2013 (1) ECS (140) (Tri-Mum)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. I

**M/s Gammon India Ltd.**

**Vs.**

**Commissioner of Customs (Import), Nhava Sheva**

Appeal No. C/895/2011

[Arising out of Order-in-Appeal No. 416(Gr VA)/2011(JNCH)/IMP/346 dated 20.09.2011 passed by the Commissioner of Customs (Appeals), Mumbai II.]

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| M/s Gammon India Ltd. | Appellant |
| Vs. | |
| Commissioner of Customs (Import), Nhava Sheva | Respondent |

Appearance:

| | |
|---|---|
| Shri Prasad Paranjape, Advocate | for appellant |
| Shri Navneet, Addl. Commissioner (AR) | for Respondent |

CORAM:

Shri P.R. Chandrasekharan, Member (Technical)
Shri Anil Coudhary, Member (Judicial)

Date of Hearing: 18.12.2012
Date of Decision:08.01.2013

ORDER No. A/12/12/CSTB/C-I

**“It is well – settled position in law that an exemption notification, being an exception, should be strictly construed. The principle of strict interpretation of taxing statutes is best enunciated by Rowlatt J in his classic statement:**

> **“ In a taxing statute on has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.””[Para 5.4]**

**“Further in law, a subcontractor is an entity that signs a contract to perform part or all of the obligations of another’s contract. A subcontractor is hired by a general contractor (or prime contractor, or main contractor) to perform a specific task as part of the overall project and is normally paid for services provided to the project by the originating general contractor. If that be so, there is no logic and reason for deeming the appellant as a sub-contractor of M/s GICL at all.”[para 6.3]**

Per: P.R. Chandrasekharan

1. The appeal is directed against Order-in-appeal No. 416(Gr VA)/2011(JNCH)/IMP/346 dated 20.09.2011 passed by the Commissioner of Customs (Appeals), Mumbai II, JNCH, Nhava Sheva.

2. The appellant, M/s Gammon India Ltd., Mumbai, (Gammon in short) imported a consignment of “Electronic Sensor Paver Vogetel model super 1800 – 2 with AB 600 – 2 TV screed for laying bituminous pavement upto 9 M width along with accessories vide Bill of Entry No. 934212 dated 10.3.2010 and claimed duty exemption under notification No. 21/2002 – Cus dated 1.3.2002 vide Sl. No. 230 of the Table annexed to the said notification. The said notification vide List 18 (sl. No. 2) granted duty exemption to “Electronic paver finisher (with sensor device) for laying bituminous pavement 7 m size and above” subject to condition No. 40. The said condition stipulated that the goods shall be imported by a person who has been awarded a contract for the construction of roads in India by the National Highways Authority of India among others or by a person who has been named as a sub – contractor in the contract referred to above. The assessing officer passed a speaking order dated 11.5.2010 denying the benefit of exemption on the following grounds. He observed that the equipment imported by the appellant has a base width of 3 meters only with hydraulic extension upto 6 meters and mechanical expansion upto 9 meters. Since the notification specified that the device should have width 7meters and above, the assessing officer held that the equipment under importation did not satisfy the description specified in the notification. He further observed that in the instant case

the contract was awarded by M/s NHAI to M/s Gorakhpur Infrastructure Company Ltd. (GICL in short) and the contract did not mention M/s Gammon as a sub – contractor as envisaged in the said notification. Accordingly he denied the benefit of duty exemption. The appellant preferred an appeal against the said order of assessment before the lower appellate authority who upheld the findings of the assessing authority and dismissed the appeal. Hence the appellant is before us.

3. The ld. Counsel for the appellant made the following submissions: -

(1) It is the capability to pave and not the width of the machine that will determine eligibility to exemption. In the instant case, as per the product catalogue, though the base width of the paver is 3 meters, the width can be varied upto 6 meters with the single tube telescoping system. With the addition of bolt on extensions, the screed builds up for joint free paving to a maximum width of 9.5 meters. Thus the equipment satisfies the criteria of laying bituminous pavement 7 m size and above.

(2) The contract was awarded by NHAI to the consortium M/s GICL vide concession agreement dated 6th October, 2006 and the members of the consortium are – 1) M/s Gammon India Ltd., the appellant, having 51% share in the consortium; 2) M/s Gammon Infrastructure Projects Ltd. having 39% share in the consortium and 3) M/s Associated Transrail Structures Ltd. having 10% share in the consortium. The appellant was the lead member of the consortium. As per the Concession Agreement, the agreement includes Request for Proposal (RPF) document issued by the NHAI and any amendments thereto made in accordance the provisions contained in the agreement apart from the agreement and its schedules ‘A’ through ‘X’ thereto. The RPF document requires execution of Memorandum of Understanding (MOU) and as per the MOU dated 24.1.06, the role of the appellant was defined as that of carrying out construction work. Further as per the agreement “contractor” means the contractor or contractors, if any, with whom the concessionaire has entered into all or any part of the Project Agreements. The appellant had executed an EPC contract dated 14.4.2007 with M/s GICL. Therefore, the appellant should be deemed as a sub contractor and therefore, they are rightly entitled for the benefit of duty exemption.

