IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. ST/1438/2011-CU[DB]

(Arising out of Order-in-Appeal No. 169-ST/MRT-II/2011 dated 31/05/2011 passed by Commissioner of Central Excise & Customs (Appeals), Meerut-II)

S.B. Shellers **Appellant**

Vs.

Commissioner (Appeals), Customs &

Central Excise, Meerut-II **Respondent**

Appearance:

Shri M.B. Mathur (Advocate) for Appellant
Shri Mohd Altaf (Asstt. Commr.) AR for Respondent

CORAM:

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

Date of Hearing : 12/11/2018
Date of Pronouncement : 27/11/2018

FINAL ORDER NO **72685 / 2018**

Per: Archana Wadhwa

As per facts on record the appellants are engaged in the manufacture of Sugar Mill, Machinery namely Sugar Rollers etc., which are being cleared by them on payment of Central Excise Duty. Apart from the above they were also providing "Maintenance and repair service" by repairing/reshelling the old and worn out rollers of sugar mills. As the appellant is registered with the Service Tax Department under the said category they are paying service tax on the repair and maintenance charges including the cost for the new shell. During the course of such repairs of the old shells the roller is de-shelled completely and new shell is shrink fitted on the shaft. During such process of repairing, scrap is generated in the appellant's factory, which is being retained by them and recorded in the Statutory Books and cleared on payment of duty of excise.

2. On scrutiny of the appellant's records, officers found that they were discharging their service tax liability only on the job charges agreed with their customers. Inasmuch as the appellant was allowed to retain the scrap generated during the course of repair, the officers entertained a view that the job charges were not the sole price for such repair and maintenance service. Inasmuch as there was an understanding between the appellant and their customers that the scrap so generated will be retained by them and the cost of such scrap had been adjusted against the agreed job charges amount.

3. In view of the above proceedings were initiated against them by way of issuance of two show cause notice dated 14.10.2009 for the period from 2007-08 to February, 2009 and dated 07.05.2010 for the period from March, 2009 to 22.12.2009, proposing to include the value of the scrap so retained by them, in the value of the services and to confirm

the demand of service tax accordingly. The said show cause notices culminated into an order passed by the Additional Commissioner, confirming the demand to the tune of Rs.29,39,406/- along with confirmation of interest and imposition of penalty. The said order of the Original Adjudicating Authority stands confirmed by Commissioner (Appeals) and hence the present appeal.

4. The short issue required to be decided in the present appeal is as to whether the cost of the scrap generated during the course of repair of their customer's, sugar rollers would form part of the service so as to discharge the service tax on the same or not. The Lower Authorities have referred to the provisions of Rule 3 of Service Tax (For Determination of Value) Rule, 2006 which is to the following effect:-

"Rule 3 of Service Tax (Determination of Value) Rules, 2006 lays down "Subject to the provisions of Section 67, the value of taxable service, where the consideration received is not wholly or partly consisting of money, shall be determined by the service provider in the following manner:-

(a) the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration;

(b) where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such taxable serice".”

From above, the Lower Authorities have observed that the retention of scrap by the appellant amounts to reduction of job charge to the extent of value of scrap so retained inasmuch as the appellants have received the job charges in cash as also in kind.

Admittedly, the job charges paid by the customers is not the sole consideration for providing the service and the value of the scrap, which in fact belongs to the customer, stands retained by the appellant. As such the same has to be treated as the value in kind for the services being provided by the appellant.

Learned Advocate appearing for the appellant has submitted that such scrap so generated was being entered by them in their books of accounts and have been cleared on payment of Central Excise Duty. He submits that payment of Excise Duty on the said scrap as also payment of service tax amounts to double taxation, which is impermissible. As such he submits that service tax liability be set aside.

5. We find no merit in the above contention of the learned counsel for the appellant. It is not a case where particular activity is being adjudged as a manufacturing activity or service activity, in which case the payment of Excise Duty on the scrap so arisen is the relevant consideration for holding the activity as not amounting to manufacture. In the present case the dispute relates to the value of the admitted service, which is leviable to service tax. The appellants are being paid for the said service by their service recipient, in cash as also in kind. The payment in kind is equivalent to value of the scrap which the appellant has been allowed to retain. Taking a hypothetical situation where agreed upon charges between the appellant and their customer is Rs.150/- per unit. However, on account of the retention of the scrap to the extent of Rs.50/- value, the customers have paid only Rs.100/- for the said services. Admittedly, in such scenario the payment made in cash to the extent of Rs.100/- and in kind to the extent of Rs.50/-, being the value of scrap is required to be considered as the value of the service. The fact of clearance of said scrap on payment of duty of Excise has no relation for arriving at the value of the service. As such we find no merits in the above contention of the appellant, and hold that the value of the scrap is required to be added in the value of the services.

6. However, appellants have also submitted that part of the demand is barred by limitation having been raised beyond normal issue. Learned Advocate has submitted that vide their letter dated 17.07.2007 they have informed the Assistant Commissioner and the Superintendent of their activity including the fact that they shall discharge the Excise Duty on scrap generated during repair, therefore, charge of suppression cannot be maintained. We find that the Lower Authorities have not adverted to the said fact and as such we deem it fit to remand the matter to the Original Adjudicating Authority for deciding the issue of limitation afresh, based upon the documentary evidence on record.

7. Appeal is rejected on merits and remanded on limitation. The issue of penalty is also left open for the Adjudicating Authority to be decided afresh in *de-novo* proceedings.

(Pronounced in Court on **27.11.2018**)

Sd/-	**Sd/-**
Anil G. Shakkarwar)	**(Archana Wadhwa)**
Member (Technical)	**Member (Judicial)**

Ankit