

**Tata Unisys Ltd. Vs. Collector of Customs**

**Tata Unisys Ltd. Vs. Collector of Customs**

**SooperKanoon Citation :** [sooperkanoon.com/7811](http://sooperkanoon.com/7811)

**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Sep-15-1994

**Reported in :** (1994)LC271Tri(Delhi)

**Appellant :** Tata Unisys Ltd.

**Respondent :** Collector of Customs

**Judgement :**

1. Learned advocate, Shri A.M. Setal-wad for the applicant has prayed for waiver of pre-deposit of Rs. 2,93,68,904/-demanded as duty by the Collector of Customs, Delhi and also of Rs. 20,00,000/- imposed as fine in lieu of confiscation. He submits the following facts leading to the aforesaid demand of duty and imposition of the fine in lieu of.

confiscation. The applicant relying on the brochure issued by the Development Commissioner of Noida Export Processing Zone (NEPZ) made an application for establishing a unit in NEPZ for computer consultancy for overseas market and computer software development for export. He has drawn particular attention to 'a Big Package of Incentives' by Government of India at S. No. 6 of the brochure which is as follows :- "6. Duty-free import of capital goods and equipment from preferred sources." He has also drawn attention to the application dated 16th October 1987 in which the applicant stated against the column 'items to be manufactured in NEPZ and annual capacity with FOB value exports (yearwise for 5 years) as follows :- Annual capacity will be based on contracts received and export man-power availability." This application was approved by the Government

of India in the Ministry of Commerce vide its letter dated 16th Dec., 1987 indicating the items of manufacture and the annual capacity as follows :-

Year of manufacture	Annual capacity (Rs. in lakhs)	Item
1955	195	Computer consultancy and computer software development
1956		Computer software development
1957		Computer software development
1958		Computer software development
1959		Computer software development
1960		Computer software development
1961		Computer software development
1962		Computer software development
1963		Computer software development
1964		Computer software development
1965		Computer software development
1966		Computer software development
1967		Computer software development
1968		Computer software development
1969		Computer software development
1970		Computer software development
1971		Computer software development
1972		Computer software development
1973		Computer software development
1974		Computer software development
1975		Computer software development
1976		Computer software development
1977		Computer software development
1978		Computer software development
1979		Computer software development
1980		Computer software development
1981		Computer software development
1982		Computer software development
1983		Computer software development
1984		Computer software development
1985		Computer software development
1986		Computer software development
1987		Computer software development
1988		Computer software development
1989		Computer software development
1990		Computer software development
1991		Computer software development
1992		Computer software development
1993		Computer software development
1994		Computer software development
1995		Computer software development
1996		Computer software development
1997		Computer software development
1998		Computer software development
1999		Computer software development
2000		Computer software development
2001		Computer software development
2002		Computer software development
2003		Computer software development
2004		Computer software development
2005		Computer software development
2006		Computer software development
2007		Computer software development
2008		Computer software development
2009		Computer software development
2010		Computer software development
2011		Computer software development
2012		Computer software development
2013		Computer software development
2014		Computer software development
2015		Computer software development
2016		Computer software development
2017		Computer software development
2018		Computer software development
2019		Computer software development
2020		Computer software development
2021		Computer software development
2022		Computer software development
2023		Computer software development
2024		Computer software development
2025		Computer software development

He has also drawn attention to the Government of India's Policy on Computer Software Export, Software Development and Training dated 18th December, 1986 which gives a special meaning to the expression 'computer software export' in Clause 5 of Part in of the Policy. Clause 5 is reproduced below :- "5. Computer software export will include besides physical export on magnetic media or on paper, also export through satellite data link and consultancy delivered at the location of foreign client abroad by Indian computer expertise.

2. With this background, submits the learned counsel, the applicant imported capital goods and has made exports worth over Rs. 2 crores in respect of consultancy and of over Rs. 6 lakhs worth of computer software in terms of physical goods. The department by the impugned order does not consider the export earnings on consultancy at the site of the foreign clients abroad as having fulfilled export obligation cast on the applicant in terms of Notification No. 339/85-Cus., dated 21-11-1985 (as amended). Finding of the adjudicating authority in this respect is as follows :- "On careful consideration of their contentions in the aforesaid Customs Notification I find that consultancy services provided at site abroad cannot be termed as 'production of goods in the Zone for export and as such these consultancy services especially when these cannot be co-related with the goods imported in the Zone are not covered by the provisions of the aforesaid Customs Notification. I also find that the term 'goods' appearing in the above-mentioned Customs notification never includes consultancy services and execution of orders outside the Zone at the site abroad. The said M/s. TUL (the applicant herein) in none of their communication including their reply to the show cause notice have stated that the goods imported duty free by them are in fact being used for production of goods for export within the Zone. Since execution of orders at site abroad cannot be termed as 'goods' produced in the Zone, I find that

they have not used the goods imported duty free into the Zone for production etc. of goods for export within the Zone as required under the aforesaid Customs notification.

2.1 He further finds in para 14 that goods means "tangible goods only and would obviously not include 'services'" 2.2 Learned advocate has submitted that the aforesaid finding of fact and law in the impugned order by the adjudicating authority is against the facts and circumstances of the case. The applicant had clearly stated that his item of manufacture is going to be computer consultancy in the overseas market. This was duly approved, as stated, by the Government of India. In the face of these facts it is not proper for the department to turn back and say that the benefit of Notification 339/85-Cus. does not apply to them because nett foreign exchange earnings on account of computer consultancy cannot be taken as having met the export obligation of the applicant. He has also submitted that there is nothing in the definition of 'goods' in Section 2(22) of the Customs Act which expressly excludes 'services' from the definition of the said goods. He submits that in view of all the facts being placed before the Government and Government having accorded the approval to export of consultancy among other software the word 'goods' should be construed as including 'services' and should be given a liberal construction as held in the case of Senior Electric Inspector and Ors.

(Appellants) v. Laxminarayan Chopra and Anr. (Respondents) [AIR 1962 SC 159]. In the said judgment, submits the learned counsel, the Court gave a wide construction to the expression 'telegraph line' occurring in the Indian Electricity Act, 1910 read with Indian Telegraph Act, 1885.

'Telegraph Line' in the said two Acts mean a wire or wires used for the purpose of an appliance or apparatus for receiving telegraphic and other communications by means of electricity. When the Telegraph Act, 1885 was passed, wireless telegraph or radio had not been developed.

Question arose whether the work of the wireless receiving was interfered inasmuch it had no telegraph line as defined in the two Acts. The Court in paras 8 and 9 after relying on some English decisions observed as follows :- The maxim

contemporanea expositio as laid down by Coke was applied to construing ancient statutes, but not to interpreting Acts which are comparatively modern. There is a good reason for this change in the mode of interpretation. The fundamental rule of construction is the same whether the Court is asked to construe a provision of an ancient statute or that of a modern one, namely, what is the expressed intention of the Legislature. It is perhaps difficult to attribute to a legislative body functioning in a static society that its intention was couched in terms of considerable breadth so as to take within its sweep the future developments comprehended by the phraseology used. It is more reasonable to confine its intention only to the circumstances obtaining at the time the law was made.

