

FAX : 0532-2400149

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38, MG Marg Civil Lines, Old Red Building, Allahabad-211001
Regional Branch, Allahabad

Dated: 30/11/2017

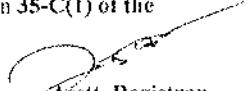
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71778/2017-EX[DB] dated 28/11/2017

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.


Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/908/2010	ITI LIMITED Mirzapur Road, Naini, Allahabad (UP)
		Name and Address of Respondent
2		-C.C.E Allahabad 38, M.G. Marg, civil Lines, Allahabad

Copy To

3 Advocate(s) / Consultant(s):

S. P. Ojha
299, Baghambari Housing
Scheme, Allahpur,
Allahabad,
Uttar Pradesh

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vailthyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

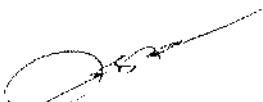
10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

12 The ICFAI society, 52, Nagarjuna Hill, Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. Ltd.(taxmanagementindia.com), FF-19, 1st Floor, Cross River Mall, CBD Ground, Near Karkardooma Court, Delhi-110032

14 C.D.R. 15 Office Copy 16 Second Folder Copy 17 Guard File


Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
REGIONAL BENCH: ALLAHABAD
COURT No. 1

APPEAL No. E/908/2010-EX[LB]

(Arising out of Order-in-Appeal No. 81/CE/ALLD/2010 dated 26/03/2010
passed by Commissioner of Central Excise & Customs (Appeals),
Allahabad)

M/s I.T.I. Limited

Appellant

Vs.

Commissioner of Central Excise, Allahabad

Respondent

Appearance:

Shri S. P. Ojha, Consultant,
Shri Mohd. Altaf, Assistant Commissioner (AR),

for Appellant
for Respondent

CORAM:

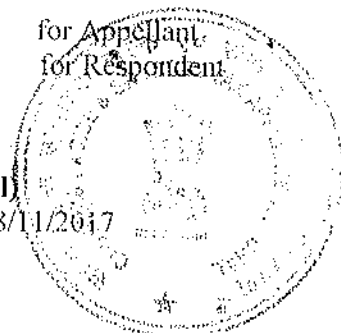
Hon'ble Mrs. Archana Wadhwa, Member (Judicial)

Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing & Date of Decision : 28/11/2017

FINAL ORDER NO. 71778/2017

Per: Archana Wadhwa



As per facts of record, the appellants are engaged in the manufacture of various transmission equipments and parts thereof falling under Heading No. 8517 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986). The sale of their products are exclusively to M/s Bharat Sanchar Nigam Limited (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 determined on the basis of lowest price quoted by manufacturer/supplier in its tender. The customer places

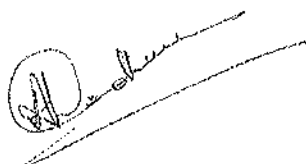
advance purchase order giving therein the description of goods, quantity of each goods and provisional price thereof.

M/s BSNL place Advance Purchase Order No. CT/APO/41/2006-07 dated 29.01.2007 for the supply of 32 Channels, DWDM equipments listed in its Annexure "A" value of at Rs.49,96,52,688/-. The provisional prices quoted in the APO were inclusive of Sales Tax Excise duty and other Statutory duties/levies etc.

In the Advance Purchase Order the composite description of DWDM, Optical Line Amplifier and Optical Add Drop Amplifier were given, therefore the appellants quoted the same description and price in their invoices and paid duty accordingly, although they had quoted the value of equipments and the customized software separately in their tender.

The prices of each equipments were finalized vide File No. 80-21/2006-MMC/ITI 38 dated 15.01.2008. The revised PO showed the price of hardware and software separately. As such, supplementary invoice were issued accordingly. Since customized software was exempt from payment of duty vide Notification No. 06/2006-CE dated 01.03.2006, it resulted in excess payment of duty amounting to Rs.2,17,93,372/- for which refund claims has been filed.

A Show Cause Notice was issued vide C.No. (18) Refund 102/08/4615 dated 28.11.2008 proposing to deny refund claim inter-alia on the ground that original invoices do not

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indicate that customized software, other than packaged software canned software have also been supplied with DWDM.

