

## **Appeal is maintainable before the High Court since the issue pertains to exemption and not the rate of duty- SC**

**31 March 2022**



## Summary

The Supreme Court (SC) has opined that a dispute regarding exemption cannot be equated with dispute in relation to rate of duty. These are distinct and mutually exclusive. The SC has upheld the view of Kerala High Court (HC) that the principal issue in given case is determining whether the vessel is a foreign going vessel (FGV) or not and it is not in relation to rate of duty. The SC observed that the appeal is maintainable before the HC since it pertains to availability of exemption and hence, agreed with the view taken by the HC.

## Facts of the case

- The petitioner<sup>1</sup> operates CS Asean Explorer ('vessel AE') for laying, repairs and maintenance of submarine cables, which is stationed at Kochi. For this purpose, it had entered into agreement with various telecommunication companies.
- A show cause notice (SCN) was issued to the petitioner wherein the department alleged that the vessel cannot be considered as an FGV. Hence, the exemption for ship stores, spares, bunkers, etc. cannot be availed.
- The petitioner contended that the activities undertaken by vessels are in terms of SEAICOMA<sup>2</sup>. Further, only one cable recovery took place within territorial waters of India out of all the operations.
- The petitioner submitted that the vessel was all time engaged in operations outside India and thus, qualifies as an FGV under the provisions<sup>3</sup> of the Act. Therefore, the petitioner is exempted from payment of any duty. Thus, no

assessment is required for determination of amount payable.

## CESTAT Bangalore observations and ruling<sup>4</sup>:

- **ASEAN explorer is an FGV:** On perusal of inclusive definition<sup>5</sup>, it was observed that the vessel was an FGV as no specific time period was prescribed in the definition. The status of vessel cannot be decided on a piece meal basis since, the contractual terms require a continuous and long drawn engagement.
- **Status of the FGV determined by terms of agreement:** The status of any FGV does not change just because only one or two engagements were undertaken in territorial waters of India. Rather, it is determined by terms of SEAICOMA, irrespective of the fact that the vessel was docked at Cochin Port for majority of time and for once, it undertook work in the territorial waters.
- **Eligible for exemption:** As per the provisions<sup>6</sup>, till the time the vessel holds

<sup>1</sup> M/s. Asean Cables Pvt. Ltd

<sup>2</sup> South East Asia and Indian Ocean Cable Maintenance Agreement ("SEAICOMA" / "Agreement")

<sup>3</sup> Section 2(21) and Section 87 of the Customs Act, 1962

<sup>4</sup> Customs Appeal No. 27102 of 2013, 27115 of 2013; Final Order No. 20218-20219/2020 dated 18 February 2020

<sup>5</sup> (ii) of Section 2(21) of the Customs Act, 1962

<sup>6</sup> Section 87 of the Customs Act, 1962

the status of FGV, it is entitled for the exemption from payment of duty.

- **Extended period not invocable:** The extended period cannot be invoked in the present case as in the past also, the customs officers have boarded the vessel berthed at Cochin Port for supervision and have even undertaken their routine formalities. However, the petitioner is liable to pay duty on stores consumed while performing in India.

#### **Kerala HC observations and ruling<sup>7</sup>:**

- **Maintainability of appeal:** The significant question was regarding whether the vessel is an FGV or not and not about the determination of rate of duty. The question of payment of duty or rate of duty will depend only on the question first posed. The case's jurisdictional fact holds it eligible for maintaining an appeal before the High Court. Further, it is not covered under the exceptions provided under the provision<sup>8</sup>.

#### **SC observations and ruling<sup>9</sup>:**

- **Disputes are distinct:** The issue related to exemption entitlement and determination of rate of duty are different. The submissions of the petitioner regarding applicable rate of duty have no substance. Hence, the disputes regarding exemption cannot be equated with dispute in relation to rate of duty.
- **Appeal maintainable before HC:** The HC is correct in observing the main question which is not in relation to rate of duty. The SC affirmed the view taken by the HC. In a similar judgement<sup>10</sup>, it was

held that the appeal filed w.r.t. availment of exemption is maintainable before the HC and not the Apex Court.

#### **Our comments**

In the present case, the petitioner has misinterpreted the issue of exemption with rate of duty. However, both disputes are mutually exclusive and different.

Accordingly, the Supreme Court in this ruling approved the view of High Court that appeal filed in relation to exemption shall be entertained by High Court. If the dispute relates to rate of duty, then appeal shall lie before the Supreme Court.

It is pertinent to note that the question relating to rate of duty is specifically excluded for preferring appeal at High Court under the Customs law and same shall lie before the Supreme Court.

Similarly, the Apex Court in case of Motorola India Limited<sup>11</sup> and Madras High Court in case of BMW India Private Limited<sup>12</sup> had held that appeals having question related to the rate of duty or value of goods for the purpose of assessment would only lie before the Supreme Court and rest all cases shall lie before High Court.

However, it is interesting to note that such an exception related to filing of appeal in relation to the rate of duty or value of goods before High Court is not provided under the GST regime.

<sup>7</sup> Cus. Appeal No. 1 of 2021, Order dated 17 Dec 2021

<sup>8</sup> Section 130 of the Customs Act, 1962

<sup>9</sup> Special Leave Petition (C) No.2208 of 2022, Order dated 15 March 2022

<sup>10</sup> Commissioner of Customs vs. Motorola (India) Ltd., (2019) 9 SCC 563.

<sup>11</sup> 2019 (9) TMI 229 - Supreme Court

<sup>12</sup> Civil Miscellaneous Appeal No.2043 of 2019

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