CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Customs Appeal No. 175 of 2012

(Arising out of Order-in-Appeal No. GOA/CUS/GSK/53/2011, dated 05.10.2011 passed by Commissioner of Central Excise & Customs (Appeals), Goa)

M/s Marine Infrastructure (Goa) Pvt. Ltd. .....**Appellant**
Ocianic Apartment,
Behind Maruti Temple,
Miramar Beach,
Panaji – Goa.

VERSUS

Commissioner of Central Excise, Goa .....**Respondent**
ICE House, EDC Complex,
Plot No. 6, Patto, Panaji –Goa
Pin-403001

Appearance:

Shri C.S. Biradar, Advocate for the Appellant
Ms. P.V. Selchar, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/88522 / 2018

Date of Hearing: 04.12.2018
Date of Decision: 04.12.2018

Per: S.K. MOHANTY

Briefly stated, the facts of the case are that the appellant herein had imported floating crane from Singapore and filed the Bill of Entry for assessment before the jurisdictional customs authorities. The subject imported goods were classified under sub-heading no. 89059090 of the Customs Tariff Act, 1975. Upon assessment of the Bill of Entry, the appellant had discharged the duty liabilities, including CVD at the tariff rate of 5% provided under Section 3 of the Central Excise Tariff Act, 1985. Thereafter the appellant had challenged the assessed Bill of Entry before the learned Commissioner of Customs (Appeals), Goa. The appeal was filed on the ground that under the provision of Section 3 (1) of the Customs Tariff Act, 1975, articles imported into India shall in addition be liable to duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. It is also contended by the appellant that it was liable to pay CVD @ 1% inasmuch as the goods classified under sub-heading no. 8905 attract the CVD as such rate. However, the appeal filed by the appellant was rejected by the learned Commissioner of Customs (Appeals), Goa vide the impugned order dated 05.10.2011, holding that the benefit provided under Notification No. 1/2011 – Central Excise dated 01.03.2011 is not available to the appellant in view of the proviso contained in the said notification, which is to the effect that the benefit contained therein shall not be available to the goods in respect of which credit of duty on inputs or tax on input services has been taken under the Cenvat statute. For denial of the benefit of 1% CVD, the learned Commissioner (Appeals) has relied upon the D.O. Letter dated 25.03.2011 issued by CBEC, wherein it has been clarified that the rate of such duty would be 5%. Feeling aggrieved with the impugned order dated 05.10.2011, the appellant has preferred this appeal before the Tribunal.

2. The learned Advocate appearing for the appellant submitted that neither the overseas supplier, nor the appellant had availed Cenvat credit in respect of the amount of CVD paid on the imported goods and thus, the benefit of 1% CVD provided under notification dated 01.03.2011 should be available to the appellant. To support the submissions that the appellant is liable to pay CVD @ 1% on the imported goods, the learned Advocate has relied upon the following judgments delivered by the judicial forums:

(i*) SRF Ltd. Vs. Commissioner of Customs, Chennai – 2015 (318) E.L.T. 607 (S.C.)*

(ii) Aidek Tourism Services Pvt. Ltd. Vs. Commissioner of Cus., New Delhi – 2015 (318) E.L.T. 3 (S.C.)

(iii) Artex Textiles Pvt. Ltd. Vs. Commissioner of Customs, New Delhi – 2018 (359) E.L.T. 561 (Tri.-Del.)

(iv) C.C. (Seaport-Export), Chennai Vs. Enterprises International Ltd. – 2017 (346) E.L.T. 423 (Tri.-Chennai)

(v) Sri Vasavi Gold & Bullion Pvt. Ltd. Vs. Commissioner of Cus., Chennai – 2016 (343) E.L.T. 429 (Tri.-Chennai)

3. On the other hand, the learned AR appearing for the Respondent reiterated the findings recorded in the impugned order. He further submitted that the duty @ 5% prescribed in the Central Excise Tariff Act, 1985 is leviable on imported goods as per Section 3 of the Customs Tariff Act, 1975. In this context, he has relied upon the explanation clause appended to Section 3 *ibid.* The learned AR has relied upon the decisions of this Tribunal in the case of *C.C., ICD, New Delhi Vs. Dr. Roshan Lal Agrawal & Sons Pvt. Ltd. – 2015 (316) ELT 153 (Tri.-Del.) and Fresenius Kabi India Pvt. Ltd. Vs. Commr. of Cus. (Imports), Nhava Sheva – 2014 (300) ELT 309 (Tri.-Mum.).*

4. Heard both sides and perused the records.

5. The excisable goods under Heading 8905 of the Tariff Act, 1985 attract central excise duty @ 5% *ad valorem.* The Central Government vide Notification No. 1/2011 – C.E. dated 01.03.2011 has prescribed the rate of duty of 1% *ad valorem*, subject to the condition that no Cenvat credit of central excise duty on inputs or service tax on input services has been taken under the provisions of Cenvat statute. Consequent upon issuance of the said notification, creating the embargo of non

availment of Cenvat credit, there was confusion with regard to levy of either tariff rate or concessional rate of CVD on the imported goods. In this case, it is an undisputed fact that neither the overseas supplier, nor the appellant had availed any Cenvat credit on the amount of CVD paid on the imported goods. Thus, in our considered view, the restrictions contained in the aforesaid notification should not be applicable in respect of claim of concessional rate of CVD by the appellant on the subject goods. The issue arising out of the present dispute is no more *res integra,* in view of the aforementioned judgments relied upon by the learned Advocate for the appellant. The relevant paragraphs in the judgment of Hon'ble Supreme Court delivered in the case of SRF Ltd. (supra) are extracted herein below:

> **"4.** As per the aforesaid entry, the rate of duty is nil. Condition No. 20 of this Notification, which was relied upon by the authorities below in denying the exemption from payment of CVD, is to the following effect :
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> "20. If no credit under Rule 3 or Rule 11 of the Cenvat Credit Rules, 2002, has been taken in respect of the inputs or capital goods used in the manufacture of these goods."
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> **5.** The aforesaid condition is to the effect that the importer should not have availed credit under Rule 3 or Rule 11 of the Cenvat Credit Rules, 2002, in respect of the capital goods used for the manufacture of these goods.
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> **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) E.L.T. 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.
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> **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) E.L.T. 352 (S.C.)] which was affirmed by the Constitution Bench in the case of *'Hyderabad Industries Limited* v. *Union of India'* [1999 (5) SCC 15 = 1999

> (108) E.L.T. 321 (S.C.)]. 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) E.L.T. 3 (S.C.)], 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."*
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> (Emphasis supplied)
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> **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.**"**

6. Review petition filed by Revenue against the aforesaid judgment in the case of SRF Ltd. has also been rejected by the Hon'ble Apex Court, reported in 2016 (340) E.L.T. A202 (S.C.). In view of the settled position of law, the issue involved in the present case in no more open for any debate with regard to levy of CVD @ 1% provided under the Notification No. 1/2011 – C.E. dated 01.03.2011.

7. In view of above, we do not find any merits in the

impugned order dated 05.10.2011 passed by the learned Commissioner of Customs (Appeals), Goa. Accordingly, after setting aside the same, the appeal is allowed in favour of the appellant.

(Operative part of the order pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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