But in a modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human society. Indeed unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them. We cannot, therefore, agree with the learned Judges of the High Court that the maxim *contemporanea expositio* could be invoked in construing the word 'telegraph line' to the Act.

(9) For the said reasons, we hold that the expression 'telegraph line' is sufficiently comprehensive to take in the wires, used for the purpose of the apparatus of the Post and Telegraph Wireless Station." 2.3. Learned advocate has further submitted that in terms of the Notification 339/85-Cus., the Collector of Customs has no jurisdiction to monitor export obligation which is the duty cast on the Development Commissioner of the NEPZ. Consequently, he cannot demand duty in terms of the said notification. In support of the latter proposition, he also submits that Notification 339/85 envisages only one circumstance under which the applicant is liable to pay duty. That circumstance is set out in condition No. (vii)(a) of the said notification i.e. when the capital goods are not proved to the satisfaction of the Collector of Customs to have been installed or otherwise used within the

Zone. He submits that there is no allegation that the capital goods imported by the applicant have not been installed or used within the Zone. He further submits that all the terms of the notification have been satisfied as follows :- (i) the applicant has been authorised to establish a manufacturing unit in the Zone; (ii) the applicant has been granted necessary licence for the import of the goods; (iii) the applicant has satisfied the Development Commissioner of the Zone that the goods so imported are used for the production of the goods for exports out of India; (iv) the applicant has executed a bond with the Development Commissioner of Zone binding himself to fulfil export obligation etc.; (v) the applicant has used the imported goods for the purposes spelt out in condition No. (v) of the notification inasmuch as apart from consultancy services the applicant has admittedly produced tangible goods such as power computer software and exported them on shipping bills to the extent of over Rs. 6 lakhs; there being no condition about the quantum of production of physical goods; (vi) there is no allegation of violation of condition No. (vi). In any case the applicant has maintained proper account of imported goods and of export goods and had been periodically submitting such account to the Development Commissioner of the Zone; (vii) condition No. (vii) already stands satisfied, as stated above; (viii) condition No. (viii) has not been alleged to have been violated.

In the aforesaid facts and circumstances; there is no justification for imposing the duty and fine in lieu of confiscation.

3. Opposing this contention, learned SDR, Shri B.K. Singh for the Revenue has urged that production of goods in terms of the Customs Act and the Customs Notification No. 339/85-Cus. can only be physical production of goods which are tangible and are cleared on shipping bills with prior notice to the Customs regarding fulfilment of the export obligation. Obviously, the services exported by the applicant cannot come within the definition of "goods", as rightly held by the adjudicating authority. Consequently, the demand of duty has been rightly made inasmuch as the applicant has not fulfilled or is not capable of fulfilling the terms of the said notification. He has also submitted that even if it is assumed, though it is not conceded, that services are "goods" in the facts and circumstances of this case for the purpose of export, these cannot be said to have been correlated with

the goods imported and installed at NEPZ. In the absence of any such correlation the benefit of the notification cannot be extended to the applicant.

3.1. In the rejoinder, learned advocate has drawn attention to the details of the contracts which were duly intimated from time to time in submission of the applicant's accounts in terms of the notification to the Development Commissioner which are directly correlated to the goods at NEPZ because the goods '1100 Platform' in the various Units of the applicant are installed only at NEPZ and these contracts executed abroad and against which net foreign exchange has been earned to the tune of over Rs. 2 crores are, therefore, directly relatable to the goods at NEPZ.4. We have carefully considered the pleas advanced on both sides. We observe that the full facts regarding their activities had been disclosed by the applicants and the nature of export obligations to be undertaken by them when they had indicated consultancy for overseas market abroad as one of the items to be manufactured by them and was duly approved by the Government of India before establishment of their unit at NEPZ. In these circumstances, it would not be correct for the authorities below to take a view prima facie that services are not goods and therefore, the applicant has not fulfilled export obligation or is not capable of fulfilling so. Rest of the requirement that the goods are to be exported through shipping bills with prior notice to the Customs are only procedural in nature. Obviously, this requirement could not be fulfilled on account of the nature of the goods. We are also inclined prima facie to agree with the learned advocate that in the context of changing technology, an interpretation should be given to the word used in a statute to take in new facts and situations if the words are capable of comprehending them. Definition of the word 'goods' in Section 2(22) of the Act includes, among other specific things, "any other kind of moveable property". Apart from the fact that the definition in Section 2(22) is only an inclusive definition and is not an exhaustive one, there is nothing in the language of the said definition that 'services' are excluded from the scope of the word 'goods'. We are also prima facie of the view that in the absence of any definition of 'moveable property' in the Customs Act, provisions of the General Clauses Act, 1897 on definitions of 'immovable property' and 'moveable property' would apply and consequently the expression 'any other kind of moveable property' would include the "services" exported by the applicant.

4.1. As regards the objection that even the export of "services" is not correctable to the goods installed at NEPZ, we find prima facie that the adjudicating authority has not gone deep into the material placed by the applicant and has made only a passing observation regarding non-correlation. He has also not given an opportunity to the applicant/appellant to establish the same to his satisfaction. Having regard to the overall facts and circumstances of the case, we allow the stay petition unconditionally.

4.2. We also feel in view of the heavy stakes being involved and the matter having recurring impact on the collection of the Revenue that the matter should be taken for out of turn hearing. We accordingly direct the Registry to post the case for early hearing in the next 3 to 4 months. Dated : 30-4-1993 Member (T) 5. [Contra per : S.L. Peeran, Member (J)]. - I have carefully gone through the order prepared by my Id. brother but I regret my inability to agree with the same. Hence, I am recording my separate order.

6. My Id. brother has already extracted in brief the facts of the case and the arguments of both sides. I will be relying on the same and few other facts and documents referred during the arguments.

7. We had heard extensively Id. Sr. Advocate Setalwad and the Id. SDR. We have also gone through in detail the entire facts and circumstances of the case and the evidence on records and also the case law cited before us.

8. The allegations in the show cause notice dated 16-3-1992 are that the applicant had submitted their project report to the Ministry of Commerce alongwith their application for approval to set up an Industrial Unit in NOIDA Export Processing Zone (NEPZ). They had stated in their application among other things that the plant and machinery as well as raw-materials, components etc. imported by them would be used for production in NEPZ of goods wholly for export. The Ministry of Commerce vide letter of approval dated 16th December, 1987 approved their project and authorised them to set up an Industrial Unit at NEPZ for manufacture of computer consultancy and computer software development for export subject to certain conditions. One of the conditions was that the net average value addition achieved by them during the first five years was not to be less than 60%. On the

basis of their letter of approval reference with OGLNo. 20/90, dated 30-3-1990, they imported goods worth Rs. 2,08,75,477/- upto December 1991 and availed exemption from Customs duties under Notification No.339/85-Cus., dated 21-11-1985. The total amount of duties foregone on the goods imported by them comes to Rs. 2,93,68,904.00.

