

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL**  
1st Floor, WTC Building, FKCCI Complex, K. G. Road,  
BANGLORE-560009

REGIONAL BENCH - COURT NO. 1

**Central Excise Appeal No. 374 of 2012**

(Arising out of Order-in-Original No. 35/2011 dated 30.11.2011  
passed by the Commissioner of Central Excise, Bangalore-I  
Commissionerate, Bangalore.) -

**M/s. ITI Ltd.**

Bangalore Plant,  
Dooravaninagar  
Bangalore – 560 016.  
Karnataka.

Appellant(s)

*VERSUS*

**The Commissioner of Central  
Excise, Bangalore II  
Commissionerate,**

Central Revenue Buildings,  
Queen's Road, P.B.No. 5400,  
Bangalore – 560 001.

Respondent(s)

**APPEARANCE:**

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

Mr. H. Jayathirtha, Superintendent (AR) for the Respondent

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

**Final Order No. 20666 / 2024**

DATE OF HEARING: 12.04.2024

DATE OF DECISION: 12.08.2024

**PER : DR. D.M. MISRA**

This is an appeal filed against Order-in-Original  
No.35/2011 dated 30.11.2011 passed by the Commissioner of  
Central Excise, Bangalore-I Commissionerate, Bangalore.

2. Briefly stated the facts of the case are that the appellant is  
engaged in the manufacture of Telephone and  
Telecommunication equipment falling under Chapter Heading 85  
of Central Excise Tariff Act, 1985. They have a Research and

Development Unit, a Division located in Bangalore Plant which provides R & D support to all the units of the appellants. The R & D Unit has been engaged in the production of model or prototype which alleged to have been cleared for field trial for customer approval without payment of duty during the period 2002-03 and 2003-04 Financial Year. Consequently, a show-cause notice was issued to them on 22.11.2005 demanding a total amount of Rs.16.50 crores along with interest and proposal for penalty. On adjudication, the demand was confirmed which was reduced to Rs.304/- lakhs with interest and penalty of Rs.25/- lakhs. Aggrieved by the said order, they filed an appeal before this Tribunal and by order dated 03.05.2010, the same was remanded to the adjudicating authority for fresh consideration. In the *de novo* proceeding, the Ld. Commissioner taking into consideration the submissions and evidences produced, confirmed demand of Rs.189.32 lakhs along with interest and equal amount of penalty.

3. The learned advocate for the appellant, at the outset, has submitted that the R & D Unit of the appellant is located at Bangalore discharging the following functions:

- Develop Transmission, Switching and Terminal Products
- To update knowledge on latest trends on communication technology
- To assist management in selection of technology partner

3.1 After successful development of the products, the results are submitted to the respective agencies for their evaluation as per the OR documents. Telecommunication Engineering Centre (TEC) issues the approval certificate / interface approval certificate after necessary field trials and environmental evaluation. With these certificates, the appellant participate in the tender floated by BSNL and MTNL. He has submitted that in the case of defence projects, the evaluation cycle is more tedious and takes long time for clearances. He has submitted that R & D develops a product and the prototypes are

manufactured and offered for field trial. If the Prototypes are accepted, then the drawings and technical documents are released for production and if the appellant doesn't succeed in the tender, it is submitted that same equipment is given for subsequent tenders.

3.2 He submits that appellants had developed certain products involving state-of-the-art technology which have a potential market and accordingly, Blue Tooth Technology and PKI Products were developed. Assailing the impugned order, he has submitted that even though the learned Commissioner has considered each and one of the R & D projects undertaken in the year 2002-03 and 2003-04, however, the error committed in arriving at the value of the product as 110% of the cost as many of the products were cleared to the customers like BSNL and others not utilised within the premises of the appellant. Further he has submitted that testing of the goods does not amount to manufacture, hence demand of duty on the impugned goods sent for testing since not marketed are not liable to duty. Further, he has submitted that the impugned goods are not marketable, therefore, confirmation of demand of Prototype goods is bad in law. Further, he has also submitted that the evaluation of Prototype goods should be based on the amortized value based upon its life or the entire project value as taken by the learned Commissioner. In support of his submission that testing does not amount to manufacture, he has relied upon the following case laws:

