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TAX ALERT

Cenvat linked benefits are extended to the imported goods even though such goods are not actually manufactured in India

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Twenty years of experience in Indirect Tax practice, specialist in Structuring & Planning and tax optimization under Indirect Tax. Lead eastern India Indirect Tax Practice of Ernst & Young in past.

Importer is liable to pay additional duty of customs equivalent to excise duty on like articles if capable of being produced in India even if not actually manufactured. When exemption from Excise Duty is allowed to the manufacturers on the condition of non Availment of credit on inputs and capital goods, the same cannot be denied to the importer on the ground of inadmissibility to credit. The question of fulfilling the aforesaid condition does not arise and the importer is entitled to refund of additional duty paid- WRIT PETITION allowed: HIGH COURT

BEFORE DELHI HIGH COURT (CUSTOMS)

LAVA INTERNATIONAL LTD. VS UNION OF INDIA & ORS[i]

Issue:

1) Whether the importer is entitled to refund of duty paid under section 3(1) of custom tariff act?
2) Whether non entitlement to credit results in not satisfying the condition of not taking credit?
3) Whether for attracting additional duty of customs under section 3(1), actual manufacturing is necessary in India?

Facts: The appellant had imported mobile handsets including cellular phones. It had made payment of additional duty of customs under section 3(1) of custom tariff act, in addition to basic custom duty. Such additional duty is imposed to compensate the duty of excise levied on the goods manufactured in India. As per notification no. 12/2012-Ex, manufacture of mobile phones are exempt from excise duty provided the credit of duty paid on inputs and capital goods used in the manufacturing of phones is not taken under Cenvat credit rules. The appellant is claiming refund of additional duty made on import as they have not claimed any credit. Adjudicating authority rejected the refund claim holding that appellant could not establish its entitlement to Cenvat credit. Commissioner(Appeals) upheld the order of adjudicating authority. Being aggrieved Appellant filed an appeal before High Court.

Revenue contention: The revenue contended on the following grounds:

1) The manufacturers and service providers are entitled to take Cenvat credit under Cenvat credit rules and the importer is not entitled for any such credit. The appellant is not admissible to claim credit. Thus The appellant is not fulfilling condition 16 of notification no. 12/2012-CE which provides for non taking of credit on inputs & capital goods under rule 3 and 11 of Cenvat credit rules.
2) The appellant is not entitled to refund as it is not fulfilling the criteria for exemption from equivalent excise duty.
3) The inputs used in manufacturing of imported mobile cannot be liable to levy of Indian excise duty. Thus the eligibility of credit does not arise. 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. Such decision was taken by Bombay High Court in the case of Ashok Traders[ii].

Appellant Contention: The appellant contended on the following grounds:

1) It had not availed any credit of inputs and capital goods used in the manufacture of imported goods and hence fulfilled the condition no. 16 of the above mentioned notification.
2) The excess payment had been made under protest as it complied with condition of exemption notification and thus entitled to refund.
3) The appellant relied on the decision of Supreme Court in M/s SRF Ltd[iii]., where the Supreme Court held that no Cenvat credit was availed by assessee and was entitled to exemption from payment of additional duty of customs.

Observations: The Honorable High Court observed that the reasoning of Revenue is no longer sustainable after the judgment of Supreme Court in the case of Hyderabad Industries Limited[iv], which interpreted Section 3(1). The Court observed that Section 3(1) of the Tariff Act

provides for levy of additional duty whose explanation has 2 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', which means that the actual production of article in India is not necessary. The second limb of 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. 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.

Additional duty Under Section 3 on the import of a manufactured or produced article can be imposed without the actual manufacturing of a like article in India. 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 quantify the duty to be imposed. Thus the contention that credit is not admissible and thus no question of fulfilling the condition is not applicable.

Held: On the basis of the aforesaid observations and the decision of Supreme Court earlier, the above appeal was allowed. A direction is issued to the respondents to process the refund application. The writ petition is allowed in these terms.

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[i] 2016-TIOL-2937-HC-DEL-CUS
[ii] 1987 (32) ELT 262
[iii] 2015 (318) E.L.T. 607 (S.C.)
[iv] 1999 (108) E.L.T. 321 (S.C.)