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

Excise Appeal No. E/50001-50003/2014-[SM]
[Arising out of Order-In-Appeal No. 38, 39 & 40/CE/Alld/2013 dated: 25.09.2013 passed by CCE (Appeals) Allahabad]

For approval and signature:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)

M/s. I Ti Limited ...Appellants

Vs.

C.C.E. & S.T. Allahabad …Respondent

Appearance:
Mr. S.P. Ojha, (Advocate) for the Appellant
Mr. R K Mishra, DR for the Respondent

CORAM:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Date of Hearing/ Decision. 31.07.2015

Final Order No. 54310-54312 /2015

Per S K Mohanty:

These appeals are directed against the impugned orders dated 25.09.2013 passed by the Commissioner (Appeals), Customs, Central Excise and Service Tax, Allahabad.

1.1 Brief facts of the case are as under:

The appellant is engaged in the manufacture of Tele Communication equipments and parts thereof, falling under Chapter Heading No. 8517 of the Central Excise Tariff Act, 1985. During the disputed period, the appellant had filed the refund applications under Section 11B of the Central Excise Act, 1944 before the Jurisdictional Assistant Commissioner of Central Excise. The Refund claims filed by the appellant were rejected vide order dated 30.03.2012 on the ground that there was no order from the competent authority in allowing payment of duty on provisional basis and therefore, the value assessed is not provisional and is final. Accordingly, it was held that the refund applications are barred by limitation of time under Section 11B of the Central Excise Act, 1944.

1.2 Feeling aggrieved with the said adjudication order dated 30.3.2012, the appellant had preferred appeal before the ld. Commissioner (Appeals). The appeal was disposed of by the Commissioner (Appeals) vide impugned order dated 25.09.2013, rejecting the appeals on the ground that there is neither any express order for provisional assessment by the Assistant/ Deputy Commissioner nor any final assessment order has been passed as per the provisions of Rule 7 of the Central Excise Rules, 2002. The appellant has challenged the impugned order by filing the appeal before this Tribunal.

2. Heard Sh. S P Ojha, the Ld. Consultant for the appellants and Sh. R K Mishra, the Ld. AR for the Revenue.

3. The appellant manufactures Tele communication items and sells the same to M/S BSNL and MTNL on the provisional price indicated in the purchase orders. The appellant supplies the goods to the above named buyers on provisional basis. The appellants opted for provisional assessment under Rule 9B of the erstwhile Central Excise Rules, 1944. The request of the appellant was accepted by the Jurisdictional Central Excise Authorities and the

procedures as stipulated in the said Rules were followed by the appellant including execution of the requisite bond. The Central Excise Rules, 1944 was resinded and in its place, Central Excise (No. II) Rules, 2001 was inserted and subsequently the said Rule was amended and in its place the **Central Excise Rules, 2002 was inserted vide notification no. 4/2002-C.E. (N.T.)**, **dated 01.03.2002**. In the said newly inserted Rules, the provisional assessment is contained in Rule 7. In view of the fact that the final price of the goods sold by the appellant was always determined at a later date, the appellant opted for the provisional assessment right from the beginning and continuing with the same practice even now. Since the permission was granted by the Jurisdictional Central Excise Authorities for resorting to provisional assessment under the erstwhile Central Excise Rules, 1944, on its recession, the appellant requested the Chief Commissioner of Central Excise and Customs for permission to continue the provisional assessment, for which the permission had already been granted earlier.

4. The said request of the appellant for continuing the provisional assessment has so far not been disposed of by the Central Excise Department. The provisional price of goods for the disputed period were finalized by the buyer of the appellant and the final prices of the goods were less than the provisional price, on which the appellant resorted to provisional assessment. Since the Central Excise duty liability has been discharged on the higher provisional price, the appellant filed the refund application before the Jurisdictional Authorities, claiming refund of excess paid Central Excise duty. The refund application was rejected by the

jurisdictional Assistant Commissioner of Central Excise on the ground that no order has been passed by the appropriate authority in allowing payment of duty on provisional basis. Thus, the value assessed on such provisional basis has been rightly considered as assessable value and as such, there is no question of payment of any excess duty, resulting in refund of the same by the Department. The other ground assigned for rejection of refund claim is that the same is barred by limitation of time, having been filed beyond the period of one year from the relevant date as provided under Section 11B of the Central Excise Act, 1944.

5. On perusal of Rule 9B of the erstwhile Rules and Rule 7 of the present Rules, it reveals that as far as the procedures are concerned, there is no change in the said Rules. In both the said Rules, there is no stipulation that provisional assessment can be resorted to by the assessee for a specified period. In absence of any specific stipulation/ prohibition prescribing for the time limit for which the provisional assessment shall be valid, I am of the opinion that order dated 7.7.1989 allowing the provisional assessment by the Jurisdictional Central Excise Authorities will hold good for the disputed period, even if, the said period is governed under Rule 7 of the Central Excise Rules, 2002. My said view gets support from the letter dated 13.10.2001 of the appellant, addressed to the Chief Commissioner of Central Excise; Lucknow, wherein it has been specifically requested for accordance of permission to carry on the provisional assessment under Rule 7 of the Central Excise Rules, 2001/2002. The request letter of the appellant has so far not been disposed of by the empowered authority under the statute. Hence, I

am of the view that though the final price of goods has been settled between the appellant and its buyers, but in absence of acceptance of such final price by the Central Excise Authorities under Rule 7 of the Central Excise Rules, the refund application filed by the appellant is pre-mature. Thus, rejection of refund application on the ground that no permission has been granted for resorting to provisional assessment or the same is barred by limitation of time is not sustainable under the law. Hence, the impugned order is liable to be set aside on this ground.

6. Therefore, I am of the view that the refund application can only be filed upon finalization of assessment, which has not yet been done. Hence, after setting aside the impugned order, the matter is remanded back to the Original Authority for finalization of the provisional assessment and for passing necessary/ appropriate orders to that effect. If the finally assessed price is less than the provisional assessed price on which the Central Excise duty has been paid, the appellant will be at liberty to file the refund claim and in such eventually, the refund application should not be considered as time barred. Needless to say, that the original authority shall grant due opportunity of personal hearing before finalizing the provisional assessment. The appeals are disposed of in above terms.

(Dictated and pronounced in open court)

(S. K. Mohanty)
Member(Judicial)

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