CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated: 29/12/2015

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70095/2015 dated 18/11/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

29/12/15

Asstt. Registrar/SPS

Application	Appeal	Name and Address of Appellant
	ST/2956/2012	TIRUPATI CYLINDERS LTD 9TH KM BHOPA ROAD MUZAFFARNAGAR251001 UP
	Name and Address of Respondent	CCE, MEERUT I EXCISE CHOWK, UNIVERSITY ROAD,MANGAL PANDEY NAGAR MEERUT(UP)

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s): SH V.L.KUMARAN,ADV
5, JANGPURA EXTENSION
LINK ROAD, NEW DELHI-14

4 Bar Association, CESTAT, Delhi
5 Director Publications, Customs, Excise, I.P. Estate, Delhi
6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi – 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy 16 Guard File

30/12/15

Asstt. Registrar/SPS
Regional Bench, Allahabad

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

S.T. Appeal No.2956/12

Arising out of O/O No.29-30/Commr/MRT I/2012 dated 14.06.2012 passed by Commissioner of Central Excise, Meerut I

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. C. J. MATHEW, MEMBER (TECHNICAL)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : NO.
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes.
3. Whether His Lordship wishes to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental Authorities? : Yes.

M/s Tirupati Cylinders Ltd.

...APPELLANT(S)

VERSUS

Commissioner of Central Excise, Meerut I

RESPONDENT (S)

APPEARANCE

Shri B. L. Narasimhan, Adv. for the Appellant (s)
Shri Nagvenkar, Addl. Commr. (A.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.C. J. MATHEW, MEMBER (TECHNICAL)

DATE OF HEARING & PRONOUNCEMENT : 18. 11. 2015

Final ORDER NO. 70095/2015

Per Mr. Anil Choudhary :

The Appellant, M/s Tirupati Cylinders Ltd., is in Appeal against Order-in-Original No.29-30/Commr/MRT I/2012 dated 14.06.2012 passed by Commissioner of Central Excise, Meerut I, by which demands have been raised on the material components utilized in repair and maintenance work of LPG cylinders carried out by the appellant holding the same to be consumables, thereby not having any element of deemed transferred of property in the same.

2. The appellant is registered under the provisions of Central Excise and service tax. For the period in question and from October 2005 to September 2011, the appellant have regularly discharged the service tax leviability on the service tax component involved in the repair and maintenance of the cylinders. The appellant also filed returns regularly. Show cause notice dated 15/02/12 for the period October,2010 to September 2011 and another show cause notice dated 13/04/11 for the extended period October 2005 to September 2010 were issued. As it appeared to revenue that the appellant is liable to pay service tax also on the material component used or consumed in the repair and maintenance of cylinders.

3. The appellant contested the show cause notice stating therein that they are regularly discharging VAT/sales tax on the material component involved in the repair and maintenance job. The appellant also stated that they have regularly filed their cost sheets, which shows cost materials components, to demonstrate the calculation of VAT on the material component. The appellant also filed certificate of

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chartered accountant in support of the contentions regarding the value of material consumed. The ld. Commissioner confirmed the proposed demand in the two show cause notices amounting to Rs.1,20,32,839/- and Rs.23,14,909/- towards service tax short paid by the appellant for the period in dispute in respect of the repair and maintenance of old cylinders for various oil companies along with interest. Further, penalty of equal amount was imposed under section 78. Penalty was also imposed under section 76 and section 77 of the Act. The ld. Commissioner also observed that the appellant have not brought anything on record as to how charging of service tax on the gross value of maintenance and repair shall be against the intention of the legislature. Further the exemption claimed for material component under notification number 12/2003, was also denied on the ground that the same is available in case of sale of materials involved in a contract but not on the deemed sale. As the appellant have not charged separately for materials in their invoice accordingly it was held that they're not entitled to get the benefit for the said material component. The ld. Commissioner has followed the ruling of the Larger Bench of this Tribunal in the case of Aggrawal Colour Advance Photo Systems Vs. CCEx., Bhopal : 2011 (23) STR 608 (Tri-LB). Being aggrieved, the appellant is before this Tribunal.