(3) Accordingly he pleads for allowing the appeal.

4. The ld. Additional Commissioner (AR) appearing for the Revenue strongly opposed the contentions of the appellant. He made the following submissions: -

1) The equipment eligible for import is “Electronic paver finisher (with sensor device) for laying bituminous pavement 7 m size and above”. The size referred to is the size of the equipment and the minimum size requirements is 7 meters. From the product catalogue, it is evident that the base width of the equipment is 3 meters and with telescopic tubing the width can be raised to 6 meters. Only with bolt – on additions, the width can be raised to 9 meters. It is, therefore, evident that the minimum size of the equipment under import is 3 meters and not 7 meters as specified in the notification. Therefore, the goods in question does not satisfy the specifications for the equipment for concessional duty and hence the lower authorities have correctly denied the exemption.

2) To be eligible for duty exemption, the appellant should have been awarded a contract for road construction by NHAI or should be named as a sub – contractor in the contract awarded by NHAI. In the present case, the contract has been awarded to M/s GICL. The appellant’s name does not figure as a sub – contractor in the contract awarded by M/s NHAI to M/s GICL. Merely because the appellant is a lead member of the consortium, the appellant can not be considered as a sub – contractor. Accordingly, the appellant does not satisfy condition No. 40 to notification No. 21 / 2002 – Cus.

3) He is also relied on the decision of the Hon’ble apex court in the appellants’s own case reported in 2011 (269) ELT 289 (SC) where in a similar situation, the appellant had claimed the benefit of duty exemption as a contractor and the Hon’ble apex court negative the said contention. Therefore, following the ration of the said decision, the appellant is not eligible for duty exemption as a sub – contractor also.

4) Accordingly he pleads for upholding the orders of the lower appellate and assessing authorities.

5. We have carefully considered the submissions made by both the sides. There are two issues for decision in the present case. The first one is whether the equipment imported by the appellant is eligible for duty exemption under notification No. 21/2002 – Cus dated 1.3.2002 and the second issue is whether the appellant is eligible for the concession as a sub – contractor to the road construction contract awarded by M/s NHAI to M/s GICL.

5.1 It would be useful at this juncture to refer to the provisions of the exemption notification No. 21/2002 – cus. The relevant portions are extracted below:-

| S.No | Chapter/Heading No. | Description of goods | Basic Duty of Customs | Additional Duty of Customs | Condition No. |
|---|---|---|---|---|---|
| 230 | 84 or any other Chapter | Goods specified in List 18 required for construction of roads | Nil | Nil | 40 |

LIST 18

1. Hot mix plant batch type with electronic controls and bag type filter arrangements more than 120T/hour capacity

2. Electronic paver finisher (with sensor device) for laying bituminous pavement 7 m size and above.

3. ………………………………………………………………………………………………………….

15. Hydraulically operated rough terrain self propelled 100 tons crank with telescopic boom

16. …………………….

17. Mobile concrete pump placer of 90/120 cu m/hr. capacity
…………………………..

20. Hydraulic gantry crane of 100 tonnes capacity for launching truss
………………………………………

CONDITIONS

40 If,
(a) the goods are imported by –
i. the ministry of Surface Transport, or
ii. a person who has been awarded a contract for the construction of roads in India by or on behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction corporation under the control of Government of a State or Union Territory; or

iii. a person who has been named as sub – contractor in the contract referred in (ii) above for the construction of roads in India by or an behalf of the Ministry of Surface Transport, by the National Highway Authority of India, by the Public Works Department of a State Government or by a road construction corporation under the control of the Government of a State or Union Territory;

(b) …………………………………………………………………………………

(c) …………………………………………………………………………………

5.2 From a plain reading of the provisions of the notification extracted above, it may be seen that List 18 specifies the equipment eligible for concessional rate of duty. There are 22 types of equipment specified and in respect of certain types of equipment, there are specifications also laid down (for eg. equipment at serial nos. 1, 2, 15, 17, and 20 of the List). In respect of serial no. 2 with which we are concerned, the equipment eligible for concession is Electronic paver finisher of size 7 m and above. The size specified is in respect of the equipment. Since the equipment is a paver, the size should relate to the paver width of the equipment.