9. On a request made by the applicant, the Ministry of Commerce vide their letter dated 1-8-1987 increased the limit of import of capital goods from Rs. 130 lakhs to Rs. 175 lakhs to enable them to bring additional equipment for manufacture of computer software subject to the condition that the prescribed value addition of 60% is maintained by them.

10. The show-cause notice alleges that during the course of monitoring of import and export activities, it came to notice that the applicant had exported software worth Rs.6.9 lakhs against their unauthenticated export of Rs. 744 lakhs claimed by them as consultancy exports. It is alleged that the export of software routed through Customs is less than 1% of the total exports claimed by them. It is alleged that no specific work of consultancy project in the shape of development of software and its export from NEPZ is being done in the Unit as is evident from the sample print out of "professional profile" of some engineers which were exported vide Shipping Bill dated 14-8-1991 coupled with the fact that no export documents for export of software showing earnings in foreign exchange were submitted to customs. The show-cause notice concurs that the applicant's unit is primarily engaged in training of their officials who after being trained on the import capital goods etc. are sent abroad to work at site for various foreign clients. The applicants did not submit any evidence to the customs of establishing the development of all manpower trained in the zone at overseas locations only and not in STA. The applicant had admitted that they had not exported any software but they had only trained their personnel and the imported goods had been used only for training their personnel. They also admitted that they had not engaged in manufacture or production of goods for exports. They had informed the Department that their foreign exchange earnings had been in terms of 'Service Exports' or 'Consultancy Exports', which should be deemed to be "goods" exported.

However, they did not give the details of their consultancy extracts nor they had furnished any information establishing overseas development of manpower for execution of the contracts (it has to be observed here that after hearing Shri Setalwad for a whole of morning session on 5-3-1993, the Bench felt that the applicant was required to place before us for scrutiny of these contracts, invoices etc. The same had been placed vide application on the date of final hearing of this stay application on 22-4-1993). The show cause notice alleges that the applicant had not intimated the department of the execution of so-called export orders and the same had remained unauthenticated, as they had not submitted any export documents or information to the Customs for verification. Therefore, it has been alleged that the applicants are not engaged in manufacture or production of goods for export and are not utilising the goods imported by them in their unit inside NEPZ for the purposes of manufacture or production of goods for export as required under their Letter of Approval and the said Customs notification. Hence the applicants were alleged with the contravention as stated in the show-cause notice and were called upon to pay the said customs duty amount and also were called upon to explain why the goods valued at Rs. 2,08,75,477.00 should not be confiscated under Sections 111(d) & 111(o) of the Customs Act and penalty be imposed on them.

11. The Id. Collector of Customs afforded them with due opportunities to present their case and after due deliberation has passed the impugned order. Among other things the Id. Collector has held in para 10 of the order : "It is, therefore, incorrect on their part to state that the formula for such calculation was not intimated to them. As far as achievement of the minimum stipulated value addition of 60% is concerned, they have themselves reported vide their letter dated 24-10-1991 that their value addition came to 50%. However, details of such calculation were not submitted by them and as such, it is not known whether they have taken into account all the ingredients for such calculation as required to be done in terms of formula prescribed in Appendix XXIII-A of Hand Book of Procedures April-March 1990-93 (vol. 1). It is strange to note that at page 8 of their reply to the show-cause notice, they have submitted that the average net value addition as per their reckoning is adequate and at page 4 of the same, they have submitted that they are confident that they are well on the way to meet the prescribed obligations.

Both of these submissions are self-contradictory and without any evidence in support of their contentions. In view of the foregoing facts and their own submissions, it appears that the net value addition achieved as reported by them is below 60%." 12. As regards the violation of conditions of Notification No.339/85-Cus., dt. 21-11-1985 as amended the Id.Collector at para 13 has held "13. As per condition (v)(a) of M.F. (D.R.) Notification No.339/85-Cus., dt. 21-11-1985 as amended, the units in NEPZ are allowed to import specified goods duty free subject to condition that the importer agrees to bring the goods into the zone and use them within the zone for the production of goods for export out of India or in connection with the promotion of such export of goods. In the present case, the said M/s. T.U.L. themselves informed that the goods imported by them in their NEPZ unit are basically used for training of personnel to make them more export worthy. They have also submitted that such goods were used by them for 'strategic business alliances with overseas customers. At page 5 of their reply to the show-cause notice they have denied that their NEPZ unit is primarily engaged in training of personnel whereas in their letters dt. 5-10-1990 and 23-10-1991, they have themselves declared that the goods imported in their NEPZ unit are used for training of personnel. Just after denial, they have submitted in their reply that such training is essential and not prohibited.

These two submissions made by them are self-contradictory. They have also declared that their consultancy exports are provided on site abroad' and they send computer engineers trained on the goods imported in the Zone to their clients' locations abroad for execution of export orders at clients' site. Such activity is not covered by the provisions of the aforesaid customs notification which clearly stipulates that production activities should be confined 'within the said zone'.

"During the personal hearing, they have submitted that the notification should be given proper interpretation so as to include export of sendees which are much wider than the restrictive term 'goods' used in the notification and also that under Customs Act, goods have a wider definition which is an inclusive definition. On careful consideration of their contentions in the aforesaid customs notification, I find that consultancy services provided at site abroad cannot be termed as production of goods in the Zone for export and as such these consultancy services

especially when these cannot be co-related with the goods imported in the Zone are not covered by the provision of the aforesaid customs notification. I also find that the term 'goods' appearing in the above-mentioned customs notification never includes Zone at the site abroad. The said M/s. TUL in none of their communications including their reply to the SCN, have stated that the goods imported duty free by them are in fact being used for production of goods for export within the zone. Since execution of orders at site abroad cannot be termed as goods produced in the Zone, I find that they have not used the goods imported duty free into the Zone for production etc. of the goods for export within the Zone as required under the aforesaid customs notification." 13. I have carefully considered every plea put forth by the Id. Senior advocate and also the arguments advanced by learned SDR. With due respect to the learned Senior Advocate, I do not find any of his arguments appealing to me. They are totally devoid of any merits and cannot be considered at this stage. Prima facie, the impugned order is sustainable, and it is valid and that I do not see any infirmity or illegality in it. I shall give my reasons for rejecting this stay application and deal with the various pleas raised before us after examining the Export Policy issued by Deptt. of Electronics dt.

18-12-1986, Notification No. 339/85 Cus., dt. 21-11-1985 and other materials on records.

The Preamble of the Policy states, "The Govt. of India have had under consideration, the question of reviewing the existing policy for computer software Export, Software Development and Training. As a first step in that direction, the President has been pleased to decide that the following POLICY ON COMPUTER SOFTWARE EXPORT, SOFTWARE DEVELOPMENT AND TRAINING SHALL COME INTO EFFECT." "The main basis is that any policy framework and its implementation has to take an integrated view of both local development of software and software export.

