

MOBILES AND IMMOBILES

(S. Jaikumar & M. Karthikeyan, Swamy Associates)

"Everything will change except the theory of change"

-An age-old adage

Not long ago, a Chennaiite had to wait for hours to reach his friend or relative at Delhi, over phone! First he had to book a trunk call to the desired number. There existed a classification called "Ordinary" and "Lightening" with varied tariffs. Once the trunk call is booked, he has to wait indefinitely depending on the tele-traffic between the destinations, availability of the person at the other end, the lunch/tea breaks of the connecting personnel, etc. But today? If we tell our children about such a situation they will curiously listen to it like "Gulliver's Travels!"

Like others, India too witnessed a telecom revolution in the past decade! That too, the arrival of cellular technology in telecom sector is the best ever invention of mankind, maybe, next to the electricity! Today, from millionaires to milkmaids, badshahs to rickshawwallahs, a mobile has become their sixth finger! Understanding that the mobiles are no more luxury stuff but are basic requirements of the public at large, the Government has extended various benefits to this sector. Concessional rates were prescribed to various telecom products, both under Excise, as well as, Customs duties. Witnessing the grand revolution going around, our beloved Mr. Confusious also wanted to partake in it. The Circular No. 57/2003-Cus dated 27/6/2003 was issued by the Board and the wick was lit, which led to a landmark decision of the Hon'ble Apex Court in the case of **M/s TATA TELESERVICES LTD vs COMMISSIONER OF CUSTOMS** as reported in **2006 (194) ELT 11 (SC)**. In this article, we shall attempt a case study of this very interesting and significant decision.

Before getting into the issue, let us understand some nuts and bolts. In telecommunication, there are two prevalent medium of communication, namely, line telephony and wireless telephony. As the normal DoT lines are based on line telephony, the wireless telephony are either based on Global System for Mobile Communication (GSM) used by Airtel, Hutch etc., or FDMA (Frequency Division Multiple Access) or CDMA (Code Division Multiple Access) used by Reliance and Tata Indicom. In this wireless technology, there are two different types of phones prevalent, namely, "mobile phones" and "fixed wireless telephones". As the mobile phones are hand held (e.g. Nokia, Samsung, etc), these fixed wireless telephones resemble a normal phone with a sturdy antenna and mostly work on CDMA technology (e.g. Tata Walkie).

Facts of the case:

M/s Tata Teleservices Ltd, (TTSL for short) was importing two types of instruments, namely, Fixed Wireless Telephones (FWP) and Fixed Wireless Terminal (FWT) under model nos. LSP-340 and LST-250, respectively. While the Fixed Wireless Telephones (FWP) are self-contained instruments having all the features of a telephone instrument like receiver, transmitter, dial pad, switch and bell or buzzer, the Fixed Wireless Terminals (FWT) are essentially transreceivers which are required to be connected to a telephone instrument for providing basic telephone services. These FWTs can also be connected to a fax or computer for data communication.

In Notification 21/2002-Cus, under Sl. No 313, there was a concessional rate of Customs duty for "Cellular phones and the Radio Trunking Terminals" falling under chapter heading 8525.20 of the Customs Tariff Act (CTA). As TTSL imported both the FWTs as well as the FWP, claiming the benefit of "cellular phones" under the above entry, the department denied the same for them, by a controversial Circular 57/2003-Cus. The dispute went to the Hon'ble Tribunal and giving rise to the decision in **M/s TATA TELESERVICES LTD vs CC, CHENNAI** as reported in **2004 (168) ELT 181 (Tri-Del)**.

Decision of the Hon'ble CESTAT:

In the case *supra*, the Tribunal distinguished between the FWT and FWP on classification, at the first place. It observed that the FWT (Model LST-250) does not have the facility of a telephone as neither one can receive the message nor transmit the message unless and until it is attached to some telephone apparatus and hence held that such FWTs are not "cellular phones" classifiable under Chapter heading 8525.20.17 of the CTA. It also held that the appropriate classification of LST-250 (FWT) is 8525.20.19 of the CTA. Coming to the FWP (Model No. LSP-340), the Tribunal held that, despite the fact that they work under wireless technology, they cannot be termed as "cellular phones" as the cellular phones has to be mobile ones. Thus the Tribunal held the classification of FWPs also under chapter heading 8525.20.19 of the CTA and denied the benefit of "cellular phones" under Sl No. 313 of the Notification 21/2002-Cus.