- Fenner Idnia Pvt. Ltd. Vs. CCE, Hyderabad: 1999 (35) RLT 861 (CEGAT)
- TI Diamond Chain Ltd. Vs. CCE, Chennai-II: 2000 (126) ELT 790 (Tri.) affirmed by Hon'ble Supreme Court as reported at 2001 (130) ELT A259 (SC)

3.3 The learned advocate has vehemently argued that marketability is an attribute of the manufacture and it is an essential character for charging duty. Identity of the product and

marketability are the twin aspects to decide levy of Excise duty. Thus, the product which is made liable to duty must be marketable in the condition in which it emerges. In support, he has referred to the following decisions:

- Moti Laminates Pvt. Ltd. Vs. Collector of Central Excise, Ahmedabad: 1995 (76) ELT 241
- UOI vs. Delhi Cloth & General Mills Co. Ltd.: 1997 (92) ELT 315
- Gujarat, Narmada Valley Fertilizer Co. Ltd. Vs. CE: 2005 (184) ELT 128 (SC)
- Deccan Fibres Glass Ltd. Vs. UOI: 2006 (193) ELT 261 (Del.)
- Texmaco Ltd. Vs. CCE, Kolkata-III: 2008 (221) ELT 535

He has submitted that the department has not placed on record that the product developed by R & D unit of ITI unit are marketable.

3.4 He has further submitted that for the Financial Year 2002-03, the learned Commissioner has dropped the demand in respect of three projects viz., Call Centre, Info-kiosk and HDSL NMS for HDSL, however, confirmed duty on total expenditure of Rs.496.46 lakhs for 14 projects.

3.5 Discussing each of the projects for the Financial Year 2002-2003 which has been confirmed by the Commissioner, the learned advocate has submitted that:

- (i) ISDN Phone: The development of this phone was taken up against TEC specification and was offered for TEC evaluation. The evaluation could not be completed as TEC changed its specification. Though interface approval was obtained the same could not be commercially exploited. The observations of the learned Commissioner that ITI have successfully developed the ISDN phone and subsequently 25 Nos. have been manufactured at their premises. The

assumption that "it is implied that the prototype of the said product was successfully cleared and deployed by ITI", is based on assumptions and not on facts. A product or goods are not liable for duty unless such products are cleared from the place of manufacture. In the instant case, since TEC have changed the specification of ISDN phone, the same cannot be offered for marketing. Further, there is nothing on record to show that the said 25 Nos. of ISDN phones were captively consumed. It is now settled law that unless a product is marketable, the same is not liable to duty.

- (ii) ADSL: The project could not be completed due to resignation of engineers. Though the learned Commissioner admits that ITI has deferred further advancement since the market projection is low, he has demanded duty though the project was abandoned as such the demand on this count is not sustainable in law.
- (iii) Frequency Agile Digital Radio: The project was completed against TEC specification. However, this could not be productionised due to changes in specification and also due to obsolescence of microwave systems. This fact has been admitted by the learned Commissioner. Though the product was developed, it could not be marketed due to change in TEC specification. It is now settled law that unless a product is marketable, the same is not liable to duty. Further, it is submitted that the product was never cleared from the factory and as such the question of payment of excise duty does not arise.
- (iv) Bluetooth: This project was taken up as a technology development project and was developed successfully but the same could not be commercially exploited. In other words, the product was not marketable. It is

now settled law that unless a product is marketable. The same is not liable to duty.

