 1994 as it stood on 13/05/2005, reads as under:-

> **73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded**
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> (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the 2[Central Excise Officer] may, within **one year** from the relevant date, serve

> notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
>
> PROVIDED . . . .
>
> (1A) . . . . .
>
> (1B) . . . .
>
> (2) The **4**[Central Excise Officer] shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

6.6 We find that much ado has been made by the appellant on the definite article 'the' before the words 'Central Excise Officer'. In English usage "the" is termed as the "definite article" while indefinite articles are "a" and "an." A definite article only specifies that the noun referred to is one which is an already known one. What it is, must be identified by the context of the matter under consideration. For example, in the present context, while referring to 'Central Excise Officers' in relation to an activity or duty, there are those officers who are empowered and have jurisdiction to undertake that activity and those that don't. "The" in this situation specifies that the officer is one who has jurisdiction in the matter. There is no ambiguity in the present case that the said officer is empowered to issue a notice. Any attempt to understand the definite article used in both section 73(1) and 7(2) of FA 1994 as being dependent sections, as sought to be done by the appellant cannot be accepted. If the definite article 'the' in sub-section (2) of section 73 ibid, is dependent on and can be understood only in the context of the definite article 'the' in sub-section (1), how is the definite article 'the'

in sub-section (1) to be understood? On what should it lean for support to discover its identity?

6.7 The sub-sections of section 73 ibid are intended to deal with different legal issues like the issue of notice and passing of a speaking order etc and one cannot be projected or read into another. Hence sub-sections (1), (2) and (3) although being parts of section 73 operate in independent domains. The phrase 'the Central Excise Officer' appears in both Section 73(1) & (2). Notice under section 73(1) ibid is based on the principles of natural justice. It is the foundation in the matter of levy and recovery of duty, penalty and interest. Hence the sub section is meant to give the noticee the charges made out by the department against him by way of a show cause notice and thereby afford him an effective opportunity to rebut the allegations contained therein and prove his innocence. This notice can be issued only by 'the' Central Excise Officer having jurisdiction in the matter. Whereas section 73(2) caters to the issue of a speaking order. It is a quasi-judicial function to be discharged by an officer/ authority who has been empowered to do the same. A speaking order discloses the reasons for the Adjudicating Authority in passing a particular order and provides the noticee and the department an opportunity to understand the issues and law involved and also provides for an objective review of the order by appellate/ judicial bodies in case of an appeal by either of the contesting parties. The powers to investigate, conduct audit, adjudicate etc. are separate powers. As seen earlier Rule 3 (1) of the Central Excise Rules 2002 empowers the Board to appoint officers to exercise all or any of the powers conferred by the Act or Rules. Hence

so long as the officer has the jurisdiction to issue a notice there is no infirmity in his action. Having completed this action it cannot be insisted that the same officer should also adjudicate the matter.

6.8 The issue whether DGCEI officers who has been vested with the powers under the impugned Notification No.22/2014-S.T., dated 06.09.2014, are "Central Excise Officers" or not was examined by the Hon'ble Madras High Court in **M/S. Redington (India) Limited vs Principal Additional Director, Directorate General of Goods and Services Tax, Chennai** [2022 (62) GSTL 406 (Mad)] dated 17/06/2022. The Hon'ble Court held:

> 140. The "Central Excise Officers" were given the task to perform the functions under Chapter V of the Finance Act, 1994. It is the "Central Excise Officers" who can issue Show Cause Notice under Section 73 of the Finance Act, 1994 to an assessee where any service tax was not been levied or paid or was short-levied or short-paid or erroneously refunded. It is also the "Central Excise Officer" who can adjudicate such Show Cause Notice.
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> 141. In fact, initially, when service tax was introduced, the power to issue Show Cause Notice under Section 73 of the Chapter V of the Finance Act, 1994 was vested only with the Assistant Commissioner of Central Excise / Deputy Commissioner of Central Excise. Later Section 73 was amended and the expression Assistant Commissioner of Central Excise/Deputy Commissioner of Central Excise were substituted with "Central Excise Officers".
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> 142. Reason why Officers form the Central Excise Department were given the task for implementing the provision relating to levy of service tax by the Parliament is because the Board did contemplate creation of a separate cadre of officers employees for implementing the provision of Chapter V of the Finance Act, 1994.
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> ***** ***** *****
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> 145. The expression "Central Excise Officer" is neither defined in the Finance Act, 1994 nor in the Service Tax Rules, 1994 framed under Section 94(1) read with 94(2) of the Finance Act, 1994. Therefore, the definition of "Central Excise Officer" in Section 2(b) of the Central Excise Act, 1944 was made applicable for the purpose of Chapter V of the Finance Act, 1994.
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148. The expression and phrase employed in Section 2(b) of Central Excise Act, 1944 is “means” and “any person (including an officer……..)”.

149. The definition of “Central Excise Officer” in Section 2(b) of Central Excise Act, 1944 is expansive. It is clear that apart from officers specified therein from the Central Excise Department, any other officer including an officer of the State Government) invested with any of the powers of a Central Excise Officer this Act by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963).

150. Thus, by default all the officer of Central Excise Department are “Central Excise Officers”. Apart from them such other officers including an officers of the State Government invested by the Board constituted under the Central Boards of Revenue Act, 1963 with any of the power of a Central Excise Officer under the Act are “Central Excise Officers”.

151. It is under Rule 3 of the Central Excise Rules, 2002 the Board appoint such person as it thinks fit as “Central Excise officers” to exercise all or any of the powers conferred by or under the Act and Rules.

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153. Thus, it is clear that any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act are “Central Excise Officers”. It is the Board which can delineate the Jurisdiction under Rule 3 of the Central Excise Rules, 2002.

154. Such officers may exercise the powers and discharge the duties conferred or imposed by or under the Act or these rules on any other Central Excise Officer who is subordinate to him

155. By virtue of Notification No.38/2001-C.E. (N.T), dated 26.06.2001 issued under Section 2(b) of the Central Excise Act, 1944 read with Rule 3(1) of the Central Excise (No.2) Rules, 2001, the Board appointed several persons as “Central Excise Officers” and invested them with all powers of an officer of “Central Excise” of the rank specified in the corresponding entry in column (3) of the Table to the Notification and that such powers being the powers of a Central Excise Officer conferred under the Act, to be exercised by them throughout the territory of India.

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189. Therefore, the reasoning of the Hon’ble Supreme Court in Commissioner v. Sayed Ali 2011 (265) E.L.T. 17 (S.C.) and in Canon India Pvt Ltd Vs Commissioner, 2021 (376) E.L.T. 3 (S.C.) cannot be imported in the context of the Central Excise Act, 1944 and/or The Finance Act, 1944.

> 190. Therefore, without doubt, the officers from the Directorate are "Central Excise Officers" as they have been vested with the powers central exercise officers.
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> 191. Thus, the definition of "Central Excise Officer" in Section 2(b) of the Central Excise Act, 1944 was made applicable for Section 73 of Chapter V of the Finance Act, 1994 which prescribes a machinery for recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.
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> 192. As mentioned above, under Rule 3 of the Service Tax Rules, 1994, the Board can appoint any other officer to exercise power within the "local limits". However, that would not mean that the officers of "Directorate of Central Excise Intelligence (DGCEI) [presently The Directorate of GST Intelligence]" who are already "Central Excise Officers" under Notification No.38/2001-C.E. (N.T), dated 26.06.2001 for whole of India cannot exercise power pan India. Notification No.22/2014-ST dated 6.09.2014 is to be read in conjunction with Notification No.38/2001- C.E. (N.T), dated 26.06.2001.
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> 193. Therefore, the 2nd argument advanced on behalf of petitioners as far as jurisdiction to issue Show Cause Notice cannot be accepted.
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> 194. Therefore, the argument of some of the counsel for the petitioners that the officer of Directorate of Central Excise Intelligence (DGCEI) [presently The Directorate of GST Intelligence] are not "Central Excise Officer" and cannot exercise function Pan India cannot be accepted.
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> 195. No restriction can be inferred on the powers of the Board while appointing the officers of the Directorate of Central Excise Intelligence (DGCEI) [presently The Directorate of GST Intelligence] to act as "Central Excise Officers".
>
> 196. Thus, it cannot be said that the officers who has been vested with the powers under the impugned Notification No.22/2014-S.T., dated 06.09.2014, are not the "Central Excise Officers".
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> (emphasis added)

Thus, DGCEI officers who had been vested with the powers under the Central Excise Act, 1944 were held to be "Central Excise Officers".