The policy is broadly aimed at accomplishing the following basic objectives :- 1. To promote software exports to take a quantum jump and capture, sizeable in international software market.

2. To promote the integrated development of software in the country for domestic as well as export markets.

3. To simplify the existing procedures to enable the software industry to grow at a faster pace.

5. To promote the use of computer as a tool for decision making and to increase work efficiency and to promote appropriate applications which are of development canalising nature with due regard for long term benefit of computerisation of the country as a whole." Para (III) deals with 'import policy for promoting software development and export' and lists out the scheme. Sl. No. 5 reads: "Computer software export will include besides physical export on magnetic media or on paper, also export through satellite data link and consultancy delivered at the location of the foreign client abroad by Indian Computer expertise." The policy gives entire details of policy on training, excess export entitlement, foreign collaboration and marketing abroad and the procedure to be followed and the legal prosecution of software under Copyright (Amendment) Act 1984. A clear reading of this policy brings out that there has to be development of software in the form of technology, tangibly exportable commodity in the form of 'goods'. But it does not deal merely of 'export' of trained personnel to carry out the programmes abroad, without developing the software in India in the Unit, to which the duty free import of machinery is granted.

14. As can be understood from the policy, the aim is to promote software exports in the form of tangible goods, which is subject matter of trade and marketing and not merely affording services abroad.

15. The applicant has produced copies of terms of agreements entered into with their clients which are all subject to the jurisdiction of the respective countries. The applicant has agreed to furnish to their customer, computer consultancy services, in the areas of system specifications, system design, system development, programming and implementation of the project 'IPF 1100/2200 Training". They have charged "TUL fees for computer consultancy services and not 'price'.

There is no 'sale of goods' for a market price, as can be envisaged from the terms of the contract. They have changed for : (e) Telephones/telex/cables (necessary in respect of services to be provided).

(g) any other expenses associated with the services to be provided to the customer.

"Computer consultancy services to be provided under the Agreement will involve besides other things, the recording of computer data etc. by TUL on Computer Tapes and/or disks and/or cassettes and/or cartridges and/or technical literature/manuals/reports etc. and dispatch of the same by TUL to customer and vice versa".

"The furnishing by TUL of computer consultancy services under this agreement conveys only a personal non-exclusive right and licence under TUL proprietary right for CUSTOMER to use the information generated and/or conveyed. TUL retains the entire right, title and interest in all and to all such proprietary rights." 16. No licence is granted to CUSTOMER to sublicense to others the material furnished under this agreement and CUSTOMER agrees not to disclose or discriminate to others, any of such material without specific written permission of TUL.

CUSTOMER understands and acknowledges that the furnishing of computer consultancy service under this Agreement does not convey a licence from TUL to use any program material licensed separately by TUL or any of its affiliated companies under a programme products licence agreement, and CUSTOMER understands that a separate programme product license may be necessary from a company authorised by the owner of programme products to grant such licenses if a licensed programing is to be used.

17. A reading of the terms and conditions of the Contract brings out the following:

(i) The computer consultancy services had been in the form of recording of deliverables (computer data etc.) by TUL on computer tapes, and for disks, and/or cassettes and/or cartridges and/or technical literature, manuals/reports etc.

(iii) There has been only a charge of fee and no bargain market price had been fixed.

(iv) The right, title, interest and all rights had remained with the applicant.

It follows that there had been no sale of goods for a price had taken place and hence no question of invoicing, determination of price had arisen between them and their customer.

18. But what then is the case of the applicant and that of the deptt.

and what is the factual position of the case as could be gathered from the documents placed before us, at the instance of the Bench? We have already seen the Govt of India policy. It envisages development of software and export of the same. Has the applicant done so? The answer is a single 'no'. The applicant has not developed it at their unit at Noida and there is no dispute on this point at all. The agreements entered into with the customers placed before us also disclose that the applicant had developed software abroad and the same has not been sold, but they had given computer consultancy service by retaining all their right, title and interest in the software developed by them abroad. Now what is the case of the applicant. They state that the experts had been trained at Noida. They utilised their knowledge and skill for the purpose of their aim of fulfilling the terms of their contract with their customer and they have pleaded that their "consultancy service" rendered by them is itself 'goods'. This is a fallacious argument, totally contradictory to the factual position as could be gathered from the terms of their contract, as noticed by me above. They have never sold their so-called 'computer consultancy services' acquired at Noida.

They developed softwares and transferred the same in the form of training only to their customers, keeping all their title rights, title and interest in the system developed by them abroad and charged only 'fee' and not sold the same for a price. They are not referring to these software developed as goods. But would like us to believe that the training obtained by them from the imported goods at Noida is in the nature of goods, which they had transferred in the form of services. These pleadings, prima facie are only to evade the customs duty and is in the total

breach of the export policy and the customs notification. The Customs Notification 339/85-Cus., dtd. 21-11-1985 exempts goods specified in the annexure to the notification when imported for the production of the goods for exports out of India or for the promotion of such exports by units within Noida Export Processing Zone at Ghaziabad from whole of duty of customs and additional duty of customs. From among the conditions listed in the notification are listed conditions for execution of a bond binding themselves to fulfil the export obligations and to fulfil the conditions stipulated in the notification and in or under the Import and Export Policy for April 1985 to March, 1988. Clauses (v)(vi)(vii) reads : (a) to bring the goods into the Zone and then use within the Zone for the production of goods for exports out of India or with the promotion of such exports of goods; (b) to export out of India, goods so purchased or packaged or to use such goods for imparting training to workers or to sell such goods (or packages) within the Zone, as the case may be; (c) to export or dispose of in the manner approved by the Development Commissioner of the Zone all remnants arising out of such production or packaging; (vi) the importer shall maintain a proper account of import, consumption and utilisation of goods and of exports made by him and shall submit such account periodically to the Development Commissioner of the Zone in such form and in such manner as may be laid down by the said Commissioner; (vii) The importer shall pay, on demand, an amount equal to the duty leviable -- [(a) on goods which are capital goods as are not proved to the satisfaction of the Collector of Customs to have been :-] (i) installed or otherwise used within the Zone or re-exported within a period of one year from the date of importation thereof or within such extended period as the Collector of Customs may, on being satisfied that there is sufficient cause for not using them within the Zone or for not re-exporting them within the said period, allow : (ii) retained within the Zone after installation or use inside the Zone; (b) on goods other than capital goods as are not proved to the satisfaction of the Collector of Customs to have been :- (i) used in connection with the production or packaging of goods (within the Zone) for export out of India or with the promotion of such export of goods or re-exported within a period of one year from the date of importation thereof or within such extended period as the Collector of Customs may, on being satisfied that there is sufficient cause for not using them or for not re-exporting them within the said period allow; (ii) retained

within the Zone in connection with the production or packaging of goods for export out of India or with the promotion of such exports of goods.

