IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No. ST/ 02/2008

(Arising out of Order-in-Appeal No.48/JSR/2007 dated 15.10.2007 passed by the Commissioner (Appeals), Central Excise and Service Tax, Ranchi)

Commissioner of Central Excise & Service Tax, JSR
....Appellant (s)

Vs.

M/s. Tata Ryerson Limited

....Respondent (s)

Appearance:
Shri S.S. Chattopadhyay, Supdt. (A.R.) for the Appellants
Dr. Samir Chakraborty, Sr. Adv. &
Shri Abhijit Biswas, Adv. for the Appellant (s)

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER(TECHNICAL)

Date of Hearing/Decision :- 22.01.2019

ORDER NO. FO/75246/2019

PER Shri P.K.Choudhary

The present appeal has been filed by the Revenue against the Order-in-Appeal No. 48/JSR/2007 dated 15.10.2007, passed by the Commissioner (Appeals), Central Excise and Service Tax, Ranchi, whereby he allowed the appeal of Tata Ryerson Limited ("TRL") against the Order-in-Original dated April 11, 2007, passed by the Additional Commissioner of Central Excise and Service Tax, Jamshedpur and set aside the service tax demand of Rs. 26,01,069/- and interest thereon, confirmed under Sections 73 and 75 of the Finance Act, 1994 ('the Act') respectively and penalties of Rs.26,01,069/-, Rs. 1,000/- and Rs.200/- per day for the period from which the service tax allegedly became payable up to the date on which the same was paid, under Sections 78, 77 and 76 respectively of the Act. The period involved is from 01.03.2005 to 18.03.2005 (18 days).

2. The facts, in brief, are that Tata Steel Limited despatched excise duty paid Cold Rolled Coils (‘C.R. Coils’) to, amongst others, TRL, which acted as its conversion agents/external processing agents for carrying out the processing job of cutting/slitting the said coils and thereafter despatched the said coils as per direction of Tata Steel to customers’ stockyards, depots etc. of Tata Steel. Pursuant to Circular No. 584/21/2001-Cx dated 07.09.2001, issued by CBEC stating that the activity of cutting of H.R./C.R. Coils of iron or non-alloyed steel into sheets and slitting of sheets into strips, amounted to ‘manufacture’ of excisable goods in terms of Section 2(f) of the Central Excise Act, 1944. TRL, as per direction of jurisdictional Central Excise authority communicated by letter dated 21.03.2002, started paying duty on the cut/slit C.R. coils cleared by it as conversion agent of Tata Steel from its factory. Consequently, TRL availed and utilized cenvat credit of the duty paid on the C.R. coils received by it from Tata Steel.

3. The said circular dated 07.09.2001 was challenged in a writ petition before the Hon’ble Delhi High Court in the case of Faridabad Iron & Steel Traders Association Vs. Union of India,

2004 (178) ELT, 1009 (Del). The Delhi High Court held that the activities of decoiling, straightening, cutting or slitting into sizes of bars/steels, did not amount to manufacture within the meaning of the Central Excise Act, 1944 and quashed the said circular dated September 7, 2001 issued by the Board. The SLP preferred by the Revenue against this judgment of the Delhi High Court was rejected by the Hon'ble Supreme Court. The Board, thereafter, issued another circular bearing No. 811/8/2005–Cx dated 02.03.2005 withdrawing the Circular dated 7th September, 2001. In the meanwhile, TRL continued to make payment of central excise duty on the cut/slit C. R. coils, manufactured and cleared by it, during the period March, 2005 to June, 2005. The appellant also continued to accept such payment of duty without any reservation.

4. However, on 09.08.2005 a show cause notice was issued by the Commissioner of Central Excise and Service Tax, Jamshedpur wherein it was alleged that TRL had paid central excise duty on exempted final products, namely, cut/slit C.R. coils during the period from 03.03.2005 to 30.06.2005, amounting to Rs.31.95 crores approximately, although, in view of the Board's circular dated 2nd March, 2005, no such duty was payable on and from that date and had, in the process, also availed and utilized cenvat credit irregularly of Rs. 4.23 crores approximately in March, 2005. Proposals for demanding and recovery of the said irregularly availed cenvat credit of Rs. 4.23

crores and for appropriation of the duty of Rs. 31.94 crores paid by TRL under Section 11D of the Act were made. The show cause notice resulted in an adjudication order dated 29.12.2015 passed by the Commissioner disallowing the cenvat credit of Rs. 4.23 crores and directing recovery thereof along with interest and further directing appropriation of the sum of Rs. 31.94 crores paid as duty by TRL under Section 11D of the Act. The appeal of TRL against this order of the Commissioner was allowed by this Bench of the Tribunal by Order No. A-614-615/KOL/06 dated 10.07.2006 and the impugned order was set aside with consequential relief to TRL. Against this order of the Tribunal, the appellant preferred an appeal before the Hon'ble High Court of Jharkhand at Ranchi, which was registered as Appeal No. 61 of 2006. The said appeal was rejected by the said Hon'ble High Court by its judgment dated November 23, 2016, upholding the Tribunal's order.

