REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2616 OF 2001

AIDEK TOURISM SERVICES PVT. LTD. .....APPELLANT(S)

VERSUS

COMMISSIONER OF CUSTOMS, NEW DELHI .....RESPONDENT(S)

W I T H

CIVIL APPEAL NOS. 7786-7787 OF 2001

AND

CIVIL APPEAL NO. 2271 OF 2006

J U D G M E N T

A.K. SIKRI, J.

In all these appeals the question of law which arises for determination is identical and even the assessee is the same. However, it so happened that the same issue was considered by the Delhi Bench as well as West Regional Bench at Mumbai of the Customs, Excise and Gold (Control) Appellate Tribunal (for short, 'CEGAT') and they have

given conflicting opinions. Insofar as Mumbai Bench of CEGAT is concerned, it has decided the issue in favour of the assessee. However, the Delhi Bench, while taking a contrary view, which is in favour of the Revenue, has not agreed with the Mumbai Bench of CEGAT for the reasons mentioned therein, which shall be noted at the appropriate stage.

2) The issue relates to the eligibility for concessional rate of additional duty [also known as Counter Vailing Duty (CVD)] in terms of Notification No. 64/93-CE. The assessee is in the business of tourism, which operates taxis to ferry the tourists from one place to another. Way back in the year 1995, it had imported Honda Accord cars and filed refund claim on the ground that it was eligible for concessional rate of CVD in terms of the aforesaid Notification. In this refund claim the assessee sought refund of 10% of total CVD. The refund claim of the assessee was rejected. Questioning the veracity of this decision of the Assistant Commissioner of Customs, Refund Department, Mumbai, as well as Delhi, the assessee approached the Commissioner (Appeals) at both the places. The Commissioner (Appeals) in Mumbai allowed the appeal of the assessee and granted the benefit of the aforesaid Notification with a direction to the lower authority to sanction the refund to the assessee as claimed. Against this order, the Revenue preferred appeal before

CEGAT. CEGAT, vide orders dated November 13, 2000 rejected the appeal of the Revenue. Against these orders, Revenue is in appeal.

3) On the other hand, in the proceedings emanating from the rejection of the refund by the Assistant Commissioner of Customs (Refund), New Delhi, the appeal of the assessee was dismissed by the Commissioner of Customs (Appeals), New Delhi. This order of the Commissioner was challenged by the assessee before CEGAT. The Delhi Bench of CEGAT, however, dismissed the appeal of the assessee vide orders dated January 08, 2001. Against these orders it is the assessee which has filed the appeals.

4) These are the reasons to hear all the appeals analogously as the question of law raised by the Revenue as well as the assessee is common.

5) Before we advert to the view taken by the two respective Benches of CEGAT, it would be apposite to take stock of few facts which led to the controversy in issue, along with terms of Notification No. 64/93-CE dated February 28, 1993.

6) The admitted facts are that the Honda Accord cars imported by the

assessee were manufactured abroad. On the import of such cars, normally, CVD is payable @ 40%. This duty was paid by the assessee at the time of clearance of the imported goods and refund of 10% was claimed seeking the benefit of Notification No. 64/93-CE. This Notification dated February 28, 1993 is reproduced below for the better appreciation of the dispute:

> "No.64/93-C.E., dated 28.2.1993 as amended by No. 11/94-C.E. dated 1.3.1994: In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise and Salt Act, 1944 (1 of 1944), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts all goods falling under heading No.87.03 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) from so much of the duty of excise leviable thereon which is specified in the said Schedule as is in excess of the amount calculated at the rate of 40 per cent ad-valorem.
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> Provided that in a case where a saloon car after clearance has been registered for use solely as a taxi, the manufacturer of the said saloon car shall be entitled to a further exemption of duty of 10 percentage points subject to the following conditions, namely:-
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> (i) the manufacture at the time of clearance of such saloon car has paid excise duty calculated at the rate of 40% ad valorem;
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> (ii) the manufacturer furnishes to the Assistant Collector of Central Excise a certificate from an officer authorised by the concerned State Transport Authority in this behalf to the effect that such saloon car has been for use solely as a taxi, within three months of the date of clearance of the said saloon car from the factory of manufacture or such extended period as the said Assistant Collector may allow;
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> (iii) the manufacturer had not collected from the person in whose name such saloon car has been registered as a taxi, or in a case had collected and has refunded to such person, the amount equivalent of such further exemption