- (v) OLTE Redesign: The production documents (drawings) were transferred to Naini were cleared from ITI, Bangalore. The appellant submit that the duty on plans and drawings falling under CSH 4906 0000 is liable to NIL rate of duty. As such, the demand of duty on this count does not survive.
- (vi) 2/34 OPTIMUX design: This project was successfully completed, TEC type approval obtained production documents (drawings) were transferred to Naini and no goods as such were cleared from ITI, Bangalore. The appellants submit that the duty on plans and drawings falling under CSH 4906 0000 is liable to NIL rate of duty. As such the demand of duty on this count does not survive.
- (vii) 16 XKBPS SCG: The product was developed in 2002-2003, the actual production and clearance of the goods were effected in 2005-2006 on payment of duty. This fact has been admitted by the learned Commissioner. It is therefore submitted that no further duty is demandable in as much as the R & D work done on this product was utilised only after receipt of work order and dispatched to the customer during 2005-2006. Since duty has been paid, demanding duty a second time is not sustainable in law.
- (viii) 2/8 OPTIMUX: The project was successfully completed and TEC approval was obtained and orders were received from BSNL. The product was product ionized and the goods were cleared on payment of duty vide Delivery Challan dated 8.11.2011. It is submitted that the development of this product and its utilisation for the manufacture of goods was done at the Bangalore plant. It is submitted that the value of prototype / intellectual

property is required to be amortized over a period of time and included in the value of the finished product. Such value of the Prototype cannot be loaded on the value of one clearance. Under the circumstances, it is submitted that the demand for the duty on this item is contrary to accepted the principals of valuation.

- (ix) Encryption for carnation: The project was successfully completed and the equipment was successfully evaluated by the customer and the equipment was released for production at ITI, Bangalore. It can be seen from letter dated 3.2.2003 that supply to be made for 159 Nos. of encryptions and 26 Nos. HHKG for Carnation project. The appellant submit that the duty is payable on this project valued at Rs.17.72 lakhs (Rs.2,83,520/-)/
- (x) Earth Station for RCPC: The project was successfully completed and the equipment was productionised at Bangalore after valuation by RCPO at ITI, R & D, Bangalore. The equipment was manufactured and despatched to the customer on payment of Excise duty. Having paid the duty on the goods, the appellants are not liable for further payment of duty. The appellants further submit that the value of R & D is amortized and added to the value of the goods manufactured and cleared from time to time as no further duty is payable.
- (xi) MCPC VSAT: This project was successfully completed and the equipment and TEC approval was obtained. The product was productionised at ITI Bangalore and duty was paid. The value of R & D is amortized and added to the value of the goods manufactured and cleared from time to time. As such, it is the submission of the appellant that no further duty is payable.

3.6 The learned advocate submits that for the Financial Year 2003-2004, 21 projects were undertaken. The Commissioner has dropped the demand in respect of following 7 projects:

- (i) CTI PABX
- (ii) Call Centre
- (iii) IP PABX
- (iv) CTI Controller
- (v) Infokiosk
- (vi) Power Group
- (vii) NMS for CIVICON

3.7 He submits that for the remaining 14 projects, the appellants submitted that:

- i. ISDN Phone: In the instant case the development of this phone was taken up against TEC specification and was offered for TEC evaluation. The evaluation could not be completed as TEC changed its specification. However, Interface approval was obtained but the same has to be commercially exploited. The observations of the Ld. Commissioner that it is implied that the prototype of the said product was successfully cleared & deployed by ITI, is based on assumptions and not on facts. A product or goods are not liable for duty unless such products are cleared from the place of manufacture. In the instant case, since TEC have changed the specification of ISDN Phone, the same could not be offered for marketing. It is now settled law that unless a product is marketable, the same is not liable to duty.
- ii. Ku Band IDR Equipment: In the instant case the project was taken up against TEC specification to participate in BSNL tenders as Ku Band Satellite Network was being expanded by BSNL. This was successfully developed and offered for TEC evaluation. However, TEC could not issue a certificate as field trial could not provide trial route. On

suggestion by TEC, ITI has requested for refund of test fees. Therefore, the project could not be commercialized. The Appellants submit when the project was not commercialized and therefore not marketable, it is settled Law that no duty is liable to be paid. It is also submitted that when a product is sent for testing, it is still considered as not fully manufactured.