5.3 In the product catalogue available in the records, the product specifications for Electronic Sensor Paver Vogetel model super 1800 – 2 with AB 600 – 2 TV are given. The screed width is the relevant criterion as that determiners the width of the paving. The AB 600 – 2 Extending Screed has a basic width of 9ft. 10 in. (3 meters). Equipped with the Vogele single – tube telescoping system, its pave width is infinitely variable upto 19ft. 8 inches (6 meters). By addition f bolt – on extensions, the screed builds up for joint – free paving to a maximum of 29ft. 6 inches (9.5 meters). In other words, the equipment per se has a basic width of 3 meters extendable upto 6 meters with the telescopic tubing system. With the addition of bolt on extensions only, the width can be raised to 9.5 meters. Bolt on extensions come in three sizes, namely, 25 cm, 75cm and 125cm. The notification refers to the pave width of the equipment and not of the extensions that can be attached to the equipment to increase the same. As the maximum pave width of the equipment is only 6 meters, it does not satisfy the criterion of 7 meters size and above. If the intention was to cover the width of the bolt – on extension also, the same would have been so specified in the notification. Thus from the product catalogue, it is amply clear that the equipment under import does not satisfy the product specification stipulated in List 18 of the notification and consequently, the equipment under importation does not qualify for the benefit of exemption and we hold accordingly.

5.4 It is well – settled position in law that an exemption notification, being an exception, should be strictly construed. The principle of strict interpretation of taxing statutes is best enunciated by Rowlatt J in his classic statement:

> " In a taxing statute on has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Applying the above principle to the facts of the present case, the equipment under import does not fall under the category of size 7 meters and above specified in List 18 serial no. 2 of the notification and we hold accordingly.

6. The next issue for consideration is whether the appellant is eligible to claim the duty exemption in terms of sub – clause (iii) of clause (a) of condition 40. The Contract in this case was awarded by NHAL to the consortium M/s GICL which comprises the appellant, M/s Gammon India ltd. as its lead member with two other members. The appellant's name is not mentioned as a sub – contractor in the concession agreement dated 6th October 2006 entered into between NHAI and M/s GICL. As per definitions at clause 1.1 of the agreement, "Agreement" means this Agreement, the Schedules "A" through "X" hereto, the Request for Proposal (RFP) document issued by NHAI dated 20th December, 2005 any amendment thereto made in accordance with the provisions contained in this Agreement. We have perused the said agreement and its Chedules. Nowhere in the agreement or the Schedules thereto, the appellant M/s Gammon India Ltd. is named as a sub – contractor. We have also perused the Request For Proposal (RFP) dated 20.12.2005. In respect of proposals submitted by a Consortium, in clause 1.4.2, there is an additional requirement which reads as under:

> "1.4.2. Members of the Consortium shall submit a Memorandum of Understanding (MOU) for the purpose of submitting the Proposal, as per format attached in Annex 2C. The Memorandum of Understanding (MOU) shall be furnished on a non – judicial stamp paper of Rs. 100/- duty attested by notary public."

6.1 In pursuance to the RFP, and MOU dated 24th January, 2006 was entered into by the three members of the Consortium, namely, M/s Gammon India Ltd., M/s Gammon Infrastructure Projects Ltd.,and M/s Associated Transrail Structures Ltd. for forming a Special Purpose Vehicle (SPV) with shareholding commitments expressly stated to domicile the Project prior to the start of implementation of the Project. The MOU was in the context of NHAI inviting Qualification and Financial Proposal from entities interested in "Design, Construction, finance, operation and maintenance of km 0.00 km to km 32.27 of Gorakhpur Bypass of NH – 28 in the State of Uttar Pradesh on Annuity Basis". The MOU was reached with respect to member's (of the consortium) rights and obligations towards each other and their working relationship. As per clause 8 of the said MOU,-

"8. That the roles and responsibilities of each Party at each stage of the Bidding shall be as follows:-

a) Construction Works: GIL shall be responsible for the execution of construction works to the Project.
b) Operations & Maintenance Works: GIL and / or GIPL shall be responsible for the operations and maintenance works for the project."

As per clause 10 of the said MOU – "That the Parties shall be jointly and severally liable for execution of the Project in accordance with the terms of the Concession Agreement."

