

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

Appeal No.ST/68-73/2010

[Arising out of Order-in-Original No.59 to 64/2009 (C) dt.30.10.2009 passed by the Commissioner of Central Excise, Puducherry]

Commissioner of Central Excise, Puducherry Appellant

Versus

Numeric Power Systems, Unit – II, III, IV Respondent

Appearance:

Shri B.Balamurugan, AC (AR)
For the Appellant

Shri S.Sankaravadivelu, Advocate
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing : 11.5.2018
Date of Pronouncement : 13.06.2018

Per Bench

FINAL ORDER No. 41795-41800/2018

The above appeals are filed by department. The issue being same in all appeals, they are disposed by this common order.

1. Brief facts are that the respondents, M/s.Swelect Energy Systems Ltd, (Formerly M/s.Numeric Power Systems Ltd) are manufacturers of Uninterrupted Power supply System (UPS) and had units II,III & IV under the jurisdiction of the appellant department. The respondents were discharging Central Excise duty, inclusive of the

value of the installation charges collected. On 5/9/2006 the department had enquired whether pre-delivery inspection charges and after sales services are included in assessable value to which respondents had replied vide their letter dated 26.9.2006 that these charges are included and also informing that their price is inclusive of installation charges of UPS. After almost two years the department issued Show Cause Notice dt.20.10.2008 to Unit III alleging that respondents are liable to discharge service tax on the installation charges for the period 1.7.2003 to 31.3.2008. Show Cause Notices for subsequent periods (Units) were also issued.

1.1 After due process of law, the original authority held interalia, that as there is no suppression of facts, the extended period cannot be invoked; that respondents have already paid Central excise duty on these values and hence service tax can be collected only for the period during which time, the rate of service tax was higher than the Central Excise duty already paid by respondents. Accordingly a differential service tax of 2% for the period 8.12.2008 to 28.02.2009 was confirmed alongwith interest; the penalty was set aside. Aggrieved the department is before the Tribunal.

2. On behalf of department, the Ld.AR, Sh.B.Balamurugan appeared and argued the matter. He stressed that the Commissioner has erred in setting off/adjusting the central excise duty paid against the service tax payable by respondents. There are no provisions in the Finance Act, 1994 that Central Excise Duty paid on the installation charges be set off against payment of Service Tax. The provisions of Finance Act, 1994 requires that a person who is providing taxable

service shall pay service Tax at the rate specified in such manner and within such period as may be prescribed. The adjudicating authority has no power to adjust the duty paid under Central Excise Act against the Service Tax amount payable under Service Tax law. The levy of Service Tax would be determined having regard to the respective nature of services provided by the provider of taxable service, whereas Excise Duty is levied on goods manufactured under Central Excise Act. Having held in the Order-in-Original that the commissioning or installation activity becomes taxable service and that the period for which Service Tax is payable is one year only under Section 73 (1) of Finance Act, 1994, there is no option available to the Adjudicating Authority other than to determine the value of taxable service and confirm the tax amount show cause notice wise as per the provisions of Finance Act, 1994 without adjusting the excise duty paid for the goods. Further, the adjudicating authority has made an observation in para 9 of the Order-in-Original that as per the judgment in the case of M/s.Allegers Medical Systems Ltd – 2009 (14) STR 235 (Tri. – Del) that whatever Excise Duty paid on the impugned amounts attributable to the installation & commissioning shall be set off against the Service Tax payable. On reading the above case law, it is found that there is no such decision arrived at by CESTAT. The conclusion drawn is, therefore, erroneous. In view of the above, the adjudicating authority ought to have determined the value of taxable service and service tax payable and confirmed the Service Tax amount show cause notice wise limited to one year period as held without adjusting central excise duty against service tax payable in the Order-in-Original itself as per the provisions of Finance Act, 1994 and imposed penalty under Section 76

for failure in payment of Service Tax. Further, the adjudicating authority has not quantified the demand amount as confirmed in the order portion for the period from 08.12.2008 to 28.02.2009. That there are no grounds for not imposing penalty under Section 76 of the Act *ibid*.