- iii. BLUE TOOTH: In the instant case the project was taken up as a technology development project & successfully developed, but the same was not commercially exploited. This position has been admitted by the Ld. Commissioner. The Appellants submit that the project was not commercialized because the same was not marketable. It is settled Law that no duty is liable to be paid when a product is not marketable.
- iv. IP Telephone : In the instant case the project was taken up against TEC QR and type approval obtained after their evaluation, but the same was not commercially exploited. This position has been admitted by the Ld. Commissioner. This project was not commercialized because the same was not marketable. It is settled Law that no duty is liable to be paid when a product is not marketable. [ITI in their letter dated 28-9-2011 enclosed Closure Report of Work Order dated 9.12.2005 - Pg. 5 of Closure Reports]
- v. Telephone Set 5C: In the instant case the product drawings has been released to the army and this position has been admitted by the Ld. Commissioner. The production drawings fall under CSH 4906 00 and liable to nil rate of duty. As such the duty demanded is not sustainable in law. [ITI in their letter dated 28-9-2011 enclosed Closure Report of Work Order dated 1.6.2009 Pg. 6 of Closure Reports]

- vi. ISDN PABX & ISPX 2K System: In the instant case the product was developed against TEC specification and after successful development the interface approval was obtained. The production documents were released and the same was taken up for manufacture at ITI Bangalore. It is submitted with respect, that in such cases the value of prototype / intellectual property is required to be amortized over a period of time and included in the value of the finished product. Such value of the prototype cannot be loaded on the value of one clearance. Under the circumstance it is submitted that the demanded for the duty on this item is contrary to accepted the principals of valuation. [ITI in their letter dated 28-9-2011 enclosed Closure Report of Work Order dated 30.8.2005 & 29.12.2005-Pg. 7 & Pg-3 of Closure Reports]
- vii. Immarsat Secrecy: In the instant case the product was developed for the army but was not commercialized. This position has been admitted by the Ld. Commissioner. The Appellants submit that the project was not commercialized because the same was not marketable. It is settled Law that no duty is liable to be paid when a product is not marketable. It is also submitted that when a product is sent for testing / field trials it is still considered as not fully manufactured. [IT] in their letter dated 28-9-2011 enclosed Closure Report of Work Order dated 28.12.2005
- viii. C Band IDR Package: In the instant case this project was successfully completed. They have obtained tender from BSNL also. It is respectfully submitted that the Appellants have cleared the goods against the BSNL tender after payment of appropriate duty in FY 2004-2005/2005-2006. Therefore, duty is not demandable once again, since the value of prototype / intellectual property is required to be amortized over a period of time and included in the value of the finished product.

- ix. MCPC V SAT: In the instant case the project was successfully completed and the equipment and TEC approval was obtained. The product was productionized at ITI Bangalore and duty was paid. The Appellants submit that the value of R&D is amortized and added to the value of the goods manufactured and cleared from time to time. As such it is the submission of ITI that no further duty is payable.
- x. Ruggedised PCM MUX: In the instant case the project though successfully completed has not been cleared for supply to the Army. The Appellants submit that the project was not commercialized because the same was not marketable. It is settled Law that no duty is liable to be paid when a product is not marketable. It is also submitted that when a product is sent for testing / field trials it is still considered as not fully manufactured. [ITI in their letter dated 28-9-2011 enclosed Closure Report of Work Order dated 22.6.2007Pg. 11 of Closure Reports]
- xi. Satellite Communication: In the instant case the project was not completed due to change in specification and the same would be undertaken against a new specification. The Appellants submit that the project was not completed. Therefore, no duty can be demanded as no product as such has been developed or manufactured. Under the circumstances the demand of duty is not sustainable in law.
- xii. ASCON Phase III Satellite (Sl. No. 19, Pg No. 196)
- xiii. ASCON Phase III NMS (Sl. No. 20, Pg No. 196):
- xiv. ASCON Phase III Switch (Sl. No. 21, Pg No. 196):

