CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2

Excise Appeal No. 20479 of 2016

(Arising out of Order-in-Appeal No. CAL-EXCUS-000-APP-424-15-16 dated 04.01.2016 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals-II), Cochin.)

BPL Telecom Pvt. Ltd.
System House, Chandranagar P.O.
Palakkad, Kerala – 678007 **........Appellant**

VERSUS

Commissioner of Central Excise, Calicut
CR Building, Mananchira, Calicut,
Kozhikode, Kerala – 673001 **............Respondent**

Appearance:

Ms. Rini Anna Kurian, Advocate for the Appellant
Mr. Vikalp Jain, Authorised Representative (AR) for the Respondent

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 22280 /2025

Date of Hearing: 26.09.2025
Date of Decision: 26.09.2025

Per: Pullela Nageswara Rao

This appeal is filed against Order-in-Appeal No. CAL-EXCUS-000-APP-424-15-16 dated 04.01.2016 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals-II), Cochin. The duty amount involved is Rs. 6,28,334 for the months of March 2008, December 2008 and March 2009. The showcase notice was issued on 02.12.2010.

2. The issue involved in the present appeal is regarding payment of duty at the revised rates of duty on the amounts received by the appellant from their customers based on 'Debit Notes' issued by the appellant.

3. The brief facts of the case are the appellant is a manufacturer of EPABX, PBT, PLCC, Wave Trap Equipment, Coupling Devices etc., falling under Central Excise Tariff Heading (CETH) 8517 of the Central Excise Tariff Act, 1985. Appellant cleared certain products in March, 2008 when the effective rate of duty was 14.42% and declared the same in ER-1 returns. There is a price variation clause in the contract between the appellant and the purchasers. The price was revised based on the contractual clause which was given effect by issuance of debit notes and this are duly declared in their respective ER-1 returns. The differential duty was paid at the rate of duty as applicable on date of issue of the debit note. The appellant submitted that as part of the economic packages introduced in 2008-09 to tackle the global recession, the rates of duties were reduced. Consequently the Central Excise duty on the equipment cleared by the appellant fell from 14.42% to 8.24%. The Appellant paid the differential duty for the months March 2008, December 2008, March 2009 on the additional amount received through the said debit note at the prevailing rate of 8.24%. However on verification, Department did not accept the payment of differential duty at the revised rate of duty and issued a show cause notice. In Show cause notice, it is alleged that there is a wilful suppression on the part of the appellant with an intention to evade payment of duty even though Appellant submitted that the debit notes were disclosed in the periodic ER-1 Returns and paid at the duty at the rates prevalent at that time of issuance of the debit note. The Adjudication authority confirmed the demand along with interest and also imposed penalty invoking the larger period under section 11AC of the Central Excise Act, 1944. Aggrieved by the said order an appeal was filed before Commissioner (Appeals), who has upheld the order. Aggrieved with the impugned order present appeal is filed before this Tribunal.

4. Learned Counsel for the appellant during the hearing submits that the show cause notice was issued invoking the larger period of limitation, however no specific reason for the same is stated in the show cause notice. The show cause notice however for the purpose of proposing penalty under Section 11AC alleged that the appellant did not disclose the receipt of

additional amount by issue of Debit Notes, which according to the department was wilful suppression of facts with an intention to evade payment of duty. The appellant objected to the proposals in the show cause notice by pointing out, among other things, that there was no suppression on the part of the appellant with the intention to evade payment of duty, for it declared the Debit Notes in the periodic ER-1 Returns and paid the duty prevalent at that time. The proposal in the show cause notice was however confirmed, save to the extent of granting the cum-duty benefit.

5. Learned Counsel submits that the Order-in-Original as affirmed in the Order-in-Appeal is unsustainable for the following reasons:

a. Appellant discharged the duty on price variation by declaring the debit notes in the ER-1 returns filed and paid the duty prevalent during the said period. The view taken by the department after the CERA audit is that the rate of duty that should have been applied on the price variation was the rate of duty prevalent during the period of clearance of goods and not the one applicable at the time of issuance of the Debit Notes and filing of the corresponding ER-1 returns. The same is essentially an interpretation of the provisions Rule 5 of the Central Excise Rules, 2002.

b. The show cause notice at paragraph 9 while proposing penalty under Section 11AC alleges wilful suppression on the part of the appellant with an intention to evade payment of duty. The show cause notice however in the earlier portion states that the appellant declared and discharged lower rate of duty for the price variation covered by Debit Notes. The allegations in the show cause notice would therefore be self-contradictory.

c. The demand is proposed and confirmed invoking the larger period of limitation. The Order-in-Original dated 07.03.2012 at paragraph 19 states that the appellant deliberately suppressed the fact regarding rate of duty while making payment of duty subsequent to price variation with intention to evade payment of duty. The appellant having declared the price variation in ER-1 returns, the application of a lesser rate of duty will not qualify as "Deliberate Suppression with the intention to evade payment of duty". It is settled in law that every short payment of duty cannot be termed as deliberate suppression with the intention to evade payment of duty. The appellant had moreover paid the duty after the order of the Appellate Commissioner.

d. The Commissioner confirmed the penalty under Section 11AC alleging suppression on the part of the appellant with the intention to evade payment of duty. the issue at best is only a wrong application of the rate of duty by the appellant and not any case of suppression with the intention to evade payment of duty. Hence, the conditions for maintaining the penalty under Section 11AC are clearly absent in the facts and circumstances of the case.

e. As no duty could have been demanded from the appellant invoking the larger period of limitation no interest also can be demanded from it. The fact that the appellant paid the duty after the order of the Appellate Commissioner would not alter the position.

6. The learned Authorised Representative (AR) for the Revenue reiterated the findings of the adjudicating authority/ first appellate authority in the impugned order.

7. Heard both sides and perused the records.

8. We find that the issue involved in this case is with respect to payment of differential duty based on the debit notes issued by the appellant to their customers in view of price variation clause in the contract. The appellant paid the differential duty at the rate of duty prevailing at the time of issuing of the debit notes. It is the contention of the Revenue that the rate applicable for payment of differential duty consequent to the issue of debit notes as per the contract between the appellant and their customers would be the rate at which the goods were earlier cleared from the factory. Further the department has

invoked extended period of limitation and imposed penalty under section 11 AC of the Central Excise Act, 1944. It is the contention of the appellant that they have been declaring the details of the payments before the issue of debit notes and after the issue of debit notes in the respective ER-1 returns therefore there is no wilful suppression with an intent to evade duty.

9. We find that in this case the differential duty discharged by the appellant at the duty rates prevailing at the time of issue of debit notes which is subsequent to the clearance of the goods is not tenable for the reason that the differential duty would be payable at rate of duty prevailing at the time of clearance of the goods not when the debit notes were issued which were issued subsequent to the clearance of the goods. Therefore we find that the confirmation of the demand along with interest is sustainable and liable to be upheld. However in the facts and circumstances of the case, we find that the imposition of penalty under section 11AC of the Central Excise Act, 1944 invoking the extended period of limitation is not sustainable and therefore is unsustainable.

10. In view of the above discussion we find that the confirmation of differential duty along with interest based on the duty rates prevailing at the time of clearance of the goods is upheld. However the imposition of penalty under 11 AC of the Central Excise Act, 1944 is set aside.

11. Accordingly, the impugned order is partially allowed in the above terms.

(Operative portion of the order was pronounced in open court on conclusion of hearing.)

(P.A Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

sasi