6.2 The argument of the appellant is that this MOU which is part of RFP should be considered as a sub – contract and the appellant, M/s GIL should be deemed as a sub – contractor. This argument is totally illogical and unacceptable for the following reason. Firstly the MOU was reached among the members of the consortium for forming a Special Purpose Vehicle with shareholding commitments expressly stated. Secondly the MOU was reached with respect to each member's rights and obligations towards each other and their working relationship. By no stretch of imagination, this MOU can be considered as a sub – contract. A sub – contract has to be between the main Contractor who is M/s GICL on the one hand and the appellant, M/s GIL, on the other spelling out the terms and considerations for the contract and such sub – contractor has to be named specifically in the concession agreement between NHAI and M/s GICL. That is not the position obtaining in the present case. As per the terms of the notification a person has been named as sub – contractor in the contract referred in (ii) above, that is in the contract between NHAI and M/s GICL in the instant case. The word "named" signifies "to make reference to or speak about briefly but specifically" (ref. Webster's online dictionary). In other words, the appellant should be specifically named or designated as a sub – contractor explicitly. We do not find any such specification of the appellant as a sub – contractor in the instant case. Accordingly we hold that the appellant has not satisfied condition No. 40 (a) (iii) stipulated in the notification. Consequently, the appellant is not eligible for the benefit of duty exemption under the said notification.

6.3 In law, "Subcontractor" is a person who is awarded a portion of an existing contract by a principal or general contractor. Subcontractor performs work under a contract with a general contractor, rather than the employer who hired the general contractor. In the present case the MOU was entered on 24th January , 2006. At that time there was no contract at all between NHAI and M/s GICL. The concession agreement between NHAI and M/s GICL was entered into on 6th October, 2006. Thus the question of treating the MOU as a sub – contract does not arise at all when the main contract itself was not in existence. Further as per clause 10 of the MOU, each member of the consortium is jointly and severally liable for execution of the Project in accordance with the terms of the Concession Agreement. Further in law, a subcontractor is an entity that signs a contract to

perform part or all of the obligations of another's contract. A subcontractor is hired by a general contractor (or prime contractor, or main contractor) to perform a specific task as part of the overall project and is normally paid for services provided to the project by the originating general contractor. If that be so, there is no logic and reason for deeming the appellant as a sub-contractor of M/s GICL at all.

6.4 It has also been argued that the appellant entered into an EPC contract with M/s GICL on 14.4.2007. No copy of the said contract has been produced before us nor is it part of the records. Assuming the contention to be true, the concession agreement between GICL and NHAI was entered into on 6th October, 2006. The so called sub – contract between the appellant and M/s GICL was entered into on 14.4.2007. If that is so, how can the appellant be named as sub – contractor in the agreement dated 6.10.2006 when no sub – contract was in existence ? Thus from whichever way one looks at it, the appellant does not satisfy condition No. 40 (a) (iii) so as to be eligible for the benefit of duty exemption.

6.5 It would be relevant at this juncture to refer to the decision of the hon'ble apex court in appellant's own case cited supra. The facts of the said case are reproduced verbatim from the Tribunal's decision reported in 2003 (156) ELT 883 Tri. Mum below : -

> "1. Gammon India Ltd. Mumbai, the respondent to this appeal, and Altanta Infrastructure Ltd., Mumbai, entered into a joint venture agreement on 18th September, 2000. The agreement was entered into for the purpose of tendering a bid to the National Highway Authority of India in order to secure the contract for construction of the stretch from 31.40 kilometers on National Highway 5. The venture provided for financial responsibility of each party in the form of guarantee, securities etc., to the extent of 50% of project value, for setting up a management board to manage the venture, composed of a Chairman and Director to be appointed by Gammon India Ltd. and a Joint Chairman and another Director to be appointed by Atlanta Infrastructure Ltd. It provided that the parties shall be jointly and severally liable to the National Highway Authority of India for execution of contract. It designated Gammon India Ltd. to be the lead partner to the venture.
>
> 2. The bid tendered by the joint venture was accepted by the National Highway Authority of India, Gammon India Ltd. subsequently imported a mobile batching plant which, we are told, is an equipment required in road concrete mixing plant. In the bill of entry that it filed in the Bombay Custom House in July, 2001 for clearance of this plant, it claimed exemption from duty in terms of Entry 217 of the table of Notification 17/2001. This entry exempts from duty goods specified in the notification required for construction of roads subject inter alia to the condition that the goods are imported by the Ministry of Surface Transport or a person who has been awarded a contract for construction of roads in India by or