In the instant case, the Ld. Commissioner has admitted that the 3 projects are under progress. No evidence has been placed on record by the Department that they have been completed and the prototypes have been manufactured. It is also submitted that the burden of proof is on the Department to

prove that any goods have been manufactured on the basis of the said prototypes are cleared from ITI Bangalore. Under the circumstances the duty demanded is not sustainable in Law.

4. Per contra, the learned Authorised Representative (AR) for the Revenue responding to the grounds raised by the appellants with regard to manufacture and clearance and prototype without recording in their statutory records and discharging appropriate duty, submitted that the appellants in their arguments had contended that number of projects were abandoned, though completed could not be commercially exploited or marketed, some were in progress as ongoing projects and later completed; the cost of such R & D was included in the cost of final products on which appropriate duty has been paid; it is also argued that in the absence of evidence, the products are marketable, demand of duty cannot be sustained, he has submitted that there is no denial of the fact that the expenditure were incurred towards R & D resulted in development of new product prototypes. The fact that the manufactured prototypes were removed subjected to field trials and technical evaluation by certain agencies who were competent to issue authorised certification regarding product quality and endurance is also not disputed. The argument of the appellant that these prototypes are not marketable and cost of such off commercial products and also several products either abandoned or in progress has been discussed in detail project-wise by the adjudicating authority. He has submitted that even though the appellant has not challenged the excisability of the product, however, it is an accepted position of law that Central Excise is a levy on manufacturer i.e., the event of levy, is the manufacturer of goods and the levy arises once the goods are manufactured. It is immaterial whether the goods are manufactured or even in a R & D unit, the duty has to be discharged on its removal from the manufacturer's premises either on sale or for any other purpose, hence, the purpose for which it is removed is immaterial to discharging duty liability as the same had crystallised upon its

manufacture, no exception or exemption is granted to the goods manufactured in R & D and removed, where no sale is involved. The prototype manufactured and cleared by the appellant through their Bangalore Unit were complete and finished products, as such. Referring to the judgment of the Tribunal, in **M/s. Alfred Herbert (India) Ltd., Bangalore vs. CCE, Bangalore: 1987 (27) ELT 664 (Tribunal)**, he has submitted that Prototypes are liable to duty.

4.1 On the issue of discharging the burden of marketability, he has submitted that the adjudicating authority dealt at length the aspect of marketability, the basic criteria is that the goods should be capable of being bought and sold though not offered for sale by the seller or purchased by any buyer. The goods may also be cleared as substandard goods or defective goods but the essential criteria of marketability is not changed. It is not the condition that the goods manufactured and cleared should be sold or transferred in a market to establish marketability. In the present case, the prototype manufactured by the appellant in their R & D unit had been removed to selected customers for field trial or customers approval. Such removal would mean that the prototypes are complete in all respect and capable of undertaking the functions as that of a normal product. Even though there is no sale involved in the transaction, removal of prototype had been accepted by the customers for various purposes; hence the prototypes are capable of being bought and sold. Accordingly, the marketability of the product has been proved by the department beyond doubt. Actual selling of the product is not necessary to determine; the criteria of marketability and capability of being marketed is a sufficient parameter to hold that the goods are excisable and duty is payable. In support, he has referred to the following judgments:

- Delhi Cloth and General Mills: 1977 (1) ELT J199[S.C.]
- Union Carbide India Ltd.: 1986(24) ELT 169[S.C.]
- Bhor Industries: 1989(40) ELT 280[S.C.]

