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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. E/3021/2007 – SM[BR] Date **07/02/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S BHIWADI CYLINDERS LTD
E-925,1200 &1201, INDUSTRIAL AREA, BHIWADI.

M/S BHIWADI CYLINDERS LTD Appellant
Vs
C.C.E. JAIPUR I Respondent

I am directed to transmit herewith a certified copy of **Final order No. 108 / 2011 - SM[BR]** dated 25.1.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E. JAIPUR I
N.C.R.BUILDING, STATUE
CIRCLE, "C" SCHEME, JAIPUR
302005.
2. Adv. / Consult SHRI BIPIN GARG ADV.
B-1/1289-A, VASANT KUNJ NEW DELHI

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32. New Rohtak Road. New Delhi -
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III

Excise Appeal No. 3021 of 2007-SM(BR)

[Arising out of Order-in-Appeal No. 150(GRM)ST/JPR-I /2007 dated 27.8.2007 passed by the Commissioner of Central Excise (Appeals), Jaipur]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, 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? : NO
3. Whether Their Lordships wish to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental authorities? : NO

M/s. Bhiwadi Cylinders Ltd. Appellants

Vs.

Commissioner of Central Excise Jaipur Respondent

Appearance:
Shri Mayank Garg, Advocate for the Appellants
Shri Krishna Pratap Singh, SDR for the Respondent

Final

Date of Hearing/decision : 25.01.2011

ORAL ORDER NO. 108/2011 SM (BR)

Per M. Veeraiyan:

This is an appeal against the order of the Commissioner (Appeals) No. 150(GRM)ST/JPR-I /2007 dated 27.8.07 by which order of the original authority dated 3.4.2007 rejecting the refund claim has been upheld.

2. Heard both sides.

3.1 The basic dispute was whether the appellants were liable to pay Service Tax on the activities of repairing and maintenance of gas cylinders relating to period 1.7.03 to 31.3.04. Both sides agree that the dispute is settled by the order of the Commissioner (Appeals) dated 28.4.06 holding that the appellants need not pay service tax. Therefore, on merits, the appellants are eligible for the refund claim.

3.2 Consequent to favourable order dated 28.4.06 of the Commissioner (Appeals), the appellants claims to have filed refund claim on 26.6.06 relating to the amounts paid by them during the period March, 2004 to August, 2005. According to the appellants, the said refund claim was returned for rectification of certain errors and the same were resubmitted on 18.8.06. The original authority held that a sum of Rs.1,24,653/- relating to period prior to 1.11.04 is time barred. He allowed refund claim amounting to Rs,1,95,025/- but ordered the same to be deposited in Consumer Welfare Fund on the ground that they have failed to prove that the duty element has not been passed on to the consumers. The order of the original authority stands upheld by the Commissioner (Appeals).

4.1 Learned Advocate submits that, as clearly recorded by the original authority a letter dated 11/12.7.2006 was written to the assessee returning the claim for filing fresh claim along with all the relevant documents. This clearly shows that their submission that they have filed the refund claim on 26.6.06 which was returned by the original authority and the same were resubmitted on 18.8.06 is correct. Therefore, he submits that the refund should have been deemed to have been filed on 26.6.06. and, therefore, the decision of the authorities below holding that the part of the claim is barred by limitation is not legal and proper.

4.2 On the issue of unjust enrichment, he submits that they produced letter from the Customers namely, IOCL to the effect that the appellants were required to bear the tax obligation. They also produced Chartered Accountant's certificate to the effect that they neither charged the tax nor realised amount of service tax from the customers. These two evidences were sufficient for the purpose of proving that they have not passed on the burden of tax to the customers. He fairly submits that they have not produced the letter dated 22.5.04 written by them to IOCL for which the IOCL has sent clarification vide their letter dated 1.7.04 that the appellants are responsible for paying the ~~Central~~ ~~Excise~~ tax.

4.3 He also submits that they have not charged and collected the Service tax from IOCL. He also relies on the decision of the Tribunal in the case of Fairlon Engineering (P) Ltd. Vs. CCE Mumbai reported in [2005 (191) ELT 651 (Tri-Del)].

5. Learned SDR submits that the entire refund claim has been submitted along with relevant documents only on 18.8.06. Further, the basis on which the Chartered Accountant's certificate was issued has not been revealed. Under these circumstances, he seeks upholding the order of the Commissioner (Appeals). Learned SDR further submits that the documents submitted were relating to IOCL only and there are other parties for whom the appellants have undertaken such activities.

6.1 I have carefully considered the submissions from both sides and perused the records. It is not in dispute that the appellants challenged the assessment order of the original authority levying the service tax and the same has been settled in their favour by order of the Commissioner (Appeals) dated 28.4.2006. Immediately, thereafter on 26.6.06, the appellants have filed the refund claim which appears to have been returned to the party as spelt out in the order-in-original dated 3.4.2007. In the facts and circumstances of the case, it is appropriate to hold that 26.6.06 is the date on which the appellants filed the claim pursuant to favourable order of the Commissioner (Appeals). Therefore, the decision of the authorities below in holding that the claim relating to period prior to 1.11.04 is hit by time bar cannot be upheld.

6.2 As regards the challenge to the order on the ground of unjust enrichment, the learned Advocate relies on the certificate issued by IOCL and the Chartered Accountant's certificate. As rightly pointed out by learned SDR, the position relating to other customers has not been discussed in the orders of the authorities below. The basis on which the Chartered Accountant's certificate has been prepared has not been furnished by the appellants. I deem it appropriate that the appellants are given another opportunity to prove their claim that tax burden has not been passed on to the customers.

7. In view of the above, the appeal is disposed of as follows:

a) The finding of the authorities below that their claim has been received on 18.8.06 is held to be wrong and it should be taken as having been received on 26.6.06. Consequently the rejection of part of the claim as barred by limitation should be reconsidered.

b) The issue of unjust enrichment relating to entire claim shall be reconsidered by the original authority. The appellants shall submit the evidence on which they want to rely upon within 45 days from the date of receipt of this order.

c) The matter shall be decided after granting reasonable opportunity of hearing to the appellants.

(M. Veeraiyan)
Member(Technical)

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