5. Meanwhile, the Additional Commissioner issued a show cause notice dated 20.04.2006, which led to the passing of an adjudication order dated 11.04.2007. As per the adjudication order, although the activity of cutting/slitting of duty paid C.R. coils carried out by TRL during the period 1.3.2005 to 18.03.2005 on processing charges basis, as conversion agent of Tata Steel had resulted in TRL rendering taxable service of 'Business Auxiliary Service' under the Act, it had failed to make payment of the service tax payable. The Additional Commissioner

accordingly confirmed the tax demand of Rs. 26,01,069/- along with interest and imposed penalties as abovestated upon TRL. Appeal of TRL against this order was allowed with consequential relief, upon setting aside of the adjudication order, by the Commissioner (Appeals) by the impugned order dated 15.10.2007.

6. On behalf of the appellant it has been contended as under :-

(a) The Commissioner (Appeals) has arrived at the conclusion that the service tax is not leviable on the activity on which or the process related thereto, the duty of central excise has been realised simultaneously. However, it appears that the Commissioner (Appeals) has failed to appreciate the issue in its entirety inasmuch as the facts and circumstances pertaining to the levying of the duty of central excise in the instant case has escaped his attention. The Order-in-Appeal has itself referred to another order of the lower authority, inter alia, proposing to disallow CENVAT credit on the ground that the finished product i.e., cut/ slit HR/ CR coils are not liable to the duty of central excise. The said order was issued in terms of CBEC circular No. 811/8/2005–CX. dated 02.03.2005 issued consequent upon the Supreme Court's order in the case of M/s Faridabad Iron & Steel Traders Association Vs. U.O.I. [2005 (181) ELT A68 (SC)]. Accordingly, input stage credit used in relation to manufacture of such non-excisable goods has been denied. The question of denial of credit on the ground that payment of duty of excise, if any, on such non-excisable goods being entirely on the assessee's own volition, will not result in availment of input stage credit, is pending decision before the Hon'ble Jharkhand High Court, Ranchi on an appeal under Section 35G of CEA preferred against the contrary order passed by the Tibunal. Therefore, CCE(A) could not conclude that the department has levied duty of central excise. This erroneous observation is also totally premature and completely non-maintainable in view of the matter, including leviability of duty of central excise in the instant case, being sub-judice.

(b) The Commissioner (Appeals) has not appreciated the fact that the show cause notice as also the Order-in–Original against which the appeal was filed, pertained to the question of leviability to service tax. The Commissioner (Appeals) appears to have taken cognizance of the new facts/ grounds, completely outside the pale of show cause notice and/or the Order-in-Original viz., reference to Rule 16 of the Central Excise Rules, 2002, question of duty of central excise etc. He ought to have decided the question involved in the matter, being precisely the levy of service tax, without being prejudiced by the leviability or otherwise of the duty of central excise, particularly when the latter issue has not obviously attained the finality.

(c) The assessee has engaged in the activities of cutting, slitting and rendering all other specified jobs/works as detailed in the work order executed with their principal namely, M/s Tata Steels Ltd., Jamshedpur. The show cause notice categorically alleged that such activities would be covered under the “Business Auxiliary Service” under clause (V) of Section 65(19) of the Finance Act, 1994. In order to reinforce the allegation, the said show cause notice, inter alia, referred to the activity not amounting to manufacture so as to rule out the levy of duty of excise in the matter. However, the Commissioner (Appeals) has totally ignored this proposition in the instant case and erroneously observed that the Department continued to realise excise duty from the appellant.

(d) The issue of service tax liability on job working “not amounting to manufacture” was settled one in as much as the Tax Research Unit of CBEC, New Delhi under the Ministry of Finance, Department of Revenue vide its circular MF(DR) letter F.No. 341/13/2005-TRU dated 12/05/2005 clearly provided that in respect of production of goods on behalf of client, other than “the activity amounting to manufacture” within the Central Excise Act, 1944, service tax was imposed in 2004 vide clause (V) of section 65(19) of the Finance Act under the category of “Business Auxiliary Service”. In view of the unassailability of the position that cutting/slitting etc. (job-working) instant did not amount to manufacture, service tax has to be levied under the aforesaid statutory provisions. The levy of service tax cannot be diluted and/or exonerated from the otherwise fact of non-liable, erroneous and unqualified payment of central excise duty by assessee, particularly when the entire issue of such payment of duty of central excise and accrued benefit of cenvat credit thereon is sub-judice.