- Hindustan Polymers: 1989(43) ELT 165[S.C.]
- A.P. State Electricity Board: 1994(70) ELT 3(S.C.)
- Indian Cable Company Ltd.: 1994(74) ELT 22[S.C.]
- Triveni Engineering & Industries Ltd: 2000(120) ELT 273 [S.C.]
- Sonic Electrochem (P) Ltd.: 2002(145) ELT 274 S.C.]
- Cadila Laboratories (P) Ltd.: 2003(152) ELT 262[S.C.]
- Hindustan Zinc Ltd.: 2005(181) ELT 170[S.C.]
- Dharampal Satyapal: 2005(183) ELT 241[S.C.]
- Gujarat Narmada Valley Fertilizer Ltd.: 2005(184) ELT 128[S.C.]
- Moriroku UT India (P) Ltd.: 2008(224) ELT 365[S.C.]
- Medley Pharmaceuticals Ltd. vs. Commissioner of Central Excise & Cus., Daman: 2011(263) ELT 641[S.C.]
- Escorts Ltd.: 2015 (319) E.L.T. 406 [S.C.]

4.2 Further responding to the argument that projects were abandoned though completed could not be commercially accepted or marketed, ongoing projects wrongly included in the cost of final products on which appropriate duty has been paid, he has submitted that all these issues have been considered by the Commissioner in the impugned order and consequently, out of total 35 projects, he has dropped 3 projects for the year 2002-03; and 7 projects for the year 2003-04. The projects which were discussed by the learned Commissioner was on the basis of inputs supplied by the appellant during the course of hearing.

4.3 Further, he has submitted that the value was quantified in terms of Rule 11 of read with Rule 8 of Central Excise Valuation Rules, 2000 as 110% of the R & D expenditure reflected in their financial accounts. In computing the value, the learned Commissioner has reduced the cost incurred for their other unit at Naini. He has submitted that project cost shown in the annual accounts is the total cost for the production of Prototypes /models/upgradation only and does not include any other cost

viz., cost of commercial production of the products; therefore, the quantification has been rightly arrived by the adjudicating authority.

5. Heard both sides and perused the records.

6. The issues involved in the present appeal is: whether the demand confirmed by the adjudicating authority on various Prototypes manufactured and cleared by the appellant during the Financial Year 2002-03 and 2003-04 are excisable and leviable to duty and the valuation arrived at in accordance with law.

7. The facts not in dispute are that the appellant in their R & D Unit at Bangalore manufactured prototype which are latter cleared to various customers including BSNL and MTNL for testing and clearance of the same. After the Prototypes are cleared, the appellant participate in the tender floated by BSNL/MTNL and manufactured the approved Prototype designs on commercial product basis and cleared the same to the customers. The allegation of the Revenue is that these Prototypes are liable to excise duty being manufactured and cleared from the R & D unit of the factory. The argument of the appellant on the other hand is that this Prototype were after being subjected to trial either accepted or rejected; also sometimes commercial production approved Prototypes designs are not executed due to various reasons, including non-viability of its production, hence the Prototypes are not being marketable accordingly not excisable. The present impugned order is the *de novo* order passed by the Commissioner after the case was remanded by this Tribunal setting aside the earlier order where the appellant could not place all the documents before the adjudicating authority and the same was placed for the first time before the Tribunal. In the *de novo* proceedings, the learned Commissioner analysed the whole issues taking into consideration the detailed submissions advanced by the appellants for all the projects i.e., 14 projects for the year

2002-03 and 21 projects during 2003-04. Thereafter, analysing each and every project, the learned Commissioner dropped three projects for the year Financial Year 2002-03 which were either abandoned or not implemented and seven projects for the year 2003-04. In the remaining projects for the respective Financial Years, the learned Commissioner observed that the projects had been implemented and accordingly, duty ought to be discharged on the said projects.

