IN THE CUSTOMS, EXCISE AND SERVECE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI
COURT NO. I

Appeal No. C/834/2012
C/CO/138/2012

Arising out of Order-in-Appeal No. 382/MCH/DC/Gr.VA/2012, Dated: 11.07.2012
Passed by Commissioner of Customs (Appeals), Mumbai

Date of Hearing: 19.12.2018
Date of Decision: 19.12.2018

COMMISSIONER OF CUSTOMS (IMPORT)
MUMBAI

Vs

NAVYUGA ENGINEERING COMPANY LTD

Appellant Rep by: Shri Roopam Kapoor, Commissioner AR
Respondent Rep by: Shri Prashant Patankar, Consultant

CORAM: S K Mohanty, Member (J)
Sanjiv Srivastava, Member (T)

Cus - Notification 21/2002-Cus - It is evident from paragraph 6 of the Order-in-appeal that the Commissioner(A) has not allowed the benefit of the exemption to any paver which is not laying pavements of 7 mtrs and above - Revenue appeal, therefore, has been filed by way of erroneous reading of the said paragraph - Issue has also been settled by the Larger Bench of the Tribunal in the case of Ramky Infrastructure Ltd. - 2014-TIOL-1020-CESTAT-MUM-LB together with the decision in Gammon India Ltd. - 2013-TIOL-471-CESTAT-MUM - There is, therefore, no merit in the grounds raised by the respondent importers in their cross objection filed in this regard - Both, Revenue Appeal as well as cross-objections by respondent are dismissed: CESTAT [para 5.3, 5.4, 5.5, 6.1]

Appeal/Cross-objections dismissed

Case laws cited:

Gammon India - 2011-TIOL-60-SC-CUS...Para 3.1

Mihir Textiles - 2002-TIOL-833-SC-CUS...Para 3.1

Hari Chand Shri Gopal - 2010-TIOL-95-SC-CX-CB...Para 3.1

Hemraj Govardhandas [1978 (2) ELT 1350 (SC)]...Para 3.1

Gammon India - 2011-TIOL-60-SC-CUS...Para 4.2

Commissioner Custom (Import) Mumbai vs Ramky Infrastructure Ltd - 2014-TIOL-1020-CESTAT-MUM-LB...Para 5.4

Gammon India Ltd - 2013-TIOL-471-CESTAT-MUM...Para 5.5

FINAL ORDER NO. A/88325/2018

Per: Sanjiv Srivastava:

This appeal filed by the revenue is directed against the Order in Appeal No 382/MCH/DC/Gr.V.A/2012 dated 11.07.2012 of Commissioner Customs (Appeal) Ballard Estate, Mumbai. By the said order Commissioner 9Appeal) has upheld the order in original no 873/DC/Gr VA/AKS/2010-11 dated 24.05.2010 of the deputy Commissioner Customs (Import) Appraising Group VA, NCH Mumbai -I holding as follows:

"I hold that the importer is not entitled for the benefit of the Notification No 21/2002-Cus dated 01.03.2002."

2.1 Appellant filed a Bill of Entry No 947167 dated 07.0.2010 for clearance of 4 Nos of Item declared as 'electronic Sensor Paver Vogele-Model Super 1800-2 with AB 600 - 2TV Screed for working upto 9.5 Mtrs for laying Bituminous Pavement" and declared assessable value of Rs 4,62,86,280/-. The y claimed exemption under Notification No 21/2002-Cus dated 01.03.2002.

2.2 On query regarding paving width of the machinery, Appellants responded 'the Machine is having in built facility of paving width from 3 meter to 6 meter. The laying width upto 9 Meter is facilitated by the addition of 2 bolt on extension (screed option) supplied with the machine. This implied that machine was capable of laying Pavement of 3 Meters to 6 meter, whereas the Sr No 2 of the List 18 (Sr No 230 of the Notification No 21/2002) covers only the machine capable of laying Bituminous Pavement 7 meter size and above.

2.3 On query to effect that importers name was not shown as the subcontractor in the main contract between NHAI and the concessionaire, importer replied

"as they have been appointed as the sub contractor by the Concessionaire and the NHAI has also approved the same vide their certificate dated 24.02.010, they should be considered as the sub contractor and benefit of notification should be extended to them."