6.9 The issue relating to the jurisdiction vested in a Central Excise officer came for consideration before the Hon'ble Supreme Court in **Pahwa Chemicals Private Limited Vs Commissioner of Central Excise,** Delhi, [2005 (181) E.L.T. 339 (S.C)]. In the said case the

powers of the Board under provisions of the Act were examined at paragraph 13 of the said judgment. It was observed that Section 2(b) defines the "Central Excise Officer" and it is mentioned therein that any Officer of the Central Excise Department or any person who has been invested by the Board with any of the powers of the Central Excise Officer would be a Central Excise Officer. Thus, the Board has power to invest any Central Excise Officer or any other Officer with powers of Central Excise Officer. By virtue of Section 37B the Board can issue orders, instructions or directions to the Central Excise Officers and such Officers must follow such orders, instructions or directions of the Board. The Hon'ble Supreme Court held that the Board can only issue such direction as is necessary for the purpose of and in furtherance of the provisions of the Act. The instructions issued by the Board have to be within the four corners of the Act. If, therefore, the Act vests in the Central Excise Officers jurisdiction to issue show-cause-notices and to adjudicate, the Board has no power to cut down that jurisdiction. However, for the purposes of better administration of levy and collection of duty and for purpose of classification of goods the Board may issue directions allocating certain types of works to certain Officers or classes of Officers. These administrative directions cannot take away jurisdiction vested in a Central Excise Officer under the Act. At the highest all that can be said is Central Excise Officers, as a matter of propriety, must follow the directions and only deal with the work which has been allotted to them by virtue of these Circulars. But if an Officer still issues a notice or adjudicates contrary to the Circulars

it would not be a ground for holding that he had no jurisdiction to issue the show cause notice or to set aside the adjudication.

6.10 To sum up, the jurisdiction vested in an authority may be classified into (i) territorial or local jurisdiction (ii) pecuniary jurisdiction (iii) jurisdiction over the subject matter etc. The list is not exhaustive. The Central Board of Excise and Customs in exercise of powers conferred by sub-rule (1) of rule 3 of the Central Excise Rules, 2001, may based on the requirement, invest an officer of the central or state government with jurisdiction only over a subject matter like investigation culminating in the issue of a show cause notice to the parties concerned, without investing that authority with the power to adjudicate that matter. If the notice is made answerable to another Central Excise Officer having jurisdiction in the matter there is nothing in law that stops that officer from adjudicating the notice. Neither is the principle of natural justice violated. In fact, the initial officers mentioned in the section were 'Deputy Commissioner / Assistant Commissioner' which was replaced by the words 'Central Excise Officer'. The section was thus expanded and made broader to bring in its fold any other officer of the Central Excise Department or officers of the State Government etc. so invested by the Board to be a Central Excise Officer. The words 'the' preceding 'Central Excise Officer' thus stands for the Central Excise Officer who is empowered to issue a notice / adjudicate the matter as per law. It clearly excludes any other Central Excise Officer from doing the same and hence the phrase 'the Central Excise Officer' appears both in Section 73(1) & (2) of FA 1994. Hence it is clear that both the SCN and the impugned order does

not suffer from the vice of jurisdictional error. Accordingly, we do not find any merit in this argument.

7. **Mining Service**

7.1 It would be relevant to reproduce the legal provisions relating to Mining service for a better understanding of the issues involved. Para 24.6 of the impugned order is hence reproduced below:

> "24.6. As regards Mining Services, as per Section 65(105) (zzzy), prior to 01.07.2012, 'Taxable Service' means, any service provided or to be provided to any person, by any other person in relation to mining of mineral, oil or gas. Further, Section 2 (11) of Mines Act, 1952 defines the term 'Minerals' as "All substances which can be obtained from the earth by mining, digging, dredging, hydraulicing, quarrying or by any other operation and includes mineral oils (which in turn include natural gas and petroleum)". Section 3 of 'The Mines and Minerals (Development and Regulation) Act, 1957 (herein after referred to as 'MMDRA, 1957 for short) defines the terms mining operation, minerals, mining lease etc. and the same is reproduced below for ease of reference: In this act, unless the context otherwise requires:-
>
> (a) "Minerals" includes all minerals except mineral oils,
>
> (b) "Mineral Oll" includes natural gas and petroleum,
>
> (c) "Mining lease" means lease granted for the purpose of undertaking mining operations, and includes a sub-lease granted for such purpose,
>
> (d) "Mining Operations" means any operation undertaken for the purpose of winning any mineral,
>
> (e) Minor Minerals" means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes and any other mineral which the Central Government may by Notification in the Official gazette, declare to be a minor mineral".
>
> Since, 01.07.2012, "service" is defined under Section 65B (44) of Finance Act, as under: "Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-
>
> (a) an activity which constitutes merely,-
>
> (1) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force."

7.2 The appellant has made a multi-pronged plea against the exigibility of their activities in relation to mining to service tax. They are examined individually below.

Exigibility of minor mineral

7.3 As pointed out by the appellant the word, "mineral" is defined in Section 3(a) of Mines and Minerals (Development and Regulation) Act.1957 (No 67 of 1957) (MMDR Act) to state that "minerals" includes all minerals except mineral oils. The appellant's plea that sand being a minor mineral will not get covered under sec. 65(105)(zzzy) as it applied only to mining of mineral, oil or gas and not to sand is not correct. The term 'all minerals' would include 'minor minerals'. The separate definition of 'minor minerals' under the MMDR Act does not take sand outside the scope of 'minerals'. Definitions as the word suggests only define the key terms used in the statute for a separate treatment in law were warranted by specific provisions of MMDR Act only. These have no relevance under FA 1994. For example, the Central Government has notified sand as a minor mineral under the Mines and Minerals (Development and Regulation) Act, 1957 for the purpose of the quarrying of sand being regulated by the state governments. These

regulatory powers over minor minerals do not hinder the levy of service tax on taxable activities in relation to mining under FA 1994.

7.3.1 The activity as under taken by the appellant is, quarrying/ earth work excavating of sand and wet sand and loading in the lorries/ tippers of the consumer using their own labourers. As per Section 3 of 'The Mines and Minerals (Development and Regulation) Act, 1957, "Mining Operations" means any operation undertaken for the purpose of winning any mineral. We find that sand quarrying as a service activity in general (not exhaustive) includes:

1. **Exploration and planning:** This stage involves identifying suitable sand deposits, obtaining the necessary permits, and developing a quarrying plan.
2. **Site preparation:** This stage involves clearing the land, removing topsoil, and constructing access roads and other infrastructure.
3. **Extraction:** This stage involves removing the sand from the ground. This can be done using a variety of methods, including:
    - **Surface mining:** This method is used when the sand deposit is close to the surface. Heavy machinery, such as excavators and bulldozers, is used to remove the sand and load it onto trucks or conveyor belts.
    - **Dredging:** This method is used when the sand deposit is underwater. A dredge boat is used to suck up the sand and pump it to a barge or shore-based processing plant.
4. **Processing and transportation:** Once the sand has been extracted, it may need to be processed to remove impurities or to meet specific size and quality requirements. The sand is then

transported to market, where it is used in a variety of applications such as construction, glassmaking, sandblasting etc. Each activity is a service. Service tax is sought to be levied on these activities and not on the mined sand per se. On the contrary the simple act of quarrying without making the sand usable by removing impurities, grading it etc is a process of selective mining and is not a manufacturing process. Hence the nature and characteristics of the mineral does not matter.

7.3.2 The Apex Court, in **Association of Leasing and Financial Service Companies v. Union of India,** [(2011) 2 SCC 352] had noted:

> "38…Today with technological advancement there is a very thin line which divides a "sale" from "service". That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. That service tax is, therefore, a tax on an activity. That, service tax is a value added tax. The value addition is on account of the activity which provides value addition…Thus, service tax is imposed every time service is rendered to the customer/client…Thus, the taxable event is each exercise/activity undertaken by the service provider and each time service tax gets attracted."
>
> (emphasis supplied)

From the activities of the appellant it is clear that they are rendering taxable service to PWD in the quarrying and loading of the mineral i.e. sand which is leviable to service tax. The tax is sought to be levied on the 'taxable service' in relation to mining and not on the goods that have been quarried. In **Shreem Coal Carriers Pvt. Ltd. v. Commissioner** [2015 (37) S.T.R. 1067 (Tribunal)], a coordinate Bench of this Tribunal held:

> "5.3 In respect of one of the contracts, we notice that the same relates to mining of sand from the riverbed and transporting the same to the Western Coalfield's mining area. Sand is a minor mineral and therefore, mining of sand from riverbed comes within the definition of mining service and will not come within the scope of "Cargo Handing Service" as the main activities is of mining and therefore, demand of Service Tax on mining of sand is not sustainable in law."

Even if the State Government is the owner of the mineral deposits in the lands which vest in the state, it will not be immune to the tax which is imposed by the Center as will be discussed later.

'In relation to mining' alone is taxable.

