

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Excise Appeal No. 433 of 2010

(Arising out of Order-in-Original No. 06-07/Commissioner/10 dated 19.03.2010 passed by Commissioner of Central Excise, Jamshedpur.)

M/s Tata Motors Limited,

Mr. Dhanu Kumar D.M. (Finance)
Finance Division Tata Motors Limited,
Jamshedpur-831010.

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Jamshedpur.

143, New Baradwari, Sakchi, Jamshedpur-831001.

..Respondent(s)

APPEARANCE :

Shri Rahul Tangri, Advocate & Ms. Payal Bharwani, Chartered Accountant, for the Appellant

Shri Mihir Ranjan, Special Counsel, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No.....75833/2023

DATE OF HEARING : 2nd May, 2023

DATE OF PRONOUNCEMENT: 22nd June, 2023

PER K. Anpazhakan :

The Appellant is engaged in manufacturing commercial motor vehicles/chassis, in their factory at Jamshedpur. During the period March 2008 to August 2009, they have cleared few chassis for executing projects funded by World Bank, by claiming the benefit of Exemption Notification 108/95 dated 28.08.1995, as amended.

2. As per the conditions of the Notification, the Appellant has produced a certificate from the Executive Head of the Project Implementing Authority, countersigned by the nodal ministry of Government of India, to the effect that

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the goods were required for execution of the project, which has been approved by the Government of India.

3. Two Show Cause Notices dated 04.03.2009 and 15.12.2009 were issued to the Appellant demanding excise duty of Rs.5,94,19,588/- along with interest and equivalent penalty on the chassis cleared, by denying the exemption on the ground that the supplied goods were not in the nature of being consumed in the core activity of the project on permanent basis. Further, it was also alleged that the contractors purchased the goods in their own name, from their own funds.

4. The Notices were adjudicated and the demands made in the Notices were confirmed vide Order-in-Original dated 19.03,2010. Aggrieved against the impugned order, the Appellant is before us.

5. In their submissions, the Appellant stated that Notification 108/95 grants exemption to all goods required for execution of the projects financed by international organizations like World Bank, Asian Development Bank etc. To claim exemption, the manufacturer has to obtain a certificate from the head of the Project Implementing Authority, countersigned by an officer not below the rank of Joint Secretary to the Government of India or Principal Secretary or Secretary to the State Government, to the effect that the goods are required for execution of the project which has been approved by the Government of India.

6. Explanation 2 was inserted in the Exemption Notification with effect from 01.03.2008, which is reproduced below:

“[Explanation 2. For the removal of doubts, it is hereby clarified that the benefit under this notification, in the case of goods supplied to the projects financed by the United Nations or an international organization, is available when the goods brought into the project are not withdrawn by the supplier or contractor and the expression “goods are required for the execution of the project” shall be construed accordingly.]”

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7. The Appellant stated that the goods supplied are required for execution of the project, as is evident from the certificate issued by the Project Implementing Authority. The Appellant also obtained declaration from the contractors that the goods shall not be withdrawn from the project and they are meant to be used on permanent basis in the execution of the project.

8. The Appellant stated that CBEC issued clarification vide Circular dated 12.06.2008, which has added words to the Notification which were not there.

For ready reference, the Circular is reproduced below:

F. No. 101/7/2008-CX-3
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs

Dated:- June, 12,

2008

Sub:- Exemption from Excise duty under the Notification No. 108/95 CE dated 28.08.95.

I am directed to refer to Explanation 2 to notification No. 108/95 CE dated 28.08.95, inserted vide notification No. 13/2008 CE dated 01.03.2008, specifying that the benefit under the notification is available when the goods brought into the project are not withdrawn by the supplier or the contractor.

2. Representations have been received expression doubts regarding the scope of the said Explanation to the notification.

3. The matter has been examined. The purpose of this notification is to enable the optimum utilization of funds provided by United Nations/International Agencies. The exemption was meant to be applied only to goods procured with the project funds and actually used and consumed in the core activity of the project. In the case of equipment's purchased by contractors independently. After completion of the project, the contractor re-allocates the equipment for other commercial use.

Therefore, it is clarified that the exemption is meant only for the goods which become part of the project on permanent basis and not for the goods which are used by the contractors for execution of the project and after completion of the project, goods remain with

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the contractors, being owners of such goods for further deployment in other projects.