2.4 Importer vide letter dated 19.05.2010 waived the requirement of show cause notice and appeared for personal hearing. Deputy Commissioner after considering the submissions made disallowed the benefit of exemption under notification No 21/2002-Cus as stated in his order referred in para 1, supra.

2.5 Aggrieved appellant filed the appeal before Commissioner (Appeal) which was dismissed as per the order in appeal referred in para 1, supra.

2.6 Aggrieved by the para 6 of the order in appeal revenue has filed this appeal.

2.7 Appellants have filed the cross objections in the matter.

3.1 In their appeal memo revenue has challenged para 6 of the order of Commissioner (Appeal) stating that

i. The imported machine had in built facility for paving width from 3 meters to 6 meters only. It was only with the help of two attachments of 1.5 Meter width each, when attached to machine that it can pave widths upto 9 meters. Thus machine is for laying pavement of width "3 Meter and above" and not "7 meter and above"

ii. Since the exemption under Notification No 21/2002-Cus (Sr No 230, Sr No 2 of List 18) is available only to paver finishers capable of laying bituminous pavement of 7 meter and above, this exemption is not available in respect of the imported machine.

iii. Commissioner (Appeal) has in order in appeal No 306/2009/MCH/AC/Gr VA/2009 dated 04.11.2009 in case of M/s C C Constructions Ltd, disallowed the benefit of the said exemption notification to similarly placed imported goods.

iv. In their support they relied upon the decisions as follows:

a. Gammon India [2011 (269) ELT 289 (SC)] = 2011-TIOL-60-SC-CUS

b. Mihir Textiles [1997 (92) ELT 9 (SC)] = 2002-TIOL-833-SC-CUS

c. Hari Chand Shri Gopal [2010 (260) ELT 3 (SC)] = 2010-TIOL-95-SC-CX-CB

d. Hemraj Govardhandas [1978 (2) ELT 1350 (SC)].

3.2 In the cross objections filed respondents have stated that -

i. Respondent was approved as sub contractor both by NHAI as well as the contractor. Approval as sub contractor was given by NHAI as per letter dated 24.02.2010 which is in nature of supplement to the concession agreement, and is t part and parcel of Concession agreement.

ii. Imported paver finisher is covered under Entry No 2 of List 18.

iii. Order of the predecessor is not binding on subsequent Commissioner (Appeal), hence order of Commissioner (Appeal) do not violate judicial discipline.

iii. Imported goods need to be assessed as presented for assessment. Imported Paver finisher was for laying bituminous pavement of width 7 mts upto to 9 mts.

iv. Exemption Notification should be interpreted in the manner it is without addition or deletion of any words to it.

v Interpretation should not make the entry itself redundant.

4.1 We have heard Shri Roopam Kapoor Commissioner, Authorized Representative for the revenue and Shri Prashant Patankar, Consultant for the respondents.

4.2 Arguing for the revenue, learned Authorized Representative reiterated the submissions made in the Appeal. He further stated that issue is well settled in the favour of revenue by the decision of Apex Court in case of *Gammon India [2011 (269) ELT 289 (SC)]* = *2011-TIOL-60-SC-CUS*.

4.3 Arguing for the respondents the learned advocate submitted that the item imported by them in form it is imported and presented for assessment, is capable of laying the pavements upto 9 mts width with the two attachments provided. Since the notification exempts all such machines capable of laying pavements of 7 mtr and above, the exemption claimed was admissible to them. He further submitted that since by the letter dated 24.02.2010 they have been approved as sub contractors by the NHAI, they should have been allowed the benefit of Concession agreement and the exemption under said notification.

5.1 We have considered the submissions made in the appeal and during the course of argument.

5.2 Concerned entries in the Notification No 21/2002- Cus dated 01.03.2002 reads as follows:

S No	Chapter or Heading or sub-heading	Description of Goods	Standard Rate	Additional Rate	Condition No
230	84 or any other chapter	Goods specified in list 18 required for construction of roads	Nil	Nil	40

List 18 (See S. No. 230 of the Table)

(1) .....

(2) Electronic paver finisher (with sensor device) for laying bituminous pavement 7 m size and above

(3) .....

.....

(21) .....