7.4 The appellant has taken an alternate plea that the wording 'in relation to' used in the definition of mining service is relevant, (i.e.) the activity in relation to mining alone is taxable and not mining per se. Hence activities 'in relation to mining' is chargeable to tax but not mining. The Division Bench of the Hon'ble Delhi High Court in **Home Solutions Retails (India) Ltd. Vs Union of India & Ors.** [WP(C) No.3398/2010 dated 23/09/2011] examined a similar issue whether an attempt has been made through the introduction of Section 65(105)(zzzz) to levy service tax on renting of immovable property as opposed to the levy of service tax on the service provided "in relation to renting of immovable property". In other words whether renting of immovable property for use in the course or furtherance of business or commerce by itself would constitute service. The Hon'ble Court held:

> 69. In view of our aforesaid analysis, we are disposed to think that the imposition of service tax under Section 65(105)(zzzz) read with Section 66 is not a tax on land and building which is under Entry 49 of List II. What is being taxed is an activity, and the activity denotes the letting or leasing with a purpose, and the purpose is fundamentally for commercial or business purpose and its furtherance. The concept has to be read in conjunction. As we have explained that service tax is associated with value addition as evolved by the judgments of the Apex Court, the submission that the base of the said decisions cannot be taken away by a statutory amendment need not be adverted to. Once there is a value addition

> and the element of service is involved, in conceptual essentiality, service tax gets attracted and the impost gets out of the purview of Entry 49 of List II of the Seventh Schedule of the Constitution and falls under the residuary entry, that is, Entry 97 of List I.
>
> (emphasis added)

The Hon'ble Court held that service tax is a value added tax which, in turn, is a general tax applicable to all commercial activities involving provision of service. That the imposition of service tax is not a tax on land and building as enumerated under Entry 49 of List II, what is being taxed is an activity, which implies letting and leasing the immovable property for commercial and business purpose and its furtherance. Similarly in the case of quarrying for sand the tax is on the value added activity and not on the sand per se. In other words, what is sought to be taxed is the activities in relation to 'mining' and not 'mining' itself. Hence this plea does not succeed.

Constitution exempts the property and income of a State from Union taxation

7.5 Another plea taken by the appellant is that they are exempt as sand is the property of the Government of Tamil Nadu (PWD). It is seen that **Article 289** of the Constitution exempts the property and income of a State from Union taxation. In **re. The Bill to Amend the Sea Customs Act (1878)**, [1963 AIR 1760/ 1964 SCR (3) 787] pertaining to indirect taxation, a Special Bench of eight judges of the Hon'ble Apex Court exercising its advisory jurisdiction decided on whether the provisions of Art. 289 of the Constitution precluded the Union from imposing, or authorising the imposition of (a) Customs duties on the import or export or (b) excise duties on the production or manufacture in India of the property of a State used for purposes

other than those specified in cl. (2). of that Article. In a majority decision the Hon'ble Chief Justice speaking for himself and four other Judges held that the immunity granted to the States in respect of Union taxation, under Art. 289(1) does not extend to duties of customs including export duties or duties of excise. Relevant portions of the judgment are extracted below:

> *"11. It will thus appear that both s. 154 and Art. 285 set out above speak only of "property" and lay down that property vested in the Unions shall be exempt from all taxes imposed by a State or by any authority within a State, subject to one exception of saving the pre-existing taxes on such property until Parliament may by law otherwise provide. Similarly whereas s. 155 of the Government of India Act exempts from federal taxes the Government of a Province in respect of lands or buildings situate in British India or income accruing, arising or received in British India, Art. 289(1). says "the property and income of a State shall be exempt from Union taxation". Section 156 aforesaid has two provisos (a) & (b); (a) relating to trade or business of any kind carried on by or on behalf of the Government of a Province, and (b) which is not relevant, relating to a Ruler. It will be seen that "income" is repeated in both the provisions, but what was "lands" or "buildings" has become simply "property" in Art. 289(1). .*
>
> *12. The question naturally arises why "income" was at all mentioned when it is common ground that "income" would be included in the generic term "property". It was suggested on behalf of the Union that the juxta-position of the terms "property" and "income" of a State which have been declared to be exempt from Union taxation would indicate that the tax from which they were to be immune was tax on "property" and on "Income", i.e., in both cases a direct tax, and not a indirect tax, which may be levied in relation to the property of a State, namely, excise duty, which is a tax on the manufacture or production of goods and customs duty which is a tax on the event of importation or exportation of goods.*
>
> *. . .*
>
> *33. Similarly in the case of duties of customs including export duties though they are levied with reference to goods, the taxable event is either the import of goods within the customs barriers or their export outside the customs barriers. They are also indirect taxes like excise and cannot in our opinion be equated with direct taxes on goods themselves. Now, what is the true nature of an import or export duty? Truly speaking, the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers, i.e., before they form part of the mass of goods within the country. Such a condition is imposed by way of the exercise of the power of the Union to regulate the manner and terms*

on which goods may be brought into the country from a foreign land. Similarly an export duty is a condition precedent to sending goods out of the country to other lands. It is not a duty on property in the sense of Art. 289(1). Though the expression "taxation", as defined in Art. 366(28), "includes the imposition of any tax or impost, whether general or local or special", the amplitude of that definition has to be cut down if the context otherwise so requires. The position is that whereas the Union Parliament has been vested with exclusive power to regulate trade and commerce, both foreign and inter-State (Entries 41 and 42) and with the sole responsibility of imposing export and import duties and duties of excise, with a view to regulating trade and commerce and raising revenue, an exception has been engrafted in Art. 289(1) in favour of the States, granting them immunity from certain kinds of Union taxation. It, therefore, becomes necessary so to construe the provisions of the Constitution as to give full effect to both, as far as may be. If it is held that the States are exempt from all taxation in respect of their export or imports, it is not difficult to imagine a situation where a State might import or export all varieties of things and thus nullify to a large extent the exclusive power of Parliament to legislate in respect of those matters. The provisions of Art. 289(1) being in the nature of an exception to the exclusive field of legislation reserved to Parliament, the exception has to be strictly construed, and therefore, limited to taxes on property and on income of a State. In other words, the immunity granted in favour of States has to be restricted to taxes levied directly on property and income. Therefore, even though import and export duty or duties of excise have reference to goods and commodities, they are not taxes on property directly and are not within the exemption in Art. 289(1).

(emphasis added)

Although initially the seventh schedule to the Constitution did not have a separate entry for service tax in the Union List, the Hon'ble Supreme Court in **T.N. Kalyan Mandapam Assn. vs Union of India** [2004 Supp (1) SCR 169 / (2004) 5 SCC 632] held that service tax was a subject matter within the "residuary power" of the Union. Subsequently entry 92C was made in the Union List by a Constitution amendment in 2004, [Constitution (88th Amendment) Act, 2004] clarifying that the Union had exclusive authority to impose service tax. Hence the ratio of this judgment would also be applicable to an indirect tax like service tax which is a later levy. We hence find that the appellant's activity of quarrying/ earth work excavating of sand / wet sand and loading in the lorries/ tippers of the consumer by the appellant being covered under

the taxable service as defined under Section 65 (105) (zzzy) of FA 1994.

Sand is excisable goods classifiable under Central Excise Tariff Heading 2505 and can't be taxed under service tax

7.6 The appellant has stated that mining activity or quarrying of sand results in the emergence of a distinct commodity amounting to manufacture and is not leviable to Service Tax. They have referred to two judgments of the Apex court to support their view that extraction of iron ore amount to manufacture. i.e. **CIT Vs N.C. N. C. Budharaja and Co.** [1973 (204) ITR 413] and **Commissioner of Income Tax Vs Sesa Goa Ltd** [2004 (271) ITR 331 (SC)]. It is seen that both the judgments have been rendered in the context of the provisions of the Income Tax Act. It has been held by a **Constitution Bench** of the Apex Court in **Hari Khemu Gawali v. Deputy Commissioner of Police, Bombay and another** [AIR 1956 SC 559], as under:

> "It has been repeatedly said by this Court that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia."

Hence we need to examine the matter in detail on merits in the context of FA 1994.

