

IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III
Excise Appeal No. 869 of 2008

[Arising out of Order-in-Original No. 01/Commr/NOIDA /2008 dated 23.1.2008 passed by
Commissioner of Central Excise, NOIDA.]

M/s. Moser Bear India Ltd.....Appellant

Versus

Commissioner of Central Excise.....Respondent NOIDA

Shri A.R.Madhav Rao, Advocate for the Appellants
Shri Deepak Garg, DR for the Respondent

CORAM: Ms. Archana Wadhwa, Member (Judicial) and Mr. M. Veeraiyan, Member
(Technical)

Date of Order: 22.7.2008

O R D E R

Per M. Veeraiyan (for the Bench):

This is an appeal against the order of the Commissioner No. 01/Commr/NOIDA /2008 dated 23.1.08.

2. Heard both sides.

3. The relevant facts in brief are as follows:-

- a) The appellant is a 100% EOU having their unit in the area specified by State Government of Uttar Pradesh for the purposes of concession from payment of Sales Tax / VAT; they are engaged in the manufacture of CDR, CD ROM, DVDR. DVD ROM falling under Chapter Heading 8523 of the Central Excise Tariff.
- b) The appellant has been issued with an eligibility certificate on 30.7.02 for availing benefit of backward area benefit from Sales Tax / VAT.
- c) The appellant sold part of their goods in DTA on payment of concessional rate of duty in terms of Notification No 23/03-CE dated 31.3.03. Such goods cleared in DTA were exempt from Sales Tax.

- d) Department felt that while calculating the aggregate value of Customs duty under Notification No. 23/03-CE read with notification No. 22/2006-CE dated 1.3.06 the duty(SAD) element of 4% should be included on the ground that the goods cleared by the said EOU to DTA are exempt from payment of Sales Tax . Accordingly, show cause notice was issued proposing to include the element of 4% duty (SAD).
- e) The Commissioner, by his impugned order confirmed the demand of Rs.10,27,94,461/- and imposed equal penalty.

4.1. The Ld Advocate 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.

4.2. It is not permissible to compare the backward area unit with other units which are paying sales tax and seek to deny exemption from SAD.

4.3. He relies on the decision of the Tribunal in the case of Hanil Era Textile vs. CCE, Belapur [2007 (210) ELT 414].

4.4. He also submits that exemption granted from levy of Sales Tax does not imply that goods removed for export have become exempt from sales tax. It is not correct to contend that goods cleared without payment of sales tax by availing the exemption under incentives for development and growth under section 4A, 4AA, 4B became exempted from sales tax.

4.5. Duty has been confirmed in respect of interstate transfer where sales tax has been paid. The duty wrongly demanded on this count is to the tune of Rs.7,23,176/-.

4.6. The allegation of suppression regarding non-inclusion of SAD element in the duty calculation is incorrect and therefore, penalty imposed is not warranted.

5.1. Learned DR submits that the Central Excise duty is levied by Central legislation. Sales Tax is levied by enactment of 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. Such levy by the State Government, are at different rates. The law envisages the Central Government can levy at the highest of the rates subject to a ceiling of 4 %.

5.2 The backward area exemption does not imply that no levy of sales tax on such articles produced in such units. The levy of SAD depends upon prevailing sales tax levies in respect of such articles through out India and not in respect any particular unit. 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. There is no

warrant to treat the units in backward area as eligible for special dispensation with reference to SAD.

6.1. We have carefully considered the detailed submissions from both the sides and we find the issues involves interplay of the provisions of the Customs Act, the Central Excises Act and laws on Sales Tax by various State Governments. We , prima facie, come to the following findings and conclusions.

6.2. SAD under section 3 of the Customs Tariff Act is a levy on the imported goods. It is imposed by the Central Government by issue of a notification published in the Gazattee. The rate at which the levy can be imposed depends up on the rates of Sales Tax levied by the State Governments. Still, it is not a levy on goods sold, purchased or transported within or out of India.

6.3. The goods manufactured in a 100% EOU having been manufatred within the territory of India attracts Excise duty only. The 100% EOUs avail several benefits like the duty free procurement of capital goods (imported and procured from domestic sources) and duty free inputs (imported as well as procured from domestic sources). Therefore, they are primarily required to export the goods manufactured by them except to the extent to which they are permitted to sell locally and subject to the conditions specified. In view of the benefits availed by them, when the goods were cleared in the domestic market there are certain quantity restrictions and the rates of duties(i.e. measure of tax) applicable is also different from the non-EOU units and the excise duty payable is based on the Customs Tariff. The measure has been prescribed under Notification No. 23/03-CE dated 31.3.03. The said Notification was amended by Notification No. 22/2006 dated 1.3.06. The amended condition reads as follows:

"In the said notification, in the Table, -

- (i) against S.No.2, for the entry in column (4), the following entry shall be substituted, namely:-

In excess of the amount equal to the aggregate of duties of Customs leviabale on like goods, as if,-

- a) duty of customs specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), read with any other notification in force was reduced by 75% and
- b) no additional duty of customs was leviabale under sub-section (5) of the section 3 of the said Customs Tariff Act:

Provided that while calculating the aggregate of customs duties, additional duty of customs leviabale under sub-section (5) of the section 3 of the Customs Tariff Act shall be included if the goods cleared into Domestic Tariff Area are exempt from payment of sales tax or value added tax."