(c) On goods so produced or packaged as have not been exported out of India and on unused goods (including empty cones, bobbins or containers, if any suitable for repeated use) as have not been exported, within a period of one year from the date of importation of such goods or within such extended period as the Collector of Customs may on being satisfied that there is sufficient cause for not exporting such goods within the said period allow;" 19. The reading of the above terms of the notification makes it very clear that the imported goods are for the purpose of production of goods or for training workers, who would in turn produce goods for export. Clause VI makes it incumbent for maintaining of records and account of import, consumption and utilisation of goods and of export, made by them.

Clause VII grants power to the Collector of Customs to demand an amount equal to the duty as specified in the said clause. Shri Setalvad, Id.senior advocate has argued that the Collector of Customs has no jurisdiction to invoke clause VII and even if so, there has been no breach of the same and hence no duty is demandable. He argued that the imported machinery had been installed in the NOIDA and the Collector of Customs could demand duty only if the machinery had not been installed.

As they had been installed, the question of Collector demanding duty did not arise and that the question of re-export did not arise at all and the post-importation condition regarding minimum value addition is not a requirement of the said notification and that the Collector had acted beyond his jurisdiction. With due respect to the Id. senior advocate, I do not agree with this argument. It is totally devoid of any merits. The applicant had not produced any goods for export nor they had maintained accounts and no goods had been exported and thus there had been a clear violation of the Import Export Policy, Import Export (Control) Act, Customs Act and there had been a clear breach of provisions of Customs Act.

Sri Setalwad, Ld. senior advocate argued that the licence had been for computer consultancy and the applicant having trained their engineers and having gone

abroad and performed services for customers and earned foreign exchange, is a sufficient compliance of the licence, Export Policy and the notification. In this contract, he argued that the services are itself 'goods' and hence there had been export of goods.

Goods need not be tangible and it can be in the form of 'technical services' itself. With due respect to Id. counsel, I am not at all impressed with this argument. As noticed earlier the export policy clearly stipulated export of 'software', and the form of export has also been delimited. In terms of the policy, the Customs Notification was issued which granted exemption to imported goods for installation for the production of goods for export and the notification listed out the terms also. Can the acquisition of knowledge in the form of training be measured and accounted and kept in books of account as per Clause (vi) of the notification. Was this expertise exported by filling shipping bill, without the knowledge having taken a shape of 'software'. Can this abstract knowledge in mental state be termed as "goods." 20. The Id. Sr. Counsel wants us to give a modern definition to the term 'goods' and he argued that in the present scientific era, the concept of goods is required to be stretched, so as to bring within the line of modernity. I do not find in this particular case, such a situation has arisen to go into the extended meaning of the term 'goods' to include 'services' still in abstract mental state. The term 'goods' has been well interpreted by Hon'ble Supreme Court in the case of Union of India v. DCM 1977 (1) E.L.T. (J 199), Union Carbide v. Union of India(SC), South Bihar Sugar Mills v. Union of IndiaBhor Industries v. Collector of C. Excise The term "goods" has been defined in Article 366(12) of the Constitution of India as "goods includes all materials, commodities and articles". The goods on which duty is levied are listed in the Schedule of Central Excise Tariff Act, 1985 and Customs Tariff Act, 1975. The goods not listed in the tariff cannot be taxed nor mere inclusion is sufficient for taxing. The test laid down can be seen in DCM's case at paras 14 to 19 of the report.

14. The other branch of Mr. Pathak's argument is that even if it be held that the respondents do not manufacture 'refined oil', as is known to the market they must be held to manufacture some kind of 'non-essential vegetable oil' by applying to the raw material purchased by them, the processes of neutralisation by alkali and

bleaching by activated earth and/or carbon. According to the Id. Counsel, "manufacture" is complete as soon as by the application of one or more processes, the raw material undergoes some change. To say this is to equate "processing to manufacture" and for this we can find no warrant in law. The word "manufacture" used as a verb is generally understood to mean as "bringing into existence a new substance" and does not mean merely "to produce some change in a substance", however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26 from an American Judgment. The passage runs thus :- "Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation that a new and different article must emerge having a distinctive name, character or use".

15. It is helpful to consider also in this connection the ordinary meaning of the word "goods". For, by the very words of the Central Excises and Salt Act, 1944, excise duty is leviable on "goods". The Act itself does not define "goods" but defines "excisable goods as meaning" "goods specified in the First Schedule as being subject to a duty of excise and includes salt". On the meaning of the word "goods" an interesting passage is quoted in the Words and Phrases, Permanent Edition, Vol. 18 from a judgment of a New York Court thus :- "The first exposition I have found of the word "goods" is in Bailey's Large Dictionary of 1732, which defines it simply "merchandise", and by Johnson who followed as the next lexicographer, it is defined to be movable in a house; personal or immovable estates; wares; freight; merchandise".

"Goods, noun, plural; (1) movables; household furniture; (2) Personal or movable estate, as horses, cattle, utensils, etc. (3) Wares; merchandise; commodities bought and sold by merchants and traders".

17. These definitions make it clear that to become "goods" ,an article must be something which can ordinarily come to the market to be bought and sold. 18. These considerations of the meaning of the word "goods" provide strong support for the view that "manufacture" which is liable to excise duty under the Central

Excises and Salt Act, 1944 must be the "bringing into existence of a new substance known to the market".

"But", says the Id. Counsel, look at the definition of "manufacture" in the definition clause of the Act and you will find that "manufacture" is defined thus : Manufacture includes any process incidental or ancillary to the completion of a manufactured product". S. 2(f) 19. We are unable to agree with the Id. Counsel that by inserting this definition of the word "manufacture" in S. 2(f), the legislature intended to equate "processing" to "manufacture" and intended to make mere "processing" as distinct from "manufacture" in the sense of bringing into existence of a new substance known to the market, liable to duty. The sole purpose of inserting this definition is to make it clear that at certain places in the Act the word "manufacture" has been used to mean a process incidental to the manufacture of the article. Thus in the very Item under which the excise duty is claimed in these cases, we find the words "in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power". The definition of "manufacture" as in S. 2(f) puts it beyond any possibility of controversy that if power is used for any of the numerous processes that are required to turn the raw material into a finished article known to the market, the clause will be applicable; and an argument that power is not used in the whole process of manufacture using the word in its ordinary sense, will not be available. It is only with this limited purpose that the legislature, in our opinion, inserted this definition of the word 'manufacture' in the definition section and not with a view to make the mere "processing" of goods as liable to excise duty".

