IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: E/1586/2010

[Arising out of Order-in-Appeal No: YDB/244/M-II/2010 dated 17th May 2010passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – II.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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Bharat Sanchar Nigam Ltd … ***Appellant***

versus

Commissioner of Central Excise
Mumbai – II …***Respondent***

Appearance:

Shri M H Patil, Advocate for appellant

Shri Ajay Kumar, Additional Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing:	**01/01/2019**
Date of decision:	**23/01/2019**

ORDER NO: A/85159 / 2019

Per: C J Mathew

M/s Bharat Sanchar Nigam Ltd is in appeal against the rejection of its claim for refund of duties of central excise that had been recovered consequent upon proceedings for enhancement of assessable value in accordance with rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The appellant had sought refund of ₹ 1,31,14,890 for the period between May 2002 and August 2004 which was rejected by the original authority as the duty liability fastened on the appellant had not been challenged beyond the first appellate authority which had held against them and that the claim, based upon a decision of the Tribunal *vide* order no. A-150/KOL 2007 dated 20 February 2007 on an identical demand by Commissioner of Central Excise, Haldia, could not be allowed as the appellant was not a party to the dispute. The first appellate authority, Commissioner of Central Excise (Appeals), Mumbai Zone-II, *vide* order-in-appeal no. YDB/244/M-II/2010 dated

17th May 2010, expressing some doubts about the period for which the refund was sought, held that the narrowed down claim was liable to be rejected for being barred by limitation of time as the appellant had been unable to establish that the duties had been paid ‘under protest.’ Hence this appeal before us.

2. At the outset, Learned Counsel for appellant informs us that the appellant had been discharging its tax liability based on cost of production without adding the notional fixed percentage of profit as stipulated in rule 8 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 for the period prior to May 2002 and for the period after March 2007 as the goods were consumed entirely by its own operational ‘circles’ and that, for the period from October 2000 to April 2002 as well as for the period thereafter till March 2007, the liability was discharged owing to determination of duty liability in proceedings that, admittedly, had not been challenged beyond that of the first appellate authority. The demand for the period after March 2007, upon their ceasing to discharge duty liability following the decision of the Tribunal referred *supra*, had been dropped in the order of Commissioner of Central Excise, Mumbai Zone-I by placing reliance on the other order of the Tribunal. He further informed that a bench of the Tribunal had, *vide* order no. A/85173/18 dated 29th January 2018, in appeal of Revenue against the dropping of the demand by Commissioner of Central Excise, Mumbai

Zone–I, referred the matter to the Hon'ble President for constitution of a Larger Bench as the decision of the Kolkata bench, that had been relied upon for filing this refund claim as well as by the adjudicating authority for dropping proceedings in relation to the demand after March 2007, were found to be based on certain assumptions that are erroneous.

3. We have heard Learned Authorised Representative at length.

4. We take note that the impugned order has upheld the rejection of the refund claim on the ground of being barred by limitation of time prescribed in section 11B of Central Excise Act, 1944; consequently, the first appellate authority had not examined the merits of the appeal filed before him. It is also noted that the original authority had not held the claim to be barred by limitation of time but had rejected it on the premise that the dispute settled by the decision of the Kolkata bench of the Tribunal would not yield consequential relief to the appellant registered separately in the Mumbai jurisdiction. Hence, the first appellate authority had failed to restrict the proceedings to the appeal before him. Both of these are valid grounds for setting aside the order.

5. The appellant has produced the challans pertaining to discharge of duty liability on which 'protest' has been clearly noted. There can, thus, be no doubt that the claim was not barred by limitation of time.

In the absence of a consideration of the merit in the appeal, we are bereft of substance to consider in the appeal. This must be rectified.

6. To enable this, we set aside the impugned order and remand the matter back to the first appellate authority for a fresh decision on the merit of the claim of the appellant.

(Pronounced in Court on 23/01/2019)

(Ajay Sharma) ***Member (Judicial)***	**(C J Mathew)** ***Member (Technical)***

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