The amendment is purely clarificatory in nature and states the position that always meant to be.

4. All pending disputes may be resolved accordingly. All the state governments and other authorities who issue the essentiality certificate may be requested to ensure that the certificates are issued only for goods which satisfy the above discussed criterion.

Dilip Goyal
Under Secretary to the Govt. of India.

9. As per the above mentioned Circular, the exemption is applicable to goods which form part of the project on permanent basis and not to the goods which are used for execution of the project and after completion of the project remain with the contractors, for further deployment in other projects. The appellant stated that this interpretation has gone beyond the mandate of the Notification.

10. The Appellant stated that the dispute has been settled by the Tribunal in the case of Schwing Stetter (I) Pvt. Ltd Vs CCE&ST.LTU,Chennai-2018(364) ELT 653 (Tri.-Chennai) which is squarely applicable to the facts of the instant case. Accordingly, they contended that the demands confirmed in the impugned order are not sustainable.

11. The Ld. Departmental Representative reiterated the findings of the adjudicating authority in the impugned order and stated that the Appellant was not eligible for the benefit of the Exemption Notification as per the clarification given by the Circular dated 12.06.2008.

12. Heard both sides and perused the Appeal records.

13. The issue involved in the present appeal is with respect to eligibility of benefit of the Exemption Notification 108/95 dated 28.08.1995, as amended. The Appellant has supplied chassis for executing projects funded by World

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Bank, by claiming the benefit of Exemption Notification 108/95 dated 28.08.1995. Notification 108/95 grants exemption to all goods required for execution of the projects financed by international organizations like World Bank, Asian Development Bank etc. To claim the exemption, the manufacturer has to obtain a certificate from the head of the Project Implementing Authority, countersigned by an officer not below the rank of Joint Secretary to the Government of India or Principal Secretary or Secretary to the state Government, to the effect that the goods are required for execution of the project, which has been approved by the Government of India. The Appellant has got the certificates and hence they fulfilled the condition stipulated in the Notification 108/95 dated 28.08.95, to avail the exemption.

14. The Appellant stated that after introduction of Explanation 2 to the Notification, CBEC issued clarification vide Circular dated 12.06.2008, which has added words to the Notification which were not there. As per the Circular, the exemption is applicable to goods which form part of the project on permanent basis and not to goods which are used for execution of the project and after completion of the project remain with the contractors, for further deployment in other projects. This interpretation has not been envisaged in the Explanation 2.

15. We observe that the department has interpreted the Explanation 2 wrongly. The Explanation 2 would only mean that the goods brought into the project should not be withdrawn by the contractor during the course of execution of the project. After the project is completed the contractor is well within his right to withdraw the capital goods and machinery used in execution of the project, since it does not form part of the structure of the project. The department wrongly interpreted the Explanation 2 to mean that only the goods which are consumed in the project are eligible for the exemption. If such a interpretation is accepted, then no capital goods will be eligible for the

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exemption, as the machinery or capital goods will not be get consumed in the project. Thus, the only plausible interpretation for the Explanation 2 would be that the goods brought into the project should not be withdrawn by the contractor during the course of execution of the project. After the project is completed and if the contractor shifts the capital goods to some other project, then the exemption cannot be denied.

16. We find that this view has been taken by the Tribunal in the case of Schwing Setter (I) Pvt. Ltd Vs CCE&ST.LTU,Chennai-2018(364) ELT 653 (Tri.-Chennai). The relevant portion of the order is reproduced below:

"2.2 The second ground is that as per Explanation 2 inserted w.e.f. 1-3-2008, in the Notification No. 108/95, when the goods are withdrawn from the project site during the pendency of the project, the assessee would not be eligible for exemption. The department alleges that the impugned goods viz., concrete mixers have been withdrawn by appellant after completion of the project and thus not eligible for exemption. He submitted that Explanation 2 in the said notification seeks to deny the exemption benefit only when the goods are withdrawn during the tenure of the project and not otherwise. The department has interpreted this Explanation to extend the work "withdrawal" even after completion of the project. This interpretation is highly erroneous. The department has incorrectly interpreted the word "withdraw" to refer to the time period even after completion of the project. In this regard, he placed reliance on the Explanatory Notes to the Budget changes 2008-2009. As per Sl. No. 3 under "miscellaneous Changes" it is stated that the Explanation has been inserted in the Notification, "to reflect the intention that the benefit of the exemption is not available for goods supplied to a project for temporary use". It is clear that the Explanation seeks to deny the benefit to goods which are withdrawn during the currency of the project. The goods supplied by the appellant to the contractors are used in the approved projects for the total duration of the project. The department does not allege that the goods were withdrawn at any point of time during the currency of the project. The goods have been withdrawn after execution of the project since they are not used in the said project any more. In addition, the Ld. Counsel submitted that the Central Excise department has dropped the proceedings