6.4. From the above it is seen 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, additional duty of Customs leviable under section 3(5) has to be included if the goods cleared into domestic tariff area was exempt from payment of sales tax or value added tax.

6.5. The Commissioner has held that in respect of clearance made by the appellant to the domestic area, payment of sales tax is exempted in view of backward area exemption granted by the UP Government. It is not a case where the is not liable pay sales tax but it is a case where is not liable to pay in view of the exemption. Since, sales tax is exempted, the exclusion of additional customs duty leviable under section 3(5) of the Customs Tariff Act to arrive at the aggregate duty of Customs leviable on like goods was held unjustified.

6.6. We find 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%.

6.7. Measure of the tax SAD appears to be not assessee-specific. Even if the appellant were to import the said goods they may have to pay SAD.

7. We find in the case Hanil Era Textiles vs. CCE, Belapur 2007(210) E.L.T. 414 (Tri-Mumbai), the Tribunal has taken a view that since assessee situated in back ward area and availing sales tax exemption, the measure of SAD being Sales tax payable which is nil, no SAD can be confirmed against them. This has been arrived primarily relying on the decision in the case of Morarjee Brembana Ltd vs. CCE, Nagpur [2003(154) E.L.T.500] which was based on the fact prior to 16-9-99 only Basic Custom Duty was payable as per Notification 2/95 C.E. The relevant portions of the cited decisions are reproduced below.

"Hanil Era Textiles vs. CCE, Belapur

2(a) These findings do not consider the claim of the assessee of full exemption of SAD under Sl. No. 3 to Notification NO.22/99-Cus. Dated 28.2.99 for the reason of full exemption to whole of Basic Customs Duty and CVD vide Notification 53/97-Cus. Dated 3.6.97 upto 31.3.2003 and thereafter 52/2003-Cus. Dated 31.3.03 for imports of EOU as claimed by the assessee. The denial of consideration of benefit of Sr. No.4 to table to Notification NO. 22/99 arrived by the Commissioner is not upheld for the reason that there was no grounds arrived to deny the claim. The Commissioner is finding that the decision of Morarjee Brembana, 2003 (154) ELT 500 wherein it has been held that SAD is not applicable to sales by EOU to DTA is not applicable for the reasons as arrived in the order impugned, as extracted supra. The non levy of Additional Duty of Excise (Goods of Special

Importance) Act, 1957 would not ipso facto lead to a conclusion that SAD has to be charged.

(b) The assessee is admittedly not discharging Sales Tax for the reasons of being situated in an area as specified under the Sales Tax Act. The appellants has strongly contended that when there is Sales Tax, there can be no levy of SAD. The said levy was introduced w.e.f. 2.6.98 under new Section 3A of the Customs Tariff Act, 1975 and was applicable only to imports. Apart from the fact that whether sale from EOU to DTA has to be treated as import or not, we also note that the measure of said levy was equivalent to Sales Tax and when the appellant was not required to pay Sales Tax; no SAD can therefore be confirmed also. When Tribunal decision in the case of *Morarjee Brembana Ltd. (100% EOU) v. CCE, Nagpur* reported in 2003 (154) ELT 500 (Tri-Mumbai) as read with *Jindal Photo Film Ltd. - 2004 (178) ELT 955*. We see no reasons to take a different view. We accordingly hold that confirmation of SAD against the appellant is not in accordance with law. The same is accordingly set aside."

Morarjee Brembana Ltd. v. CCE, Nagpur

"18. **Special Additional Duty:** The next plea is that special additional duty leviable under Section 3 of the Customs Tariff Act is not payable by them. Since only basic customs duty was payable on goods cleared by EOU to DTA as per Notification No. 2/95, prior to 16.9.99. Sub-section(5) of Section 3A provides that nothing contained in this section shall apply to any article, which is chargeable to duty levied under sub-section 3(1) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957. The appellants manufacture fabric classifiable under chapter heading 5207 of the Central Excise Tariff Act, 1985 on which duty under the above mentioned Act is leviable. Therefore, we accept the appellants contention regarding non-leviability of Special Additional Duty on the fabrics manufacture by them."

8. Since our prima facie based on appreciating the overall facts and circumstances is at variance with the decision cited supra we feel that it would be appropriate to refer 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?"

9. The registry is directed to place the case records before the Hon'ble President for considering constitution of the **Larger Bench**.