7.7 In the pre-Service Tax regime while the Center was empowered to tax goods up to the production / manufacture stage, the States had the power to tax the sale of goods. The Center introduced a new Article 268A in the Constitution in the year 2003 by Constitution (Eighty-eighth Amendment) Act, 2003 which provides that taxes on services shall be charged by Union of India. The Hon'ble Supreme Court in

Union of India Vs Intercontinental Consultants and Technocrats Pvt. Ltd [2018 (10) G.S.T.L. 401 (S.C.)] held as under:

> *"17. As stated above, the source of the concept of service tax lies in economics. It is an economic concept. It has evolved on account of Service Industry becoming a major contributor to the GDP of an economy, particularly knowledge-based economy. With the enactment of Finance Act, 1994, the Central Government derived its authority from the residuary Entry 97 of the Union List for levying tax on services. The legal backup was further provided by the introduction of Article 268A in the Constitution vide Constitution (Eighty-eighth Amendment) Act, 2003 which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new Entry 92C was also introduced in the Union List for the levy of service tax. As stated above, as an economic concept, there is no distinction between the consumption of goods and consumption of services as both satisfy human needs. It is this economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution vide Constitution (Eighty-eighth Amendment) Act, 2003. Further, it is important to note, that "service tax" is a value added tax which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services. Moreover, VAT is a consumption tax as it is borne by the client."* (emphasis added)

The **Intercontinental Consultants** judgment (supra) makes it clear that "service tax" is a value added tax which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services. Hence it is possible to distinguish between production/ manufacture of goods and the service aspect of production/ manufacture. In **All India Federation of Tax Practitioners & Ors. v. Union of India**, [(2007) 7 SCC 527] the Hon'ble Supreme Court observed that service tax is a value added tax and that just as excise duty is a tax on value addition on goods, services tax is on value addition by rendition of services. The Hon'ble Supreme Court in **In re**, **Sea Customs Act, [AIR 1963 SC 1760]** has contrasted sales tax with excise duty and observed that in case of sales tax, the taxable event is an act of sale. Therefore, though both

excise duty and sales-tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In **Carlsberg India Private Limited Vs Union of India & Ors.** [W.P.(C)--1120/2015. Dt 05/08/2016], the Hon'ble High Court of Delhi examined the legislative competence of the Union to enact legislation on the service aspect of the contract of manufacturing on behalf of the principal manufacturer/brand owner. It was held:

> "The central thrust of the Petitioners' argument is that Parliament lacks the legislative competence to enact the said amendments since the activity manufacture of alcoholic liquor for consumption, whether for oneself another person, lies exclusively within the domain of the State under Entry 51 of List II of Schedule VII to the Constitution. The case of the Respondents on the other hand is that service tax introduced by Chapter V to the FA 1994 is within the legislative competence Parliament to levy and collect. The topic of legislation is sought to be traced to the residual Entry 97 of List I of the VII Schedule to the Constitution. The Respondents contend that service tax is not levied on the manufacture alcohol but on the service aspect of the contract of manufacturing on behalf of the principal manufacturer/brand owner. For the reasons follow, this Court agrees with the Respondents and rejects the raised by the Petitioners."
>
> (emphasis added)

The Hon'ble Court distinguished between manufacture and the service aspect of manufacture. This being so, the appellants contention that quarrying of sand may be considered as production of excisable goods classifiable under Central Excise Tariff Heading 2505, and hence outside the scope of service, is not acceptable. Mere processing of goods by quarrying/ earth work excavating of sand and wet sand and loading in the lorries/ tippers of the consumer cannot be called as production of goods. The goods are not even processed to remove impurities or to meet specific size and quality requirements etc. The incidence of tax in this case is not on the goods i.e. sand but on the

service rendered in quarrying/ earth work excavating of sand and wet sand and loading in the lorries/ tippers of the consumer. In **Moti Laminates Pvt. Ltd. v. Collector of Central Excise, Ahmedabad, 1995 (76) ELT 241 (SC)** the Hon'ble Supreme Court held that where goods are specified in the schedule to the Act they are excisable goods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the assessee. As per the facts of this case the appellant is engaged in rudimentary processing of goods which is not amounting to manufacture or production of goods and is a taxable service in relation to mining, hence they are liable to pay service tax.

The sand is sold hence VAT is applicable and not Service Tax

7.7 'Sale' involves a transfer in the title of goods whereas a 'service' involves human effort / exertions, skill or labour. Service tax is a value added tax on activity. The appellant is only involved in processing of goods by quarrying/ earth work excavating of sand and wet sand and loading in the lorries/ tippers of the consumer and his services ends on the completion of the said activities. Payments of service tax as also the VAT are mutually exclusive. Hence, he is not involved in the sale of sand. He is also not paying VAT on the said activity. The Hon'ble Supreme Court in In re, Sea Customs Act, (supra) has contrasted excise duty with sales tax. In one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. Similarly in this case the tax is levied on the value addition done due to the service rendered. As stated in All India Federation of Tax

Practitioners (supra) service tax is a value added tax and is on value addition by rendition of services. As stated by the Apex Court in Association of Leasing and Financial Service Companies (supra), service tax is imposed every time service is rendered to the customer / client. Thus, the taxable event is each exercise / activity undertaken by the service provider and each time service tax gets attracted. Hence it is possible to distinguish service tax from VAT. This satisfies the law that one transaction can be either a service or a sale hence both VAT and Service Tax cannot be levied on the same transaction, in the impugned case also. In the instant case as per the statement of Shri M Palaniswamy (appellant) dated 22/01/2015 he has not paid VAT/ sales Tax on the service charges amount received from CPWD since no sales of goods were involved. The statement has not been retracted. This fact of non-payment of VAT / Sales Tax has also been confirmed by PWD as stated at para 7 of the SCN dated 09/10/2015 itself. Since the appellant is only rendering service in relation to the mining of sand and no sale of sand is done by him requiring payment of sales tax / VAT, the appellant’s plea fails.

The appellants services are covered under works contract

7.8 In the case of quarrying of sand, PWD provided works contract service to WRD, Department of Govt. of Tamil Nadu/ District Collector and hence as sub-contractors they are rendering the service of works contract. As per the definition under Section 65 B "Assessee" means a person liable to pay tax and includes his agent as they are agents of PWD they are rendering works contract service. As PWD are doing

statutory functions as defined by statue which were covered under 243 W/243G and hence the activity of PWD is outside scope of service /exempted as per circulars /education guide for the period prior to 01-07- 2012 as well as from 01-07-2012. Hence they are also exempt from paying tax. We find that PWD is an arm of Government and cannot be rendering contract service to itself. The appellant is a contractor of CPWD for quarrying / earth work excavating of sand and wet sand and loading in the lorries / tippers of the consumer. The appellant had no rights over the land and the sand, nor was any VAT/ sales tax paid for the said activity as per the various statements given by PWD officials. If a contract is primarily a contract of work and labour and materials are supplied in execution of such contract, it is a works contract. In the appellants case no materials are supplied in execution of such contract. There is only pure service rendered by him by engaging his own laborers and the question of works contract does not arise. The substance of the contract entered into by the appellant is hence one of service, hence the service cannot be classified as a 'works contract'.

7.9 Even if we take for the sake of an argument the case of a sub-contractor rendering a taxable service to a main contractor, Section 68 of the Act provides that every person, which would include a sub-contractor, providing taxable service to any person shall pay Service Tax at the rate specified. Therefore, in the absence of any exemption granted, a sub-contractor has to discharge tax liability. The service recipient i.e. the main contractor can, avail the benefit of the provisions of the CENVAT Rules. Exemption to PWD for the statutory functions as

defined by statue which were covered under 243 W/243G for the impugned activities relating to mining are examined below.

Exemption for services rendered to a governmental authority

7.10 The appellants final plea has been that in case if mining activity is treated as service their eligibility for exemption may be considered as negative list or exemption under Notification No. 25/2012 dated 20/06/2012, Sl. No.39:

> 39. Services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution.

as amended by Notification No. 22/2016-Service Tax dated 13/04/2016 by which the following entry among others was inserted:

> 60. Services by Government, a local authority or a governmental authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution;

PWD are doing the statutory functions as defined by statue which were covered under 243 W/243G of The Constitution and hence the activity of PWD is outside scope of service / exempted. The appellant has highlighted the following activities related to the 12th Schedule under Article 243W;

1) Urban planning including town planning
2) Planning for economic and social development
3) Urban poverty alleviation
4) Provision of urban amenities

and the following activities related to the 11th Schedule under Article 243G:

5) land development, implementation of land reforms, land consolidation and soil conservation

6) Minor irrigation, water management and watershed development
7) Rural housing
8) Road, culverts, bridges, waterways and other means of communication
9) Poverty alleviation programme.

We find that none of the activities relating to mining is mentioned in the list above as highlighted by the appellant from the appendix to Articles 243 G and W of the Constitution. Hence this plea of theirs fails.

Mining services in case of Neyveli Lignite Corporation

7.11 The appellant has stated hat in the show cause service tax of Rs 4,83,408/- + ED cess Rs 9674/- and SHE cess Rs 4837/- was demanded on the taxable value of Rs 40,30,896/-(copy as Annexure K) They had contended that the value of Rs 40,30,896/- was inclusive of service tax +cess but their reply was not accepted and the demand was confirmed. But it is evident from the answer to Q3 statement dated 23/03/2015 (Annexure L) recorded from Shri R Raju. Chief manager (Finance) of NLC that two running bills were prepared and payment of Rs. 28,31,134/- (including service tax of Rs. 3,11,435/)and Rs. 13,24, 706/(including service tax of Rs. 1,45, 7224) were made to Shri M. Palanisamy by NLC. It is evident from the ledger account of recovered by the Department from Shri M Palanisamy. (copy enclosed as Annexure M) also. We paid the service tax +Cess + interest of Rs. 4,62,995/- and hence the question of payment of differential amount in respect of NLC will not arise. We find that as per section 67(2) of FA 1994, where service tax is not separately recovered from the customer, the cum-tax benefit shall be granted and the tax shall be excluded from

the value of the service on which service tax is to be calculated. Hence if the benefit of cum-tax calculation has not been given by the department to the appellant the same should be given.