The Assistant Commissioner rejected the refund claim vide Order-in-Original No. 13 Refund/09 issued vide C. No. V (18) Refund/83/08/445 dated 20.02.2009. On appeal against the Revenue, Commissioner (Appeals) rejected the appeal vide Order-in-Appeal No. 81/CE/2009/1407 dated 29.03.2010.

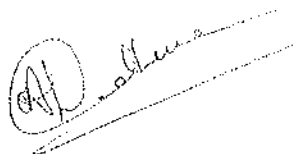
2. After hearing both the sides, we note that the issue involved in the present case is as follows:-

"(i) Whether the appellants have not given sufficient proof of excess payment of duties of excise for which refund claim has been filed.

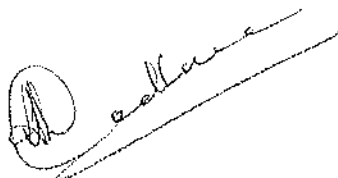
(ii) Whether the refund of duty shall cause unjust enrichment to the appellants."

3. The appellant in their support has raised the following grounds:-

(i) In the original invoices issued under Rule 11 of the Central Excise Rules 2002 the goods supplied to M/s BSNL were described by its generic name i.e. LB DWDM CHL, Optical Line Amplifier and Optical Add Drop Amplifier, which, included all other equipments necessary for its installation and functioning, which, inter-alia included customized software. They paid duties o excise on the composite prices shown in the advance P.O. In the final P.O. the value of Hardware and Software were shown separately and the duty was payable accordingly.

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- (ii) the customized software falling under heading number 8524 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) was exempt from payment of duty vide notification number 06/2006 CE dated 0.030.2006 therefore, no duty was payable on such customized software.
- (iii) the appellants state and submit that they do not manufacture software, instead they procure it and supply it with other equipments.
- (iv) The revised P. O. showed the prices of the software and Hardware separately and the supplementary invoices were issued accordingly.
- (v) The appellants filed refund claim of duty of Excise paid in excess (i) as a sequel to revision of prices and (ii) payment of duty on the value of software earlier included in the composite price of the equipments indicated in the APO.
- (vi) The prices quoted in the P.O. were inclusive of Sales Tax, Excise Duty and other statutory duties/ levies, as envisaged in clause (ii) under caption prices. On reduction of the price every element of price including duty of excise gets proportionately reduced. Since the customer has paid the price according to prices indicated in Final P.O. hence it would not cause unjust enrichment to the appellants. In this context the appellants refer to and rely upon the following judgement / decision.
- i.) *Mahabir Kishore Vs State of Madhya Pradesh* [1989 (43) ELT 205 (SC)]

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ii.) *BWL Limited Vs CCE Chandigarh [2004 (168) ELT (Tri. Delhi).*

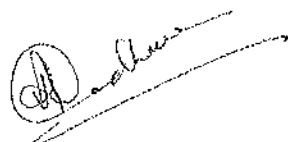
iii.) *J.R. Fabrics Ltd Vs CCE Vadodara [2008 (232) ELT 859 (Tri. Ahmd.)*

iv) *The customer viz M/s BSNL have given certificate to the effect that they have paid the prices of the goods as per the final prices indicated against each item."*

4. We note from the impugned order of Commissioner (Appeals) and observation made to the effect that the appellant has failed to furnish the relevant documents providing that payments have been received only in accordance with the revised invoices. In the absence of cogent evidence regarding the payments received by the party, principles of unjust enrichment are to be invoked.

5. As is seen form the above the authorities have rejected the refund on the ground of unjust enrichment on the ground of non-production of documentary evidences. Ld. Advocate submits that they are in a position to establish that the unjust enrichment does not stand attracted, in as much as, the payments were received by them from BSNL only in terms of revised final purchase order. Ld. Advocate however fairly agrees that the certificate of BSNL, now placed before us, was not before the Authorities below.

6. In as much as, the issue relates to verification of the documents, which can only be done at the level of the Original Adjudicating Authority, we deem it fit to set aside the



7. Appeal is, thus, allowed by way of remand.

..(Dictated & Pronounced in Court) ..

Sd/-
(Archana Wadhawa)
Member (Judicial)

Appendix

प्रमाणित प्रति-Certified True Copy

28/10/11

राजस्थान नवीनवादात. Register
राजस्थान, राजस्थान प्र. शा. नं.
जयपुर अधिका. (S.T.A.T.)
38, एन.जी. मार्ग, जयपुर-211001
38, M. G. MARG, JAYPUR-211001

