

SUPREME COURT OF INDIA

Commissioner of Customs, Bangalore

Vs

Messrs Spice Telecom, Bangalore

Appeal (Civil) 1695 of 2006

(Ashok Bhan, Altamas Kabir and, JJ)

19.10.2006

JUDGMENT

ASHOK BHAN, J.

The question that arises in the present appeal is whether Radio Terminals imported by the respondent-assessee (for short the Respondent) should be considered as 'Base Transceivers Station (BTS) ancillary equipment' in order to be given the benefit of exemption Notification No. 11/97-Cus. Dated 1.3.1997, as amended by Notification No. 51/97 dated 2.6.1997.

Exemption Notification and its relevant entries:

The Central Government in exercise of powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 issued a notification No. 11/97 dated 01.03.1997 in public interest to exempt certain goods mentioned in the table of the notification read with relevant list appended thereto from payment of duty imported into India either in entirety or partially.

Notification No. 11/97 was amended by Notification No. 51/97 on 2.6.1997 to include certain other goods from payment of duty or partial duty. Relevant entries in List 9-B are:

"1. Telephonic or telegraphic apparatus of the following description:

(a) Switching apparatus for cellular mobile telephone service.

(b) Base station controllers.

2. Radio communication equipment including VHS, UHF and microwave communication equipment with following description:

(a) Base transceivers stations (BTS)

5. BTS ancillary equipment."

[Emphasis supplied]

Facts:

Respondent placed a purchase order on M/s Italter SPA, Italy, for the supply of 30 sets of Radio Terminals amongst other items. Respondent cleared the said items at customs on payment of applicable duties in a sum of Rs. 64, 80, 572/- without exemption but under protest. In the bill of entry the goods were classified as falling under Entry No. 8525.2009.

Respondent had cleared identical goods imported at New Delhi and claimed benefit of Notification No. 11/97 as amended by Notification No. 51/97. The Bill of Entry described the goods as radio equipment SRAL/7GHZ by the 8/2 MBPS under Tariff Heading 8525.20. Based on the Respondent's submissions and representation, Delhi Customs extended the benefit of the said notification to the goods imported by the Respondent.

Respondent filed a refund claim for an amount of R. 34, 73, 385/- on 26.8.1999 for the goods imported at Bangalore. Respondent in the refund claim had annexed thereto technical literature and details explaining the nature of the equipment to show that radio terminals are to be classified either as 'BTS' equipment or 'BTS ancillary equipment'.

Deputy Commissioner of Customs (Refunds) Bangalore by his order dated 10.4.2000 rejected the Respondent's claim for exemption by holding that radio terminals are only interconnectivity apparatus between BTS and the Main Switching Centre (MSC). Deputy Commissioner took the view that the notification gives exemption only to BTS and not to parts. Radio terminals have an independent function and identity and therefore are not a part of BTS or MSC. It was accordingly held that the radio terminal is only part of cellular network and the same cannot be treated either as BTS itself or as an ancillary of BTS equipment.

Aggrieved by the order dated 10.4.2000 the respondent preferred an appeal before the Commissioner of Appeals who by his order dated 13.3.2003 dismissed the appeal by holding that merely because the radio terminals are co-located at the same site, it does not mean that the said equipment is a part of the main equipment. The technical literature filed by the respondent was disregarded and instead of applying the test of co-location of the equipment dismissed the appeal.

Aggrieved by the order of Commissioner of Appeals respondent filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal bench at Bangalore (for short "the Tribunal"). The Tribunal by its order dated 20.5.2005 after taking into consideration the technical literature held that the radio terminals and antenna are ancillary equipments of BTS and without radio terminals there cannot be interconnectivity in the network system. The Tribunal accordingly granted the benefit of the exemption notification as had been given by the Delhi Customs House. Aggrieved by the same revenue has come up in appeal.

Discussion:

It is the case of the respondent that the radio terminals imported by it are BTS ancillary equipments, essential for providing connectivity for use of cellular phones. Whereas according to the Revenue the radio terminals are independent equipment having independent identity and function and are not ancillary equipments of BTS and are not covered under the said exemption notification.

What is exempted under the notification is Base Transmitter Station (BTS) or BTS ancillary equipment. Ancillary has been assigned the meaning in various dictionaries as:

"P. Ramanatha Aiyar: The Lax Lexicon: "aiding auxiliary; subordinate; attendant upon; that which aids or promotes a proceeding regarded as the principal. A work is said to be "ancillary or incidental" to a thing, trade, or business when it is not necessary thereto or a primary part thereof." Stroud's Judicial Dictionary:

"A work is said to be "ancillary or incidental" to a trade or business when it is not necessary thereto or a primary part thereof."

This Court in *Vareed Jacob vs. Sosamma Geevarghese*, 4, has accepted the meaning assigned to the word "ancillary" in The Lax Lexicon:

"The expression "ancillary" means; aiding auxiliary; subordinate; attendant upon; that which aids or promotes a proceeding regarded as the principal."

In order to understand the nature of the goods, a brief background of the cellular network system is required to be understood, as per literature supplied to us on whom the reliance was placed by the

Tribunal as well.

“A Cellular Network comprises of Main Switching Centre (MSC) operating in tandem with the following:

Base Transceiver Stations.

Base Station Controller.

Transcoder.