4. The ld. Counsel for the appellant urges that the issue is no longer *res-integra*. The ruling of larger bench of this Tribunal in the case of Aggrawal Colour Advance Photo Systems (Supra), have been impliedly over-ruled by the Honourable Supreme Court in the case of

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State of Karnataka Vs. Pro Lab & Ors. : 2015 TIOL-08-SC-CT-LB. The facts before the Honourable Supreme Court in the case of Pro Lab & Ors. Were, under the State VAT Act with regard to imposition of sales tax on processing and supplying photographs, Photoprints & Photonegatives. It was held that while going into this exercise of the divisibility, dominant intention behind the contract, namely, where it was for sale of goods or for services is rendered otiose or immaterial. The State legislature is now empowered to segregate the goods part of the works contract and imposed sales tax thereupon. The ld. Counsel also referred to the ruling of Honourable Supreme Court in the case of Xerox Modicrop Ltd. Vs. State of Karnataka, : (2005) 7 SCC 380 wherein the contention of the assessee was that in the case of maintenance and service contract, the costs of toners and developers are not deemed to be sold and accordingly not taxable to VAT. It was held by the Apex Court that toners and developers get consumed after the same are put in the machine. But the moment, the toner & developer are put in the Xerox machine, they are not consumed and are tangible goods in which property can pass and accordingly it was held that toners and developers are supplied by the assessee in the maintenance contract and are exigible to Sales Tax/VAT. The appellant further relied on the ruling of Honourable Allahabad High Court in the case of Commissioner of Customs and Central Excise Vs. J.P.Transformers : 2014 (36) STR 961 (Tri.Del.) wherein under similar circumstances, when the assessee was engaged in repairing and maintenance of Transformers, and paid VAT. It was held that service tax could not be demanded on the component present in value of goods and materials used for carrying out repairs. The mere fact that cost of various items was shown for the purpose of price variation, would not make any difference to legal position. The appellant also relies on the Hon'ble Allahabad High Court in the case of CCE and CE Vs. Balaji Tirupati Enterprises 2013 (32) STR 530 (All) wherein under the repair and maintenance service, goods were used and deemed to be sold. It was held that the same are not in the purview of Levy/service tax. As such, goods are deemed to be sold under the contract. The ld. Counsel also relies on the ruling of the South Zonal Bench of this Tribunal in the case of the Wipro GE Medical Systems Pvt. Ltd. Vs. Commr. of S.Tax ; 2009 (14) STR 43 (Tri.-Bang.), wherein the issue whether cost of material is includible in gross value, taxable to service tax. It was held that spare parts used in the course of maintenance service under Annual Maintenance Contract are considered to be sold and no demand is sustainable on the value of spare parts and materials. The said decision of the Tribunal have been uphelp by the Apex Court reported at 2012 (28) STR J 44 (SC). Accordingly, the ld.Counsel prays to allow the appeal by setting aside the impugned order. The ld. Counsel also challenges the invocation of extended period under the facts and circumstances, as the appellant have admittedly filed all the returns and paid the admitted taxes and interest and in such circumstances, there is no element of suppression, fraud or contumacious conduct

5. Heard ld.DR for Revenue. The ld.DR relies on the impugned order and also relies on the Division Bench ruling of this Tribunal in the

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case of Luxmi Tyres Vs. Commissioner of Central Excise, Pune : 2014 (36) STR 364 (Tri.-Mumbai). It was held that there being no documentary proof indicating value of goods and materials sold to customers, accordingly, the benefit of notification 12/2003 will not be available, but it was also held that there is no judicial bar leading in Levy of service tax, in case of overlapping of sales tax/VAT.

6. Having considered the rival contentions. We find that the issue is no longer *res-integra*. It has been explained in the decision by the Apex Court that service tax and sales tax are mutually exclusive. Further following the ruling of the Apex Court in the case of Pro Lab and others (supra) and Balaji Tirupati Enterprises (All-HC)), we hold that the ld. Commissioner is in error in Levying tax on the material component involved in repair and maintenance of the cylinders carried out by the appellant. Thus, the impugned order is set aside. The appellant shall be entitled to consequential benefits, if any, in accordance with law.

(Dictated and pronounced in the open Court)

Sd/-
(C. J. MATHEW)
MEMBER (TECHNICAL)

Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

प्रमाणित प्रति / Certified True Copy
12-1-14
Asstt. Registrar
(C.E.S.T.A.T.)
38, M. G. MARG, ALLAHABAD-211001