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initiated vide 14 SCNs issued for the subsequent period in appellants own case. The department has accepted this order and no appeals have been filed. The CCE, LTU, Chennai vide OIO No. LTUC/568-568/2016, dated 30-9-2016, in identical set of facts, in appellant's own case held that the appellants are eligible for exemption under Notification No. 108/95. The Ld. Counsel argued that the exemption Notification is available for capital goods which are not completely consumed in the approved projects. The stand of department that the exemption is available only to those goods which are consumed in the project or become part of the project on a permanent basis is incorrect. The authorities below have denied the exemption by incorrectly interpreting the abovesaid Explanation 2 inserted in Notification No. 13/2008, dated 1-3-2008. He pleaded that the appeal may be allowed.

3. *The Ld. AR, B. Balamurugan supported the findings in the impugned order. He adverted to Explanation 2 of the Notification and submitted that the benefit of the Notification is available only when the goods brought into the project are not withdrawn by the supplier or contractor. The exemption would be applicable only for such goods which become part of the project on permanent basis (eg : cement and steel etc.) and not for those which are used by the contractors for execution of the project who after completion of the project will become the owners of the said goods and would put the said goods for further deployment in other project. That in the present case, the appellant has withdrawn the capital goods after completion of the project and therefore the exemption has been rightly denied by the authorities below. To support his contention he relied upon the decision in the case of *Bird Machines v. CCE, Delhi - 2011 (263) E.L.T. 82* (Tri.-Del.), that in the said case, the Division Bench of the Tribunal has held that withdrawal of machines even after completion of the project would disqualify for the exemption under the said notification.*

4. *Heard both sides.*

5. *The first issue is whether the denial of exemption on the ground that the impugned goods are supplied to the contractor of the project instead of the Project Authorities is correct or not. This issue was considered by the jurisdictional High Court in the case of *CCE, Pondicherry v. Caterpillar India Pvt. Ltd. (supra)*. The respondent in the said case was a manufacturer of variety of earth moving*

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equipments and these products were cleared under the Notification No. 108/95, dated 28-8-1995 to the contractors executing "Golden Quadrilateral Road Project" financed by the United Nations and International Organization claiming exemption from duty. The Hon'ble High Court held that the use of the phrase "supply to the projects financed by United Nations or International Organization and approved by the Government of India" clearly shows that the condition for grant of exemption is supply of the goods towards the project. That since the conditions are satisfied, the benefit of exemption cannot be denied stating that the goods were supplied to the contractor. The Hon'ble Apex Court has affirmed the said decision. Similar view was taken by the jurisdictional High Court and Tribunal in the decisions relied by the appellants and cited supra. Following the same, we are of the view that the denial of exemption benefit on the ground that the goods were cleared to contractors cannot sustain.

6. *The second issue is with regard to the denial of exemption on the basis of Explanation 2 inserted in Notification 108/95-C.E. w.e.f. 1-3-2008. For better appreciation the Explanation 2 is reproduced as under :-*

"Explanation 2 :- For the removal of doubts, it is hereby clarified that the benefit under this notification, in the case of goods supplied to the projects financed by the United Nations or an International Organization, is available when the goods brought into the project are not withdrawn by the supplier or contractor and the expression "goods are required for the execution of the project" shall be construed accordingly.