(e) The fact of continuance of payment of duty of excise by the assessee is a course of action for which separate legal remedy appears available to assessee. In case the same is found not leviable and liable notwithstanding assessee's payment of the same, as proposed in the instant show cause notice, the assessee could seek such legal remedies against erroneous levy and unqualified payment. However, the Commissioner (Appeals) appears to have pre-empted the assessee from seeking such remedy by deciding the issue hitherto pending before the Hon'ble High Court. In this perspective, it is patently wrong on the part of the Commissioner (Appeals) to have not decided the question of leviability of service tax under "Business Auxiliary Services". The Commissioner (Appeals) has erroneously and by default allowed the assessee to go out of the mischief of service tax by way of referring to simultaneous levy under the Central Excise Act and not at all on the merit of the case.

7. On behalf of the respondent, TRL, it is submitted that in the undisputed facts and circumstances of the case, as apparent from the records, the Revenue having collected, without any demur or reservation, central excise duty on the subject H.R. coils during the material period and having not refunded the same to TRL, cannot now turn around and contend that TRL was liable to make payment of service tax on the ground that the job of slitting/cutting of H.R. coils amounted to providing business auxiliary services within the meaning of the Finance Act, 1994. In support of their contention, they have relied upon the decision of the Tribunal in the case of K. R. Packaging Vs. Commissioner of C.Ex.& Service Tax in 2017 (51) STR 438 (Tri – Del). It was further submitted that there was no infirmity in the impugned order passed by the Commissioner (Appeals) and that the issue relating to payment of central excise duty and availment of cenvat credit was sub-judice has no force since the Hon'ble Jharkhand High Court has decided the issue finally by rejecting the Revenue's appeal and affirming the Tribunal's order.

8. Heard both sides and perused the appeal records.

9. The following undisputed facts emerge from the records of the instant proceedings:-

(a) On the self-same activity of cutting/slitting of duty paid C.R. coils, central excise duty of Rs. 31.94 crores approximately has been paid by TRL and released by the jurisdictional Central Excise and Service Tax authorities, the same Commissioner. The excise duty paid and realised, inter alia, covered the same final products removed from the respondent's factory during the period from March 2, 2005 to March 18, 2005, the period involved herein.

(b) The amount of Rs. 31.94 crores was paid by utilising cenvat credit to the extent of Rs.4.32 crores. Thus, a net amount of Rs. 27.63 crores approximately was paid by TRL and realised by the Department, as and by way of central excise duty in respect of the said goods after adjustment of cenvat credit through Account Current.

(c) The Department's attempt to disallow the cenvat credit of Rs. 4.32 crores and recover the same from TRL was rejected by the Tribunal, which has been upheld by the Hon'ble Jharkhand High Court by its judgment dated 23.11.2016 passed in Tax Appeal No. 61 of 2006 (CCE, JSR Vs. Tata Ryerson Ltd.).

(d) Similarly, the Department's attempt to appropriate the sum of Rs. 31.94 crores of central excise duty paid by TRL and realised by it under Section 11D of the Act was also rejected by the Tribunal, which has also been upheld by the Hon'ble Jharkhand High Court by the aforesaid judgment.

(e) There has been no refund to TRL of the said sum of Rs. 31.94 crores/Rs.27.63 crores approx. of excise duty paid to the Department on the ground that since there was no manufacture involved, no duty was payable. There has also been no refund claim by TRL.

10. We find that in similar circumstances pertaining to demand of excise duty vis-à-vis service tax, in the case of K. R. Packaging Vs. Commissioner of C.Ex. & Service Tax (supra) this Tribunal has held as under:-

"7. Hence, in the light of above discussion, we are of the considered view that the activity of the assessee-appellants is of manufacture and falls within the category of Section 2(f)(iii) of he Central Excise Act, 1944. In the instant case, the assessee-appellants had already paid the Service Tax under the bona fide belief and the half yearly returns were also being accepted by the Department as the assessee-appellants were having the registration for the Service Tax and the payment was made for this period. No double jeopardy can be applied in this case. Hence, assessee-appellants cannot be punished twice as they have already paid the Service Tax during the relevant period. When the assessee-appellants have filed the excise declaration on 30.3.2010 from the very day his activity is subject to excise duty being 'manufacture'. During the period under consideration, no duty is leviable as the Department never raised any objection which is an implied consent for having the Service Tax from the assessee-appellants. Now refund of Service Tax is time-barred. Let it be as was at the relevant period specially when no fraud, collusion or concealment is on the part of the assessee-appellants."

11. We are in respectful agreement with the said observations and finding which fully applies to the instant

case also. In that view of the matter, there is no infirmity in the impugned order of the Commissioner (Appeals) and hence find no reason to interfere with the same. We accordingly dismiss the appeal.

(Dictated and pronounced in the open court.)

Sd/

(V. Padmanabhan)
Member(Technical)

Sd/

(P.K. Choudhari)
Member(Judicial)

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