on behalf of the Ministry of Transport or other authorities designated in the notification of the Central or State Government or by a person as sub – contractor to a contract that has been awarded by any of these authorities. With regard to two of the machinery qualifying for exemption, stone crushing (cone type) plants and concrete batching plants 50 cum/hr., the exemption is also subject to the further condition and that the importer produces a certificate from not below the rank of Deputy Secretary in the Ministry of Surface Transport (Roads Wing) of the Government of India to the effect that the imported goods are required for construction of roads in India. The Custom House proposed to deny the exemption on the ground that the contract for construction of the stretch on highway in question has been awarded not to Gammon India Ltd., the importer of the goods, but to Gammon – Atlanta (JV) and that the certificate issued by the Deputy Secretary to the Government of India in terms of the exemption, in regards to batching plants is indicated that the contract has been awarded to the Gammon Atlanta (JV) and not to Gammon India Ltd. the importer waived issue of notice at the hearing and requested a decision. The Deputy Commissioner of Customs, basing his reasoning on the grounds above, and holding that an exemption notification is strictly interpreted, concluded that since the importer did not satisfy the conditions contained in the exemption notification, it was not entitled to the exemption and denied it."

6.6 The appeals of the appellant were rejected by the lower appellate authority and this Tribunal and the appellant filed as SLP before the hon'ble apex court. In the said case, the hon'ble apex court framed the question for consideration as follows: -

> "12. The short question for determination is whether import of the specified machine by Gammon can be considered t be an import "by a person who has been awarded a contract for construction of the roads in India", so as to fulfill condition No. 38, laid down in Exemption notification no. 17/2001-cus, dated 1st March, 2001?"

6.7 After hearing both sides, the hon'ble apex court held as follows in para 20 and 21 thereof.

> "20. The argument was that since a joint venture has been declared to be legal entity in New Horizons (supra), it squarely falls within the ambit of the said definition of the word "person". We are of the opinion that even if the stated stand on behalf of the appellant is accepted, mercifully, on stark facts at hand, it does not carry their case any further. Neither was it the case of the appellant before the Adjudicating Authority or before the Appellate Authority or before us, nor is it suggested by the documents viz. the supply order or the bill of entry, that the import of the machine was by or on behalf of the joint venture. On the contrary, the Tribunal has recorded in its order that when questioned, learned counsel for

the appellant clarified that correspondence with the supplier of the goods and placement of the order had been done by Gammon and not by the joint venture or on their behalf. He also admitted that payment for the machine had not been made from the joint venture account, which had been provided for the contract but from the funds of Gammon.

21. Thus the inevitable conclusion is that import of "concrete batching plant 56 cum/hr" by Gammon cannot be considered as an import by M/s Gammon – Atlanta JV, "a person" who had been awarded contract for construction of roads in India and, therefore, neither Gammon Atlanta JV nor Gammon fulfill the requisite requirement stipulated in Condition No. 38 of the exemption No. 17/2001 dated 1st March, 2001.".

6.8 The hon'ble apex court further laid down the principle of interpreting the exemption Notification as under:

"22. As regards the plea of the appellant that the Exemption Notification should receive a liberal construction to further the object underlying it, it is well settled that a provision providing for an exemption has to be construed strictly. In Novopan India Ltd. (supra), dealing with the same issue in relation to an exemption notification, a three – Judge Bench of this Court, stated the principle as follows:

"1. We are, however, of the opinion that, on principle, the decision of this Court in Mangalore Chemicals --- and in Union of India v. wood Papers referred to therein --- represents the correct view of law. The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee --- assuming that the said principle is good and sound --- does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals and other decisions, viz, each such exception / exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by a Constitution Bench of this Court in Hansraj Gordhandas v. H.H. Dave that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter

should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption."

23. Applying the above principles, we are of the opinion that since in the instant case the language of condition No. 38 in the Exemption Notification is clear and unambiguous, there is no need to resort to the interpretative process in order to determine whether the said condition is to be imparted strict or liberal construction."

6.9 The facts of the present case are very similar to the case decided by the hon'ble apex court in the appellant's own case cited supra. Notification No. 17/2001 was the predecessor to notification No. 21/2002. Condition No. 38 (a) specified in notification 17/2001 is identical in wording to condition No. 40 (a) specified in notification No. 21/2002. The appellant is also the same in both these cases. The conditions of the contract are also the same. The only different is that earlier appellant claimed the benefit under the category of a "contractor" which was negative by the hon'ble apex curt. In the present case, the appellant has changed the claim from a contractor to that of a "sub – contractor. For the reasons already discussed in paras 6 to 6.4 above, we have held that the appellant can not be considered as a sub – contractor since he has not been named as such in the contract awarded to the consortium. Therefore, the ratio of the above judgment and principles of interpretation laid down therein apply squarely to the present case before us.

7. In view of the foregoing we do not find any merit in the present appeal and accordingly, we dismiss the same.

(operative part of the order pronounced on 08.01.2013)