21. In Bhor Industries case the Supreme Court again reiterated basing on the above ruling and other rulings as follows : "Therefore, the marketability in the sense that the goods are known in the market or are capable of being sold and purchased in the market is essential. This principle was again reiterated by this Court in South Bihar Sugar Mills Ltd. etc. v. Union of India and Ors. - 1968 3 SCR 21, where this court held that the gas generated by the appellant companies in that case was kiln gas and not carbon dioxide as known to the market i.e. to those who deal in it or who use it. Therefore, the kiln gas in question is neither carbon dioxide nor compressed carbon dioxide known as such to the commercial

community and could not attract duty under Item 14-H of the First Schedule. It was held by this Court that the duty being on the manufacture and not on the sale, the mere fact that kiln gas generated by those concerns, was not actually sold did not make any difference if what they generated and used in their manufacturing process was carbon dioxide. Justice Shelat speaking for the Court at page 31 of the report observed : "The Act charges duty on manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the legislature must be taken to have used that word in its ordinary; dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be such an article which would attract the Act was brought out in Union of India v. Delhi Cloth & General Mills Ltd. In the view of the matter, the Court came to the conclusion that the gas generated by these concerns was kiln gas and not carbon dioxide as known to the trade, i.e. to those who deal in it or who use it.

It must be capable of being sold in the market and known in the market as such. Then only it would be dutiable. Union Carbide India Ltd. v. Union of India -1986 2 SCC 547 where Pathak, J. as the Id. Chief Justice then was, speaking for the Court observed that in order to attract excise duty the article manufactured must be capable of sale to a consumer. The expression "goods manufactured or produced" must refer to goods which are capable of being sold to the consumer. This Court observed as follows: "It does not seem to us that in order to attract excise duty the article manufactured must be capable of sale to a consumer. Entry 84 of List 1 of Schedule VII to the Constitution specifically speaks of "duties of excise on tobacco and other goods manufactured or produced in India" and it is now well accepted that excise duty is an indirect tax, in which the burden of the imposition is passed on to the ultimate consumer. In that context, the expression "goods manufactured or produced" must refer to articles which are capable of being sold to a consumer. In Union of India v. Delhi Cloth & General Mills, this Court considered the meaning of the expression "goods" for the purposes of the Central Excises and Salt Act, 1944 and observed that "to become "goods" an

article must be something which can ordinarily come to the market to be brought and sold", a definition which was reiterated by this Court in *South Bihar Sugar Mills Ltd. v. Union of India*.

It is necessary in this connection to reiterate the basic fundamental principles of excise. The Judicial Committee of the Privy Council in *Governor General in Council v. Province of Madras - 1945 F.C.R. 179*, this Court observed at page 1287 of the report that excise duty was primarily a duty on the production or manufacture of goods produced or manufactured within the country. This Court again in *In Re the Bill to amend S. 20 of the Sea Customs Act, 1878, and Section 3 of the Central Excises and Salt Act, 1944* 1964 (3) SCR 787 at page 822 of the report referring to the aforesaid observations of the Judicial Committee reiterated that taxable event in the case of duties of excises is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. Therefore, the essential ingredient is that there should be manufacture of goods.

The goods being articles which are known to those who are dealing in the market having their identity as such. Section 3 of the Act enjoins that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or "manufactured" in India.

"Excisable goods" under Section 2(d) of the Act means goods specified in the Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. Therefore, it is necessary, in a case like this, to find out whether there are goods, that is to say, articles as known in the market as separate distinct identifiable commodities and whether the tariff duty levied would be as specified in the Schedule. Simply because a certain article falls within the Schedule it would not be dutiable under excise law if the said article is not "goods" known to the market.

Marketability, therefore, is an essential ingredient in order to be dutiable under the Schedule to Central Excise Tariff Act, 1985." 22. Therefore, it follows that the knowledge and skill acquired from the imported goods should bring into existence something distinct, new substance known to the market and it should be marketable to be bought and sold. There has to be production of goods from the

imported machinery in the sense that there must be transformation, and a new and different article must emerge having a distinct name, character and use. This should be in a position to be traded by a bargain, for a market price through sale. It is not on the acquisition of skills or knowledge on which tax is proposed. The acquisition of knowledge through training from the imported goods should result in production of products, which are saleable at a market price. In this case, the applicant did not produce any goods at Noida. The Engineers were trained only and their "services" rendered abroad cannot be goods. They had developed software abroad, which they did not sell at market price but only rendered training with it, by retaining the right, title and interest over it. Therefore, the concept of 'goods' does not fit in the concept of 'services', which Id. Senior Counsel had persuaded us to accept.

23. The imported goods are tangible ones. The same are liable to customs duty and additional duty of customs. But Govt. of India granted conditional exemption as per the notification. The notification makes it clear that the same should be utilised for production of goods.

Hence what is required to be exported is tangible goods, which should have a market and ascertainable price. The definition of market price as per Section 2(3) of the Customs Act is "market price" in relation to goods, means the wholesale price of the goods in the ordinary course of trade in India".

Therefore, for the purpose of charging duty there has to be import of goods, which is a merchandise, recognised in trade and has a market price. The chargeable duty is as fixed in the Tariff Act. It follows that the goods should have been incorporated in the Tariff Act and should not have been prohibited or barred for Import/Export under the relevant statutes. Therefore, 'services' as envisaged and as construed by the applicant in this case, can neither be recognised as "goods" within the concept assigned to it and interpreted by statute and Hon'ble Supreme Court of India. Even if it were for argument's sake, it could not be subject to duty as the type of service explained by the applicant does not appear to be found in the Schedule of the Tariff Act. Its value can neither be ascertained nor wholesale price fixed. As can be gathered, the export policy for export of computer software

is to boost up foreign exchange and also to collect excise duty on the manufactured goods. The Customs Act envisages valuation, pricing, declaration of goods by Bill of Entry, classification of goods, warehousing, provision of re-export, confiscation and imposition of fines and penalties for contraventions. All these concepts cannot be applied in the type of 'services' envisaged by the applicant, as it is more in the nature of acquisition of skills only at the point of installation of imported machinery at Noida. Abstract skill acquired cannot be weighed in the pans of material value or in the terms of 'goods' as understood in the Customs Act. In this case only 'fee' has been charged and the acquired knowledge has been utilised to produce computer consultancy service for training purpose abroad and without it having been sold also, as seen earlier. Hence, with due respect to Id.Senior Advocate, his arguments do not convince me at this prima facie stage to accept the proposition that 'services' of the type explained by him are goods.

24. The Id. Senior Advocate argued that there had been no violation of Section 111(d) and 111(o) of the Customs Act. In this connection para 12 of the ruling rendered by Hon'ble Supreme Court of India in Sharp Business Machines Pvt. Ltd. v. Collector of Customs -1990 (49) E.L.T.640 is quite relevant.

"12. Mr. Dholakia next contended that the Tribunal itself had set aside the finding of the adjudicating authority on the question of treating SKD/CKD packs of the copiers imported comprised of all the 100% components of copiers. The company had tried to practise a fraud in defeating the import policy itself. The intention and purpose of the import policy was to give incentive and encouragement to the new entrepreneurs establishing small scale industries and in the first phase to import 62% of the components of the copiers and the balance of 38% - was to be manufactured by them indigenously.

