

SUPREME COURT OF INDIA

Tata Teleservices Limited

Vs.

Commissioner of Customs

C.A.No.5527 of 2004

(B. N. Srikrishna, Mrs.Ruma Pal and Arijit Pasayat JJ.)

13.12.2005

JUDGMENT

B. N. SRIKRISHNA, J:-

1. The question in these appeals is whether the telephone LSP 340 imported would be entitled to the benefit of the exemption granted by Customs Circular No. 57/2003 dated June, 2003 to Cellular Telephones classified under Tariff Heading 8525-17 of the Customs Tariff Act. Contrary decisions have been taken by different tribunals. However, certain facts are admitted. The basic fact on which there is no controversy is that the LSP 340 utilises cellular technology and is mobile although within a limited range. The difference of opinion has arisen because of a circular being Circular No. 57/2003 dated June, 2003 issued by the Central Board of Excise and Customs (CBE&C) in clarification of the exemption notification.

2. Before we come to the contents of the circular, we may note the relevant entries in the Customs Tariff Act. Entry 8525-2017 refers to "Cellular Phones". The entry relied upon by the Revenue is Tariff Heading 8525-2019 as "Other".

3. The exemption notification granted exemption against serial No. 313 to "Cellular Phones and Radio trunking terminals" to the extent specified in the notification. The percentages of exemption have varied from time to time. However, the entry remains the same.

4. The circular issued by the Central Board of Excise and Customs defined the phrase "Cellular phones" mentioned at item No. 13 of the exemption notification by saying that a telephone would not be considered as a cellular phone merely because it works on cellular technology. This conclusion was to the circular the phrase 'cellular phones' as used in the exemption notification only referred to hand held mobile phones. Therefore, it was clarified "that the term "Cellular Phone" in notification No. 21/2002-Cus (SI. 313) dated 1-3-2002 covers, only hand held mobile phones working on cellular technology. The notification does not cover either fixed wireless terminals or fixed telephones working on cellular technology."

5. On the basis of this circular the claims of the importers for the benefit under the exemption notification in respect of LSP 340 were rejected and demands were raised on the party importers. The issue first reached the Customs Excise Services Tax Appellate Tribunal (CESTAT) Delhi. The Tribunal held in favour of the Revenue on the ground that LSP 340 had been described as a fixed wireless terminal and that since the essence of a cellular phone was mobility the LSP 340 did not qualify. It was also held that the Board circular did not impose any new condition for availing of the exemption. It may be noted at this stage, that both the Ministry of Finance and the Ministry of Commerce had made enquiries from the Department of Telecommunications as to whether the LSP 340 could qualify as a cellular phone for the purposes of the exemption notification. The DOT had by a series of letters dated 12-3-2003, 16-4-2003 and 29-5-2003 written to the department concerned had stated that the LSP 340 was a cellular phone as it operated on cellular technology having the properties of both transreceiver and a telephone and that therefore, the items should be classified under the category "cellular phone" and covered under serial No. 313 of the exemption notification. The Tribunal did not consider this evidence at all.

6. When the same issue was raised before the CESTAT (Bombay), the Bombay Bench came to the conclusion that the circular sought to provide conditions to the notification and that this would tantamount to rewriting the notification or legislating by circular when the notification itself did not provide for any such condition viz. that the cellular phone should be hand held. More so, because the Department of Telecommunications had certified that the imported goods were cellular telephones.

7. In addition, the Bombay Tribunal also went into the issue of valuation of the particular batch of LSP 340 imported by the importer viz. Bhagyanagar Metals Ltd. and came to the conclusion that the software which had been imported along with the mobile telephones were merely accessories and could not be added for the purpose of levy of duty at the rates applicable to the main instrument.

8. The matter also came up before the High Court of Andhra Pradesh. The High Court, on a writ petition filed by one of the importers, M/s. Surana Telecom Ltd., quashed the circular dated June, 2003. According to the High Court, the circular sought to preclude the assessing authorities from deciding whether the particular phone was a cellular phone or not. It was held that the CBEC had no right to interfere with the power of the authorities who were required to make assessment and hear the appeals and revisions, as a part of their quasi-judicial powers.

9. The series of appeals which are before us pertain to these three orders. As far as the decision of

the Delhi Tribunal is concerned, the appellant is the importer (Tata Teleservices Ltd. v. Commissioner of Customs CA. No. 5527 of 2004). As far as the Bombay decision is concerned the appellant is the Commissioner of customs (commissioner of customs & central Excise v Bhagyanager Metals Ltd CA No 7939 of 2004) As far as the appeals from the decision of Andhra Pradesh are concerned, the appellant is the Government of India, (Government of India & Ors. v. M/s. Surana Telecom Ltd. & Anr. CA. No. 3774-3775 of 2005). There is also an application for intervention being IA. No. 2/2005 in CA. No. 7939/2004 by M/s. Teracom Private Ltd.

10. We are of the view that the reasoning of the Bombay Bench of the Tribunal as well as that of the Andhra Pradesh High Court must be affirmed and the decision of the Delhi Tribunal set aside insofar as it relates to the eligibility of the LSP 340 to the benefit of the exemption notification. The Andhra Pradesh High Court was correct in coming to the conclusion that the Board had, in the impugned circular, pre-determined the issue of common parlance that was a matter of evidence and should have been left to the Department to establish before the adjudicating authorities. The Bombay Bench was also correct in its conclusion that the circular sought to impose a limitation on the exemption notification which the exemption notification itself did not provide. It w"s not open to the Board to whittle down the exemption notification in such a manner. The exemption notification merely reproduced the language of Entry 8525-20-17 and since the exemption notification merely reproduced the tariff entry, the limitation sought to be imposed by the Board would tantamount also to reading the limitation into the classification itself. Since the issue would be ultimately a question of evidence the onus was on the Department to prove by appropriate evidence that the goods were classifiable under 8525-20-19 being the residuary entry. This the Department could have done by negating the claim of the importers that the goods were classifiable under Tariff Entry 8525-20-17 and by establishing that the imported goods could not reasonably be classified under any other head. In this particular case the onus had not been discharged by the Revenue. The only evidence on record was the opinion sought for by the Ministry of Finance itself and given by the Department of Telecommunications to the effect that the Model LSP 340 was in fact covered by the phrase "cellular telephone". Sine there is no dispute that the technology used in LSP 340 and the hand held mobile phone is the same there is no warrant to limit either the tariff entry or the exemption notification to hand held cellular phones. Neither the range nor the size would make any difference.

11. Therefore, Civil Appeal Nos. 3774-3775/05 from the decision of the Andhra Pradesh High Court is dismissed. As far as CA. No. 7939 of 2004 is concerned, the Commissioner, on the issue of valuation, had drawn a distinction between loaded software and detached software. The Commissioner had given certain reasons for including the software in the valuation of the phone. The Tribunal has dealt with the matter in a somewhat perfunctory a manner. We do not express any view on the merits of the valuation. However, we are of the view that the matter requires more consideration by the Tribunal. Therefore, on the question of valuation alone, we remand CA. No. 7939/2004 back to the Tribunal for rededding the issue. All questions relating to the valuation of the LSP 340 imported by respondent in that appeal are left open.

12. As far as CA. No. 5527 of 2004 and CA. No. 5556/94 are concerned, for the said reasons, they are allowed. The decision of the Tribunal is quashed. CA. Nos. 6048-6049 of 2004 are dismissed.

13. There shall be no order as to costs.