IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD

COURT No. I

APPEAL No. ST/3568/2012-CU[DB]

(Arising out of Order-in-Appeal No. 138-CE/GZB/2012 dated 30/07/2012 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Ghaziabad)

M/s Arun Enterprises **Appellant**

Vs.

Commissioner of Central Excise, Ghaziabad **Respondent**

Appearance:

Ms. Rinki Arora, Advocate, for Appellant
Shri Rajeev Ranjan, Joint Commissioner (AR), for Respondent

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical

Date of Hearing : 03/01/2018

Date of Pronouncement : 08/05/2018

FINAL ORDER NO. **70889/2018**

Per: Archana Wadhwa

After hearing both the sides, we note that the appellants are engaged in the manufacture of Meter Pillar Boxes filing under chapter 90 of the Central Excise Tariff Act, 1985. On scrutiny of their records, it was found that they were showing some amount as 'other income' and on being pointed out by the Revenue they paid Service Tax amounting to Rs.15,31,000/- on the same under the Head/Account of 'Business Auxiliary Services'. The said payment was paid by the appellant vide TR-6 Challans on 30/11/2006.

2. Subsequently, the appellant took the credit of the same in their Cenvat credit accounts on 31/10/2007 on the ground that the 'other income' shown in the records belonged to the Transportation Activities and as such the Service Tax was to be paid under the category of "Transport of Goods by Road Services". Instead the same was wrongly deposited under the head of "Business Auxiliary Services". It was their contention that in as much as, the GTA Services availed by them for inward as well as outward transportation, which were eligible Cenvatable input services, they were entitled to avail the credit of the same.

3. In the above backdrop, Revenue issue a Show Cause Notice dated 15/04/2011, proposing to deny the said credit entry on the ground that Service Tax was paid under the category of "Business Auxiliary Services", which cannot be held to be input service. The Show Cause Notice also alleged that the Service Tax paid by the appellant, was under the category of "Business Auxiliary Services", and not in respect of "Transport of Goods by Road Services". It was further alleged that the appellant is not entitled to avail the *suo-motu* credit.

4. The appellant assailed the impugned order on merits as also on limitation. However, the Lower Authorities did not find favour with the appellant's contentions and accordingly confirmed the demand along with imposition of penalty, etc.

Hence, the present appeal.

5. After carefully considering the submissions made by both the sides and after going through the impugned order, we note that the said Service Tax amounting to Rs.15,31,000/- was paid by the appellant in respect of amount shown as ‘other income’ in their records. The payment was made under the Category/Head/Account of “Business Auxiliary Services”. However subsequently the appellant realized that the said ‘other income’ was on account of differential cartage and as such the Service Tax was required to be paid under the category of “Transport of Goods by Road Services”, which is a Cenvatable input service. Accordingly, they took the Cenvat credit of the amount paid by them.

6. The dispute essentially relates to the fact that as to whether the ‘other income’ shown by the appellant was taxable under the category of “Business Auxiliary Services” or “Transportation of Goods Services”. Admittedly, Revenue has also not shown any detailed evidences to reflect upon the fact that the said ‘other income’ was taxable under the category of “Business Auxiliary Services”. There is nothing on record to show that the appellant has provided the services under the said category. Merely because the appellant agree to pay Service Tax under the said category would not be reflecting of

the fact that the said ‘other income’ was on account of services provided by the appellant under the said category.

On the other hand, the appellant’s contention is that the said ‘other income’ was a reason on account of the differential cartage and as such would fall under the category of “Transportation of Goods by Road Services”. As such, the Service Tax paid by them should be considered as having been deposited under the said category and is a Cenvatable input service, accordingly they have taken the Cenvat credit on the same.

We are of the view that in the absence of any evidence to substantiate the stand of the Revenue that the said ‘other income’ was on account of services proved under the category of ‘Business Auxiliary’, the appellant stand of the ‘other income’ having been arisen on account of the Transportation Activities has to be accepted in which case the appellant would be entitled to Cenvat credit of the same.

7. Apart from the above, we also note that the appellant had taken the Credit on 31/10/2007, whereas the Show Cause Notice stands issued on 15/04/2011, by invoking the longer period of limitation. The Lower Authorities have observed that had it not been audited the said fact would have escaped the attention of the Revenue and as such there was a suppression on the part of the assessee. We note

that the audit has also found out the said fact from the scrutiny of the records maintained by the appellant. The credit was availed by reflecting the same in the Cenvat credit account, in which case it cannot be said that there was any *mala-fide* suppression on the part of the appellant. As such, we are of the view that the demand raised by invoking the longer period of limitation is not sustainable and is liable to be set aside on the ground of limitation itself.

8. We also find no merits in the finding of Commissioner (Appeals) that in terms of the Larger Bench decision in the case of BDH Industries Ltd. *Versus* Commissioner of Central Excise (Appeals), Mumbai-I reported at 2008 (229) E.L.T. 364 (Tri. – LB), the appellant was not entitled to take *suo-motu* refund without the sanction and permission of the authorities. We note that the present case is not a case of refund but a case of availment of credit of Service Tax paid by the appellant on GTA Services, which is admittedly, a Cenvatable input service. As such, the ratio of the said decision does not apply to the facts of the present case.

9. In view of the forgoing, we set aside the impugned order confirming the demand and imposing penalties and allow the appeal with consequential relief to the appellant.

(Pronounced in Court on 08/05/2018)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Ansari