According to the import policy this percentage of 62% was to be reduced in the subsequent years. The import policy was not meant for such entrepreneurs who instead of importing 62% of the components, imported 100% of the components of a fully finished and complete goods manufactured by a foreign country. It is an admitted position that fully finished plain paper copiers were a prohibited item for import and thus the device adopted by the company in the present case was a

complete fraud on the import policy itself. Apart from the above circumstances in our view the Tribunal was not right in setting aside the finding of the adjudicating authority and in taking the view that one has to look into the respective licence and not to the fact that if all the consignments covered by all the bills of entry assembled together, there will be a full and complete machinery".

25. At this prima facie stage, I am of the considered opinion that there has been a violation of provision of Import and Export Control Act, Import & Export Policy, 1985 and the provisions of Customs Act. It appears that the applicant has played fraud on the Export Policy, as observed by the Hon'ble Court, in the abovequoted para.

26. The Id. Senior Advocate had also argued that it is the Department, with its wide net work, who should establish the nexus between the contracts executed and the goods produced. I am not convinced with this plea. The burden to avail the benefit of the notification is on the importer. The importer has not discharged the same. The importer cannot try to shift the burden on the Revenue, more specially, the importer had failed to establish his case and moreover, had failed to produce the evidence, which has been now produced. Even a scrutiny of the same by us has not helped their case as stated by me in the preceding paragraph.

27. The applicant has not made out any prima facie case on merits and the entire balance of convenience is in favour of Revenue. The applicant has not pleaded any financial hardship. They have made profits of several crores of rupees, hence no hardship would be caused to them if the stay application is rejected.

28. In the result, I reject the prayer for waiver of pre-deposit of duty amount confirmed in the impugned order. I direct them to deposit the entire duty amount and a sum of Rs. 5 lakhs towards penalty within a period of three months. On their depositing the duty amount and the part penalty, the balance of penalty amount shall stand waived till the disposal of the appeal.

29. In view of the differing opinions, the matter be placed before Hon'ble President for reference to third member to resolve the points of difference of opinion, which are as follows : (1) whether the applicant has made out a prima facie case for

grant of waiver of deposit of duty and penalty and grant of early hearing of the appeal as held by Id. Member Technical in this opinion.

(2) whether the applicant has not made a prima facie case on merits for grant of waiver of duty demand in the impugned order and as such to deposit the entire duty and penalty of Rs. 5 lakhs as held by Id. Member Judicial in his opinion.

30. Addressing arguments on the point of difference, the Learned Sr.

Counsel, Shri A.M. Setalvad, submitted that the appellants, herein, had obtained approval of the Government of India in terms of the export policy for the development of computer software and computer consultancy services overseas. The Ld. Sr. Counsel referred to the Government of India Policy of computer software export as in the communication dated 18-12-1986. The Ld. Sr. Counsel emphasised that these documents give an extended definition to the concept of export to take in the value of consultancy services rendered abroad within the ambit of computer software export. In this context the Ld. Sr. Counsel pointed out that there is a Public Notice No. 10/1993 dated 24-6-1993 issued by the Collector of Customs, which inter alia, stated that Export Declaration Form A & B annexed to the Public Notice will meet the requirement of export documentation under Section 50 of the Customs Act, 1962 in respect of export of consultancy service, which has not been in physical form, and having regard to the special nature of the exports. It was contended that this Public Notice clearly acknowledges that for the purpose of Notification 339/85, export of consultancy services is also to be taken into consideration. There is a further development which is in favour of the plea that concept of export in the context of Notification 339/85 has been given an extended meaning.

This is the issue of the Notification 154/93, dated 13-8-1993. This notification inserted a fresh paragraph in Notification 339/85 which provided that the exemption contained there was also applied to goods imported by such units for development of software for export and for providing consultancy services for development of software on site abroad. There was also Explanation to the para inserted that consultancy fees received by software development unit for such services on site abroad shall be deemed to be export for the purpose of fulfilment

of export obligation under this notification. The Id. Sr.

Counsel argued that it is very clear that earlier Public Notice 10/1993 and the Notification 154/93 taken together would show that the latter notification is clarificatory and makes explicit which was implicit in the earlier notification. It was contended that it is well settled that when a notification is capable of two interpretations, the subsequent notification can be looked into. So also the Id. Sr. Counsel pointed out that further Notification 133/94 has also since been issued which has the same enlarged meaning for the concept of export as in the earlier Public Notice and Notification 154/93. Relying upon the Supreme Court decision in the case of Dayawati and Anr. v. Inderjit and Ors., AIR 1966 Supreme Court 1428, the Id. Sr. Counsel urged that change in law has to be considered at the appeal stage. Accordingly, it was contended that the term 'goods' for the purpose of notification must, therefore, include consultancy services provided abroad on site. These are also necessary in the context of the well-settled proposition that terms used in a statute must be given modern interpretation and the understanding of the departmental authorities, as revealed by the Public Notice and subsequent notification, is also indicative to the fact that goods for the purpose of Notification 339/85 would have a larger meaning to include consultancy services. The conclusion in the proposed order of the Hon'ble Member (Technical) now stands supported by the Public Notice and the notifications, referred to above and the view contra that goods are invariably tangible material, cannot also stand in this context.

The Id. Sr. Counsel, further, relied upon the Orissa High Court judgment in the case of Greaves Cotton and Co. Ltd. v. Sales Tax Officer and Anr., Sales Tax Cases Vol. 67 1987 364, for the proposition that in a case where there is a difference of opinion between two judges and where one of the Members in a stay application has taken a view that prima facie case has been made out, then on that ground alone stay in favour of the assessee can be granted. This decision of the Orissa High Court was on a difference of opinion between two judges on a stay matter in Sales Tax Case.

31. Shri B.K. Singh, Id. SDR, opposing the stay, submitted that the point of difference has been drafted by the Bench only based on the material and arguments put forth before the Bench and the question was whether the appellants, herein, have made out prima facie case.

Therefore, the Id. SDR urged that arguments now made on the basis of Public Notice and subsequent notification, cannot be considered and only arguments put forth before the Referring Bench are relevant.

Referring to the order proposed by the Hon'ble Member (Technical), the Id. SDR pointed out that there is nothing to show that goods, as defined in the Customs Act, includes services and the Id. SDR referred to and relied upon the paras 13 and 15 of the proposed order of Hon'ble Member (Judicial) on this aspect. The consultancy services which are rendered on payment of fee and which are not sold but where ownership is retained, cannot be said to be goods at all. The Id. SDR referred to the provisions of General Clauses Act to argue that there is nothing in that Act to show that expression "other movable property" would include services.