8. Leasing services

8.1 The appellant is of the view that they do not render services of supply of tangible goods for use. The transaction is the one of transfer of right to use goods, which is not leviable to service tax. For the period prior to 01-07-2012 Section 65 (105) [(zzzzj) taxable service means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances. After 01-07-2012 as per Section 66 E (f) transfer of goods by way of hiring. leasing, licensing or in any such manner without transfer of right to use such goods was a declared service. Their transactions were deemed sales defined in Article 366(29A) of the Constitution and hence it will not attract service tax.

8.2 The Apex court in its judgment **Rashtriya Ispat Nigam Ltd. vs Commercial Tax Officer** [[1990] 77 STC 182 AP] has discussed the issue regarding 'transfer of a right'. The relevant portion is extracted below.

> "5. An owner of property has a bundle of rights in it, namely, right to possess, right to use and enjoy, right to usufruct, right to consume, to destroy, to alienate or transfer, etc. In law it is not only possible but also permissible that the various rights and interest may be vested in various persons. While remaining the owner of a property, a person may create a charge on the property, mortgage it or lease it. In the transaction of sale, all the rights of the owner are transferred to the purchaser and it is said that the property in the goods passes to the purchaser. In a lease of immovable property, there is a transfer of a

right to enjoy such property; "a lease of land and a bailment of chattels are transactions of essentially the same nature." (Salmond on Jurisprudence - Twelfth Edition at page 424) Section 148 of the Contract Act defines "bailment" in the following terms :

> "148. 'Bailment', 'bailor' and 'bailee' defined. - A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'."

6. Thus in bailment there is transfer of goods for a particular period and thereafter the goods have to be returned to the person delivering them. One of the categories of bailment is hire of chattel. In Halsbury's Laws of England (Fourth Edition) at paragraph 1551 it is defined as follows :

> "It is a contract by which the hirer obtains to use the chattel hired in return for the payment to the owner of the price of the hiring."

7. It is this category of bailment of goods that is the tax base under section 5-E of the Act. The taxable event under section 5-E is the transfer of the right to use any goods. What does this phrase connote ? This means that unless there is a transfer of the right to use the goods, no occasion for levying tax arises; providing a facility which involves the use of goods nor even a right to use the goods is not enough, there must be a transfer of that right.

> "The transfer of a right is an event which has a double aspect. It is the acquisition of a right by the transferee, and loss of it by the transferor. The vestitive fact, if considered with reference to the transferee is a derivative title, while from the point of view of the transferor it is an alienative fact."
>
> (Salmond on Jurisprudence - Twelfth Edition at pages 332 and 333.)

8. In Corpus Juris Secundum "transfer" is defined :

> "The common use of the word 'transfer' is to denote the passing of title in property, or an interest therein, from one person to another, and in this sense the term means that the owner of property delivers is to another person with the intent of passing the rights which he had it to the latter."
>
> (Corpus Juris Secundum, Vol. 87, page 892.)

9. The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word "transfer" due regard must be had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee.

> Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under "rent-a-car" scheme, and a cab is provided, usually driver accompanies the cab; there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as possession; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab whereas in the latter case it is lacking. We may have many examples to indicate this difference.
>
> 10. Whether there is a transfer of the right to use or not is a question of fact which has to be determined in each case having regard to the terms of the contract under which there is said to be a transfer of the right to use.
>
> (Emphasis applied)

8.3 The impugned order at para 25 records that both Shri K Diwakar and Shri K Prabhu in their statements dated 24/03/2015 have categorically stated that they did not execute any written agreement with the appellant for hiring the vehicles and the same was based on oral orders. However the appellant had produced "lorry Supply Agreement" purportedly entered into between the appellant and Shri Diwakar, which the learned Adjudicating Authority went on to study and comment upon. We hence examine the agreement. The relevant portion of the agreement with Shri K Diwakar is given below.

> NOW THEREFORE IT IS AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:
>
> 1. In consideration the quantum of payment agreed hereafter reserved and all the covenants and conditions hereinafter mentioned are on the part of the second party to be observed and performed, the first party hereby agree to supply the fleet of lorries to the possession and effective control to the second party.
>
> 2. All the lorries in the fleet have the standard LW to transport the building materials and are built under the normally approved conditions. The First party declares that the Lorries have the required Fitness Certificate and Other Certificates required by Law and are either Tata Make Chassis or Ashok Leyland Make Chassis.
>
> 3. The First party shall supply the fleet of vehicle and the Second Party has to make his own arrangements of drivers, cleaners etc.

4. The number of lorries to be supplied is decided between the First and Second party from time to time and will be intimated by the Second party by a simple letter.

5. The charges for the supply of lorries shall be monthly basis. The rate per month or year is to be fixed mutually depending upon market conditions and is revisable from time to time.

6. That the fuel and minor repairs shall be borne by the Second Party and has to keep the vehicle in good condition. Major repairs if any shall be borne by the first party.

7. That the lorries will be solely used by the Second party for his legitimate business purposes. No unauthorized / prohibited / hazardous chemicals, inflammables goods shall be transported. The Second party shall also not sublet the lorries to anybody in any form whatsoever.

8. The Second party shall not make any additions or alterations in the lorries. Insurance including third party insurance shall be at the cost of the First party and so also the Annual Road Tax/Vehicle License, fitness certificate required to be obtained under the Motor Vehicles Act, 1988. However Insurance on the goods including transit insurance shall be at the cost of the Second Party.

9. The Second Party will permit the First Party and his agents to enter into the lorries at all reasonable times and at various road points, after due notice is given to the Second Party for the purpose either of inspection / or repairs of the said lorries.

10. At the expiry of the lease the Second Party shall handover possession of the Lorries to the First party with all the fittings and fixtures intact and in working order, except reasonable wear and tear.

11. That all the rules, laws and by-laws of the Motor Vehicles Act 1988, Sale of Goods Act, 1930 or Police any other local law over the usage of lorries shall be complied with by the Second Party, Second Party shall be liable to the default of the Second Party in observing the said rule, regulation, law and by-laws.

12. That is distinctly understood that the supply under this agreement is for capital equipment as a whole and no, part of the lorry or right in lorry is transferred nor any second party is entitled to avail any credit facility from any bank or financial institution or third party.

13. The First Party expressly stipulates that the Second Party be entitled to peaceful and quiet hold, possess and use the Lorries for all legitimate business purposes without any interruption or disturbances during the term of this Agreement.

14. In case of any dispute between the parties, the matters shall be settled initially by direct negotiations and mutual discussions; should the direct negotiations and mutual discussions fail then the parties may refer the matter to conciliation and mediation through

> arbitration; by the appointment of sole arbitration should that mechanism also fail, courts in Coimbatore alone will have jurisdiction.

8.4 The crux of the definition Section 65 (105) [(zzzzj) prior to and from 01/07/2012 is that the taxable service is provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, is done without transferring right of possession and effective control of such machinery, equipment and appliances. In other words the service should be provided without there being:

(i) transfer in the right of possession of, and;

(ii) transfer in right to effective control

such machinery, equipment and appliances.

8.5 The transfer of 'effective control', in the impugned context, is a legal concept that refers to the transfer of the ability to make decisions about and manage the tangible goods. It means acquisition of a right by the transferee and loss of it by the transferer. Due to the transfer, the transferee must gain the ability to make decisions about and manage the tangible goods i.e the lorry etc. This includes among other things the ability of the transferee to freely:

i. decide where to station the lorry
ii. decide (a) how (b) when and (c) for whom to use the lorry
iii. decide who has access to the lorry
iv. decide about the maintenance of the lorry during the period of lease
v. decide the persons who will operate the lorry and have full control over these persons

The agreement reproduced above satisfied these conditions. However, it is seen from paras 7 and 12 of the contract above that the transferee i.e. the Second party shall not sublet the lorries to anybody in any form whatsoever and at para 12 that no, part of the lorry or right in lorry is transferred nor any second party is entitled to avail any credit facility from any bank or financial institution or third party.

