# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# SOUTH ZONAL BENCH
# BANGALORE

Appeal(s) Involved:

**E/845/2008-DB**

[Arising out of Order-in-Appeal No. 180/2008 dated 13/08/2008
passed by the Commissioner of Central Excise, Bangalore-I
Commissionerate, Bangalore.]

**M/s. ITI LTD.**
BANGALORE PLANT
DOORVANINAGAR
BANGALORE – 560 016.

Appellant(s)

**Versus**

**Commissioner of Central Excise**
**BANGALORE-I**
POST BOX NO 5400,
CR BUILDINGS,
BANGALORE - 560001
KARNATAKA

Respondent(s)

**Appearance:**

**Mr. B.V KUMAR, Advocate**
LAW ASSOCIATES
#103,17TH "C" MAINROAD,
5TH BLOCK, KORAMANGALA ,
BANGALORE – 560 095.
KARNATAKA

For the Appellant

**Mrs. Kavitha Podwal,**
**Superintendent (AR)**

For the Respondent

Date of Hearing: 24.07.2018

Date of Decision: 25.09.2018

## CORAM:

## HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
## HON’BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

**Final Order No. 21386 /2018**

**PER: P. ANJANI KUMAR**

M/s. Indian Telephone Industries, the appellants, are manufacturers of excisable goods like telephone instruments, satellite communication instruments, C-Exchange, CDMA/WILL equipment and software falling under Chapter 85 of the First Schedule to the Central Excise Tariff Act, 1985. The appellants have filed a refund claim on 9.10.2007 for an amount of Rs.7,33,29,913/- claiming to be the excise duty paid by them on the goods viz., IFWT integrated fixed wireless terminals cleared by them during the years 2003-04 and 2004-05. They have filed the refund claim on the basis of the CESTAT's Bangalore Final Order No.937/2006 dated 17.5.2006 in respect of appellants themselves wherein it was held that IFWT is liable for classification under the Customs Tariff Heading 8525.2017 following the ratio of ***Bhagyanagar Metals Ltd.: 2004 (117) ECR 28 (Tri.-Mum.)*** and ***Tata Teleservices : 2006 (194) ELT 11 (SC)***. The Assistant Commissioner of Central Excise vide Order-in-Original No.23/2008 (R) dated 29.2.008 rejected the refund claim. The Commissioner (A) vide No.180/2008 upheld the same on the grounds that:

(i) Refund claim is time barred

(ii) CESTAT judgment is in respect of merits and is not relevant for the goods cleared by the appellants as they have not given any evidence to show that the goods were the same.

(iii) The appellants initially claimed classification under Chapter 8417 cleared the goods on payment of 16% of duty and later changed to 8525.2017.

(iv) If the assessments are provisional as claimed by the appellants, refund cannot be granted until the same is finalized as held by Madras High Court in Indian Tyre and Rubber Company: 1997 (94) ELT 495 (Mad.)

(v) The appellants did not dispute the classification and provisional assessment was only for valuation and this issue not disputed cannot be raised at this stage.

2. The learned counsel for the appellants has submitted that it is incorrect to say that the assessments were not provisional; in fact, the Order-in-Original records categorically in para 4 that the assessments were made provisional and the duty was not paid under protest. The provisional assessment was for only valuation not for classification. The counsel for the appellants

contended that the Department has issued a show-cause notice No.V/85/117/3/2007-EA dated 15.10.2007 proposing to finalise assessment from 2003-04 to 2006-07; therefore, the Department cannot allege that the assessments were not provisional. The learned counsel also submitted that provisional assessment cannot be provisional for a particular issue and the appellants were well within their rights to claim additional grounds at time of finalisation. It has been held by the Tribunal in the case of ***Swastik Fragrances vs. CCE: 2000 (121) ELT 375 (T)*** that provisional assessment has to be treated as provisional for all purposes and not necessarily in respect of particular ground considered. Similar was the view held by the Tribunal in case of ***IJM Gayatri Joint Venture: 2008 (231) ELT 683 (T),*** which was maintained by the Supreme Court in ***2016 (336) ELT A131 (SC)***; similar judgment was given by the Tribunal in case of ***LM Glassfibre (India) Pvt. Ltd.: 2009 (235) ELT 146 (Tri.-Chennai)***.

2.1 The learned counsel also submitted that the amounts were paid as per the contracts and no extra amounts were paid which can seen as per the price schedule (package) submitted to the Department by BSNL which is annexed at page 224 of the appeal paper book. It can be seen that BSNL vide their letter dated 13.7.2007 addressed to Assistant Commissioner of Central Excise, Bangalore-I Division have clarified that the L-1 bidder as well as M/s. ITI Limited have quoted zero percent excise duty in the bid against the above said purchase orders and accordingly, the rates of IFWTs were finalized. The learned counsel submitted that in view of the above, it is clear that no incidence of duty has been passed on to their customers; therefore, the question of unjust enrichment cannot be alleged.

3. The learned DR reiterated the findings of Order-in-Original and Order-in-Appeal and submitted that it was clear from the OIO that the appellants were under self-assessment and they themselves have classified the goods under Chapter Heading 8417. The duty was not paid under protest. Moreover, the provisional assessment was for finalization of value and not for classification. It was submitted that as per Rule 7, provisional assessment can be resorted to where the assessee is only to determine the value of excisable goods or the rate of duty applicable, thereto. A plain reading of the Rule gives understanding that provisional assessment can be resorted in one

of the issues and not on both, therefore, the assessee's contentions on provisional assessment is not acceptable.

