

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 87/2007

COMMISSIONER OF CUSTOMS, BANGALORE

APPELLANT(S)

VERSUS

M/S. HUTCHISON ESSAR SOUTH LTD.

RESPONDENT(S)

O R D E R

The respondent/assessee herein which is engaged in the business of telecommunication system, imported what is known as 'Base Transreceiver Station (BTS) and Microwave Communication Equipments. In the present appeal, however, we are concerned with BTS equipments imported. The assessee filed Bill of Entry disclosing the price of BTS and at the same time claimed benefit of Notification No. 21/2002 dated 1.8.2002 (Serial No. 239) and paid concessional rate of duty i.e. @ of 5%, as such. However, the appellant/Revenue thereafter found that along with the said BTS the assessee had also imported Antenna as well as installation cable. The Adjudicating Authority was of the opinion that insofar as Antenna and installation cable are concerned, they are not covered by Serial No. 239 of Notification No. 21 of 2002 but no separate Bill of Entry was filed which attracts duty @ of 10%. On that basis, various show cause notices were served upon the assessee

calling upon the assessee to pay differential rate of duty on the Antenna and installation cable. The assessee replied the same by contending that the Antenna as well as installation cable were integral parts of the BTS and were imported together under the same provisions and the price was also declared. On that basis, it was submitted that the demand covered at Serial No. 239 of Notification No. 21/2002 could not be segregated for the purpose of levy of import duty. The contention of the assessee was not accepted and Order-in-Original was passed calling upon the assessee to pay the differential duty along with penalty and interest. The assessee filed appeals against the order of the Adjudicating Authority before the Commissioner. The Commissioner confirmed the order of the Adjudicating Authority. Not satisfied with the outcome, the assessee preferred further appeals before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT). The CESTAT has allowed the appeals of the assessee by a common decision dated 06.07.2005. Being aggrieved, the Revenue has filed this appeal challenging the veracity of the decision given by the CESTAT.

Mr. Yashank Adhyaru, learned senior counsel appearing for the Revenue, took us through the various provisions of Notification No. 21/2002 and tried to demonstrate that as far as installation cable and Antenna are concerned they had to be assessed separately. We would like to reproduce the relevant portion of Notification No. 21 of 2002 which reads as under:

239	84,85 or 90	Goods specified in List 22 required for basic telephone service, cellular mobile telephone service, internet service or closed user's group 64 KBPS domestic data network via INSAT satellite system service.	5%	16%	47
242	84,85 or any other Chapter	Parts of goods specified in List 25, for the manufacture of goods falling under heading 85.41 or 85.42	5%	16%	5
317	8529.10	Aerials or antennae of a kind used with apparatus for radio-telephony and radio-telegraphy	10%	-	-

Entry No. 239 covers Chapter Headings 84,85 or 90 and the goods mentioned there are the one specified in List 22. These goods are meant for basic telephone service, cellular mobile telephone service, internet service etc. It is not in dispute that the goods in question imported by the assessee were for cellular mobile telephone service. If the goods are covered under Entry No. 239, the duty payable is 5% with additional duty @ of 16%. It is further mentioned that the same goods are covered under Condition 47. Condition 47 mentioned in the same Notification reads as under:

"47. If imported by a person licensed by the Department of Telecommunications of the Government of India for the purpose of providing basic telephone service, cellular mobile telephone service, value added services via V-SAT system or Internet Service."

Likewise, List 22 which mentions goods that are to be covered under Entry No. 239, annexed with the same Notification, reads as under:

"(1) Telephonic or telegraphic apparatus of the

following description: (a) Switching apparatus for cellular mobile telephone service (b) Base station controllers (c) ATM Switches (d) Frame Relay Switches (e) Ethernet Switches (2) Apparatus for Carrier Current Line System or Digital Line System of the following description:- (a) HDSL System (b) Dense Wave Division Multiplexing (DWDM) System (c) Routers (3) Radio communication equipment including VHF, UHF and microwave communication equipment of the following description:- (a) Base Transreceivers stations (BTS) (b) Satellite communication equipment; the following customer premises equipment, namely:- (i) Radio with LNA, up converters and down converters (ii) Satellite modems (c) BTS ancillary equipment of the following description, - (I) Cellular repeaters (ii) Amplifiers (iii) Wave Guides (4) Network management stations (5) Computers for billing and customer services (6) Short message service hardware (7) Automatic call distribution system (8) Transcoders (9) Test equipment. "

It was argued by Mr. Adhyaru that in List 22, the items which are mentioned do not include installation cable or other installation features. It was further submitted that as far as Antenna is concerned, it is specifically covered under Entry No. 317 that has already been reproduced above and the duty payable in respect of Antenna is 10%.

