CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 44 of 2012

(Arising out of Order-in-Appeal No.303/2011-CE dated 29.09.2011 passed by the Commissioner of Central Excise(Appeals-I), Bangalore.)

M/s. ITI Ltd.
Bangalore Plant,
Doorvaninagar,
Bangalore – 560 016.

Appellant(s)

VERSUS

The Commissioner of Central Excise, Bangalore I Commissionerate,
P.B.No.5400, Central Revenue Buildings,
Queen's Road,
Bangalore – 560 001.

Respondent(s)

APPEARANCE:

Mr. B.V. Kumar, Advocate, for the Appellant

Mr. P. Saravana Perumal, Addl. Commissioner (AR) for the Respondent

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20634 /2024

DATE OF HEARING: 13.02.2024
DATE OF DECISION: 12.08.2024

PER : DR. D.M. MISRA

This is an appeal filed against Order-in-Appeal No.303/2011-CE dated 29.09.2011 passed by the Commissioner of Central Excise(Appeals), Bangalore.

2.1. Briefly stated the facts of the case are that the appellant are engaged in the manufacture of telecommunication equipment falling under Chapter 85 of the Central Excise Tariff Act, 1985. During the relevant period, they have approached the Department for clearance of the goods resorting to provisional assessment under Rule 9B of Central Excise Rules, 1944, since the value of the manufactured goods could not be determined as the price of the goods sold to Department of Telecommunications, Government of India against contracts, which provide various variation clauses on certain factors, finalised after a period of time from their final clearance from the factory. Consequently, their assessment was made provisional under Rule 9B of the Central Excise Rules, 1944 by an order dated 16.10.2001, which has been extended from time to time. After receiving the final price, the appellant approached the jurisdictional authorities for finalisation of their assessment. Consequently, the assessment order was passed on 10.03.2003.

2.2. On the basis of the said final assessment order, duty has been quantified and for the period 2001-2002 after adjusting the duty payable and actually paid, the differential duty short paid by the appellant has been worked out as Rs.14,09,55,430/- by the adjudicating authority. Aggrieved by the said order, they filed appeal before the learned Commissioner(Appeals) who in turn remanded the matter to the adjudicating authority as the principles of natural justice has not been followed including reconsideration of the issue of inclusion of value of software as it was not an issue at the time of finalisation of provisional assessment. The adjudicating authority confirmed the demand of Rs.14,09,55,430/-. Aggrieved by the said order, the appellant filed appeal before the learned Commissioner (Appeals) who in turn rejected their appeal for non-compliance of condition of pre-deposit under Section 35F of the Central Excise Act, 1944. Consequently, they approached the Tribunal and vide Order dated 14.12.2009, the Tribunal remanded the matter to the Commissioner(Appeals) to decide the issue on merit without insisting on predeposit. Consequently, the learned Commissioner(Appeals) after observing the principles of natural justice, out of three issues raised in the appeal for the demand confirmed, dropped issues relating to inclusion of value of software in the assessable value and also confirmation of duty on packing and forwarding charges by including its value in the total assessable value; however, rejected the appeal partly relating to confirmation of demand on account of disallowing the amounts claimed by the appellant on account of credit notes issued for wrong billing, short-supply, incorrect calculation of duty, price escalation etc. and corrigendum for deductions / adjustments from the total duty payable amounting to Rs.1,38,76,301/- along with interest. Hence, the present appeal.

3.1. At the outset, the learned advocate for the appellant has submitted that they are aggrieved by the impugned order to the extent of upholding demand of Rs.1,38,76,301/- relating to credit notes issued towards wrong billing, short-supply, incorrect calculation of duty, price escalation etc. and corrigendum while adjusting excess duty against short-payment of duty during the process of quantification of demand. They have submitted that excess duty to the Department was paid in respect of goods supplied to the customers viz. Department of Telecommunications, BSNL due to wrong billing, short-supply, incorrect calculation of duty etc. The said customers paid the appellant the correct price payable after excluding the said excess duty paid due to various mistakes. In support, they have enclosed the relevant documents along with supporting credit notes in the paper book; therefore, the findings of the learned Commissioner(Appeals) i.e. denial of adjustment of the amount claimed by the appellant on account of credits notes and corrigendum (wrong billing, short-supply, incorrect calculation of duty, price escalation etc.) is not sustainable. In support, they have referred to the judgment in the case of ***Meenakshi Industries Vs. CGST&CE, Puducherry*** [2019(369) ELT 832 (Tri. Chennai) and in ***Chemplast Sanmar Ltd. Vs. CCE, Salem*** [2021(377) ELT 255 (Mad.)].

3.2. Further they have submitted that once the assessments are provisional, they are provisional for all purposes. In support, they have relied upon the decision of Hon'ble Supreme Court in the case of ***CC Vs. Hindustan Zinc Ltd***. [2023(384) ELT 626 (SC)] and in ***CCE Vs. Allied Photographics India Ltd***. [2004(166) ELT 3 (SC)].

