CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 988 Of 2010

[Arising out of Order-in-Appeal No.26-28/CE/CHD-I/2010 dated 02.02.2010 passed by the Commissioner of Central Excise (Appeals-I), Chandigarh]

M/s Himachal Futuristic Communications Limited, Unit-I **: Appellant (s)**
(formerly: HFCL, Wireline Division,
Unit-III, (OLTE) 8, Electric Complex,
Chambaghat, Solan (HP)

Vs

The Commissioner of Central Excise, Chandigarh-I **: Respondent (s)**
Plot No.19, Central Revenue Building,
Sector-17C, Chandigarh-160017

APPEARANCE:
Shri Surjeet Bhadu and Shri Veer Singh, Advocates for the Appellant
Shri Amandeep Kumar, Authorised Representative for the Respondent

CORAM :
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60191/2023

Date of Hearing: 27.04.2023

Date of Decision:12.07.2023

Per : P.ANJANI KUMAR

M/s Himachal Futuristics Communications Limited, the appellants, have supplied Telecom equipment to MTNL/BSNL against purchase orders during the period 26.06.2001 to 12.07.2001; they filed a refund application for Rs.67,74,866/- on 17.06.2002 on the ground that they have supplied the said equipment along with software which was not chargeable to duty; since they paid duty which is not payable and have not recovered the same from
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customers, they are eligible for refund under Section 27 of Customs Act, 1962. A show cause notice dated 10.09.2022 was issued seeking to reject the refund claim. Order-in-Original dated 19.04.2006 was passed by Lower Authority holding that the duty was correctly paid as the value of software was correctly included in the assessable value and that the appellants could not prove that the incidence of duty was borne by them and was not passed off. On an appeal filed by the appellant, the First Appellate Authority vide Order dated 10.01.2007 remanded the matter to Lower Authority with a direction to verify the nature of software and the issue of unjust enrichment. In the remand proceedings, the Original Authority vide Order dated 19.03.2009 held that the value of the software is not includable in the assessable value of hardware. However, the appellants did not cross the bar of unjust enrichment. Accordingly, the Original Authority rejected the refund claim. The First Appellate Authority vide the impugned order dated 02.02.2010, on an appeal filed by the appellant, upheld the Order-in-Original. Hence, this appeal.

2. Shri Surjeet Bhadu, learned Counsel for the appellants reiterates the grounds of appeal and submits that the sole ground of rejection of the appeal was that the Chartered Accountant's Certificate produced by the appellants only say that they have paid Excise Duty on the software and recovered the total value of software and not recovered any amount over and above the value of software as indicated in the certificate; the said certificate does not explain how the amount of duty paid has been accounted for in their books of accounts. He

submits that the learned Commissioner has not denied the genuineness of the CA Certificate. He relies upon the following case laws:

- *Grasim Industries Limited-2009 (241) ELT 321 (SC).*
- *Acer India Limited- 2004 (172) ELT 289 (SC).*
- *Cimmco Limited- 1999 (107) ELT 246 (Tri.).*
- *Kumar Metallurgical Corpn. Limited- 2008 (221) ELT 519 (Tri. Bang.).*
- *Himatsingka Seide Limited- 2005 (191) ELT 885 (Tri. Bang.).*
- *Premier Arycro India Limited- 2010 (260) ELT 158 (Tri. Bang.).*
- *Transformers and Electricals Kerala Limited- 2005 (188) ELT 60 (Tri. Bang.).*
- *Crane Betal Nut Powder Works-2011 (274) ELT 113 (Tri. Bang.).*
- *Reliance Communications Infrastructure Limited-2012 (279) ELT 85 (Tri. Del.).*

3. Shri Amandeep Kumar, learned Authorized Representative appearing on behalf of the Department submits that the Excise Duty charged on the software has clearly been mentioned in the invoices; the appellant has collected duty at the rate of 16% on the combined value of hardware and software; invoice being a statutory document is evidence for either availing CENVAT or Refund; appellant has fulfilled the requirement of Section 12A of Central Excise Act, 1944. He relies upon the following case law:

- *Interach Building Products (P) Limited-2005 (184) ELT 154 (Tri. Del.).*
- *Delton Cable Limited-2005 (185) ELT 301 (Tri. Del.).*
- *J.C.T. Limited-2006 (202) ELT 773 (P&H).*
- *J.C.T. Limited-2004 (163) ELT 467 (Tri. Del.).*
- *M.R.F. Limited-2002 (149) ELT 801 (Tri. Chennai).*
- *ITC Limited-2019 (368) ELT 216 (SC).*

4. Heard both sides and perused the records of the case. The brief issue that requires to be addressed in the instant case is as to whether the appellants' claim for refund of duty paid is hit by the bar of unjust enrichment. The appellants’ claim that they have paid duty on the software supplied by them to MTNL/BSNL along with the hardware equipment, although there was no duty payable on the software. On the contrary, it is the claim of the Department that duty paid being reflected in the invoices issued under Section 12A of Central Excise Act of 1944 which in itself is enough proof that the incidence of duty has been passed on to the customers . The appellants’ claim that the First Appellate Authority has discarded the certificate issued by the Chartered Accountant (CA) without any valid reason whereas , the First Appellate Authority finds that except stating that the incidents of duty has not been passed on, the said CA certificate is silent on the issue as to how this amount has been treated in the books of accounts of the respondent ; no proof has been submitted to the effect that the expenses on this count have been charged to Profit and Loss Account so as to prove that the incidence of duty has not been passed on .

5. On going through the contracts/purchase orders, it is seen that the same are for a value which is inclusive of Excise duty, Sales Tax, Fright/Insurance/ Packing/Forwarding, Documentation, Training charges, Octroi and any other charges; this indicates that the consideration paid by MTNL/BSNL is inclusive of taxes payable; in the schedule the value of software, for each of the hardware items, is indicted per unit and the total price thereof. However, in respect of the purchase order dated 12/02/2001 indicates under bill of material that

the Excise Duty and Sales Tax payable for software, as at Row no. 1.3b and 1.5b, to be 0%. However, there is no indication whatsoever to show that such duty paid by the appellants was not reimbursed by their customers. On the contrary on perusal of Invoice no. 326 dated 30/11/2001, we find that the invoice evidences payment of Excise duty of Rs.11,15,890/-. However, the value of material and software is shown together at a value of Rs 69,18,757/- .

6. We find that similarly, the duty and the value are shown under Invoice no. 340 dated 12/12/2001. In addition to these, no other record or evidence has been produced by the appellants. To substantiate their claim of not passing on the incidence of duty under the circumstances, we find that there is considerable force in the argument of the Revenue that the invoice issued under statutory provisions does not indicate that the incidence of duty has not been passed on. We find that Hon'ble Supreme Court in the case of *Interarch Building Products (P)* Limited (supra) held that:

> *"8. In the invoices as observed above, duty element has been separately shown while clearing the goods. We are unable to subscribe to the contention of the counsel that it was done only with a view to meet this statutory requirement of showing the duty separately in the invoices. Rather, from this fact of showing the duty separately in the invoices, it can be safely inferred that appellants had passed on the incidence of duty to the customers/ buyers. In none of these invoices it was indicated that the duty element separately shown by them was only a formality and that it was not to be charged from the buyers. When they were paying the duty under protest, it is difficult to accept that they did not charge duty from their customers. They in fact indicated the duty separately in their invoices while clearing the goods with an intention to make it known to their customers/buyers, the duty involved*

on the cleared goods and requiring them to pay the same. "

7. In view of the above discussion and findings, we don't find any merit in the appeal filed by the appellants. In the result, the appeal is dismissed.

(Pronounced in the open Court on 12.07.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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