of duty, and

(iv) the manufacturer files a claim for refund of duty in terms of section 11-B of Central Excise and Salt Act, 1944 (1 of 1944)."

7) What follows from the bare reading of the aforesaid Notification is that exemption from customs duty is provided in respect of goods falling under Heading 87.03 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the 'Tariff Act'), which is in excess of the amount calculated @ 40% *ad valorem*. Under Heading 87.03, various kinds of goods are mentioned. However, proviso to this Notification gives exemption of duty of 10% CVD in respect of particular goods, namely, saloon cars, if such saloon cars are used solely as taxis. It is subject to four conditions mentioned in the proviso.

8) Pertinently, this proviso mentions that the entitlement of further exemption of duty of 10% is admissible to *'the manufacturer of the said saloon car'*. It is this expression used in the said proviso which is the bone of contention. According to the Revenue, only the manufacturer of the saloon car, which is imported and used solely as a taxi, is entitled to additional exemption of duty of 10% CVD, as the plain read of the provision manifestly suggests. The submission of the assessee, on the other hand, is that for the purpose of this proviso, the importer, like the assessee, is to be deemed as the manufacturer of the said saloon car.

This is the short issue that needs determination.

9) Before adverting to the respective arguments of the learned counsel for the Revenue as well as the assessee, we deem it proper to state the reasons given by the two Benches of CEGAT, rendering opposite decisions. In fact, as we take notice of these orders, it would become apparent as to how the two Benches have perceived the language of the same Notification, in the light of the same judgments, differently, and that will obviate the necessity of taking note of the arguments of the counsel for the parties, and those are the respective arguments of the counsel for the parties.

10) The argument of the assessee before the Mumbai Bench (or for that matter even before the Delhi Bench) was that the entire case had to be viewed from the philosophy behind the provisions of Section 3 of the Tariff Act, which was taken note of by the Apex Court in the case of ***Hyderabad Industries Ltd. & Anr.*** v. ***Union of India & Ors.***[1] and ***Collector of Central Excise, Jaipur*** v. ***J.K. Synthetics***[2], treating the importer as the manufacturer of such goods for the purpose of giving benefit of such Notification. Reliance was also placed on the judgment of this case in ***Thermax Private Limited*** v. ***Collector of Customs***

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1 (1999) 5 SCC 15
2 (2000) 10 SCC 393

(Bombay), New Customs House[3]. The Mumbai Bench of CEGAT relied upon and extracted from the judgment of this Court in ***Thermax Private Limited*** (supra) and accepted the plea of the assessee thereby giving benefit of the Notification to the assessee. The Delhi Bench, on the other hand, though took note of judgments in ***Thermax Private Limited*** (supra) and ***Hyderabad Industries Ltd.*** (supra), was of the opinion that those judgments did not apply to the facts of this present case. According to the Delhi Bench, the importer was to be treated as manufacturer only to the extent of granting the benefit of levying CVD @ 40% in terms of the Notification and the ratio of the said judgments could not be stretched to hold that the importer is to be treated as a manufacturer for the purpose of Notification No. 64/93-CE, which extends further concession of 10% only to the manufacturers.

11) From the aforesaid, it is clear that the entire case hinges upon the ratio laid down in ***Thermax Private Limited*** (supra) and followed in ***Hyderabad Industries Ltd.*** (supra) as well as in ***J.K. Synthetics*** (supra).

