CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

COURT NO. I

Appeal No. E/798/2007

[Arising out of Order-in-Appeal No. 337/NS/GGN/2006 dt. 29.11.2006 passed by the Commissioner of Central Excise, Delhi-III, Gurgaon.]

Date of hearing: 23.05.2017
Date of interim order: 01.11.2017
Date of Final order: 26.03.2018

For approval and signature:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Hon'ble Mr. Devender Singh, Member (Technical)

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M/s Bharti Teletech Ltd. **Appellant(s)**

VS

CCE Delhi-III : **Respondent(s)**

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Appearance:

Sh. Srinivas Kotni, Advocate, for the Appellant(s)

Sh. Harvinder Singh, AR for the Respondent(s)

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Devender Singh, Member (Technical)

INTERIM ORDER NO. 28/2017 dt. 01.11.2017
FINAL ORDER NO. 61997/2018 dt. 26.03.2018

Per : Ashok Jindal

The appellant is in appeal against the impugned order wherein refund claim has been rejected by the authority below.

2. The brief facts of the case are that the appellant entered into a contract for supply of telephonic instruments to M/s BSNL, Bihar. As per the purchase order, the prices are inclusive of all

taxes, freight etc. The appellant was of the view that they were not liable to pay Sales Tax on these instruments as they are claiming exemption and applied for the exemption with the Sales Tax Department. Accordingly, the appellant raised invoices with composite prices of Rs. 265/- per unit as per the contract. Later on, the Sales Tax Department denied the exemption to the appellant accordingly appellant was required to pay Sales Tax to the Sales Tax Department. As per the contract, the prices are inclusive all taxes, therefore, appellant claim refund of excess duty paid on the component of Sales Tax paid by them. The refund claim was rejected by the authority below on the ground that as the Sales Tax has been paid after completion of the contract and the same is not inclusive in the contract, therefore, they have to bear the amount of Sales Tax and whatever duly have been paid by them at the time of clearance of goods is correctly paid. Therefore, the refund claim is not admissible. Aggrieved from the said order, the appellant is before us.

3. The Ld. Counsel for the appellants submits that their contract of supply of goods was inclusive of all taxes i.e. Sales Tax, excise duty other statutory levies and freight. If any duty or taxes leviable after completion of contract is to be borne by the appellant. In fact the Sales Tax was leviable on the goods sold by them at the time of clearance of goods but the appellant was under bona fide belief that they are entitled for exemption from Sales Tax, therefore, they did not charge the component of Sales Tax in the invoices. Consequently, they had paid excess duty on

the components of Sales Tax as their contract was composite contract, in that circumstances, they are entitle for refund claim. It is further submitted that if the prices are inclusive all taxes or duties, in that circumstances bar of unjust enrichment is not applicable. To support this contention he relied upon the decision in the case of *Cimmco Ltd. Vs. Collector of Central Excise, Jaipur – 1999 (107) ELT 246 (Tribunal), Panibati Rubber limited Vs. CCE, Calcutta-II – 2001 (127) ELT 742 (Tri.-Cal), Monally Bharat Engg. Co. Ltd. Vs. CCE, Ranchi- 2004 (168) ELT 249 (Tri. Kolkata) and Subha Engineers Pvt. Ltd. Vs. CCE, Chennai-III – 2005 (183) ELT 362 (Tri.-Chennai).*

4. On the other hand Ld. AR reiterated the findings of the impugned order and submits that as Sales Tax has been paid by the appellant after discharging their contract, therefore, they are not entitle for refund claim.

5. Heard both the sides and considered the submissions.

6. We find that the price as per the purchased order is inclusive of all taxes including Sales Tax which was leviable at the time of clearance of goods but the appellant was under bona-fide belief that they are not liable to pay Sales Tax on their goods and applied for exemption. The said exemption was denied to the appellant. Consequently, the appellant was required to pay Sales Tax for the goods already cleared by them. It is not a case where levy of Sales Tax came after completion of the contract by the appellant, in fact, Sales Tax levy was there at the time execution of contract or supply of the goods and appellant did not pay

Sales Tax at that time which was paid later on**.** Further, as the price was inclusive of all taxes including Sales Tax, in that circumstances, the transaction value of goods has to be determined accordingly. Therefore, the amount of Sales Tax paid by the appellant during the normal period of limitation was required to be deducted from the composite price of the goods payable by the appellant and on that amount, the duty was not payable. In that circumstance, we hold that the appellant is entitled to claim the refund of excess duty paid by them on account of Sales Tax paid by them.

