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Indirect Tax Alert

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CESTAT decision – Misuse of STPI Scheme for duty free import ¹

Brief Facts

M/s. Converge Labs Software Technologies Pvt. Ltd. ('Converge') is a 100% export oriented unit ('EOU') operating under the Software Technology Parks of India ('STPI') Scheme and is engaged in the development and export of software. Notification No. 140/91-Cus dated 22nd October 1991 ('subject Notification'), granted exemption from the Customs Duty to goods imported into India by a 100% EOU under the STPI Scheme subject to certain specified conditions. Converge imported several consignments of Telecom equipment consisting of Personal Access System, Wireless Local Loop System and telephone handsets (collectively referred to as the 'equipment') from M/s. U.T.Starcom Inc ('UTSC') in terms of this notification.

The equipment was taken out of the unit with the permission of the jurisdictional Assistant Commissioner Customs and the STP authorities and installed at Mahanagar Telephone Nigam Ltd. ('MTNL') site for demonstration and testing.

As per the terms of the Agreements between Converge, MTNL and UTSC it appeared that the purpose of import of the equipment was to provide the same to MTNL on behalf of UTSC for field trial. It was confirmed by the Company's officials that the said equipment was not used for software development.

Since the equipment appeared to have been imported in contravention of the provisions of the subject Notification and the EOU Scheme, the same was seized and show cause notices were issued to Converge, UTSC and the officials of Converge (collectively 'Appellants') demanding duty and penalty and seeking confiscation of the equipment –

Upon confirmation of the demand an appeal was filed to the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT').

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Contentions of the Appellant

The Appellants put forth the following contentions to substantiate their plea that they were eligible to the exemption under the subject Notification -

- The equipment imported by the Appellants are specified in the subject Notification and are backed by 'Import Certificate' issued by the STPI certifying that the equipment is relevant to the activity of Converge. Once the duty free clearance is allowed, the eligibility of the same cannot be challenged subsequently.
- The imported equipment was used for the purposes of undertaking software testing for MTNL on behalf of UTSC. As software development includes software testing, the equipment imported was used for its intended purpose.
- The imported equipment was taken to the premises of MTNL in accordance with the provisions of the subject Notification.
- Since UTSC is neither the importer nor the person dealing with the imported equipment, no penalty can be imposed upon them.
- As UTSC is willing to take back the equipment, the same may be allowed to be re-exported to UTSC.

Contentions of the Respondent

Justifying the confiscation of the equipment and the demand for duty and penalty, the Respondents made the following submissions –

- The role of Converge was to import the equipment dispatched by UTSC on loan basis, install and commission the same in MTNL's premises and carry out maintenance during the period of trial. The equipment was not meant for software development for export.
- The conditions of the subject Notification were not fulfilled viz. -
 - The use of the equipment was not undertaken within the unit, and
 - The equipment was used for trial and not for test or demonstration for which permission for removal was granted.
- The equipment was removed for possible sale which is not permitted under the subject Notification.
- The equipment was neither required for the purposes of software development nor had any software been developed with the help of the equipment.
- UTSC being the abettor was also liable for penalty under the Customs Act, 1962.
- The equipment was supplied by UTSC to MTNL through Converge in order to take advantage of Converge's eligibility for duty free import of capital goods. Hence, UTSC's request for re-export had been rightly rejected.

Observations of CESTAT

The following observations were made by the Principal Bench of the Hon'ble CESTAT –

- The purpose of import of the equipment was to provide it to MTNL for free trial and subsequent purchase. Converge's role was merely to act as a facilitator for import, installation, commissioning, maintenance and arrange for sale of the equipment to MTNL or re-export to UTSC.
- The import of the equipment was not a specific requirement for software development. The imported equipment was neither installed in the STPI unit for the purposes of use nor was any software developed by the use of the same.
- The sole purpose of the import of the equipment was to install the same for trial and subsequent sale or re-export, as the case may be.
- The transaction of import of the equipment was arranged through STP to avoid the payment of Customs duty payable at the time of import.
- The certificate from the STP authorities and the jurisdictional Assistant Commissioner under the provisions of the subject Notification was obtained by misrepresentation and mis-declaration with regard to the actual purpose of import of the equipment into India and the clearance of the equipment from the unit. Accordingly, the authorities would be well within their rights to re-open the assessment and deny the exemption.

Conclusion

The CESTAT held that Converge was not eligible for availing the exemption on the import of the said equipment as the conditions under the subject Notification for duty free import of the equipment were not fulfilled. Accordingly, the confiscation of the equipment, the demand for the duty on the equipment and imposition of the penalty against the Appellants was in order. In view of the circumstances of the import of the equipment, permission to re-export the equipment to UTSC without payment of duty was also denied.

Source:

1. *CESTAT decision in the matter of M/s Converge Labs Software Technologies Pvt. Ltd. & Others vs. Commissioner of Central Excise, Gurgaon (2009-TIOL-1469-CESTAT-MUM)*

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