12) In ***Thermax Private Limited*** (supra), the facts were that the assessee had imported goods described as “Sanyo Single Effect Chiller” from Japan for the purpose of using the same for refrigeration/air conditioning

[3] (1992) 4 SCC 440

of two factories. The assessee cleared the goods by paying customs duty as well as additional duty leviable under Section 3(1) of the Tariff Act. The customs duty had been paid on the imported goods under customs tariff Item No. 84.17(1) at 40 per cent of the value of the imported goods plus a surcharge of 25 per cent thereon. The rate of additional duty had to be determined on the basis of Item 29-A(3) of the Central Excise Tariff and the basic excise duty payable thereon was at 80 per cent of the value of the goods under the above item read with Notification No. 42 of 1984/C.E. dated March 1, 1984. However, Notifications (No. 93 of 1976/CE and 63 of 1985/CE) provided a further concession of 25 per cent *ad valorem* provided conditions set out therein was fulfilled. There was no dispute that the assessee was fulfilling other conditions contained in column (5) of the said Notification, one of which was that the Chiller imported by the assessee was used in a factory – vide item (xiii). The Revenue, however, took the view that the second condition to claim a concession in CVD was not fulfilled, namely, the procedure specified in Chapter X of the Central Excise Rules, 1944 (for short, the 'Rules') was not followed. Chapter X of the Rules deals with remission of excise duty on goods used for special industrial purposes. Rule 192 in the said Chapter provides that benefit under this Chapter would be claimed by a manufacturer. The primary reason for rejection of concessional duty, therefore, was that the assessee in the said case as

importer of goods was not a manufacturer. In this context, the issue arose as to whether assessee could be treated as a manufacturer for the purpose of availing the concession under the Rules. The Court answered the aforesaid question in the affirmative deeming the importer as the manufacturer to make him entitled to get the benefit of the said Notification.

13) The discussion in the judgment started with reference to Section 3(1) of the Tariff Act. As this provision applies in the present case as well, we take note of the same, which reads as under:

> "3. *Levy of additional duty equal to excise duty.* - (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article.
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> *Explanation.* - In this section, the expression 'the excise duty for the time being leviable on a like article if produced or manufactured in India' means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs and where such duty is leviable at different rates, the highest duty."

14) This Section deals with levy of additional duty, i.e. CVD, which is normally equal to the excise duty that is payable on a like article if produced or manufactured in India. However, it is a matter of common

knowledge that Notifications of exemptions have been issued by the Excise Department from time to time under Rule 8(1) of the Rules, in the case of imported goods, for determining the leviability of additional duty under Section 3(1) of the Act. In that case, Notification No. 93/1976 was issued under Rule 8 of the aforesaid Rules, which provides for a concession of 25% *ad valorem,* as already noted above. As per this Notification, one of the conditions to be fulfilled was that of procedure specified in Chapter X of the Rules. This Chapter provides for – *'remission of (central excise) duty on goods used for special industrial purposes'.* Rule 192, which appeared in this Section, relates to *'application for concession'* and a reading of this Rule suggested that such application for concession under Chapter X could be filed by a manufacturer only. While holding that for the purpose of getting benefit of remission of CVD under the concession notification, the importer shall be treated as manufacturer. The Court gave the following rationale for holding so:

> "10...The benefit of Chapter X will no doubt generally be claimed by a manufacturer in which event he will have to make the application, get the licence and give the assurances, bond or guarantee required by the Rules but it can also be claimed by other persons. The language of the Rule applies to any person, not necessarily a manufacturer, wishing to obtain remission of duty sanctioned by a notification under Rule 8 on excisable goods in a specified industrial process...
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> xx xx xx
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> 11. It will at once be seen that there is nothing in the