Condition No	Conditions
40.	If,-

	(a) the goods are imported by- **(i) the Ministry of Surface Transport, or** **(ii) a person who has been awarded a contract for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory; or** **(iii) a person who has been named as a sub-contractor in the contract referred to in (ii) above for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory;** **(b) .....** **(c) .....**

5.4 A five member bench of Hon'ble Apex Court in case of Dilip Kumar & Company [2018 (361) ELT 577 (SC)] = 2018-TIOL-302-SC-CUS-CB has held as follows:

"52. To sum up, we answer the reference holding as under -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."

5.3 Para 6 of the impugned order reads as follows:

"6. I have gone through the facts of the case and submissions made by both the sides. It observed that the said list 18 under Notification No 21/2002 (Sr No 230) grants exemption to Electric Pavers Finishers (With Sensor Device) for laying bituminous pavements 7 mtr., size and above. In other words, the machine/ pavers should be able pavements of size 7 mtrs (and above). As per the manufacturers catalogue, the screed options are "basic width 3 mtrs infinitely variable with 3 mtrs to 6 mtrs, maximum width 9 mtrs. Hence the pavers can lay pavement upto 9 mtrs through additional

bolt in extension. Therefore it is opined that the pavers should be able to lay pavements of 7 mtrs and above in order to claim the benefit."

From the plain reading of the said para it is quite evident that Commissioner (Appeal) has not allowed benefit of said exemption notification to any paver which not is laying pavements of 7 Mts., and above. The appeal has been filed by way of erroneous reading of the said para.

5.4 Even the issue is well settled by the decision of larger bench of Tribunal in case of *Commissioner Custom (Import) Mumbai vs Ramky Infrastructure Ltd [2014 (306) ELT 525 (T-LB)]* = *2014-TIOL-1020-CESTAT-MUM-LB*, wherein in para 8 to 10, it has been held as follows:

"8. Now, the issue before us is whether the machines in question fulfil the criteria laid down under the Notification. The only contention of the present respondents is that with the addition of bolt-in extensions, the machine in question is capable of laying bituminous pavement of 7 meters size and above. From the purchase order and from the packing list, we find that the accessories i.e. bolt-on extensions were separately ordered. In a situation when bolt-on extensions are not imported, the relevant question would then be whether the machines still qualify for exemption under Notification 21/2002. Certainly, the benefit of the Notification is not available to such machine. In other instance, when the machine has been imported with accessories, whether the benefit of the Notification is available. The mere import of the accessories with the machine cannot change the basic character of the machine. As per the Webster New International Dictionary, accessory is 'an object or device not essential in itself but adding to the beauty, convenience, or effectiveness of something else'. We find that the machine in question is complete in itself without the accessories.

9. A Notification is to be interpreted strictly as held by the Hon'ble Supreme Court in the case of Novopan India Ltd. (supra). The Hon'ble Supreme Court held as under :- "18. We are, however, of the opinion that, on principle, the decision of this Court in Mangalore Chemicals - and in Union of India v. Wood Papers referred to therein - represents the correct view of law. The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee - assuming that the said principle is good and sound - does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals and other decisions, viz., each such exception/exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave [1978 (2) E.L.T. (J350) (S.C.) = 1969 (2) SCR 253] = 2002-TIOL-

351-SC-CX -CB that such a Notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption."

10. In the present case, as we find that as per the product literature, the machines in question are capable of laying bituminous pavement from 3 meters to 6 meters i.e. less than 7 meters, therefore we find no reason to take a different view as in the case of Gammon India Ltd. (supra). The matter be placed before the regular Bench for further necessary orders."

Thus we do not find any merits in the grounds raised by the respondents in their cross objection in this respect.