Operation Maintenance Centre (OMC-R).

Digital Cross Connect Systems.

BASE TRANSCEIVER STATION:

The Base Transceiver Station is the interface between the cellular network and the mobile subscriber. The basic function is to receiver and transmit mobile calls from the subscriber to the caller through the GSM cellular network supported by BTS equipment and the following ancillary equipments of BTS:

Miscrowave Communication Equipments (Radio Terminals & Antennas).

Power Converter Unit.

Battery Back-up Unit.

GSM & Miscrowave Antennas.

Installation/Ancillary Items.

BTS equipment is a 19 inch cabinet consisting of Transceiver Control Units, RF modules like Combiner band pass filter, duplexer, integrated antenna distribution unit (IADU), Digital Cage consisting of Main Control Unit (MCU), Fibre optic extender (FOX), Network Interface unit (NIU), power supplies (NPSM & BPSM) and interconnecting feeder cables. The BTS equipment operates

in 900 MHz GSM Band. The speech is converted into digital mode by the mobile and sent to the BTS situated at the caller's area at 13 kbps and is further transported to the BSC at 64 kbps through the microwave radio terminal, which is further routed to the MSC at 2 Mbps. The BTS controls the operation of the subscriber and enables handovers between cell (BTS) when the mobile subscriber is traveling.

MISCROWAVE COMMUNICATION EQUIPMENTS (RADIO TERMINALS & ANTENNAS):

The Miscrowave Communication Equipment comprises of radio terminals and Antennas. The radio terminal is made-up of Indoor units and outdoor units. The indoor unit consists of Multiplexer, base Band Unit. The Miscrowave Equipment operates at 7 Ghz/15 Ghz/23 Ghz Radio Frequency and transports the already converted digital speech and control information from the BTS equipment to the Base Station Controller (BSC) through the Outdoor units and antennas. Each communication link consists of one set comprising of two numbers radio terminal (IDU, ODU) and antennas at both ends."

In order to have inter-connectivity Radio terminals are a must. The technical literature produced indicates that the radio terminal and antennas as ancillary equipment. It "aids and attends" to discharge the functions it is meant to discharge. The authority in original as well as the Commissioner (Appeals) have held that radio terminals are part of BTS therefore they are not eligible for exemption. Upholding the said view would amount to reading ' BTS components' in the notification instead of 'BTS ancillary equipment' which is not permissible under law.

The technical literature submitted makes it clear that the radio terminals transport the already converted digital speech from BTS equipment to the BSC (Base Station Control) through the outdoor units and antennas. It demonstrates that these radio terminals are solely and principally used with the BTS and therefore they rightly qualify as BTS ancillary equipments to be eligible to the benefit of Notification No. 11/97 dated 1.3.1997 as amended by Notification No. 51/97 dated 2.6.1997. Radio terminal is not independent equipment having its own independent function. It cannot be termed as a general purpose radio equipment as the technical literature clearly indicates that this is specially designed to support Mobile Communication Network in particular GSM. The literature makes it abundantly clear that the radio terminal is not a stand alone equipment and cannot function at all, on its own, as contended by the Department. Revenue in its appeal has admitted that the radio terminal functions as a radio wave transmitter between BTS/BSC/MSC. Without this function BTS/BSC/MSC will be rendered useless as there will be no connectivity.

Revenue has relied upon the subsequent Notification No. 21/2002 dated 1.3.2002. The subsequent notification defines the scope of ancillary equipment for BTS by restricting the entry to only three equipments, namely, i) Cellular repeaters, ii) Amplifiers and iii) Waves Guides (List 22 S. No. 239 of the Table). Radio terminals in this notification have not been considered as ancillary equipment of BTS. Revenue contends that Notification No. 21/2002 is clarificatory in nature and would be applicable to the radio terminals imported by the respondent in the year 1998 as well. We do not find any substance in this submission. The subsequent notification which defines the scope of ancillary equipment is effective only from 1.3.2002 and does not have retrospective effect.

Respondent's clearance pertains to July, 1998 and the Notification No. 21/2002 has come into effect with effect from 1.3.2002. It would not apply to the goods which have already been cleared. Notification No. 21/2002 cannot be given retrospective effect. In the absence of any express provision contained in the notification ordinarily it cannot be presumed that the same is retrospective in nature. Learned counsel for the Revenue has failed to show that the subsequent notification is clarificatory in nature. Incidentally, it may be mentioned that with regard to the identical goods imported through Delhi, wherein the items were classified under the same heading, Delhi Customs House extended the benefit of the said notifications to the respondent.

Tribunal in its order after referring to the literature to which we have also made the reference came to the conclusion:

"From the above it is very clear that without the Radio Terminals there cannot be any interconnectivity between BTS and BTS or BSC or MSC. In view of this the Radio Terminals definitely qualify to be ancillary equipments for BTS. On going through the technical literature it is seen that without the Radio Terminal there cannot be any interconnectivity at all and the Cellular Telephony System would not work. Hence, we hold that the imported items namely, Radio Terminals should be considered as BTS ancillary equipments and given the benefit of the above-mentioned notification".

We do not find any infirmity at the finding arrived by the Tribunal. The said finding is approved.

For the reasons stated above, we do not find any merit in the appeal and dismissed the same leaving the parties to bear their own costs.