7. *The argument of the Ld. AR is that the exemption would be eligible only to those goods such as cement, steel which become permanently part of the project. That since the capital goods are withdrawn after completion of the project, these goods are not eligible for exemption. He has strongly relied upon the decision of the Tribunal in the case of Bird Machines v. CCE, Delhi - [2011 \(263\) E.L.T. 82](#) (Tri.-Del.). The relevant portion of the said decision in Bird Machines case is reproduced as under :-*

"39. It is contended that the Explanation II being clarificatory nature, it supports the case of the appellants. The Explanation prohibits withdrawal of the goods from the project by the

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supplier or the contractor. The same according to the Advocate for the appellants discloses that the ownership of the goods is immaterial and can vest in any supplier or contractor. First of all one has to understand that we are trying to interpret an explanation to a notification. It is settled law that the explanation cannot be construed beyond the scope of what is provided under the main provision itself. Explanation is added to any statutory provision to avoid any ambiguity arising out of the main statutory provision. The explanation cannot have existence independent of the main statutory provision. Being so, based on explanation itself, one is not entitled to enlarge the scope of the main notification more so, when the explanation is added to clarify what is stated in the main part of the notification. We find the clarification is in consonance with what we have expressed hereinabove. The explanation in question merely makes the position more explicit as discussed above. The bar prescribed against the withdrawal is at a stage after clearance of the goods for the project and on arrival of the goods at the project site. Prohibition of withdrawal is from the project site. But arrival of goods at the site by availing benefit under the notification has to be on supply of such goods 'to' the project 'for' the use at the project site, from where such goods cannot be withdrawn by the contractor even after completion of the project work. In other words, he cannot claim any ownership right over such goods."

8. *In the Bird Machines case, the main issue was whether the exemption is available when the goods are supplied to the Contractors. The Hon'ble Apex Court vide judgment reported in [2016 \(335\) E.L.T. A27](#) (S.C.) subsequently has affirmed the decision of the jurisdictional High Court in Caterpillar India (P) Ltd. (supra). Therefore, the decision given in Bird Machines being prior to the judgment of Hon'ble Apex Court is no longer a good law and cannot be relied upon. The jurisdictional High Court in the case of CCE, Pondicherry v. CESTAT, Chennai - [2016 \(335\) E.L.T. 211](#) (Mad.) has considered the eligibility of exemption Notification No. 108/95 and followed the decision in the case of Caterpillar India (P) Ltd. (supra). It is pertinent to mention that the Hon'ble High Court in the said judgment had disagreed with the judgment laid in the case of Bird Machines (supra). We find that in para-39 of the judgment in the*

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case of Bird Machines, the Tribunal made an observation that benefit is available only when the goods are supplied to the project for the use at the project site. The Ld. AR has laid much thrust on the last two sentences in this para. In our view this is only a passing observation and does not lay down the ratio of the case. In other words, the issue agitated in the said case was not whether the exemption under the notification would be available if the goods are withdrawn after the completion of the project. Being only obiter dicta the same does not have precedential value. This apart, to compel the contractor that the capital goods used in the project cannot be withdrawn even after completion of the project would be highly impractical and impossible. The law does not compel a man to do that which he cannot possibly perform. 'Lex. non cogit ad impossibilia'. The decisions in the case of Caterpillar India Pvt. Ltd, (supra), IBM India Pvt. Ltd., held that the goods supplied to Contractors were available for exemption. The goods involved in these cases are not goods such as cement or steel which form part of the project permanently. The Higher Courts have held that exemption is available even if such goods are supplied to Contractor and that supply to Contractor would mean supply to Project Authority as stated in the Notification. The department cannot then interpret the Explanation inserted in the Notification to restrict the exemption only to goods which form part of project on permanent basis. The appellant has complied with the condition of furnishing certificate of designated authorities. The department allowed clearance of the goods without any murmur on the validity of the certificate. The department cannot later turn around to deny exemption by interpreting Explanation 2 to the effect that the exemption is not available if the goods are withdrawn from project site. The Contractor would not be able to retain the capital goods in the project site after completion of the project and the interpretation of Explanation 2 by the Department in this angle does not find favour with us.

9. *From the discussions made above and following the law laid in the above decisions, we are of the view that the denial of exemption is unjustified. The impugned order is set aside. The appeals are allowed with consequential reliefs, if any".*

17. The decision of the Tribunal cited above clearly supports the view of the appellant. Thus, we hold that the Appellant are eligible for the benefit of the

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Notification 108/95 dated 28.08.95, for the chassis cleared to the projects funded by international organizations, as they have fulfilled the conditions stipulated in the Notification. Accordingly, we hold that the impugned order is liable to be set aside.

18. In view of the above discussion, we allow the appeal filed by the Appellant, with consequential relief, if any, as per law.

(Pronounced in the open court on...22nd June, 2023...)

Sd/-

(P. K. Choudhary)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar