IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. I

APPEAL No. E/963/2012-EX[DB]

(Arising out of Order-in-Appeal No.24/CE/ALLD/2012 dated 01/03/2012 passed by Commissioner (Appeals), Customs, Central Excise, Allahabad)

M/s ITI Ltd. **Appellant**

Vs.

Commissioner of Central Excise, Allahabad **Respondent**

<u>Appearance:</u>

Shri S. P. Ojha (Consultant) for Appellant
Shri Mohd. Altaf (Asstt. Commr.) AR for Respondent

<u>CORAM:</u>

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 19/11/2018
Date of Decision : 19/11/2018

FINAL ORDER NO. - **72676/2018**

Per: Archana Wadhwa

After hearing both the sides, we find that the appellants are engaged in the manufacture of various transmission equipments and parts thereof falling under heading number 8517 of the First Schedule to the Central Excise Tariff Act, 1985(5 of 1986). The sale of their products is exclusively to M/s Bharat Sanchar Nigam Ltd. (BSNL) and to Mahanagar Telephone Nigam

Ltd. (MTNL). Both these customers are Public Sector Undertaking

The appellants are allotted preferential quota by M/s BSNL/MTNL for supply of various equipments irrespective of the facts, whether, their tender is accepted or not. However, the price is finally determined on the basis of lowest price quoted by manufacture/supplier in its tender. The customer places advance purchase order giving therein the description of goods, quantity of each goods and provisional price thereof.

M/s BSNL placed provisional Purchase Order No. CT/PO/10/2008-09 dated 26/05/2008 for the supply of STM-1 ADM equipments listed in its Annexure “A” valued at Rs.35,35,45,175/-. The provisional prices quoted in the PPO were inclusive of Sales Tax Excise duty and other Statutory duties/levies etc.

In the provisional Purchase Order, the rate per card having different transactories was mentioned but the value for the purpose of payment of duty of excise was calculated on total transactories instead of per card. For example, if the rate of one card of 21 transactories was Rs.1486.19/-, but while showing the value in the invoices, it was given 21 times the actual value i.e. 21 x Rs.1486.19/-. Similar, mistakes were also committed in Item Code No.10.2 and 2.03 which resulted in excess payment of duties of excise to the extent of the number of transactories in each card.

The prices of each equipments were finalized vide File No.80-01/2018-MMC/Vol-II/1949 dated 08/12/2009 which were higher than the provisional prices on which goods were supplied to M/s BSNL. However, after determination of duty payable and duty paid, it was found that duty to the extent of Rs.56,97,591/- (Basic Excise duty Rs.55,31,647/- + Ed. Cess Rs.1,10,629/- + S.H. Ed. Cess Rs.55,315/-) has been paid in excess. Consequently, the refund claim for Rs.56,97,591/- was filed on 30/04/2010.

2. Show cause notice was issued vide C.No. V(18) Refund/ITI/DIV-I/29/10/1249 dated 16/09/2011 proposing to deny refund claim inter alia on the ground (i) that the appellants have not submitted any request letter for granting provisional assessment during the relevant period; (ii) that the appellants have not proved that incidence of duty has not been passed on to the buyers.

3. Assistant Commissioner rejected the refund claim vide Order-in-Original No.04/Refund/2011 issued vide C.No. V(18) Ref./171/DIV-I/29/10/2029 dated 31/10/2011.

4. On appeal the Commissioner (Appeals) rejected the appeal vide Order-in-Appeal No.24/CE/ALLD/2012 issued vide C.No.164/CE/APPL/2011/1435 dated 01/03/2012. Hence the present appeal.

5. The issue involved in the present appeal is as the assessments were provisional or not; as to whether evidence stand produced by the appellant prove excess payment and refund would result in unjust enrichment to the appellant.

6. We find that an identical issue was the subject matter of the dispute before the Tribunal in the assessee's own case and vide Final Order No.70968/2016 dated 07/10/2016, the matter stands remanded by observing as under:-

> *"6. Having heard the rival contentions, I hold that under the provisions of Section 38A (c) the provisional assessment permission granted under the Central Excise Rule 9B in the year 1989, remained valid and continuing upon enforcement of the new Central*

Excise Rules, 2002. Accordingly, I hold that the denial to finalise the assessment not treating the same as provisional is bad and against the provisions of law."

7. By following the above decision in the same assessee's case, we set aside the impugned order and remand the matter to the Original Adjudicating Authority for fresh decision in the light of directions contained in the earlier order of the Tribunal. Appeal is thus allowed by way of remand.

(Dictated & Pronounced in Court)

Sd/-	**Sd/-**
(Anil G. Shakkarwar)	**(Archana Wadhwa)**
Member (Technical)	**Member (Judicial)**

Lks