IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Appeal No. E/628/2009-EX [DB]

[Arising out of the common Order-In- Appeal No. 69/RPR-II/2008Dated 15.12.2008 passed by the Commissioner Appeals-II) Costums & Central Excise, Central Excise Building, Dhamtari Road, Raipur, (C.G.) 492001]

Bharat Sanchar Nigam Ltd. **…Appellant**

Vs.

C.C.E. Raipur **…Respondent**

Appearance:
Sh. Himanshu Khemuka, Ld. Advocate for the appellant
Sh.Yogesh Agarwal, Ld. AR for the respondent

CORAM:
Hon'ble Justice Mr. Dr. Satish Chandra, President
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Date of Hearing. 19.12.2016
Date of decision. 11.01.2017

Final Order No. 50233/2017

Per Ashok K. Arya:

1. The appellant, M/s Bharat Sanchar Nigam Ltd., Telecom Factory Bhilai is in appeal against Order-in-Appeal order No. 57/CE/2008 dated 15/12/2008 passed by Commissioner (Appeals), whereunder Order-in-Original dated 11/06/2008 passed by the Deputy

Commissioner rejecting the refund claim of the appellant has been sustained.

2. Briefly the facts are as under:

i. The appellant had filed a refund claim for Rs. 62,52,413/- representing the duty of excise paid by the appellant ,BSNL, on the value which was calculated at the rate of 10% of the cost of production of Tower Components manufactured and cleared by them during December, 2005 to April, 2007 in favour of their own organization situated at different stations. As per the show cause notice dated 11.09.2007, the Appellant had contended that they had paid duty of excise as directed by Central Excise Anti authorities (who visited their plant) on cost of production of the subject goods + 10 percent of such cost under the provisions of Central Excise Valuation (Determination of price of Excisable goods) Rules, 2000. The Central Excise duty Rs. 62,52,413/- as mentioned above was paid by the appellant under protest under intimation to the office of the Assistant Commissioner, Central Excise, Division-II, Bhilai.

ii. It was the contention of the Appellant, BSNL, that the Tower Components produced by them were used by BSNL itself and hence enhancement of assessable value by adding 10 percent profit was not sustainable. They in support of their contention relied upon the decision of the Apex Court in the case of *P.C.C. Pole Factory Vs CCE* ELT 2003 (198) ELT 429 (SC) and claimed that the ratio of judgment of the said case was squarely applicable to their case. In the case of *P.C.C. Pole Factory Vs. Collector of Central Excise* 2003 (158) ELT 429 (S.C.) while deciding valuation of PCC Poles manufactured and captively consumed by Electricity Board for laying lines and transmission energy it was held by the Hon'ble Supreme Court that Electricity Board itself carrying on job work and not assigning the job to any other person; who can give profit from such activity and no business was carried on by the Electricity Board after manufacturing the electricity poles, and selling them out or dealing out with any other person, thereby enhancement of assessable value, by adding 10% profit not sustainable.

iii. The appellant is claiming here the amount of Duty of Excise Rs. 64,52,413/- which was paid during December 2005 to

April 2007 on that part of the value which was calculated at the rate of 15% or 10% (as applicable during relevant time) of the cost of production or manufacture of subject goods was not required to be paid by them, and the appellant requested to refund the said Central Excise duty paid in excess by them. In other words the appellant's contentions is that they were required to pay duty on the cost of production or manufacture of subject goods only and that the duty of excise Rs. 64,52,413/- paid by adding 10% or 15% of cost of production or manufacture of subject goods has been paid in excess by them; hence is liable for refund.

3. The Appellant has been represented by the Ld. Advocate, Shri Himanshu Khemuka and the Revenue has been represented by the Ld. AR, Shri Yogesh Agarwal.

4. The ld. Advocate for the appellant based on the appeal memorandum and the written submissions *inter alia* submits as under:

i. In the appeal order No. (OIA NO. 357/2015 dated 21.10.2016) for the subsequent period their appeal was allowed on identical facts & grounds. In this order it was held that the appellant was not required to pay duty on one hundred and ten per cent of cost of production, thus allowing their appeal.

ii. For above case, the Hon'ble Tribunal dismissed the departmental appeal vide final order No. A/54842/2016-EX [DB] dated 08.11.2016.

iii. Reliance is placed on the following case laws:

a. *PCC Pole Factory vs. Collector Central Excise* 2003 (158) ELT 429 (SC)
b. Deputy General Manager BSNL Kharagpur vs. CCE Kolkata (order no. A-150 dated 20.02.2007 decided by CESTAT, Kolkata)

5. On the other hand, the Ld. AR for the Revenue reiterates the contents of the impugned order.

6. We have carefully considered the facts of the case, the submissions of both the sides and the case laws cited.

7. It may be mentioned that the Hon'ble Supreme Court in the case of *PCC Pole Factory (supra),* (whose subject item was PCC poles) observes that-

> …. The appellant having lost before the authorities, carried the matter to the Tribunal. The Tribunal upheld the orders made by the authorities and took the view that "PCC poles are marketable and where the work is done by job work, there may be some margin of profit in such activity" forgetting the fact that in the present case Electricity Board itself was carrying on that hob and has not assigned the job to any other person who can gain such profit and no business was carried on by the Electricity Board after manufacturing the poles and selling them out or dealing out with any other person. On the other hand, the poles were used for drawing electricity lines over them for purpose of transmission of electricity.
>
> 2. In this view of the matter, we think the order of the Tribunal cannot be sustained. The order made by the Tribunal is, therefore, set aside and the enhancement to the extent of 10 per cent is deleted.

8. By keeping in mind the ratio laid down by the Hon'ble Supreme Court in the case of *PCC Pole Factory* (supra), we are of the view that facts did not warrant levying Central Excise duty on enhanced assessable value, where 10% notional profit was added to the cost of the goods in terms of Rule 8 read with Rule 9 [not Rule 4(b) as mentioned by the notice] of Central Excise Valuation (Determination of Price of Excisable goods) Rules, 2000 read with provisions of Section 4(1) (b) of the Central Excise Act, 1944.

9. Further, the CESTAT in the appellant's own case namely *CCE, Delhi Vs. BSNL* (supra) *inter alia* observes that-

> 3. We find, first of all, the claim made by the Revenue that the provisions of Rule 233-B is applicable for the period 2000-01 to 2006-07 is factually incorrect. Rule 233-B was in Central Excise Rules, 1944. The said provision is not available in Central Excise Rules, 2001/2002 as such the elaborate procedure under Rule 233-B do not cover the substantial period in dispute. Further, in view of the clear finding by the Commissioner (Appeals) regarding protest made by the respondent for allowing refund from 01.02.2001 which is not factually rebutted by the Revenue, we find no reason to interfere with the above finding. The Revenue seeks to apply the procedure under Rule 233B for all the period in dispute which s quite contrary to the legal provisions applicable. The 1944 Rule was superseded in 2001. Further, the impugned order's records existence of protest by the respondent. As such, we find no reason to interfere with the findings recorded in the impugned order and accordingly the appeal is rejected.

10. In the light of well settled legal position (supra), we find no reason to sustain the impugned order and the same is set aside.

11. In the result, appeal is allowed with consequential relief.

[Pronounced in open Court on 11.01.2017]

(Justice (Dr.) Satish Chandra)
President

(Ashok K. Arya)
Member (Technical)

NK