M/s. Moser Bear India Ltd Vs Commissioner of Central Excise

FACTS

Assessee is a 100% EOU engaged in the manufacture of CDR, CD ROM, DVDR, DVD ROM. Assessee's unit is in the specified backward area wherein it is entitled to concession from payment of Sales Tax / VAT.

Assessee sold part of its goods in DTA on payment of concessional rate of duty in terms of Notification No 23/03-CE, however such goods supplied in Domestic Tariff Area ('**DTA**') were exempt from Sales Tax.

CONTENTIONS - - SERIVCE TAX DEPARTMENT

Service Tax Department contended that while

- Calculating the aggregate value of Customs duty, special additional duty leived under section 3(5) of Customs Tariff Act, 1975 ('**SAD**') element of 4% should be included as the goods cleared by the said EOU to DTA.
- Central Excise duty is levied by Central legislation and Sales Tax is levied by various State legislatures. The levy of SAD on imported goods is to counter balance the sales tax leviable on like articles sold, purchased or transported into India. Sales tax is Leived by State Governments at different rates. As per law Central Government can levy at the highest of the rates subject to a ceiling of 4 %.
- The backward area exemption does not imply that no levy of sales tax on such articles produced in such units. The rates prevailing across the country as levied by different State Governments could vary. In respect of units in the specified backward area, the rates are to taken as 0%, and still what will be relevant is the highest rate prevailing in the whole of the country.

CONTENTIONS - - ASSESSEE

Assessee submits that

- units set up in backward areas are not leviable to Sales Tax, therefore, the question of counter balancing the sales tax or value added tax does not arise. Therefore, levy of SAD under Section 3(5) of Customs Tariff Act is not applicable in respect of such units.
- backward area unit shall not be compared to other units which are paying sales tax and therefore exemption from SAD shall not be denied.

CESTAT observations

- CESTAT observed that the duty payable has to be determined based on the aggregate of duty of customs leviable on like goods. While determining the aggregate duties of Customs normally the additional duty of Customs leviable under section 3(5) of Customs Tariff Act need not be included However it has to be included if the goods cleared into domestic tariff area was exempt from payment of sales tax or value added tax.
- CESTAT also observed that the levy of SAD is not be dependent upon rate of duty applicable in respect of an individual unit; it is not dependent on the "sales tax payable" but on the "sales tax leviable". It is not a case that no sales tax is leviable in respect of goods cleared by the appellant. The levy is not dependent on rates applicable in the entire territory of any particular State. It can go up to the maximum rate applicable to such articles through out India subject to a ceiling of 4%.

CONCLUSION

CESTAT observed that they at variance with the decision made by Mumbai tribunal in a similar case therefore they refered the appeal to the larger Bench for deciding the following question of law.

> "Whether in respect of a 100% EOU availing sales tax exemption, for determining the excise duty payable based on aggregate value of customs duty, the element of SAD should be taken into account or not?"

CA. Rajat Mohan