

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11.02.2016

Coram:

The Hon'ble Mr.Justice V.RAMASUBRAMANIAN  
and  
The Hon'ble Mr.Justice N.KIRUBAKARAN

Civil Miscellaneous Appeal No.2614 of 2008

Commissioner of Central Excise,  
Pondicherry Commissionerate,  
Goubert Avenue, Beach Road,  
Pondicherry - 605 001. ... Appellant/Respondent

Versus

1. Customs Excise And Service  
Tax Appellate Tribunal, Chennai,  
South Regional Bench,  
Chennai- 600 006.
2. M/s. IBM India Limited,  
RS No.19/1A, 19/2A,  
Thavalakuppam Revenue  
Village, Edayarpalayam,  
Pondicherry - 605 007. ... Respondents/Appellant

Civil Miscellaneous Appeal filed under Section 35G of  
Central Excise Act, 1944, against the Final Order No.1303 of  
2007, dated 31.10.2007 passed by the Customs, Excise and Service  
Tax Appellate Tribunal, South Regional Bench, Chennai-600 006.

For Appellant : Mr.A.P.Srinivas,  
Sr.Standing Counsel

For Respondent I : Tribunal

For Respondent-2 : C.Saravanan

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JUDGMENT

V.RAMASUBRAMANIAN, J

This appeal is filed by the Revenue, under Section 35G of  
the Central Excise Act, 1944, questioning the correctness of an  
order passed by the Customs, Excise and Service Tax Appellate  
Tribunal, Chennai. It was admitted on 22.8.2008 on the following

substantial questions of law:-

"1. Whether it is right in granting exemption, when the goods were not "supplied" either to the project or to the concerned International Organization funding the project but were supplied to the individual contractors who own these goods and not in any way under obligation to the "Project Authority" to use the goods in execution of the "Project"?

2. When the certificates were produced by the second respondent after clearance of the goods which is contrary to the conditions of the notification, whether first respondent is correct in holding that revenue has no case that appellants did not fulfill the substantive conditions of Notification?"

2. We have heard Mr.A.P.Srinivas, learned Senior Standing Counsel for the appellant Department and Mr.C.Saravanan, learned counsel for the second respondent.

3. The second respondent are the holders of a Central Excise Registration Certificate. They are manufacturing and clearing computers falling under Chapter Sub Heading No.8471.00 of the first Schedule to the Central Excise Tariff Act, 1985.

4. The second respondent cleared 1676 personal computers valued at Rs.5,17,46,000/- for a project known as "Second Health Systems Development Project" for implementation by the Government of West Bengal. Goods were cleared without payment of appropriate Central Excise Duty, in view of the exemption contained in Notification No.108/95 CE, dated 28.8.1995.

5. Contending that the exemption was wrongfully claimed by the second respondent assessee, the Additional Commissioner issued a show cause notice dated 19.10.2004. In the show cause notice, the Additional Commissioner gave four reasons for the issue of the show cause notice. They are:-

(i) that the exemption certificates were produced after the clearance of the goods from the factory, and not before the clearance as required under the Exemption Notification;

(ii) that the International Development Association, which financed the project had not been declared to be an International Organization as required by Clause (a) of Explanation (1) to the Exemption Notification dated 28.8.1995;

(iii) that the life span of the computers was around 6 years, but they may be used in the project only for one year or

less, making the computers available for use for other purposes;

(iv) that the computers were supplied not directly to the project but through intermediary by name "M/s. CMS Computers Limited, Kolkatta"; and

(v) that the Exemption Certificates were not countersigned by the Principal Secretary to the Government of West Bengal, as required by the Exemption Notification.

6. The assessee submitted a detailed reply. Thereafter, the Additional Commissioner passed an Order in Original bearing No.6/2005 dated 3.6.2005. In the Order in Original, the Additional Commissioner recorded the following findings:-

(i) that International Development Association is one of the five closely associated institutions of the World Bank, even as per the Statement of the Project Director of the Department of Health and Family Welfare of the Government of West Bengal and hence the inference that the project was funded by the World Bank was inevitable;

(ii) that the certificates have actually been countersigned by the Principal Secretary of the State of West Bengal, who was also holding the office as Principal Secretary, Health and Family Welfare Department, Government of West Bengal and there was no deviation;

(iii) that the objections with regard to the life span of the personal computers cannot be sustained, as the Notification was not an end use based notification and there is no condition that the computers should be put to use for such and such a period; and

(iv) that since CMS Computers Limited, Kolkatta to which the computers were supplied was a contractor, for the implementation of the very same project, it could be construed that the goods are supplied to a project approved by the Government.