8. The learned Commissioner on the issue of marketability held that the R & D goods is in the nature of Prototype commercially recognised by the concerned stakeholders for whom the projects are executed by the ITI. In most of the cases, the products have been evaluated, tested and project-wise successfully implemented. Further, he has held that since the prototypes were successfully cleared by Telecommunication Engineering Centre (TEC), these are not only capable of being marketable but actually marketed, consequently, the Prototypes are marketable goods. The learned advocate for the appellant though opposed the said argument of the Revenue on the issue of marketability but could not rebut the findings of the learned Commissioner that since the Prototype goods were cleared and put to trial, certified by the appropriate committee itself indicate the test of marketability has been satisfied.

9. From the records, it is noticed that the Prototypes were even though not brought and sold in the market but cleared by R & D Centre of the appellant to various stakeholders for testing and approving for further manufacture on commercial basis, therefore, it is not necessary for satisfying the test of marketability in the sense that the product should be physically bought and sold in the market when the test of capability to be bought and sold in the market is satisfied. Also, the Prototype are known in the market as such and having a distinct identity and accordingly, be considered as excisable.

10. The Hon'ble Supreme Court in the case of **Medley Pharmaceuticals Ltd.** (supra), while explaining the meaning and scope of marketability, after analysing the relevant case laws on the subject has observed as follows:

"8. The consistent view of this Court is that for the purpose of levy of excise duty, an article must satisfy two requirements to be 'Goods' i.e. (a) it must be movable and (b) it must be marketable. In these appeals, we are primarily concerned whether the 'Goods' namely Physician samples of patent and proprietary medicines intended for distribution to the medical practitioner as free samples, satisfies the test of 'Marketability'. Marketability is an essential criteria for charging duty. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. The word 'Marketable' means saleable or suitable for sale. It need not in fact be marketed. The article should be capable of being sold to consumers, as it is without anything more. The essence of marketability of goods is neither in the form nor in the shape or condition in which the manufactured article is found. It is the commercial identity of the article known to the market for being bought and sold. The fact that the product in question is generally not being bought or sold or has no demand in the market, would be irrelevant. [See *Indian Cable Co. Ltd. v. CCE, 1994 (74) E.L.T. 22 (S.C.)*]. We will now refer to some of the decisions of this Court, which have explained the concept of 'Marketability' for the purpose of the Act."

11. The learned Commissioner in the impugned order has discussed in detail the prototypes cleared on project-wise for the Financial Year 2002-03 and Financial Year 2003-04. For the Financial Year 2002-03, he has discussed all total 14 projects viz., (i) Call Centre; (ii) ISDN phone; (iii) ADSL; (iv) Frequency Agile Digital Radio; (v) Blue Tooth; (vi) INFOKIOSK; (vii) OLTE Redesign; (viii) 2/34 OPTIMUX Redesign; (ix) HDSL NMS for HDSL; (x) 16KBPS SCG; (xi) 2/8 OPTIMUX; (xii) Encryption for Carnation; (xiii) Earth Station for RCPC; and (xiv) MCPC VSAT (10+1) CH. Against each of the project, the learned Commissioner taking note of the written submission furnishing details of projects filed by the appellant during the course of *de novo* proceedings and after due analysis, dropped the demands

relating to projects on (i) call centre; (ii) INFOKIOSK and (iii) HDSL NMS for HDSL; whereas for other projects, he has confirmed the demands for clearances made to the said projects after considering the submissions advanced by the appellant and on scrutiny of the same in the light of the test of marketability, and principles of manufacture discussed above. For example: In the case of ISDN phone, the learned Commissioner referring to written submissions of the appellant observed that development of phone was offered against specification of Technical Engineering Centre, Department of Telecom, Government of India. Even though, it was not commercially exploited but in their closure of work order, it is stated that the same has been successfully developed and subsequently 25 Nos. have been manufactured at their premises. He has concluded that the prototypes manufactured were successfully cleared and deployed by ITI, accordingly, excise duty is leviable. The appellant in their submissions argued that the finding of the Commissioner is based on assumptions and presumptions and not on facts as the products are not leviable to duty unless such products are cleared from the place of manufacture. However, they have not provided any explanation in their written submission nor evidences have been adduced to show that how these prototypes are disposed of by the appellant, in the event the ITI has changed the specification of ISDN phone could not be marketed. In the absence of any such evidence, the claim being not substantiated, therefore, cannot be considered.