8.6 A question arises whether 'effective control' by the transferee includes the power to sell, lease, mortgage, or dispose of the goods as the transferee sees fit. Sale entails that the permanent title of the property along with a complete bundle of rights gets transferred by the owner or his representative to a buyer, whereas in tangible goods service there is a limited transfer of right and no permanent transfer of property. In a deemed sale the ownership of tangible goods does not change permanently. In other words, the power to sell, lease, mortgage or dispose of the lorry is bundled with the 'right to title' and its transfer is felt to be not necessary in determining 'effective control' of the transferee over the lorry in the impugned situation. In **Indus Tower Ltd Vs Deputy Commissioner of Commercial Taxes, Bangalore** [2012 (285) E.L.T. 3 (Kar.)] the Hon'ble Karnataka High Court held that:

> "64. It is well settled that, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole to determine the nature of the transfer. . . . . It is because an owner of a property has a bundle of rights, namely right to possess, right to use and enjoy, right to usufruct, right to consume, to destroy, to alienate or transfer, etc. Therefore, to constitute a deemed sale under Article 366(29A)(d) having regard to the object with the 46th Constitutional Amendment was inserted, it is clear the right that is transferred under a contract should be a bundle of rights minus right to title. It is because of the earlier Constitution Bench judgment of the Apex Court where the right to use the property was

> transferred by the person who retained the title as only a nominal owner with the benefit of the goods has been passed on to the transferee, without paying taxes to the exchequer, that the Constitution was amended to bring within its fold such transactions which are styled as deemed sales. Therefore, in deciding whether a transaction falls within Article 366(29A)(d) so as to constitute a deemed sale, the purpose of the 46th Amendment, the mischief sought to be remedied and the object sought to be achieved by the said provision cannot be lost sight of. . .”
>
> (emphasis added)

Again in **G.S. Lamba & Sons Vs State of Andhra Pradesh** [2015 (324) ELT 316 (A.P.)] cited by the appellant, it has been held that the transfer of right is the sine qua non of the right to use any goods. Hence, since the other conditions stated above in the impugned agreement are satisfied ‘effective control’ can be said to have been established by the customer-transferee.

8.7 In a deemed sale the term transfer of ‘right of possession’ means that the ownership rights are transferred by the transferor to the transferee so as to enable the transferee to use goods at his own will to the exclusion of the transferor. This implies that full liberty is vested in the transferee to have the right to use goods to the exclusion of all other including the owner of goods during the period of the agreement.

8.8 A three judge Bench of the Hon’ble Supreme Court in **Commissioner of Service Tax, Ahmedabad Vs M/s Adani Gas Ltd.** [Civil Appeal No. 2633 of 2020] has examined the law pertaining to supply of tangible goods and has laid out the test for determining whether a taxable service of supply of tangible goods has occurred. It stated as under:

> “13. Section 65(105)(zzzzj) of the Finance Act 1994 provides for taxability of supply of tangible goods for use, without transferring right of

possession and effective control over such goods, as a 'taxable service'. Section 65(105)(zzzzj) of the Finance Act, 1994 reads as follows:

> "65(105) "taxable service" means any service provided or to be providedxx xx xx (zzzzj) to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances."

14 Section 65(105)(zzzzj) of the Finance Act 1994 was introduced by Notification No.18/2008-S.T. with effect from 16 May 2008. Section 65(105)(zzzzj) levies a service tax on the use of tangible goods. On the other hand, the transfer of the right to use any goods is treated as a 'deemed sale' and is subject to sales tax under Article 366(29-A)(d) of the Constitution of India. It is necessary to distinguish the applicability of these two provisions. Article 366(29- A)(d), provides:

"(366)(29-A) tax on the sale or purchase of goods includes–

***** ***** *****

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

***** ***** *****

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

***** ***** *****

20. The taxable service is defined as a service which is provided or which is to be provided by any person to another "in relation to supply of tangible goods". The provision indicates that the goods may include machinery, equipment or appliances. The crucial ingredient of the definition is that the supply of tangible goods is for the use of another, without transferring the right of possession and effective control "of such machinery, equipment and appliances". Hence, in order to attract the definition of a taxable service under sub-clause (zzzzj), the ingredients that have to be fulfilled are:

(i) The provision of a service
(ii) The service is provided by a person to another person;
(iii) The service is provided in relation to the supply of tangible goods, including machinery, equipment and appliances;
(iv) There is no transfer of the right of possession;
(v) Effective control over the goods continues to be with the service provider; and
(vi) The goods are supplied for use by the recipient of the service. There is an element of service which is the foundation for the levy of the tax"

8.9 From the agreement for supply of lorry in the impugned case it is seen that Shri K Diwakar (second party) must make his own arrangement for driver, cleaner etc. The charges for the supply of lorry are on a monthly basis. Fuel and minor repairs are to be borne by the second party. Insurance of goods including transit insurance shall be at the cost of the second party. The supply under the agreement is for capital equipment as a whole. The second party is entitled to the peaceful holding, possession, and use of the lorry without any interruption or disturbance during the terms of the agreement. Although the appellant takes care of major repairs, pays for insurance of the vehicle including third party insurance and has the right to inspect the vehicle, the agreement indicates that full control of the lorry had been given to the second party to use the lorry exclusively during the validity of the agreement. The impugned order has noted that there is a duality of control, and the transferee has no rights which are to the exclusion of the transferor. It must be understood that the whole concept is of a deemed sale. The actual ownership of the lorry continues to be that of the appellant and in this situation, he must undertake certain statutory obligations. This cannot be understood as duality of control. The transfer of right to use of the lorry in this case involves transfer of both possession and control of the vehicle to the second party for a definite period as per the contract while the title for the goods remains with the appellant. The second party has to employ his own staff and is not hindered in putting the vehicle to his use as desired. Fuel, minor repairs, goods transit insurance are all borne by him (second party). Hence there is a transfer of right of possession

from the appellant to the second party and the effective control over the lorry is with the second party for the duration of the contract. This being so the test for supply of tangible goods prescribed by the Hon'ble Supreme Court in the case of Adani Gas Ltd. (supra) when applies to the Agreement mentioned in the impugned order does not succeeds. No service tax is payable on vehicles supplied as per the said agreement.

8.10 In the case of vehicles supplied without a contract it was for the appellant to show the terms of engagement of vehicle by their clients, to the investigating officers. Both the customers of the appellant and Shri M Palaniswamy (appellant) in his statement dated 22/01/2015 have stated that no written agreements were executed in respect of the vehicles leased out for a short term. The appellant stated that they supplied their vehicles on a long-term basis to Shri A Senthil Kumar, Coimbatore and to M/s Senthil Kumar Building Materials Co, Coimbatore. Investigations by the officers at TAMIN revealed that the appellant supplied excavators and rock breakers at hourly rates to TAMIN. The appellant provided the operators for the machines, took care of the day-to-day repair and maintenance and also insured the vehicles. The charges paid by TAMIN to the appellant were inclusive of all statutory dues. Hence effective control over the vehicles was exercised by the appellant and this was a case of rendering service to TAMIN. There is no reason to disbelieve the statements given by the persons during the investigation by DGCEI, under section 83 of FA 1944 read with section 14 of the Central Excise Act 1944. Statements given during the investigation have also not been retracted. Once a

query has been raised by Revenue adverse inference could be drawn against the assessee if they are not able to provide a satisfactory reply. The initial burden of rebuttal is on the assessee because the basic facts are within their special knowledge. Even as per section 106 of the Indian Evidence Act, the fact within the knowledge of a person must be proved as the burden of proof is cast upon him. The Apex Court in **A. Raghavamma v. A. Chenchamma** [AIR 1964 S.C. 136] held:

> "When sufficient evidence either direct or circumstantial in respect of its contention is disclosed by the Revenue, adverse inference could be drawn against the assessee, if he failed to put before the Department, material which, he was in exclusive possession. This process is described in the law of evidence as shifting of the onus in the course of a proceeding from one party to the other."

Hence in those cases where the appellant was unable to produce a contract for supply of vehicles or to prove its terms, despite being asked to do so they have not shown that effective control of the vehicle was transferred to the transferee and the appellant would be liable to pay duty along with interest under the taxable service of supply of tangible goods. Therefore, for re-working out the correct demand, the cases has to go back to the Original Authority. The duty may be worked out by bifurcating the demand made on the value of supply of vehicles covered by Agreement / contract and amounts received for supply of vehicles without an agreement/contract, by the department and informed to the appellant who shall pay the same for supply of vehicles without a contract including those leased out to TAMIN.

9. <u>Site formation clearance excavation, earthmoving and demolition services.</u>

9.1. The appellant has stated that they have not rendered any service with respect to Site formation, clearance, excavation, earthmoving and demolition services. The works were related to road work and that it

was for usage for general public and hence eligible exemption Sl. No. 13 under Notin No 25/2012.

9.2 The legal provisions relating to the service as given in the Show Cause Notice are reproduced here under:

> Legal provisions prior to 30.06.2012:
>
> 15. 1.1 Section 65 (97a) defines the terms 'Site Formation, clearance, excavation and earthmoving and demolition services'. There is no direct definition for the said service. The definition includes -
>
> - drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or
> - soil stabilization; or
> - horizontal drilling for the passage of cables or drain pipes; or
> - land reclamation work; or
> - contaminated top soil stripping work; or
> - demolition and wrecking of building, structure or road.
>
> The definition contains exclusive clause also. The definition does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies. The said service was brought into the service tax with effect from 16.06.2005.
>
> 15.1.2 Section 65(105)(zzza) defines the taxable service as any service provided or to be provided by one person to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities.
>
> Legal Provisions after 01.07.2012:
>
> 15.1.3 The service is defined under Section 65B (44) of Finance Act, as under "Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-
>
> (a) an activity which constitutes merely,-
>
> (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
>
> (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment,

(c) fees taken in any Court or tribunal established under any late for the time being in force.

