CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT No. I

Excise Appeal No.70182 of 2017-Division Bench

(Arising out of Order-in-Appeal No. MRT/EXCUS/000/APPL-I/257/2016-17 dated 14/12/2016 passed by Commissioner of Central Excise (Appeals-I), Meerut)

M/s Tirupati Cylinders Ltd. **.....Appellant**

(9th KM, Bhopa Road Muzaffarnagar, U.P.)

VERSUS

Commissioner of Central Excise, Meerut **....Respondent**

(CCE, Meerut)

APPEARANCE:

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

CORAM:

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

FINAL ORDER NO.- 71138 / 2019

Date of Hearing : 19 June, 2019
Date of Decision : 19 June, 2019

PER: ARCHANA WADHWA

After hearing both the sides, we find that the appellant is engaged in the manufacture of Empty LPG Cylinders, VP Ring, Stay Plates and Foot Rings etc. Sometime the appellant received back old used Cylinders from their customers and repair the same by replacing certain parts which they are manufacturing themselves.

2. Till 2012 the appellant was paying Central Excise duty on various parts being used by them. However with the introduction of negative list based on service tax regime, they started paying the service tax on said activities. The requisite of ST-3 returns were being filed by the appellant and were being accepted by the Revenue.

3. Subsequently on the basis of certain investigations, Revenue entertained a view that the appellant should have paid the excise duty on various parts which were being consumed by them captively in the repair of the Cylinders. Accordingly by way of issuance of a show cause notice dated 08/10/2014, demand of Rs.19,32,185/- approximately was raised against them for the period 01/07/2012 to 30/06/2013. The same stands confirmed by the Original Adjudicating Authority and upheld by Commissioner (Appeals). Hence the present appeal.

4. It is seen that during the course of proceedings before the Lower Authorities, the appellant took a categorical stands that they have already discharged service tax on the said activities by treating the same as services. They also contended that rate of tax is equivalent to the rate of Central Excise duty required to be paid by them and as such the entire situation was Revenue neutral. While dealing with the said plea of the Commissioner (Appeals) observed as under:-

> *"I observe that the appellant, might have paid service tax in excess of what was due but it cannot validate their stand regarding non-payment of Central Excise duty. Further, Service Tax and Central Excise duty are paid/payable under different statutes and excess payment under one Act cannot be adjusted against short/non-payment under another Act."*

5. It is seen that the Revenue is not disputing the fact of payment of service tax. The only ground of the Revenue is that instead of paying service tax they should have paid duty of

excise. However, the excise duty payable by the appellant was available as credit to them, thus again leading to a Revenue neutral situation. Tribunal in the case of Commissioner of Service Tax, Mumbai-II vs. Reliance Communication Ltd. 2019 (22) G.S.T.L. 203 (Tri.-Mum.) has observed that wherever the service tax was payable by the assessee but has not been paid, the situation would lead to a Revenue neutral situation as the service tax payable was available as credit to the assessee in which case the demand would be time barred. Further in the case of B.N. Pack vs. Commissioner of Central Excise Final Order No.70319/18 dated 18/01/2018, it was observed:-

> *"3. Learned counsel for the appellant submits that although the activity under taken by the appellant amounts to manufacture but on job work activity they were paying service tax and the same has been accepted by the Revenue. It is submitted that the extended period of limitation cannot be invoked as the Revenue never raised any objection for paying service tax by the appellant instead of duty. In that circumstances, the demands are not sustainable. He also submitted that Adjudicating Authority has adjusted the amount of service tax paid by the appellant from the impugned demand."*

6. Inasmuch as the appellant in the present case also has paid the service tax which is more or less equivalent to the excise duty required to be paid by them. We find no justification for upholding the duty of excise and observe that the service tax paid by them is required to be adjusting towards the excise duty now confirmed against them.

7. Apart from the merits of the case, we also note that the demand stands raised by invoking longer period of limitation. As observed in the case of B.N. Pack and in the case of Reliance Communication Ltd. supra the longer period would not be available inasmuch as the entire situation a Revenue neutral. In this case we also note that the appellant was paying service tax

and was filing ST-3 returns which were not being objected by the Revenue. No case of suppression or misstatement can be made out against the assessee so as to invoke the longer period of limitation. Accordingly, we hold the demand as barred by limitation and consequently unsustainable.

8. In view of the foregoing, the impugned order is set aside and appeal is allowed with consequential relief to the appellant.

(Dictated and pronounced in open court)

Sd/-
(Archana Wadhwa)
Member (Judicial)

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

Lks