But interestingly, there was an alternate plea for TTSL in the said case *supra*. As per Notification 26/2003-Cus, a new Sl No. 427 was inserted to the parent notification 21/2002-Cus, whereby, "Routers. Modems and Fixed Wireless Terminals" falling under chapter heading 85.17 of CTA were also given a concessional rate of Customs duty. TTSL pleaded that, alternatively, the benefit of Sl. No. 427 *supra* shall be extended to both their products, namely, FWT and FWP. But there was a bottleneck. The Tribunal had already held that both the FWT as well as FWP are classifiable under chapter heading 85.25 of CTA. But this Sl. No 427 gave the benefit only to the FWTs falling under chapter heading 85.17 of CTA. With sound reasoning, the Tribunal laid down the law that, the benefit of exemption will be available to the goods even though the articles mentioned in the Notification are not covered by the Chapters/Heading Nos./Sub-heading Nos. mentioned in the Notifications, if the goods are squarely covered by the description, based on a Customs Circular No 9/96 – Cus dated 13/2/1996.

Ratio:

From the above decision, the following ratio emerges:

- FWT (Model No LSP-250) is not a telephone at all and are classifiable under Chapter Heading 8525.20.19 of CTA.
- FWP (Model No. LSP-340) is a telephone based on cellular technology but cannot be termed as "cellular telephones" and is classifiable under Chapter Heading 8525.20.19 of CTA.
- Both FWP as well as FWT are not eligible for concessional rate of duty under Sl No 313 of Notification 21/2002-Cus.

- Alternatively, both the FWP as well as FWT are entitled to the benefit of SI No. 427 of the said Notification, irrespective of the fact that there is a Chapter heading mismatch.

Enter Mr. Confusious:

In the above Circular No. 57/2003-Cus, the Board, with its own wisdom, had clarified that,

"It is a settled law that where a taxing statute does not define a term, it has to be interpreted according to its meaning in common trade parlance. The term cellular phone, in common parlance, refers to mobile phones. The HSN Notes also equate cellular phones with mobile phones. Thus a telephone will not be considered as a "cellular phone" merely because it works on "cellular technology". It may be noted that the relevant entry in the notification is "cellular phones" and not "phones based on cellular technology".

Further it was also clarified that the benefit of the new SI No. 427 to Notification 21/2002-Cus, shall be available only to FWTs and not for FWPs. In other words, the department extended the benefit of the SI. No 427 *ibid*, only to the Model No. LST-250 and denied the same to the Model No. LSP-340. Aggrieved TTSL, appealed to the Hon'ble Supreme Court thus giving rise to this present landmark decision.

Decision of the Hon'ble Supreme Court:

After a detailed analysis of various judgments on the subject and the impugned circular No. 57/2003, the Hon'ble Supreme Court has held that the Board has pre-determined the issue of common parlance, which was a matter of evidence to be left for adjudication. It also upheld the observations of the decision of the Bombay Bench that, the impugned Circular has sought to impose a limitation on the exemption notification which the exemption notification itself did not provide for. It further observed that it was not open to the Board to whittle down the exemption notification in such a manner. The Apex Court also observed that it is the onus of the department to prove that the impugned goods, namely, FWP (LSP-340) are classifiable under chapter heading 8525.20.19 of CTA, which has not been discharged by the department. It also held that, as there is no dispute that the technology used in LSP-340 (FWPs) and the hand held mobile phones are the same, there is no warrant to limit either the tariff entry or the exemption notification only to the hand held cellular phones. In effect, the Hon'ble Apex Court also set aside the decision of the Delhi Tribunal *supra*, in so far as it related to the eligibility of LSP-340 to the benefit of SI. No 313 of the Notification 21/2002-Cus and allowed the same.

In fine, the Apex Court held that the FWPs are "cellular phones" classifiable under chapter heading 8525.20.17 of CTA and are eligible for the benefit of the concession under SI. No. 313 of the notification 21/2002-Cus.

**At this juncture, it is highly relevant to note that the dispute before the Apex Court was only in respect of the model No. LSP-340 (FWP) and not in respect of the Model No. LST-250 (FWT). In other words, in respect of the FWT, the decision of the Hon'ble Tribunal classifying the FWT under Chapter Heading 8525.20.19 of CTA, and considering them as "NOT A CELLULAR PHONE" has been accepted by the TTS.*

Before parting...

As stated above, there are two different technologies in telecommunication, namely, line telephony, as well as, wireless telephony. Both are thoroughly distinct and entirely different technologies altogether. After going into the case in depth, we find that, as chapter heading 85.17 of CTA deals with line telephony, chapter heading 85.25 of CTA deals with wireless technology. That being the case, we are left with utmost surprise as to how the department included the "Fixed **Wireless** Terminals" under chapter heading 85.17, under Sl. No. 427 of Notification 21/2002-Cus, which is meant only for line telephony? Is it time to amend the age-old adage, *supra*, as "*Everything will change except our CBEC!*"