12. Similarly in case of Bluetooth, the Commissioner recorded that the project was successfully developed and though not commercially exploited, it was demonstrated to banking and conference at Pune. In other words, the prototypes have been manufactured and demonstrated for further marketability but could not be exploited commercially. It is objected by the appellant that since it is not commercially exploited, therefore, it could not be considered as marketable and duty cannot be leviable on the same. We do not find merit in the said contention

of the appellant in view of the principle of law laid down by the Hon'ble Supreme Court as discussed above. We find that similar arguments have been taken in other projects for the said Financial Years 2002-03 and 2003-04, which, in our opinion, cannot justify the claim of the appellant since the prototypes not commercially exploited cannot be leviable to duty.

13. For the Financial Year 2003-04, the learned Commissioner has discussed 21 R & D projects viz., (i) CTI PABX; (ii) Call Centre; (iii) IPPABX; (iv) ISDN Phone; (v) Ku Band IDR Equipment; (vi) Blue Tooth; (vii) IP Telephone; (viii) Telephone set 5C; (ix) CTI Controller; (x) ISDN PABX & ISPX 2K System; (xi) INFOKIOSK; (xii) Inmarsat Secrecy; (xiii) C Band IDR Package; (xiv) MCPC V SAT; (xv) Power Group; (xvi) NMS For Civicon; (xvii) Ruggedised PCM MUX; (xviii) Satellite Communication; (xix) ASCON Phase III Satellite; (xx) ASCON Phase III NMS and (xxi) ASCON Phase III Switch. Analysing the written submissions filed by the appellant with regard to the findings of the Commissioner more or less, a common argument has been advanced by submitting that since the product could not be commercially exploited, therefore duty cannot be sustained in law. Also, it has been argued by the appellant that the value of prototypes/intellectual property is required to be amortized over a period of time and included in the value of the finished product. Such value of the prototype, therefore, cannot be loaded on the value of one clearance. This argument also cannot be sustained in as much as where the prototypes have been used like a mould or it's design has been used in the manufacture of commercially viable goods; therefore, the said argument also cannot be acceptable.

14. In nutshell, the Commissioner while confirming the demand discussing each project applied the test of marketability to prototypes manufactured at R & D unit and used in the said projects. There is no merit in the contention of the appellant that these prototypes be leviable to duty only when the project

becomes commercially successful and not on its closure due to non-viability or abandoning of the project.

15. Therefore, there is no doubt that the Prototypes manufactured by the appellant are marketable and hence, excisable and the department has discharged the burden by adducing evidences that the prototypes are marketable and accordingly leviable to duty. Also, we do not find any error in arriving at the value of prototypes by the Commissioner in the impugned order while applying Rule 11 read with Rule 9 of the Central Excise Valuation Rules, 2000.

16. We find that the Commissioner besides reducing the duty from Rs.304.00 lakhs confirmed in the order dated 27.04.2006 to Rs.189.32 lakhs after setting aside the demand on 3 projects for the year 2002-03 and 4 projects for the year 2003-04, subsequent to the remand order of this Tribunal dated 03.05.2010, the learned Commissioner has enhanced the penalty from Rs.25.00 lakhs to Rs.189.32 lakhs, which cannot be sustained. Therefore, the penalty is maintained at the level in which initially it was imposed.

17. The impugned order is accordingly modified and appeal is partially allowed to the extent of reduction of penalty only, however, confirmation of duty and interest is upheld.

*(Order pronounced in Open Court on 12.08.2024.)*

**(D.M. MISRA)**  
**MEMBER (JUDICIAL)**

**(R BHAGYA DEVI)**  
**MEMBER (TECHNICAL)**