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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4712/2016

MICROMAX INFORMATICS LIMITED ..... Petitioner

Through: Mr.Tarun Gulati, Mr.Shashi Mathews, Mr.Rony O John, Mr.Kishore Kunal and Mr.Ankit Sachdeva, Advocates

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr.V.P.Singh Charak, Senior Panel Counsel with Mr.Santosh Kumar Pandey, Advocate for UOI. Mr.Pramod Kr.Rai, Sr.Standing counsel and Mr.Deepak Anand, Jr.standing counsel for R-2 and R-3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

O R D E R

% 28.09.2016

1. The claim of the petitioner in these proceedings under Article 226 of the Constitution is that the rejection of the refund applications, preferred by it is contrary to law. The petitioner had imported mobile phones and paid additional duty of customs at the rate of 6% of the value from the imported goods which is equivalent to the rate of excise duty. Under prevailing notification and at the relevant time the rate of excise duty was 1% subject to condition that no CENVAT credit was availed of. The petitioner – being an importer and not a manufacturer had not availed of CENVAT credit. But the petitioner

claimed difference between excise duty leviable on like goods and the additional customs duty under a Notification no.12/2012 – CE, read with Section 3 (1) of the Customs Tariffs Act. The Assistant Commissioner who considered the refund application, applied the law declared by the Supreme Court in ***Motiram Tolaram vs. Union of India*, 1999 (112) ELT 749 (SC)**.

2. It is contended on behalf of the petitioner that the rejection of its refund application is unsustainable given the larger Constitution bench ruling in ***Hyderabad Industries Ltd. vs. Union of India* (1999) 5 SCC 15** and recent decision in ***Aidek Tourism Services Pvt. Ltd. vs. Commissioner of Customs* 2015 SCC Online SC 314** and ***SRF Limited vs. Commissioner of Customs, Chennai*, 2015 (318) ELT 607 (SC)**.

3. In ***SRF Limited***'s case (*supra*), the condition applicable i.e. No.20 relied upon by the revenue was that credit should not have been availed of under CENVAT for inputs or capital goods used in the manufacture of dutiable goods in India.

4. The Supreme Court rejected the contentions identical with the present one espoused by the revenue in the present case:

> *6. In the present case, admitted position is that no such CENVAT credit is availed by the Appellant. However, the reason for denying the benefit of the aforesaid Notification is that in the case of the Appellant, no such credit is admissible under the CENVAT Rules. On this basis, the CEGAT has come to the conclusion that when the credit under the CENVAT Rules is not admissible to the Appellant, question of fulfilling the aforesaid condition does not arise. In holding so, it followed the judgment of the Bombay High Court in the case of 'Ashok Traders v. Union of India' [1987 (32) ELT 262]*

wherein the Bombay High Court had held that "it is impossible to imagine a case where in respect of raw nephtha used in HDPE in the foreign country, Central Excise duty leviable under the Indian Law can be levied or paid." Thus, the CEGAT found that only those conditions could be satisfied which were possible of satisfaction and the condition which was not possible of satisfaction had to be treated as not satisfied.

7. We are of the opinion that the aforesaid reasoning is no longer good law after the judgment of this Court in Thermax Private Limited v. Collector of Customs (Bombay), New Customs House [1992 (4) SCC 440=1992 (61) ELT 352 (SC)] which was affirmed by the Constitution Bench in the case of 'Hyderabad Industries Limited v. Union of India' [1999 (5) SCC 15 = 1999 (108) ELT 321 (SC)]. In a recent judgment pronounced by this very Bench in the case of 'AIDEK Tourism Services Private Limited v. Commissioner of Customs, New Delhi' [Civil Appeal No. 2616 of 2001-2015 (318) ELT 3 (SC)], the principle which was laid down in Thermax Private Limited and Hyderabad Industries Limited was summarised in the following manner:

> *15. The ratio of the aforesaid judgment in Thermax Private Limited (supra) was relied upon by this Court in Hyderabad Industries Ltd. (supra) while interpreting Section 3(1) of the Tariff Act itself; albeit in somewhat different context. However, the manner in which the issue was dealt with lends support to the case of the Assessee herein. In that case, the court noted that Section 3(1) of the Tariff Act provides for levy of an additional duty. The duty is, in other words, in addition to the customs duty leviable Under Section 12 of the Customs Act read with Section 2 of the Tariff Act. The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable Under Section 3(1) would be the excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation deals with the situation where 'a like*

article is not so produced or manufactured'. The use of the word 'so' implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced or manufactured in India. The words 'if produced or manufactured in India' do not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced, then it must be presumed, for the purpose of Section 3(1), that such an article can likewise be manufactured or produced in India. For the purpose of attracting additional duty Under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. For quantification of additional duty in such a case, it has to be imagined that the article imported had been manufactured or produced in India and then to see what amount of excise duty was leviable thereon.

(Emphasis supplied)

8. We are of the opinion that on the facts of these cases, these appeals are squarely covered by the aforesaid judgments. We accordingly hold that appellants were entitled to exemption from payment of CVD in terms of Notification No.6/2002. The appeals are allowed and the demand of CVD raised by the Respondents-authorities is set aside.

5. The court also notices that the decision of the Supreme Court was applied by this court in at least two other judgments i.e. ***YU Televentures Pvt. Ltd. vs. Union of India*** [WP(C) 6750/2016 decided on 03.08.2016] and ***Vishal Video & Appliances Pvt. Ltd. vs. Union of India & Others*** [WP(C) 7851/2016 decided on 05.09.2016].

6. In the light of the above, the petition has to succeed and direction is issued to the respondent to process the refund claims and

pass appropriate orders, having regard to the fact that the petitioner has filed supporting certificates in the form of Chartered Accountant's Certificate and other documents, claiming that the benefit was not passed on to the consumer. The respondents are directed to pay the appropriate refund amount together with interest payable till the date of actual payment, within three weeks from today.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

SEPTEMBER 28, 2016
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