9.3 It appears from the depositions made by Shri. M. Pradeep, Senior Manager (F&A) of M/s. GVR Infra Projects Ltd., Chennai in his statement recorded on 24.02.2015, Shri. V.Srinivasan, Accountant, M/s. NAPC Ltd., Chennai in his statement recorded on 30.01.2015 and Shri. K. Pattabiraman, Assistant Manager (Indirect Taxes), M/s. Larsen & Toubro Ltd., Chennai in his statement recorded on 27.01.2015 that Shri. M. Palanisamy provided services such as jungle clearance, earth formation, earthmoving, solving of local problems, getting required permission for all concerned departments, transportation of materials from borrow area to work site by utilizing his vehicles Tipper and Taurus and also supply of required manpower for the completion of such services.

9.4 The appellant has prayed for considering exemption for their activity under Notification No. 25/2012 dated 20/06/2012 at Sl. No. 13. The said Sl. No. reads:

13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

(a) a road, bridge, tunnel, or terminal for road transportation for use by general public;

We find that the work is of a composite nature involving site formation. Further the appellant has not been able to show that the work was executed in the formation of a road for the general public. Their

activities have been described above by the recipients of service and are consisting of activities related to site formation service. Hence the failure of the appellant to satisfactorily respond to the query raised by Revenue on basic facts which are within their special knowledge, has led to the inference of the appellant providing the taxable service of site formation. Even at this appeal stage they have not been able to demonstrate by way of documents that their principal activities were towards the construction of roads for use by the general public. They have also referred to the amending Notification No. 22/2016-Service Tax dated 13/04/2016 which inserted Sl. No. 60 as under:

> "60. Services by Government, a local authority or a governmental authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution"

The appellant has sought exemption as their activities are related to the following headings of 11th Schedule to Article 243G:

1) land development, implementation of land reforms, land consolidation and soil conservation
2) Minor irrigation, water management and watershed development
3) Rural housing
4) Road, culverts, bridges, waterways and other means of communication
5) Poverty alleviation programme.

We find that the appellant can make a claim for exemption under the said provision of the notification if taxable services were provided by them to a Governmental Authority etc. Services provided to NAPC, L&T, GVR etc. will not get the benefit of this exemption as the taxable service is not provided by the appellant to Government, a local

authority or a governmental authority nor are the principal activities meant for construction of roads etc. The activities hence get covered under the definition of taxable service as per Section 65(105)(zzza) of FA 1994 and are liable to discharge duty accordingly without the benefit of exemption under Sl. No. 13 of Notification 25/2012 dated 20.6.2012.

10. Extended Period not Invokable

10.1 The appellant has submitted that the demand has been confirmed invoking extended period of time which is incorrect and unwarranted. In the present case, the period covered by the impugned order is from 2010 to 2015. The Show Cause Notice is dated 9.10.2015. Therefore, the maximum period upto which the demand can be imposed is only till October 2013 and the demand from 2010 to October 2013 merits to be set aside. There was never a suppression of facts to the department. Audit has been conducting periodical verification of accounts during the alleged period. They have been filing ST-3 returns and TR6 forms regularly in which they have disclosed all requisite information. Therefore, the extended period cannot be invoked. They have relied on the following judgments in their favour:-

a. Scott Wilson Kirkpatrick (I) Pvt. Ltd. Vs. CST – 2007 (5) STR 118 (Tri. Bang.)

b. CCE Vs. Spiced Communication (P) Ltd. – 2006 (4) STR 74 (Tri. Del.)

c. CCE Vs. Umakanth & Co. – 2008 (9) STR 527 (Tri. Bang.)

d. BPL Ltd. Vs. CST – 2006 (4) STR 307 (Tri. Bang.)

e. India Colour Lab Vs. CCE – 2006 (3) STR 180 (Tri. Del.)

Further as per the Hon'ble Supreme Court the burden of proving any form of malafides lies on the shoulder of one alleges it. There is no positive act of suppression on the side of the appellant to find willful suppression on their part. In this regard they have relied on the following judgments: -

a. Uniworth Textiles Ltd. Vs. CCE, Raipur – 2013 (228) ELT 161 (SC)

b. Anand Nishikawa Co. Ltd. Vs. CCE, Meerut – 2005 (188) ELT 149 (SC)

c. Padmini Products Ltd. Vs. CCE – 1998 (43) ELT 195 (SC)

Moreover, the issue involves interpretation of law and hence extended period cannot be invoked. Similarly, penalty is also not imposable as there was not fraud, collusion or willful misstatement etc. They should be allowed the benefit of Section 80 of the FA 1994 as the appellant had reasonable cause even if it is assumed that they are liable to pay service tax as confirmed in the impugned order since the matter involves interpretation of complex provisions of law. They relied on the following judgments: -

a. Star Neon Singh Vs. CCE – 2002 (141) ELT 770 (Tri. Del.)

b. Flyingman Air Courier Pvt. Ltd. Vs. CCE – 2004 (170) ELT 417 (Tri. Del.)

c. ETA Engineering Ltd. Vs. CCE – 2004 (174) ELT 19 (Tri. LB)

d. Medpro Pharma Pvt. Ltd. Vs. CCE – 2006 (4) STR 322 (Tri. Del.)

Since there was a reasonable cause for the alleged violation to pay service on their part, penal provision of section 78 of the Act cannot be invoked. In this regard, they have relied on the following judgements:-

a. CCE Vs. Dial & Travels – 2007-TIOL-127-Raj.

b. Sajjan Kumar Kariwala Vs. CCE – 2003 (159) ELT 1131 (Tri. Del.)

c. Ashok Rastogi Vs. CCE – 1998 (104) ELT 480

d. Catalyst Capital Services Pvt. Ltd. Vs. CCE – 2005 (184) ELT 34 (Tri. Mum.)

e. CCE, Rajkot Vs. Air Express Courier Services – 2005 (182) ELT 409 (Tri. Mum.)

f. Mitul Engineering Services Vs. CCE, Jaipur – 2011 (24) STR 323 (Tri. Del.)

g. CCE Vs. Gujarat Intelligence Security (India) – 2011 (24) STR 167 (Guj.)

10.2 We find that the appellant has not enclosed any of the judgments cited along with their appeal or written submissions. We examine the matter on the accepted principle that it is neither desirable nor permissible to pick out a word or a sentence from a judgment divorced from the context of the question under consideration and treat it to be complete law.

10.3 This is a case where the appellant is registered with the Service Tax Department for the categories of "Works Contract Services" and "Transport of goods by road/goods transport agency services' and has rendered a host of services without informing about these activities to the department through the statutory returns being filed by them or otherwise. They have been awarded with the contract of quarrying of sand and loading the same onto customers vehicles using their own labourers for the past 12 years. In the ‘Statement of Facts’ (SOF) of their appeal, they admit to owning “1000 Numbers Trucks and 300 Number Poclains”. The SOF notes that the investigation alleges that no written agreements were executed by them for the hiring of the trucks/

proclaim and that the hire charges were calculated on an hourly basis agreed upon over the phone. The customers who hire these vehicles for use in transportation of goods, state that the charges are paid to the appellant in cash through his agents. The SCN note that the appellant did not issue bills/invoice/vouchers to PWD Department for receiving service charges for the services rendered to them. The service charges are paid by PWD based on the works completion details recorded in 'Measurement Book' (M Book) maintained by PWD. In the instant case as per the statement of Shri M Palaniswamy (appellant) dated 22/01/2015 he has not paid VAT/ sales Tax on the service charges amount received from CPWD since no sales of goods were involved. These charges are not denied in the SOF. The statement of various persons recorded during investigation have also not been retracted and have evidentiary value.