scheme of the Rule which makes it inapplicable to an importer of goods. The assessee here has imported the goods and is selling them for use in a factory, a use which qualifies for the concession under the Rule 8 notifications. The types of use specified in the concessions notified could be of any kind and, even in the notifications under our consideration, there are many and varied. In respect of items falling under serial Nos. 3 and 8, in particular, the actual users may be private individuals or authorities and need not necessarily be manufacturers using the goods in question in an "industrial process" in a narrow sense of that term. For instance, any computer room, hospital or factory purchasing parts of refrigerating and air-conditioning appliances and machinery for use in the computer room, hospital or factory would be entitled to claim the concession by following the prescribed procedure. Only, for claiming a concession in excise duty the user should be the manufacturer himself or he must have made the purchase from a manufacturer liable to pay excise duty on the item whereas in regard to a claim for CVD concession, the supplier will be an importer. The latter will be entitled to sell the goods at the concessional rate of duty (or at *nil* rate if there is an exemption) if the purchaser from him who puts the goods to the specified use (whether a manufacturer or not) fulfils the requirements of Rule 192. Since the concession under Rule 192 turns only on the nature and use to which the goods ar eput by the user or purchaser thereof and on whether he has gone through the procedure outlined in Chapter X, it would not be correct to deny it to a supplier of such goods on the ground that he is an importer and not a manufacturer. That aspect is provided for by Section 3(1) of C.T. Act which specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event. Thus, if the person using the goods is entitled to the remission, the importer will be entitled to say that the CVD should only be the amount of concessional duty and, if he has paid more, will be entitled to ask for a refund. In our opinion, the Tribunal was in error in holding that the assessees could not get a refund because the procedure of Chapter X of the Rules is inapplicable to importers as such.

(emphasis supplied)"

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; *al beit* 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 is tht the article is produced or manufactured in India. The second limb to 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.

It is thus clear from the reading of this judgment that the Court held that the levy under Section 3 of the Tariff Act is in the nature of a countervailing duty and is with a view to levy additional duty on an import to counter balance the excise duty payable on a like article indigenously manufactured. The Court also adverted to the scope/effect of Section 3 of the Tariff Act, particularly the expression, “Excise Duty for the time being leviable on a like article in produced in India” and the explanation thereto. In this regard it observed as follows: (At Para 11 of the Report)

> “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.”

The Court further referred with approval to the rationale of the provision as laid down in ***Thermax*** case (supra) in the following terms:

(At Para 11 of the Report)

> "... As observed by this Court in Thermax (P) Ltd. v. Collector of Customs (at SCC pp. 452-53, para 11) that Section 3(1) of the Customs Tariff Act:
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> > "specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event".
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> To our mind the genesis of Section 3(1) of the Customs Tariff Act has been brought out in the aforesaid observations of this Court, namely, that for the purpose of saying what amount, if any, of additional duty is leviable under Section 3(1) of the Customs Tariff Act, it has to be imagined that the articles imported had been manufactured or produced in India and then to see what amount of excise duty was leviable thereon."

This position has been reiterated in ***Motiram Tolaram*** v. ***Union of India***[4], ***CCE*** v. ***J.K. Synthetics***[5]***, Lohia Sheet Products*** v. ***Commr. Of Customs***[6] and ***Collector of Customs (Preventive)*** v. ***Malwa Industries Ltd.***[7] In fact, in ***Lohia Sheets*** and ***Malwa Industries*** cases (supra), this Court was considering exemption notifications envisaging use of certain material within a "factory" and still held that an importer would be entitled to the benefit of the exemption notifications in view of Section 3 of the Tariff Act and the decisions in ***Hyderabad Industries*** and ***Thermal*** cases. As such, it is now settled that the rate of duty would

4 (1999) 6 SCC 375
5 (2000) 10 SCC 393
6 (2008) 11 SCC 510
7 (2009) 12 SCC 735

be only that which an Indian manufacturer would pay under the Excise Act on a like Article. Therefore, the importer would be entitled to payment of concessional/reduced or nil rate of countervailing duty if any notification is issued providing exemption/remission of excise duty for a like article if produced/manufactured in India.