7. On the basis of the above findings, the Additional Commissioner dropped further proceedings in the show cause notice, by his Order in Original. However, this Order in Original was later reviewed by another order dated 25.1.2006 in respect of a very small issue, about which we are not concerned.

8. However, the Department filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) allowed the appeal, on the only ground that the intended goods were not directly delivered to the Project Authorities but to an intermediary contractor. In other words, the Appellate Authority did not set aside the other findings which were part of the

imputations raised in the show cause notice.

9. The assessee filed further appeal before the Customs, Excise and Service Tax Appellate Tribunal, Chennai. The Customs, Excise and Service Tax Appellate Tribunal allowed the appeal on the basis of its own decisions in Caterpillar India Pvt. Ltd., v. Commissioner of Central Excise, Pondicherry [2005 (185) ELT 430]; Automatic Electric Ltd., v. Commissioner of Central Excise, Mumbai [2004 (178) ELT 524] and SPIC Organics Ltd., v. Commissioner of Central Excise, Chennai vide Final Order No.1569/2005 dated 3.11.2005 in Appeal No.E/216/2001. Aggrieved by the said order, the Revenue is on appeal.

10. As we have indicated earlier, the appeal was admitted on two substantial questions of law. The first question revolves around the issue as to whether the supply through a contractor to a project that comes within the purview of the Notification, could be construed as a supply.

11. On the first question, the answer is not too difficult to be found. A careful look at the Notification No.108/95-C.E. dated 28.8.1995 shows that the object of the Notification was to exempt all goods falling under the first Schedule to the Central Excise Tariff Act, 1985, when they are supplied to the United Nations or an International Organization for their official use or supplied to the projects financed by the United Nations or an International Organization and approved by the Government of India. It is sufficient to extract the first portion of the Notification to appreciate this point.

"In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise and Salt Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all goods falling under the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said goods) when supplied to the United Nations or an International Organization for their official use or supplied to the projects financed by the said United Nations or an International Organization and approved by the Government of India, from the whole of-"

12. The focus of the Notification is actually only on two things namely (a) goods when supplied to the United Nations or an International Organization for their official use or (b) goods supplied to the projects financed by the United Nations or

the International Organization and approved by the Government of India.

13. In other words, the supply made to the Organization indicated in the Notification for their official use as well as supply made to the projects financed by them, are both included within the purview of the Notification. It may be open, to the Department to contend, in some cases where the supply is made for the official use of International Organization that such supply should have been made directly. We are not saying this as an interpretation to the Notification, but we are indicating that at least if a case falls within the first limb, there is some possibility for the Department to take such a contention.

14. But when a case falls under the second limb namely supply to the projects financed by the United Nations or an International Organization, we do not know how an interpretation is sought to be given by the Department that such supply should have been made directly to the projects. The project in this case was undertaken by the Government of West Bengal. It was financed by the International Development Association and the same was approved by the Government of India. Therefore, it is completely illogical to think even in cases covered by the second limb, that the supply should have been made directly.

15. To put it differently, the Department seeks to insert the word "directly" into the Exemption Notification dated 28.8.1995, after the word "supply". No addition or deletion of any expression either by the Department or by the assessee is possible, when it comes to the interpretation of Exemption Notifications. Therefore, the first question of law is obviously to be answered against the appellant/Revenue, in view of the fact that the case on hand falls within the second limb namely "supply to the project financed by the United Nations."

16. Mr.A.P.Srinivas, learned Senior Standing Counsel for the Department placed heavy reliance upon the decision of the Punjab and Haryana High Court in Dee Development Engineers Limited v. Union of India [2010 (254) ELT 412], in support of his contention that the goods ought to have been supplied directly to the project, to enable the assessee to claim the benefit of the Exemption Notification.

17. But with great respect, we find that in para 16 of its decision in Dee Development Engineers, the Punjab and Haryana High Court did not deal with the difference between the two limbs of the Notification, the first relating to the supply to an International Organization and the second relating to the supply to the projects financed by the International Organization. Since this distinction was not noted in para 16 of its decision, we are unable to agree with the decision of the Punjab and Haryana High Court.