Mr. Adhyaru also referred to Order-in-Original passed by the Adjudicating Authority and particularly the findings contained therein wherein the Adjudicating Authority took the view that List 22 attached to the Notification mentions certain specified equipments like BTS and does not include ancillary equipments of BTS which would be Antenna and installation cable. The Adjudicating Authority further stated that from the aforesaid, intention of the Notification was clear viz. to extend the benefit only in respect

of the main equipment and certain specified ancillary equipments, such as Antenna and installation materials that are used along with BTS equipments and not appearing in List 22, would not be covered by Serial No. 239 but would be covered under Serial No. 317.

This reasoning has been negatived by the CESTAT in the impugned order. In this process, the Tribunal has defined the equipment BTS as appearing in various technical dictionaries etc. On that basis, the Tribunal came to the conclusion that the Antenna as well as installation materials are the integral part of BTS and, therefore, cannot be segregated when entire equipment of BTS is imported, as was done by the assessee herein.

After going through the said order and the submissions of Mr. V.Lakshmikumaran made on behalf of the respondent in support thereof, we are of the opinion that the approach adopted by the Tribunal, while holding that the Antenna and installation materials are part and parcel of the BTS, is perfectly justified.

In the first instance, it is to be kept in mind that the BTS equipments which were imported by the assessee were along with the Antenna and installation materials. This is so noted and accepted by the Adjudicating Authority as well, inasmuch as the Order-in-Original itself records that the invoice was for the entire value of the consignments which included the value for Antenna and installation materials. It is specifically recorded therein that there is no separate value of Antenna and material indicated in the invoice, for the purpose of assessment.

In the light of the aforesaid facts, we have to understand the definition of BTS. In Wiley Encyclopedia of Electrical and

Electronics Engineering (Vol.13), mobile communications network architecture has been explained. The Base Station System therein is described in the following manner:

"Base Station System. The mobile station communicates to the network via the air interface. The base station system (BSS) includes a base station controller (BSC) and one or more base transceiver stations (BTS). The BSC manages radio channels on the radio interface and handovers. Radio transmission and reception devices, including antennas, and all radio interface signal processing are contained in the BTS. The BSS terminates the air interface from the mobile station and then connects the network signaling and user traffic to the mobile switching system over the A interface. The BSC manages the air interface to the mobile station and usually any associated air interface encryption protection. The BSC, along with the MS and MSC, manages the hand off between cells. When cells span MSCs, the hand off signaling for the cells is exchanged between MSCs. This type of hand off is referred to as *inter system hand off*."

It is clear from the reading of the aforesaid that Base Station System includes BTS and while explaining the function of BTS, it is specifically mentioned that the same is inclusive of Antenna. BTS is defined in Newton's Telecom Dictionary to mean "the electronic equipment housed in cabinets that together with antennas comprises a PCS facility or "site". The cabinets include an air conditioning unit, heating unit, electrical supply, telephone hook-up, and back-up power supply.

It becomes clear that BTS, which is an electronic equipment, has to be put together with Antenna apart from other components. Thus, Antenna becomes an integral and inseparable part of the BTS without which it cannot even function. It is not in dispute that

this equipment falls under Chapter Heading 84,85 or 90 and was so cleared.

No doubt Entry No. 317 of Notification No. 21/2002 lists Antenna separately on which 10% duty is payable. However, at the same time, it would be pertinent to point out that it mentions Chapter Heading 8529.10. It becomes clear that when aerials of Antenna are separately imported as independent items, they would be covered by Entry No. 317 and chargeable to 10% duty. On the other hand, when the same Antenna which is inseparable part of BTS, is imported along with the entire BTS equipment as one equipment and is installed in the same BTS, it would be subsumed under Entry No. 239.

Needless to mention that the same reasoning shall apply to mini-link as well.

We are, therefore, of the opinion that this appeal lacks merit and is, accordingly, dismissed.

.....J.
[A.K. SIKRI]

.....J.
[ROHINTON FALI NARIMAN]

NEW DELHI;
SEPTEMBER 09, 2015

ITEM NO.101

COURT NO.14

SECTION III

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 87/2007

COMMNR. OF CUSTOMS, BANGALORE

Appellant(s)

VERSUS

M/S. HUTCHISON ESSAR SOUTH LTD.

Respondent(s)

(with office report)

Date : 09/09/2015 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

For Appellant(s) Mr. Yashank Adhyaru, Sr. Adv.
 Ms. Nisha Bagchi, Adv.
 Ms. B. Sunita Rao, Adv.
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 Ms. Pooja Sharma, Adv.
 Mr. B. Krishna Prasad, Adv.
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For Respondent(s) Mr. V. Lakshmikumaran, Adv.
 Mr. M. P. Devanath, Adv.
 Mr. S. Vasudevan, Adv.
 Ms. Disha Jain, Adv.
 Ms. L. Charanaya, Adv.
 Mr. Aditya Bhattacharya, Adv.
 Mr. Hemant Bajaj, Adv.
 Mr. Anandh K., Adv.
 Mr. Aman, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeal is dismissed in terms of the signed order.

(Ashwani Thakur)
COURT MASTER

(Renu Diwan)
COURT MASTER

(Signed order is placed on the file)