The Id. SDR cited the case law reported in 1987 (28) E.L.T. 458 (Tribunal) in the case of Collector of Central Excise v. Intercon Engineers (P) Ltd., of the Tribunal to say that Central Excise is a tax on goods and not on services so also the Customs duty is on goods and not on services. The Id. SDR contended that there is a decision of the Supreme Court reported in AIR 1970 S.C. 732 in the case of Commissioner of Sales Tax, Madhya Pradesh v. Madhya Pradesh Electricity Board holding that electricity to be goods because it is capable of extraction, consumption and use. This would also support the quality of tangibility as an attribute of goods. Consultancy services rendered abroad in the present case do not satisfy this criteria. The Id. SDR also submitted that even in the context of the transfer of the Property Act there is a judgment of the Calcutta High Court reported in AIR 1970 Calcutta 15 in the case of The Metal Corporation India Ltd. v. Union of India that know-how is not a saleable commodity. The Id. SDR, however, emphasised the well-settled proposition that in interpreting a notification, nothing is to be added to the words used therein and these words occurring in the notification

have to be given their plain meaning. Therefore, the Notification 339/85 in this case, as it was worded at the material time of import, is to be interpreted with reference to the words used therein. This notification is for exempting goods imported for the production of goods for export in NEPZ. The Id.SDR relied upon para 13 of the Collector's order which is extracted in the proposed order by the Hon'ble Member (Judicial). Notification 154/93, the Id. SDR, contended, cannot be given retrospective effect unless it specifically contains such a provision.

32. The submissions made by both the sides, have been carefully considered. The question is whether export of consultancy service can be regarded as export of goods for the purpose of Notification 339/85.

In this context, the department's own understanding of the scope of the notification is important. This is revealed in the Public Notice 10/1993, dated 24-6-1993 issued by the Collector of Customs, which is reproduced below : "It has been observed that software units in the N.E.P.Z. are providing computer consultancy services to their overseas clients at client's overseas location, in addition to software development in N.E.P.Z. with the help of the goods imported free of duty under Customs exemption Notification No. 339/85 dated 21-11-1985. Since, the export of said consultancy services is not in the physical form, the units have not been, meeting the requirement of Section 50 of the Customs Act, 1962.

The question of streamlining the procedure to ensure that all the exports including the export of consultancy services by the Zone units who have availed the benefits of Customs & Central Excise duty has been under consideration of the N.E.P.Z. authorities.

In order to ensure that goods acquired free of Customs and Central Excise duty are used in accordance with the provisions of relevant Customs and Central Excise Notifications, the exports are expected to give information to Customs Officers before, during and after exportation. It has, therefore, been decided that all Exporters of Consultancy services will be required to give an Exporter's Declaration in Form A (copy annexed to this Public Notice) before consultants of N.E.P.Z. units are sent abroad to provide software consultancy services at overseas location. The form shall be noted and signed by a Gazetted Officer of

Customs. One copy of the form duly cleared by Customs shall be returned to the exporter for their record. After completion of the project or as soon as payment in respect of the consultancy services has been received, the exporter shall submit the required information in Form B (copy annexed) alongwith the self attested bank certificate. This is necessary so as to enable customs to certify figures for exports for discharge of export obligation including calculation of value addition etc.

It is hereby clarified that the Exporter's Declaration Form in Form A and in Form B annexed to this Public Notice, shall meet the requirement of exports documentation under Section 50 of the Customs Act, 1962 in view of the special nature of exports. Other instructions regarding submission of periodical return etc. will remain unchanged.

33. The above Public Notice has been issued recognising that export of consultancy services is not in physical form and the difficulties in meeting the requirements of Section 50 of the Customs Act. Form A, which is the prescribed export declaration, also makes it clear that it is prescribed for export of consultancy services by the N.E.P.Z. units.

In this form, against column 7, expected amount of billing/inflow of Foreign Exchange (Deemed FOB Value) is to be given. What is significant is that the subsequent Notification 154/93, dated 13-8-1993 inserted a fresh para 3C with an Explanation in Notification 339/85 in the following manner : "In exercise of the powers conferred by Sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby directs that each of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table annexed hereto, shall be further amended by inserting after the paragraph number of each of the said notifications as specified in the corresponding entry in column (3) of the said Table, the following paragraph with the paragraph number specified in the corresponding entry in column (4) of that Table namely :- "Notwithstanding anything contained in paragraph (1), in the case of units engaged in the development of computer software, the exemption

contained therein shall also apply to goods imported by such unit for the development of software for export and for providing consultancy services for development of software 'on site' abroad : (a) the conditions stipulated in this notification are complied with by such software development unit; and (b) the procedure specified by the Collector of Customs is followed.

Explanation : With effect from 13th August, 1993, the consultancy fees received by software development units in convertible foreign currencies for consultancy services for development of software 'on site' abroad shall be deemed to be exports for the purposes of fulfilment of export obligation under this notification."----- S.

No. Notification No. No. of the para- No. of the paragraph and date graph after to be inserted which insertion 1.

2.

3.

4.----- 5.

339-Cus./85, 3B 3C dated 21st 6 to 9 \*\*\*\*\*

\*\*\*\*\*----- This notification, which merely inserts the enabling para with its Explanation in Notification 339/85 when read with the Public Notice 10/1993 of the Customs House which is prior to the Notification, clearly brings out the fact that the insertion of para 3C was clarificatory in order to make explicit, the intention already implicit in the earlier notification that the exemption shall apply to goods imported for the development of software for exports for providing consultancy services on site abroad. The introduction of a deemed export concept to cover consultancy services on site abroad has been apparently brought in so as to align the exemption notification to the export policy in respect of computer software development which had laid down that computers software exports will include besides physical export on magnetic media or on paper also export through satellite data link and consultancy delivered at the location of foreign client abroad by Indian Computer expertise. No doubt, arguments could not be made before the Referring Bench based on this

material for obvious reason that these were not then available. However, having regard to the nature of this material, being documents revealing the departmental authorities' own understanding of the scope of exemption under the notification, there will be no infirmity in taking these into consideration at this stage especially when it is found that the amending notification, mentioned above, is in the nature of clarificatory notification. The intention behind the deemed concept introduced is apparently to the extent only of making the fees received by such units for consultancy services on site abroad to be exports only for the purpose of fulfilment of export obligation under the notification. This is, therefore, a situation where, in order to interpret the scope of one notification, the latter notification, which is in line with and confirms the understanding of the authorities as reflected in the Public Notice, can reasonably be looked into. Further, the submissions made by the appellants that the Board of Approval N.E.P.Z. had also, on a representation by the appellants, extended the time limit for fulfilment of export obligation upto 31-9-1997 and that the Commerce Ministry has communicated this decision to the CBEC is also a relevant aspect for consideration in this case. In the result, for the reasons set out above, the proposed order by the Hon'ble Member (Technical) that a prima facie case has been made out for grant of waiver of deposit of duty and penalty and for grant of early hearing of the appeal is concurred with.

34. In terms of the majority order, the pre-deposit of customs duty of Rs. 2,93,68,904/- and penalty is waived and recovery stayed till the pendency of the appeal. Further, in terms of the majority order, the registry shall list the appeal for final hearing in the month of Nov' 94, after consulting the President's Diary.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**