7. Now the next issue comes whether the bar of unjust enrichment is applicable to the facts of this case or not.

8. We find that similar issue came up before this Tribunal in the case of *Subha Engineers Pvt. Ltd. Vs. CCE, Chennai-III (supra)* wherein this Tribunal observed as under:-

> "***6.*** *We have gone through the rival contentions. In the brief facts of the case the entire circumstance leading to the refund claim have been detailed. Hence we do not want to repeat the same. It is very clear that the appellants quoted an amount of Rs. 621/- per piece without including the excise duty element as at the time of quotation no duty was payable. The fact that the price is inclusive of duty does not mean that the price includes duty element when the duty is nil. When the exemption was withdrawn, the appellants made Herculean efforts for the re-introduction of the exemption notification. They were also successful when the Govt. of India re-introduced the exemption with effect from 1-10-2001. As law abiding citizens, the appellants paid excise duty treating Rs. 621/- as cum-duty price. This action of the appellants in the peculiar circumstances of the case should not be held against them to deny the rightful benefit due to them.*

> *Even though duty was paid on 3-10-2001 the same is not payable by virtue of re-introduction of exemption notification. The Ordnance Factory, Trichy were very clear that they would not pay more than Rs. 621/- which is contracted price when there was no duty leviable. In spite of the best efforts of the appellants, the Ordnance Factory said that they would not pay any amount more than Rs. 621/-. All these things indicate the fact that the amount of Rs. 621/- does not include the duty at the rate of 32% which has been paid by the appellants. Under these circumstances there is no question of passing on the burden of duty to the buyer. The appellants are entitled for the refund. Therefore we set aside the impugned order by allowing the appeal with consequential relief."*

Further, the said decision was relied by this Tribunal in the case of *Panibati Rubber limited Vs. CCE, Calcutta-II* (supra) wherein it has been held that when the price is inclusive all taxes, in that circumstances, the bar of unjust enrichment is not applicable, therefore, we hold that bar of unjust enrichment is not applicable to the facts of this case.

8. In view of the above observations, we hold that the appellant is entitle for refund claim, accordingly, the impugned order is set aside. The appeal is allowed with consequential relief.

(Dictated and pronounced in the open court)

Devender Singh
Member (Technical)

Ashok Jindal
Member (Judicial)

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Per : Devender Singh

9. Having gone through the Final order recorded by my Ld. brother Member (Judicial), I proceed to record a separate order.

10. I find that the appellants have claimed refund of excess duty paid on the clearances made during 07.06.2001 to 27.03.2002. The refund claim was filed on 05.07.2002. I find that the lower authority has rejected the refund application of the appellants on the ground that as per price clause of purchase order, any increase in taxes and other statutory duties/levies shall be to the contractors account. The said clause is reproduced below:-

> *"That the prices are firm and are inclusive of ST, ED and other statutory duties/levies etc. and Freight, packing & forwarding charges. Any increase in taxes and other statutory duties/levies after the expiry of delivery date shall be to the contractors account. However, benefit of any decrease in these taxes/duties shall be passed on to the purchaser by the supplier."*

Therefore, it is evident that any increase in duties, tax levy after expiry of delivery date has no bearing on the price of the past clearances, therefore, any increase in duty tax is to be borne by the appellant from their account. Therefore, I agree with the findings of the Ld. Commissioner (Appeals) that no excise duty has been paid on the Sales Tax element and hence there is no excess payment of duty. Besides, the appellant have failed to submit any concrete/specific documentary evidence to prove that the contract price actually included the Sales Tax. During their oral pleadings also, they did not bring up any such evidence. In the invoice No. 264 placed on record against Sales Tax, it is mentioned exemption A/F and no Sales Tax figure is mentioned at all and hence in the absence of any documentary proof, it is mere assumption that Sales Tax figure was included in the price charged from the buyer.

11. In view of the above, I find that there is no infirmity in the order of the Ld. Commissioner (Appeals) and the same is upheld.

12. The appeal of the appellants, being devoid of any merit, is dismissed.

Devender Singh
Member (Technical)

<u>Difference of opinion</u>

As there is difference of opinion between both the Members, therefore, matter is place before the Hon'ble President to appoint third Member to decide the following issues:-

(A) Whether the Member (Judicial) is correct holding that the amount of Service Tax paid by the appellant during the normal period of limitation was required to be deducted from the composite price of goods payable by the appellant and that amount of duty was not payable, therefore, for the excess amount paid by the appellant as duty, the appellant is entitle for refund on account of Sales Tax paid by them and bar of unjust enrichment is not applicable to the facts of this case; or

(B) Whether the Member (Technical) is correct holding that any increase in duties, tax levy after expiry of delivery date has no bearing on the price of the past clearances, therefore, any increase in duty tax is to be borne by the appellant from their account, particularly when no documentary evidence to prove that the contract price actually included Sales Tax has been produced.

(Order pronounced in the court on 01-11-2017)

(Devender Singh) **Member (Technical)**	**(Ashok Jindal)** **Member (Judicial)**

<u>Per. B. Ravichandran :-</u>

The issue referred to the third Member for a decision is regarding entitlement of refund claim filed by the appellant. The difference of opinion between the two members of the Division Bench referred to is as below :-

"(A) Whether the Member (Judicial) is correct holding that the amount of Service Tax paid by the appellant during the normal period of limitation was required to be deducted from the composite price of goods payable by the appellant and that amount of duty was not payable, therefore, for the excess amount paid by the appellant as duty, the appellant is entitle for refund on account of Sales Tax paid by them and bar of unjust enrichment is not applicable to the facts of this case or

(B) Whether the Member (Technical) is correct holding that any increase in duties, tax levy after expiry of delivery date has

> no bearing on the price of the past clearances, therefore, any increase in duty tax is to be borne by the appellant from their account, particularly when no documentary evidence to prove that the contract price actually included Sales Tax has been produced".