16) We may mention that in the case of ***Commissioner of Central Excise, New Delhi*** v. ***Hari Chand Shri Gopal & Ors.***[8], a three Judge Bench of this Court had raised certain doubts on the correctness of the principle contained in ***Thermax Private Limited*** (supra) as well as in ***J.K. Synthetics*** (supra) and referred the matter to a larger Bench. Reference order is reported as (2005) 8 SCC 164. The Constitution Bench decided the said case, which is reported as (2011) 1 SCC 236. From the reading of para 39 to 41 of the said judgment it becomes clear that though these cases were held not applicable to the fact situation and were distinguished, the Court did not say that the aforesaid judgments were incorrectly decided. In fact, by distinguishing the ratio of the said cases, the Constitution Bench impliedly gave its imprimatur to the principle laid down in the aforesaid judgments.

17) We are of the opinion that since we are dealing with exemption notification issued under Rule 8 of the Rules, which was the position in

[8] (2011) 1 SCC 236

Thermax Private Limited (supra) as well, for the purpose of extending benefit of concession contained in Notification No. 64/93-CE, the principle in ***Thermax Private Limited*** (supra) would clearly become applicable. We may point out that a specific query was put to the learned counsel for the Revenue to the effect that if the importer is not deemed as manufacturer for the purpose of applicability of the said notification, then there cannot be a situation where such benefit of this Notification would be extended to any person, inasmuch as, it was almost impossible to visualise a situation where a foreign manufacturer would import the saloon cars in this country and would utilise those cars for tourist taxis. Learned counsel for the Revenue had no answer or reply to our query. It is obvious that the purpose of exemption Notification No. 64/93-CE was to extend benefits to the importers of saloon cars to use the said cars for tourist taxis. Going by the spirit and the objective behind this Notification, the irresistible conclusion would be to apply the principle of ***Thermax Private Limited*** (supra) in the present case as well.

18) We, accordingly, allow the appeal preferred by the assessee and reverse the order of the Delhi Bench of CEGAT. On the other hand, the view of the Mumbai Bench of CEGAT is upheld thereby dismissing the appeals preferred by the Revenue. Outcome of these appeals would be that the

assessee shall be entitled to refund of 10% CVD paid by him.

No costs.

.....J.
(A.K. SIKRI)

.....J.
(ROHINTON FALI NARIMAN)

NEW DELHI;
MARCH 19, 2015.

ITEM NO.1A COURT NO.13 SECTION III
(for Jt.)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 2616/2001

AIDEK TOURISM SERVICES PVT. LTD. Appellant(s)

VERSUS

COMMNR. OF CUSTOMS, NEW DELHI Respondent(s)
WITH
C.A. No. 7786-7787/2001
C.A. No. 2271/2006

Date : 19/03/2015 These appeals were called on for judgment today.

For Appellant(s)
Mr. S. R. Setia,Adv.

Mr. A.K.Panda,Sr.Adv.
Mr. Arijit Prasad,Adv.
Ms. Shweta Garg,Adv.
Mr. B. Krishna Prasad,Adv.

For Respondent(s)
Rr-ex-parte,Adv.

Hon'ble Mr. Jusice A.K.Sikri pronounced the judgment of this Court comprising of His Lordship and Hon'ble Mr. Justice Rohinton Fali Nariman.

The appeal is allowed preferred by the assessee and reverse the order of the Delhi Bench of CEGAT. On the other hand, the view of the Mumbai Bench of CEGAT is upheld thereby dismissing the appeals preferred by the Revenue. Outcome of these appeals would be that the assessee shall be entitled to refund of 10% CVD paid by him.

The signed Reportable Judgment is placed on the file.

(SUMAN WADHWA) **(SUMAN JAIN)**
AR-cum-PS **COURT MASTER**

(SIGNED <u>REPORTABLE</u> JUDGMENT IS PLACED ON THE FILE)