5.5 On the issue of raised by the Appellants in their cross objections, vis a vis they being approved as sub contractors by NHAI, we do not find any merits in the said submissions made by the respondents in view of the decision of tribunal in case of *Gammon India Ltd [2013 (298) ELT 740 (T-Mum)]* = *2013-TIOL-471-CESTAT-MUM* wherein similar set of facts it has been held-

"6.1 In pursuance to the RFP, an MOU dated 24th January, 2006 was entered into by the three members of the Consortium, namely, M/s. Gammon India Ltd., M/s. Gammon Infrastructure Projects Ltd., and M/s. Associated Transrail Structures Ltd. for forming a Special Purpose Vehicle (SPV) with shareholding commitments expressly stated to domicile the Project prior to the start of implementation of the Project. The MOU was in the context of NHAI inviting Qualification and Financial Proposal from entities interested in "Design, Construction, finance, operation and maintenance of km 0.00 km to km 32.27 of Gorakhpur Bypass on NH-28 in the State of Uttar Pradesh on Annuity Basis". The MOU was reached with respect to member's (of the consortium) rights and obligations towards each other and their working relationship. As per clause 8 of the said MOU, -

"8. That the roles and responsibilities of each Party at each stage of the Bidding shall be as follows :-

a. Construction Works: GIL shall be responsible for the execution of construction works to the Project.

b. Operations & Maintenance Works : GIL and/or GIPL shall be responsible for the operations and maintenance works for the Project."

As per clause 10 of the said MOU - "That the Parties shall be jointly and severally liable for execution of the Project in accordance with the terms of the Concession Agreement".

6.2 The argument of the appellant is that this MOU which is part of RFP should be considered as a subcontract and the appellant, M/s. GIL should be deemed as a sub-contractor. This argument is totally illogical and unacceptable for the following reason. Firstly the MOU was reached among the members of the consortium for forming a Special Purpose Vehicle with shareholding commitments expressly stated. Secondly the MOU was reached with respect to each member's rights and obligations towards each other and their working relationship. By no stretch of imagination, this MOU can be considered as a sub-contract. A sub-contract has to be between the main Contractor who is M/s. GICL on the one hand and the appellant, M/s. GIL, on the other spelling out the terms and considerations for the contract and such sub-contractor has to be named specifically in the concession agreement between NHAI and M/s. GICL. That is not the position obtaining in the present case. As per the terms of the notification a person has been named as sub-contractor in the contract referred in (ii) above, that is in the contract between NHAI and M/s. GICL in the instant case. The word "named" signifies "to make reference to or speak about briefly but specifically" (ref. Webster's online dictionary). In other words, the appellant should be specifically named or designated as a sub-contractor explicitly. We do not find any such specification of the appellant as a sub-contractor in the instant case. Accordingly we hold that the appellant has not satisfied Condition No. 40(a)(iii) stipulated in the notification. Consequently, the appellant is not eligible for the benefit of duty exemption under the said notification.

6.3 In law, "sub-contractor" is a person who is awarded a portion of an existing contract by a principal or general contractor. Sub-contractor performs work under a contract with a general contractor, rather than the employer who hired the general contractor. In the present case the MOU was entered on 24th January, 2006. At that time there was no contract at all between NHAI and M/s. GICL. The concession agreement between NHAI and M/s. GICL was entered into on 6th October, 2006. Thus the question of treating the MOU as a sub-contract does not arise at all when the main contract itself was not in existence. Further as per clause 10 of the MOU, each member of the consortium is jointly and severally liable for execution of the Project in accordance with the terms of the Concession Agreement. Further in law, a subcontractor is an entity that signs a contract to perform part or all of the obligations of another's contract. A subcontractor is hired by a general contractor (or prime contractor, or main contractor) to perform a specific task as part of the overall project and is normally paid for services provided to the project by the originating general contractor. If that be so, there is no logic and reason for deeming the appellant as a sub-contractor of M/s. GICL at all.

6.4 It has also been argued that the appellant entered into an EPC contract with M/s. GICL on 14-4-2007. No copy of the said contract has been produced before us nor is it part of the records. Assuming the contention to be true, the concession agreement between GICL and NHAI was entered

into on 6th October, 2006. The so called subcontract between the appellant and M/s. GICL was entered into on 14-4-2007. If that is so, how can the appellant be named as a sub-contractor in the agreement dated 6-10-2006 when no sub-contract was in existence? Thus from whichever way one looks at it, the appellant does not satisfy condition No. 40(a)(iii) so as to be eligible for the benefit of duty exemption."

6.1 In view of discussions as above we do not find any merits in the appeal filed by the revenue and the cross objections filed by the respondents. We accordingly dismiss both the appeal and the cross objections.

(Pronounced in court)