CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT No. I

Excise Appeal No.71031 of 2018-Division Bench

(Arising out of Order-in-Appeal No. GZB/EXCUS/000/APPL-MRT/47/2018-19 dated 25/04/2018 passed by Commissioner (Appeals) Central Goods & Service Tax, Meerut)

The Commissioner, Central Goods

& Service Tax, Ghaziabad .....Appellant

(CGO Complex-I, Kamla Nehru Nagar, Ghaziabad)

VERSUS

M/s Shape Machine Tools Pvt. Ltd. ....Respondent

(E-188 & 206, Kavi Nagar Ind. Area, Sector-17, Ghaziabad)

APPEARANCE:

Shri Pawan Kumar Singh, Authorised Representative for the Appellant
Shri Rajesh Chhibber, Advocate for the Respondent

CORAM:

HON'BLE SMT. ARCHANA WADHWA, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 70993 / 2019

Date of Hearing : 14 May, 2019
Date of Decision : 14 May, 2019

PER: ARCHANA WADHWA

Being aggrieved with the order passed by Commissioner (Appeals) Revenue has filed the present appeal. We have heard Shri Pawan Kumar Singh learned A.R. appearing for the Revenue and Shri Rajesh Chhibber learned advocate appearing for the respondents.

2. As per facts on record, the respondents were receiving certain goods for job work against the returnable challans and after doing job work, the same were sent been to the principal manufacturer. They were registered with the Service Tax Department for payment of service tax under the category of "Business Auxiliary Services" and were discharging their tax liability accordingly.

3. As a result of investigation, Revenue entertained a view that the activity undertaken by the respondents amounted to manufacture and as such they should have paid duty of excise instead of payment of service tax. Accordingly proceedings were initiated against them by way of issuance of two show cause notices dated 26/04/2106 and 09/05/2016. The same culminated into an order passed by the Original Adjudicating Authority confirming the demands and imposing penalties as also confiscating the seized goods with redemption fine.

4. On appeal Commissioner (Appeals) set aside the impugned order on merits as also on limitation. As regards limitation he observed as under:-

> *"6.3. The appellant has also contended that since the process of machining being carried out by him on the impugned goods did not amount to manufacture, he was required to pay service tax on job work charges under Business Auxiliary Services (BAS) and he was discharging the same which was also shown in his returns filed and accordingly, it cannot be alleged that he suppressed the facts from the department. The appellant, in this regard, has placed reliance on the decision of Hon'ble CESTAT, Bangalore, in the case of M/s Osnar Chemical P. Ltd. vs.*

CCE, as reported in 2009 (240) E.L.T. 115 in which it was held that-

> *Excisability – Service tax payment, effect – Manufacture – Excisability assailed by assessee contesting non-manufacture and payment of service tax – Once appellant pays service tax on process and Department not objecting, there is no question of treating process as manufacture and levying Central Excise duty – Not proper to levy service tax and Central Excise duty simultaneously – Section 2(f) & 3 of Central Excise Act, 1944.*

The said order of the Hon'ble CESTAT was affirmed by the Hon'ble Apex Court, as reported in 2012 (276) E.L.T. 162.

There is no denial that the appellant was showing the service tax payment on the impugned activity being carried out by him in the returns filed by him. There is nothing on record to infer that the department had objected to it. In the case of Chemphar Drugs – 1989 (40) E.L.T. 276 (S.C.), the Supreme Court held that something positive other than mere inaction or failure on the part of the assessee or conscious or deliberate withholding of information when assessee knew otherwise, is required before it is saddled with the liability during the extended period. Under the circumstances, the extended period of limitation is not available for the demand. In view of the above, and given the fact that the appellant was paying service tax on the job work charges received by him, the demand of excise duty is not sustainable on this ground as well.

6.4. I further find that there is nothing in the SCN to substantiate the seizure of the goods found in the premises of the appellant. There is no allegation that the goods were un-accounted or brought without payment of duty. In case the goods seized were the ones which were received for job work on returnable basis, the seizure of the same is not sustainable as the demand of excise duty in respect of the same is legally not sustainable as discussed in the foregoing paras."

5. As against the above finding of Commissioner (Appeals) Revenue has not produced any evidence to show that the non-payment of duty of excise by the respondents was on account of

any *mala fide*. Admittedly, he was registered with the Service Tax Department and was discharging tax liability accordingly. The fact of registration and payment of service tax was in the knowledge of the Revenue and as such it cannot be said that the appellant suppressed any facts with intent to evade payment of duty. The benefit of extended period stands rightly allowed by Commissioner (Appeals). No infirmity is found in the said order of the Appellate Authority. Accordingly Revenue's appeal is rejected.

(Dictated and pronounced in open court)

Sd/-
(Archana Wadhwa)
Member (Judicial)

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

Lks