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

\+ W.P.(C) 10513/2016, C.M. APPL.41220-1221/2016

LAVA INTERNATIONAL LTD. ..... Petitioner

Through : Sh. M.P. Devnath with Sh. Abhishek Anand and Sh. Yogendra Aldak, Advocates.

versus

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

Through : Sh. Kavindra Gill, CGSC, for UOI.
Sh. Sanjeev Narula, Sr. Standing Counsel with Sh. Abhishek, Advocate, for Respondent Nos. 2 and 3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

O R D E R

% 30.11.2016

1. Issue notice. Sh. Kavindra Gill, CGSC accepts notice on behalf of Respondent No.1 and Sh. Sanjeev Narula, Sr. Standing Counsel accepts notice on behalf of Respondent Nos. 2 and 3.

2. With consent, the matter was heard finally.

3. The petitioner seeks a direction for the respondents to process its application for refund under Section 27 of the Customs Act, claiming a refund of additional customs duty made on import under Section 3(1) of the Customs Tariff Act. The petitioner had imported mobile handsets including cellular phones and according to it had made excess payments under protest and complied with condition no. 16 of Notification No. 12/2012-Ex. dated 17.03.2012. This notification was admittedly amended vide Notification No. 12/2012-

CE.

4. The impugned order of the Commissioner of Customs (Appeals) rejected the refund claim. The adjudicating authority held that the petitioner could not establish its entitlement to CENVAT credit and, therefore, was ineligible for the refund. The petitioner had relied upon the ruling of the Supreme Court in *SRF Ltd. vs. Commissioner of Customs, Chennai* 2015 (318) ELT 607 (SC) and the order of this Court in *Micromax Informatics Ltd. vs. UOI and Ors.* in W.P.(C) 4712/2016, decided on 28.09.2016. This Court in *Micromax Informatics Ltd. (supra)* extracted the contentions and findings recorded by the Supreme Court which had considered earlier rulings, such as, *Motiram Tolaram vs. Union of India* 1999 (112) ELT 749 (SC); *Hyderabad Industries vs. Union of India* 1999 (108) ELT 321 (SC) and discussed the principle applicable in the following terms:

> *"..... 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:*
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> *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....”*

5. This Court noticed that in Micromax Informatics Ltd. (supra) the claim was identical as in the present case; the petitioner could not claim CENVAT credit as it was an importer and nevertheless claimed the difference between the excess duty paid and additional customs duty under Notification No. 12/2012-CE.”

In the light of the foregoing discussion and the law declared in *SRF Ltd. v. Commissioner of Customs, Chennai* 2015 (318) ELT 607 (SC), the petitioner’s claim has to succeed. A direction is issued to the respondents to process the refund application and pass appropriate orders having regard to the materials placed provided it is filed within two weeks from today.

The writ petition is allowed in these terms. No costs.

Order dasti.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

NOVEMBER 30, 2016
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