

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/446 /2011-456 /2011 - CU[DB]
C/S/2415-2425/2011

Date 25/01/2012

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C. (ICD) NEW DELHI
ICD, TUGHLAKABAD, NEW DELHI 110020.

C.C. (ICD) NEW DELHI

Appellant

Vs
Respondent

M/S RELIANCE COMMUNICATIONS INFRASTRUCTURE LTD.

I am directed to transmit herewith a certified copy of **Final order No.C/A/26-36/ 2012 CU[DB]** dated 08.12.11

passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Alongwith Stay order No. C/S/12-22/12

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent

M/S RELIANCE COMMUNICATIONS INFRASTRUCTURE LTD.

H-BLOCK, DHIRUBHAI AMBANI
KNOWLEDGE CITY, THANE-
BELAPUR ROAD,
KOPARKHAIRANE,
NAVI MUMBAI.

400710

2. Adv. / Consult : Mr. Tarun Gulati, Adv
C/O Respondent

3. C.D.R

4. Bar association. CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3

7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17

8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road.
Ahmedabad-15

10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)

11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Guard file

Assistant Registrar
(Customs Appeal Branch)

14. **M/S RELIANCE COMMUNICATIONS INFRASTRUCTURE LTD.**
H-BLOCK, DHIRUBHAI AMBANI KNOWLEDGE CITY, THANE-BELAPUR
ROAD, KOPARKHAIRANE,
NAVI MUMBAI

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.

Date of hearing/decision: 08.12.2011

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)

Hon'ble Sh. Rakesh Kumar, Member (Technical)

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

Custom Stay Nos. 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424 & 2425 of 2011 and Custom Appeal Nos. 446, 447, 448, 449, 450, 451, 452, 453, 454, 455 & 456 of 2011

(Arising out of order in appeal No. ICD/217-227/2011 dated 05.05.2011 passed by the Commissioner of Customs (Appeals), New Delhi).

CC (ICD), New Delhi

Appellants

Vs.

M/s Reliance Communications Infrastructure Ltd. Respondent

Appearance:

Rep. by Sh. K.P. Singh, DR for the appellants.

Rep. by Sh. Tarun Gulati with Sh. Shashi Mathews, Advocates for the respondent.

Coram: Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Sh. Rakesh Kumar, Member (Technical)

Final ORDER NO. C/A/26-36/12-Cus
Stay order No. C/S/12-22/12-Cus

Per: Rakesh Kumar:

The facts leading to these appeals by the Revenue, in brief, are as under:-

1.1 The respondent imported Set Top Boxes on payment of duty including Special Additional Duty (SAD) under Section 3(5) of Indian Customs Tariff Act, 1975. Exemption Notification No. 102/07-Cus dated 14.09.2007 issued under Section 25(1) of Customs Act, 1962 provides for exemption from SAD subject to the following conditions:-

- (a) The goods have been imported into India for subsequent sale;
- (b) At the time of import, the importer shall pay all the duties including SAD as applicable;
- (c) The importer while issuing the invoices for sale of the said goods shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of SAD levied under Section 3(5) of Customs Tariff Act, 1975 shall be taken.
- (d) The importer shall file claim for refund of SAD with the jurisdictional Customs Officer;
- (e) The importer must have paid appropriate tax on the sale of the said goods; and
- (f) The importer shall provide copies of the documents evidencing payment of SAD, sales invoice in respect of imported goods for which the refund of SAD has been

claimed and documents evidencing payment of appropriate sales tax or VAT as the case may be.

1.2. In this case the respondent after import of the Set Top Boxes supplied those Set Top Boxes to consumers on right to use basis and in respect of such supply, the VAT was paid by them by treating the same as sale. As per the definition of sale in the VAT Act of the State Governments or the Central Sales ^{Tax} Act, 1956 the term 'Sale' includes transfer of right to use any goods for any purpose (whether or not for specified period) for cash or deferred payment or other valuable consideration. The respondent within a period of one year from the date of payment of duty filed eleven claims for refund of SAD with the jurisdictional Customs authority. The refund claims were, however, rejected by the Deputy Commissioner on the ground that there was no sale of Set Top Boxes, as the invoices issued by the respondent under which the Set Top Boxes have been supplied to the consumers, mention that the Set Top Boxes remain the property of the respondent. On appeal to Commissioner (Appeals), the Commissioner (Appeals) vide order-in-appeal dated 05.05.2011 set aside the Deputy Commissioner's order and allowed the refunds on the ground that for the purpose of claiming refund of SAD under Notification No. 102/2007-Cus, what is material is as to whether the sales tax/VAT has been paid on the goods at the appropriate rate and sale in the notification must be understood in the sense ^{in which} it has been defined in the VAT Act of the State Government or the Central Sales Tax Act, 1956. He also observed that since Notification No. 102/2007 does not define

'sale', for the purpose of grant of refund of SAD paid at the time of import, it would be legal and reasonable to adopt the definition of 'sale' ⁱⁿ the VAT Act^s of State Governments or Central Sales Tax Act, 1956, as that alone determines the charge of VAT/CST upon sale. The Commissioner (Appeals) also observed that Cenvat Credit of SAD paid under Section ^{3C5} 44 of the Customs Tariff Act has not been availed by the respondent and in the exemption notification, there is no prohibition on availing cenvat credit of additional custom duty ^{paid} ~~payable~~ under Customs Tariff Act, 1975. Against this order of the Commissioner (Appeals), these appeals alongwith stay applications have been filed.