10.4 Although the appellant has a fairly long standing in the business with a large fleet of vehicles, he has not been diligently maintaining transaction level records or reporting the activities to the department. This is a standard modus operandi of assessee's who seek not to report taxable activity and evade duty. No VAT/ sales tax is also being paid. He should hence well have been aware of his obligations to pay service tax and intimated the department of his activities for which no tax was being paid, more so when the payments received by him in relation to quarrying activities were inclusive of all statutory dues, whereby he was collecting the tax from his customers. Tax dues not paid should be declared in column 4C of the ST-3 Return and be filed on time. Which was not done. Suppressing these facts by not filing their complete

Returns, even after having collected the tax from their customers, is a clear case of suppression of vital information with i7ntention to evade payment of duty. There is a positive act of suppression on the side of the appellant showing willful suppression on their part. Hence suppression of information with intention to evade payment of duty is established. In this era of self-assessment, the facts would not have been revealed had investigations into the appellants' activities not been initiated by the officers of DGCEI. The issue relating to the suppression of facts is dependent on the facts of each case. This being so the extended period for issue of SCN has rightly been invoked under the proviso to sub-section (1) of section 73 of FA 1994. None of the judgments cited by the appellant can serve as a precedent, without advertence to its facts. Each judgment is thus an authority in the setting of its own facts. The judgments cited by the appellant in Scott Wilson Kirkpatrick; Spiced Communication (P) Ltd.; Umakanth & Co., BPL Ltd.; India Colour Lab; Uniworth Textiles Ltd.; Anand Nishikawa Co. Ltd., and Padmini Products Ltd. (supra) are hence distinguished.

NO PENALTY IMPOSABLE

11. The appellants plea against penalty also does not sustain as there was no substantial interpretation of law involved. The question regarding the adjudication by the Commissioner on a SCN issued by the Additional Director General DGGI does not have a bearing on their nonpayment of tax. Similarly, their plea that no tax is payable on mining activity, is also not correct. Relevant statutory provision admits no ambiguity. The grammatical meaning of the taxing provision is in

conformity with its legal meaning. Having had the experience of 12 years in the field and when they did not pay sales tax / VAT they should have paid Service tax or sought clarification from the department on the matter. Raising numerous, and at times contradictory, pleas does not mean that there was a substantial interpretation of law involved. Hence there is no 'reasonable cause' involved to invoke the benefit of Section 80 of the FA 1994. The judgments in Star Neon Singh; Flyingman Air Courier; ETA Engineering Ltd. and Medpro Pharma Pvt. Ltd. (supra) do not come to their help. Hence no reasonable cause has been made out and the penal provision of section 77 (1) and 78 of the FA 1994 has been rightly invoked. The impugned order has not made out a case for imposition of penalty under section 77 (2) ibid and the same is hence quashed. The judgments in CCE Vs. Dial & Travels, Sajjan Kumar Kariwala, Ashok Rastogi, Catalyst Capital Services Pvt. Ltd., Air Express Courier Services, Mitul Engineering Services Vs. CCE, and Gujarat Intelligence Security (supra) stand distinguished. As per the Hon'ble Supreme Court's judgment in **Commissioner of Central Excise, Pune Vs M/s SKF India** [2009-TIOL-82-SC-CX] interest is leviable on delayed or deferred payment of duty for whatever reasons. Further the Supreme Court, in its decision in **UOI Vs. Dharmendra Textile Processors** (2008 (231) ELT-3), held that a section prescribing mandatory penalty should be read as penalty for a statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined.

Summary

12. The issues involved and decided in this order are summarised here under:

A. Rule 3 (1) of the Central Excise Rules 2002 empowers the Board to appoint officers to exercise all or any of the powers conferred by the Act or Rules. The sub-sections of section 73 ibid are intended to deal with different topics like the issue of notice and passing of a speaking order etc and one cannot be projected or read into another. Hence sub-sections (1), (2) and (3) although being parts of section 73 operate in independent domains.

B. A definite article only specifies that the noun referred to is one which is an already known one. What it is, must be identified by the context of the subject.

C. The words 'the' preceding 'Central Excise Officer' stands for the Central Excise Officer who is empowered to issue a notice / adjudicate the matter as per law. It clearly excludes any other Central Excise Officer from doing the same and hence the phrase 'the Central Excise Officer' appears both in Section 73(1) & (2) of FA 1994. Thereby both the SCN and the impugned order do not suffer from the vice of jurisdictional error.

D. The term 'all minerals' would include 'minor minerals'. Service tax is sought to be levied on activities where service is rendered and not on the mined sand per se. Hence the nature and characteristics of the mineral does not matter. In other words, what is sought to be taxed is the activities in relation to 'mining' and not 'mining' itself.

E. In a majority decision in **re. The Bill to Amend the Sea Customs Act (1878), (supra)** the Hon'ble Chief Justice speaking for himself and four other Judges held that the immunity granted to the States in respect of Union taxation, under Art. 289(1) does not extend to duties of customs including export duties or duties of excise. The ratio of this judgment would also be applicable to an indirect tax like service tax which is a later levy.

F. Where goods are specified in the schedule to the Central Excise Act, I944, they are excisable goods but whether such goods can be subjected to duty would depend on whether they were produced or manufactured by the assessee.

G. Mere selective processing of goods by quarrying / earth work / excavating of sand and wet sand and loading in the lorries / tippers of the consumer cannot be called as production or manufacture of goods. No new identifiable goods have come into existence in the process to say that production has taken place.

H. The appellant is only rendering service in relation to the mining of sand and no sale of sand is done by him requiring payment of sales tax / VAT,

I. If a contract is primarily a contract of work and labour and materials are supplied in execution of such contract, it is a works contract. The appellants activities constitute pure service rendered by him by engaging his own laborers and the question of works contract does not arise. The substance of the contract is hence one of service, hence the service cannot be classified as a 'works contract'.

J. No activities relating to mining are mentioned in the list as highlighted by the appellant from the appendix to Articles 243 G and W of the Constitution. The functions of PWD in relation to mining are hence not exempted under the said provisions.

K. As per section 67(2) of FA 1994, where service tax is not separately recovered from the customer, the cum-tax benefit shall be granted and the tax shall be excluded from the value of the service on which service tax is to be calculated. Hence if the benefit of cum-tax calculation has not been given by the department to the appellant the same should be given.

L. A transaction where the transferor allows the transferee to use the tangible goods, without giving legal right of possession and effective control, is treated as the rendering of a service otherwise it may amount to deemed sale. In the impugned case as per the substance of the agreement examined in the impugned order there has been a transfer of right of possession and effective control to the transferee by the appellant-transferor in the said agreement and the activity as mentioned is not liable to service tax.

M. Statements given by the appellant and his customers of vehicles show that there was no written agreement in most cases. In those cases where the appellant is unable to produce a contract / agreement for supply of vehicles or demonstrate the terms of the lease, they would be liable to pay duty along with interest under the taxable service of supply of tangible goods as determined in the impugned order.

N. The appellant has provided composite services to NAPC and GVR such as jungle clearance, earth formation, earthmoving, solving of local problems, getting required permission for all concerned departments, transportation of materials from borrow area to work site by utilizing his vehicles Tipper and Taurus and also supply of required manpower for the completion of such services. The activity is hence a composite activity of 'site formation' even in those cases where a part of the service may involve formation of roads.

O. Services provided to NAPC, L&T and GVR etc. will not get the benefit of exemption meant for governmental authority as the taxable service is not provided by the appellant to Government, a local authority or a governmental authority.

P. There is a positive act of suppression on the side of the appellant showing willful suppression on their part. Hence suppression of information with intention to evade payment of duty is established. In this era of self-assessment, the facts would not have been revealed had investigations into the appellants' activities not been initiated by the officers of DGCEI.

Q. As per the Hon'ble Supreme Court's judgment in **Commissioner of Central Excise, Pune Vs M/s SKF India [2009-TIOL-82-SC-CX]** interest is leviable on delayed or deferred payment of duty for whatever reasons.

R. The Supreme Court, in its decision in **UOI Vs. Dharmendra Textile Processors** (2008 (231) ELT-3), held that a section prescribing mandatory penalty should be read as penalty for a statutory offence and the authority imposing penalty has no discretion

in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined.

12. As a sequel to our above discussion, we are largely in agreement with the decisions taken by the learned Adjudicating authority but for few modifications as under.

(a) In the case of vehicles supplied without an agreement / contract including those related to the supply of tangible goods / vehicles to TAMIN the effective control of the vehicles was with the appellant. Tax for the lease of the vehicles will have to discharged as a taxable service of 'Supply of tangible goods service' as defined in Section 65 (105) [(zzzzj) has been rendered. Therefore, the matter is remanded to the Original Authority only for the purpose of quantifying and intimating the correct demand of duty and interest to the appellant as discussed above.

(b) If the benefit of cum-tax calculation has not been given by the department to the appellant in determining the taxable value and consequently the duty demanded, the same should be given.

(c) Since the amount of penalty imposed under section 78 of FA 1994 is a statutory penalty dependent on the duty demanded, the revised amount of penalty payable may also be informed to the appellant.

(d) The impugned order has not made out a case for imposition of penalty under section 77 (2) of FA 1994 and the same is hence quashed.

The appellant should cooperate with the department and the quantification may be completed within 90 days of this order or any extra time that the learned Adjudicating authority may allow. Needless to say, that the appellant may be given an opportunity to put forward his views on the duty calculation before the revised demand for duty along with interest and penalty is quantified and intimated. The appeal is disposed of on the above terms.

(Pronounced in open court on 23.11.2023)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

Rex