18. Mr.A.P.Srinivas, learned Senior Standing Counsel for the Department next relied upon the decision of the Andhra Pradesh High Court in Sterlite Industries (I) Limited v. Transmission Corporation of Andhra Pradesh Limited [(2005) 189 ELT 266]. In the said case, the Andhra Pradesh High Court recorded a finding of fact that the Organization in question namely JBIC was not one of the Organizations declared under the provisions of Section 3 of the United Nations (Privileges and Immunities) Act, 1947 (Act 46 of 1947). Therefore, the decision of the Division Bench of the Andhra Pradesh High Court is of no avail to the appellant.

19. Even the decision of the Principal Bench of CESTAT, New Delhi in Bird Machines v. Commissioner of Central Excise [2011 (263) ELT 82], will not be of any avail since the same revolves around the Explanation-(2) and not Explanation (1). Therefore, the first question of law is answered against the Appellant/Revenue.

20. In so far as the second question is concerned, it revolves around the issue as to whether the assessee could have produced certificates of exemption after clearance. But unfortunately for the appellant, the Original Authority held this question in favour of the assessee. The Commissioner reversed the decision of the Original Authority not on this ground. Therefore, the finding of the Original Authority in this regard has attained finality.

21. Moreover, the Supreme Court has already held in Commissioner of Customs v. Tullow India Operations Limited [2005 (189) ELT 401 (SC)] that even the production of certificates post-facto, is permissible in law. Therefore, the second question of law also has to be answered against the Revenue.

22. In the result, the appeal is dismissed. No costs.

s/d-  
Assistant Registrar (CS-III)

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Sub-Assistant Registrar

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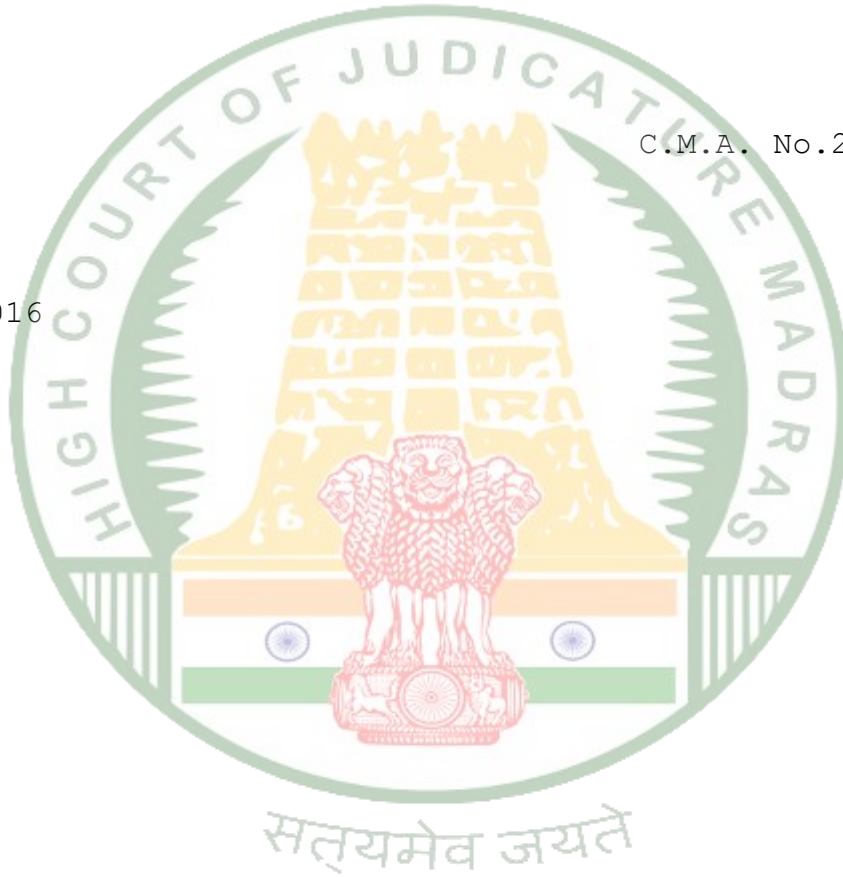
To

The Customs, Excise and  
Service Tax Appellate Tribunal,  
South Regional Bench, Chennai-600 006.

+1 cc to Mr.A.P.Srinivas Advocate sr.9247/16  
+1 cc to Mr.C.Saravanan Advocate sr.8964/16

C.M.A. No.2614 of 2008

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