2. Heard both the sides. Though these matters were listed for hearing of the stay applications, after hearing these stay applications, we are of the view that the same can be taken up for final disposal. Accordingly, the matters were heard for final disposal with the consent of both the sides after waiving the pre-deposit.

3. Shri K.P. Singh, Id. DR assailed the impugned order passed by the Commissioner (Appeals) by reiterating the grounds of appeal in the revenue's appeal and emphasized that the respondent at the time of importation had declared that the goods are not meant for sale and on this basis they also took exemption from printing MRP on the packages of the goods as per the provisions of Standards of Weights and Measures Act; that though the respondent have paid VAT in terms of VAT Acts of the respective State Governments, on transfer of the imported Set Top Boxes to the consumers on right to use basis,

the invoices clearly mentioned that the Set Top Boxes remain the property of the respondent from which it is clear there is no sale of Set Top Boxes and mere transfer of imported Set Top Boxes to the consumers on right to use basis ^{for some consideration} cannot be termed as sale even if the VAT has been paid, as the ownership of the goods has remained with the respondent. He also emphasized that by the impugned order, the Commissioner (Appeals) has remanded the matter to the original authority with certain directions for which he has no powers, He, therefore, pleaded that the impugned order is not correct.

4. Sh. Tarun Gulati, Advocate, the learned Counsel for the respondent, defended the impugned order by reiterating the findings of the Commissioner (Appeals) and emphasized that ⁱⁿ by the Notification No. 102/2007-Cus, in absence of any definition of the word 'sale', this term must be understood on the basis of its definition in the Central Sales Tax Act or the VAT Acts of the State Government, that the purpose of the exemption Notification No. 102/2007-Cus is that imported goods should not suffer the special additional custom duty as well as VAT/ Sales Tax on their sale; that for the exemption from SAD under this notification what is relevant is as to whether the VAT or Sales Tax has been paid on the goods, irrespective of whether the transactions were on actual sale or deemed sale.

5. We have carefully considered the submissions from both the sides and perused the records. In this case, there is no dispute that the Set Top Boxes have been imported by the respondent for supply to their consumers on right to use basis for which some amount is

charged by the respondent and on that amount VAT has been paid in terms of provision of the VAT Acts of the State Governments. The department's contention is that supply of Set Top Box on right to use basis to the consumers when the ownership remains with the respondent cannot be treated as sale. Relevant portion of the exemption Notification No. 102/2007-Cus dated 14.09.2007 is reproduced below:-

"G.S.R. (E)- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

- (a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;
- (b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;
- (c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;
- (d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;
- (e) the importer shall, inter alia, provide copies of the following documents alongwith the refund claim:
 - (i) document evidencing payment of the said additional duty;

- (ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;
- (iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods”.

6. Thus, from the perusal of the notification, it is clear that for refund of SAD the main condition to be satisfied are-

- (a) “The goods have been imported for sale;
- (b) On sale of the goods, appropriate sales tax or VAT has been paid; and
- (c) The sales invoices specifically indicate that no credit of the SAD paid under Section 3(5) of the Customs Tariff Act, 1975 shall be admissible”.

7. The main purpose of the exemption is that the same goods should not suffer SAD as well as VAT/ Sales Tax. Though the word ‘sale’ has not been defined in this notification, it is clear that the word ‘sale’ must be understood in the sense in which it has been defined in sales tax /VAT Acts of various State Governments or Central Tax Act, 1956 and in ^{then} ~~this~~ Act, the word ‘sale’ also includes transfer of right to use any goods for any purpose (whether or not for a specified period) for cash or deferred payment or other valuable consideration. In this case, there is no dispute that the imported Set Top boxes have been supplied by the respondent to their consumers on right to use basis for which some amount has been charged ^{on which VAT has been paid}. Department’s plea that the respondent’s transaction with their customers cannot be treated as sale is, therefore, without any basis. It is also not the allegation of the department ~~is~~ that the customers to whom the Set Top boxes have been

supplied on right to use basis have availed cenvat credit of the SAD. As observed by the Commissioner (Appeals) in the impugned order, even the respondent have not availed the cenvat credit of the SAD in their RG23-C Part-II register. As regards department's plea that the Commissioner (Appeals) remanded the matter to the original authority for which he has no powers, we find that there is no order for remand and what the Commissioner (Appeals) has done is that he has allowed ^{for the purpose of refund,} the appeal subject to verification of the original documents wherever necessary in terms of the Notification No. 102/2007-Cus. and this direction cannot be treated as remanding the matter to the original adjudicating authority for denovo adjudication. In view of this, we do not find any infirmity in the impugned order. The appeal as well as stay applications of the Revenue are dismissed.

^{operative}
(~~C1~~ portion of the order pronounced in the open Court)

(Arshana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

Pant