3. The Ld.Counsel, Sh.S.Sankaravadivelu made written and oral submissions which can be summarized as under :

i) The department has not appealed against the finding of Commissioner that the demand for extended period cannot sustain. Similarly the finding that service tax is payable only with effect from 16.6.2005 is also not contested by the department in their grounds of appeal.

ii) The main ground raised is that the Commissioner ought not to have adjusted the service tax payable against the Central excise duty already paid by respondents. He adverted to their letter dated 29.10.2006 and submitted that appellant had clearly informed the department that they were including the charges of installation of UPS in the assessable value and were discharging the excise duty thereon. If the department had instructed that they had to pay service tax and not excise duty, the respondent would have discharged the service tax accordingly and stopped paying Central excised duty on the installation charges. After payment of Central Excise duty, the Commissioner has rightly adjusted the amount towards the service tax. The appellant has paid the differential amount of 2% as held by the Commissioner along with interest.

iii) In Allengers Medical Systems Ltd. Vs Commr. Of C.Ex., Chandigarh 2009 (14) S.T.R.235 (Tri. – Del.) the Tribunal held that when there was no separate contract for erection and installation and when such charges were included in value for which excise duty was paid, service tax could not be demanded. The Commissioner has rightly relied on the said decision.

iv) The department has raised demand of service tax on the notional value of 33% of sale value as if the respondents were rendering 'installation service'. Such concept of adoption of 33% after giving abatement of 67% is applicable only when the whole activity is only 'Commissioning & Installation Services'. In the present case, the prime activity is manufacturing of UPS and its' installation is only incidental to such activity. The activity of installation of UPS is very simple just like installation of computers, washing machine etc, and it would be unrealistic to arrive 33% of the sale value towards installation charges.

v) The Commissioner has rightly taken note of these facts and quantified the demand for the limited period. The respondents accordingly filed ST-3 returns and discharged the service tax liability.

vi) It is well settled principle that Central Excise duty and service tax cannot be collected on the same activity.

vii) The penalty has been rightly set aside.

4. Heard both sides.

5. The original authority has set aside the demand for the extended period observing that there is no suppression of facts. In the letter

dated 29.10.2006, the respondents have informed the department that they are including the installation charges in the assessable value and are discharging service tax on the same. The appellants having disclosed the fact of paying excise duty on the installation charges, they cannot be saddled with guilt of suppression of facts with intent to evade payment of excise duty/service tax and we therefore find that the Commissioner has rightly set aside the demand for the extended period.

6. The main ground raised by the department is that the Commissioner ought not to have adjusted the service tax payable against the excise duty already paid. It is contended by Revenue that the service tax ought to be confirmed for the entire period. It is argued by Ld.Counsel for respondent that excise duty was always higher than service tax, which has been accepted by the Commissioner and only for the limited period (18.12.2008 to 28.2.2009) when excise duty was lower than service tax, the demand is confirmed by directing appellant to pay differential amount of 2%. One aspect that has to be considered is that the installation services has already suffered duty. To impose service tax again on the same charges would amount to double taxation. Further, the argument of the counsel that the installation is a simple task and the demand of service tax raised in show cause notice on 33% of the value of UPS cleared by them, is high is not without substance. Such demand would be ignoring substantial portion of the manufacturing activity which is the predominant one and treating the whole transaction as service only which is not legal.

7. In Allengers Medical Systems Ltd (supra) the Tribunal held that when installation charges are included in the assessable value and excise duty paid; as there is no separate contract for installation services, the demand for service tax cannot sustain. In Lloyd Sales Corporation vs State of Andhra Pradesh (1992) 86 STC 529, the Hon.High Court, considered the issue whether the transaction of supply and installation of air conditioners at the customers premises involved independent sales for levy of sales tax. It was held that the air conditioners were supplied in a fully manufactured form and the price was payable immediately on supply. That the work of installation of air conditioners was only incidental to the sale of air conditioners.

8. In our view, in any case, the demand of service tax on 33% of sale value cannot sustain. Though we may agree that Central excise duty cannot be adjusted against service tax, taking into consideration, the facts in a broader perspective, we strongly feel that the allegations in the Show cause notice for raising the demand lacks legal footing, and therefore the demand cannot sustain. The appellant has however accepted the differential demand and paid the same with interest. In the peculiar facts of the case, we are of the considered opinion that the impugned order does not call for any interference. The appeal filed by department is dismissed.

(Order pronounced in open court on 13.06.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

vSr