2. I have heard the learned Counsel for the appellant. He mainly submitted that as per the contract with BSNL the total value fixed per unit is Rs. 265/-. This should include taxes and levies which are to be borne by the appellant only. At that time, the appellant applied for an exemption from sales tax and was awaiting decision from the State Authorities. Accordingly, in the invoices prepared for clearance of the goods the duty of excise was calculated on cum duty basis by reverse calculation and the assessable value was arrived at Rs. 226.399. Later, the Sales Tax Authorities refused to grant the exemption applied for. This resulted in payment of sales tax on the past clearances. Since, the value agreed upon is a total value inclusive of all taxes, the appellant re-calculated the assessable value and claiming excess payment of excise duty on the ground that the sales tax element should also be deducted prior to arriving at the assessable value. The claim for refund was filed. It is the submission of the learned Counsel that since no Central Excise duty is payable on sales tax, the sales tax paid later also should be deducted from the assessable value and the appellant should be eligible for refund.

3. The learned AR submitted that the contract clearly says that the appellant shall bear all the duty liabilities. At the time of clearance only excise duty element was paid. No sales tax was paid or payable. Now, the appellant after all the transaction is over and delivery schedule is completed is coming forward with a claim that the sales tax denied

exemption and accordingly the excise duty calculation has to be reworked resulting in refund of differential duty. He submitted that the said claim is not supported by the provision of law as at the time of clearance of goods no sales tax was paid or even payable as per the details in the invoice. He also submitted there was no provisional assessment on this issue.

4. I have heard both the sides and perused the appeal record. The eligibility of the appellant for refund due to later liability of sales tax was the point of dispute. I note that on this central issue, the difference framed though points to the eligibility or otherwise of the appellant the basic issue remains whether or not the appellant is entitled for refund of differential central excise duty in terms of Section 4 readwith Section 11B of the Central Excise Act, 1944. The facts of the case are not in dispute. I have perused the terms of contract as well as the invoices issued by the appellant during the material time. The sale value of the goods are fixed at Rs. 265/- per unit. Admittedly, the said sale price includes all taxes and duties which are to be borne by the appellant. The "transaction value" as per Section 4 means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; <u>but does not include the amount of</u>

duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

5. Admittedly, in the present case all the goods were cleared on final assessment on a reverse calculation from the contract value. The assessable value was arrived at after deducting excise element. No deduction was made for sales tax as no sales tax was paid or payable. This much is clear from the details entered in the invoice. Here, the learned Counsel submitted that they have indicated against sales tax 'exemption applied'. It is clear that the appellant is claiming exemption for the goods. The same was later denied by the sales tax authorities resulting in payment of sales tax. The "transaction value" as mentioned above clearly talks about sales tax actually paid or actually payable. In the present case when the goods were cleared on the final assessment neither sales tax was paid or actually payable. Later the sales tax exemption/dispute was settled against the appellant. This will not make the final assessments already made, without any room for future completion/finalizing of assessment by way of provisional assessment, for deduction of sales tax payable. In other words, when the goods were finally assessed and cleared the sales tax deduction on such clearances either should be on "actually paid" or "actually payable". In the present case both are not applicable. Incidentally, in a situation where any element of assessable value is not finally known recourse for provisional assessment is resorted to. Such provisional assessment is not only for applying relevant date (limitation) either for demand or for refund. The basic need for provisional assessment is to declare that the assessment is not final due to any reason. In such situation, the sales tax, if any, payable and determined during the

pendency of such provisional assessment can form a reason with claim of such differential duty upon finalizing of such assessment.

6. As discussed above, the assessable value in terms of the clearance documents and assessment made during the relevant time show that neither sales tax was paid or payable and as such no deduction was permissible. The claim of the appellant that the sales tax dispute was settled against them later will not have any bearing as the invoice and the assessments were on the claim of the appellant that no sales tax was paid or payable. The same was finalized accordingly.

7. In view of the above legal position and analysis, the question referred is answered against the appellant. In other words, the assessment being final and excise duty has been discharged correctly with no indication of sales tax 'payable' or 'paid', no variation in assessable value later is permissible. Further, on specific query regarding evidence of payment of sales tax, I note that the same was not submitted before this bench. Accordingly, the view of the Member (Technical) regarding merits of the Commissioner (Appeals) order is correct. Reference is returned to the Division Bench for further decision.

(Order dictated and pronounced in the open court.)

(B. Ravichandran)
Member (Technical)

MAJORITY ORDER

In view of the majority decision that the assessment being final and excise duty has been discharged correctly with no indication of sales tax 'payable' or 'paid' , no variation in assessable value later is permissible.

2. Accordingly, the appeal filed by the appellant is dismissed.

(Order pronounced in the court on 26.03.2018)

Devender Singh
Member (Technical)

Ashok Jindal
Member (Judicial)