3.3. He has further submitted that there is a basic difference between duty paid under protest and duty paid under Rule 9B. The duty paid under protest falls under Section 11B whereas duty paid under provisional assessment falls under Rule 9B. Section 11B of CEA, 1944 deals with claim for refund whereas Rule 9B CER 1944 deals with making adjustment of duty on finalisation of assessment. In case of Rule 9B, the assessee need not comply with Section 11B; hence both operates in a difference sphere.

3.4. Further he has submitted that the burden of the excess differential duty was not passed on to their buyers during the material period. Referring to the purchase orders of BSNL, he has submitted that the price fixed for the goods supplied is inclusive of all duties / levies; any increase in taxes and other duties/levies, after the expiry of the delivery date shall be to the contractors' account. However, benefit of any decrease in the tax/duties shall be passed on to the purchaser by the supplier.

4. Learned AR for the Revenue reiterated the findings of the learned Commissioner(Appeals).

5. Heard both sides and perused the records.

6. The short issue involved in the present appeal for consideration is: whether the appellant are entitled to adjust the amount of Rs.1,38,76,301/- on account of excess payment of duty due to various reasons, at the time of the quantification of duty pursuant to finalisation of provisional assessment.

7. Undisputedly, the appellant resorted to provisional assessment under Rule 9B of Central Excise Rules 1944 during the period 2001-2002, as the final price of the goods cleared from the factory was not known at the time of clearance which could be finalized only after a period of time. The said assessment was later finalized by Order No.10/2003 dated 10th March 2003.

8. The Order reads as below:-

> *7. The provisional assessment of the assessable value of the provisionally assessed goods cleared by the assessee M/s. Indian Telephone Industries Limited, Dooravaninagar, Bangalore 560 061 during the year 2001-02 is ordered to be finalized after determination of the value of the goods on the lines indicated in paras 4 and 5 supra.*
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> *8. The Superintendent of Central Excise, Dooravaninagar Range is hereby directed to finalise/scrutinise the assessment of RT 12/ER1 returns filed by the assessee in respect of the goods cleared during the year 2001-02 on the above basis, to quantify the differential duty payable, if any, by the assessee and raise a demand on the assessee in terms of sub-rule 9B(5) of the erstwhile Central Excise Rules, 1944 and Rule 7 of the Central Excise Rules, 2001.*
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> *9. The duty amount paid by the assessee subsequent to the clearance of the goods shall be appropriated towards demand indicated in the previous para. The assessee shall pay the remaining amount of duty along with interest leviable in terms of the said Rules, if any, due*

> *from them on account of finalisation of provisional assessment, soon after the demand is received by them from the said Superintendent of Central Excise.*
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> *10. Since the above order is not inconsistent with the assessee's claim as to the basis on which the provisional assessment is sought to be finalized, putting them to notice or hearing them in person is not considered necessary.*

9. The said assessment order was accepted both by the Department as well as by the appellant. On the basis of the said assessment order, duty was quantified by the department and the differential duty payable was arrived at Rs.14,98,98,259.00/-. The adjudicating authority in computing/quantifying the said differential duty has taken into consideration the duty short paid an account of packing and forwarding charges and the value of the software which were not considered and added to the assessable value at time of finallization of assessment but ordered to be considered based on a subsequent Order of the Commissioner; rejected the claim of the appellant seeking adjustment of excess duty paid on account of wrong billing short supply etc., which was also not raised at the time of finalisation of assessment.

10. The learned Commissioner (Appeals) after analysing the provisions of Rule 9B of the Central Excise Rules, 1944 held that the factors which were not at the time of provisional assessment or while finalizing the assessment were not raised, cannot be considered while quantification of the demand. Consequently, the learned Commissioner (Appeals), dropped the excess amount relating to addition of packing and forwarding charges and value of software in arriving at the assessee value as proposed by the department. Applying the same principle he has also rejected the claim of the appellant that the excess amount of the duty, if any, paid due to various reasons, not raised at the time of finalisation of assessment under Rule 9B of Central

Excise Rules, 1944, the Order of assessment being not challenged, cannot be raised at the quantification of demand.

11. We find that the learned Commissioner has confused between assessment and quantification. Once the provisional assessment is finalised taking note of the elements to be considered in determining the assessable value subsequent additions or alterations of certain elements of deduction or expenses relating to sale would be in contravention to the finalisation order of the assessment.

12. However, in the present case, at the time of quantification of the demand, the appellant claimed certain corrections in the quantification amount by submitting that excess payment of duty due to error in billing, wrong quantity etc. which has nothing to do with the assessment for determination of assessable value of the goods. Therefore, the rejection of the claim of the appellant to adjust the excess duty paid during the assessment period at the time of quantification of demand cannot be sustained.

13. Consequently, the impugned order is modified on this count and the appeal is allowed.

(Order pronounced on 12.08.2024)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

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