4. The learned counsel for the appellants at this juncture have submitted that the Hon'ble High Court of Karnataka in their order CEA No.30/2017 and No.62/2017 C/W CEA No.66/2017 have in their own case while rejecting the Revenue's appeals have observed that the very fact that the central Excise Department made an allegation of unjust enrichment and wanted to enquire into against the Government of India undertaking i.e., ITI Limited is not palatable, especially because the customer or purchaser of tele equipments from the respondent/assessee ITI Limited was none other than a Central Government Department or BSNL.

5. Heard both sides and perused the records. As seen above, the Department rejected the refund claim by the appellant on the ground that the assessment was not provisional and even if it was provisional, refund is premature and that the appellants did not pay duty under protest; the appellants did not produce proof that the equipment manufactured by them were same as those covered by the Tribunal's order cited above and they have

not given proof that they have not passed on the incidence of duty. It is seen that the appellants in reply to the show-cause notice that M/s. BSNL had placed two purchase orders on the appellants for supply of goods i.e., Integrated Fixed Wireless CDMA 2000 IX Terminals supporting voice, voice band data up to 14.4 kbps in circuit mode and subscriber call charge meter (home meter) with patch panel antenna, RF Feeder cable, data cable, connectors and accessories model LSP-340 E and the appellants submitted that accordingly they placed two purchase orders on M/s. LG Electronics Inc. They imported a total 1,05,025 fixed wireless telephones (NIU software / NIU hardware) which have been cleared at the Air Cargo Complex, Bangalore vide 20 Bills of Entry. The same goods were taken into stores of ITI vide inward goods advice note. The same were issued from the stores to the production division for manufacture of Integrated Fixed Wireless CDMA 2000 IX Terminals supporting voice, voice band data up to 14.4 kbps in circuit mode and subscriber call charge meter (home meter) with patch panel antenna, RF Feeder cable, data cable, connectors and accessories model LSP-340 E, as ordered by BSNL in their purchase orders and a request to the Stores Division for issue of the imported IFWTs were made on "Multiple Stores

Requisition" forms. The said IFWT were cleared after the same were subjected to provisional assessment vide provisional invoice copies of which was submitted along with subject refund claim. In view of the above, it is seen that the appellants have submitted the documentary proof that the goods cleared by them were manufactured out of the imported items or equipments. Once the appellants have submitted the details of the same, the department could have well verified the claim instead of simply brushing aside the claim saying that the appellants did not prove that the imported equipments and the equipments cleared by them were one and the same. Moreover, the appellants submitted that they have cleared IFWT model telephones which are classifiable under 8525.2017 of Central Excise Tariff Act as held by this Tribunal in the order cited above and also by the Hon'ble Supreme Court in the case of ***Tata Telephone Services: 2006 (194) ELT 11 (SC)***.

5.1 Coming to the issue of provisional assessment, the records of the case are very clear that the assessments were provisional for not only the impugned period but for subsequent periods also. A show-cause notice dated 15.7.2007 was issued to the appellants and the show-cause notice cites so many letters written by the appellants to show that the assessments were provisional. The notice also refers to the letter dated 7.9.2007 addressed by the appellants to the Commissioner of Central Excise requesting for extension of provisional assessment for the year 2003-04; 2004-05 and 2005-06. As discussed above, the Order-in-original also refers to the assessment being provisional; therefore, it is evident that the assessments were provisional.

5.2 The lower authorities have also taken a plea that assessments are provisional for the purpose of valuation and not for classification. We find that as cited above, it was held in so many cases that provisional assessment has to be treated as provisional for all purposes and not necessarily in respect of particular grounds considered. This Bench in the case of ***IJM Gayatri Joint Venture*** (supra) has observed that once the assessment is provisional for a particular reason, it will be provisional for any other reason. In other words, the assessment which is provisional is provisional for all purposes ………. once the assessment is provisional, there is no question of time bar and the short-payment can always be recovered at the time of finalization. Applying the ratio of the judgment, it is held that the same is applicable to refund also. As held by the Tribunal in ***LM***

***Glassfibre (supra)***, therefore examination of all facts including classification of goods requires to be undertaken at the time of finalization of provisional assessment. The refund claim of the appellants is to be considered at the time of finalization of provisional assessment.

5.3 Further, from the available records of the case, it is not clear as to whether the assessments have been finalised or not. In the absence of the same, it is to be understood that the assessments are provisional, therefore, we hold that the refund claim made by the appellants is not hit by limitation. Moreover, we find that there was no reason or requirement for the appellants to file a refund claim as grant of refund should be a normal process on finalization of the assessments.

5.4 Coming to the unjust enrichment, in view of the submissions of the appellants and the letter written to the Assistant Commissioner by M/s. BSNL and the invoices issued, it is seen that the rates at which the goods are to be supplied by the appellants to BSNL were fixed as per the contracts or purchase orders. In the summary sheet submitted by BSNL to the Assistant Commissioner, it was seen that the excise duty charged or chargeable were shown as 'nil' or 'zero'. Therefore, *prima facie*, a strong case has been established by the appellants that there was no scope for believing that the incidence of duty has been passed on by the appellants to their customers. Therefore, we find that there is no question of unjust enrichment in the instant issue. However, as the finalization of assessment did not appear to have been finalized, this aspect can be verified by the lower authority on finalization of the provisional assessments. We have also taken into consideration the order of the Hon'ble High Court of Karnataka High Court in the appeal cited above in this regard. As the assessments are not finalized, the issue requires to go back to the original authority for finalization of provisional assessment and thereon, sanction the refund to the appellants as a consequence.

6. In view of the above, we allow the appeal by way of remand.

(Order was pronounced in Open Court on **<u>25.09.2018</u>.)**

**P. ANJANI KUMAR**
**TECHNICAL MEMBER**

**S.S GARG**
**JUDICIAL MEMBER**

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