

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
BANGALORE**

**REGIONAL BENCH - COURT NO. 1**

**Customs Appeal No. 472 of 2007**

(Arising out of Order-in-Appeal No. 280/2007 dated 12.04.2007 passed by Commissioner of Customs (Appeals), Cochin)

**M/s. Kerala Horticultural  
Development Programme,**  
Mythri Bhavan, Near Doordarshan Kendra,  
Kakkanad, Kerala

**...Appellant**

VERSUS

**Commissioner of Customs, COCHIN-CUS**  
Custom House, Willingdon Island  
Cochin, Kerala-682009

**...Respondent**

**APPEARANCE:**

Shri Kurian Thomas, Advocate for the Appellant  
Shri K.A. Jathin, Deputy Commissioner (AR) for the Respondent

**CORAM:**

**HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT  
HON'BLE SHRI C.J. MATHEW, TECHNICAL MEMBER**

**Date of Hearing: 09.01.2023  
Date of Decision: 03.02.2023**

**Final Order No. 20009/2023**

**JUSTICE DILIP GUPTA:**

This appeal seeks to assail the order dated 12.04.2007 passed by the Commissioner of Customs (Appeals)<sup>1</sup> by which the order dated 13.03.2006 passed by the Deputy Commissioner of Customs confirming the assessment covered by seven Bills of Entry has been confirmed.

2. The issue involved in this appeal is as to whether the appellant could have claimed exemption from the whole of the duty of customs leviable under the First Schedule of the Customs Tariff Act 1975<sup>2</sup> on the imported plant and machinery from the European Union for

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**1. the Commissioner (Appeals)  
2. the Tariff Act**

setting up a Fruit Processing Plant at Muvattupuzha in Kerala. The said exemption notification dated 18.07.1994<sup>3</sup> deals with exemption to specified free gifts, donations, relief and rehabilitation material imported by charitable organizations, Red Cross Society, CARE and Government of India and is reproduced below:

**“Exemption Notification No. 148/94-Cus-dated  
18.07.1994**

**Exemption to specified free gifts, donations, relief and rehabilitation material imported by charitable organizations, Red Cross Society, CARE and Government of India.-** 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 exempts goods (hereinafter referred to as the said goods) of the description specified in column (2) of the Table hereto annexed and falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), from the whole of the duty of customs leviable thereon under the said First Schedule and from the whole of the additional duty leviable thereon under section 3 of the above mentioned Act subject to the conditions specified in column (3) against each serial number in column (1) of the said Table.

**TABLE**

S.No.	Description of Goods	Conditions
(1)	(2)	(3)
(1)	xxxxx	xxxxx
(2)	xxxxx	xxxxx
(3)	xxxxx	xxxxx
(4)	xxxxx	xxxxx
(5)	xxxxx	xxxxx
(6)	xxxxx	xxxxx
(7)	xxxxx	xxxxx
(8)	Goods, gifted free of cost under a bilateral agreement between the Government of India and a Foreign Government	xxxxx

**3. the exemption notification**

3. It needs to be noted that a Financing Agreement dated 17.01.1992 was entered into between the European Economic Community (now European Union) and the Republic of India in regard to a project called Kerala Horticulture Development Programme. The European Economic Community was to contribute, by way of grant, towards the Financing of the said project. It is pursuant to the said Agreement that the appellant, during the period from 1996-99, imported items of plant and machinery. The goods, on their import, were assessed provisionally by the customs authorities and the appellant paid an amount of Rs. 4,54,10,258/- towards customs duties. The appellant claimed the benefit of the exemption notification, as according to the appellant the cost of the machinery that was imported was not to be repaid to the European Union.

4. The Deputy Commissioner, by order dated 13.03.2006, rejected the claim of the appellant for being granted the benefit under the exemption notification basically for the reason that the import was not on free of cost basis but was based on a global tender and was covered by the European Economic Community grant, whereas the exemption notification covers only free gifts and donations covered under bilateral Agreements.

5. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals), which appeal was dismissed by order dated 12.04.2007. The Commissioner (Appeals) noted that the cost of plant and machinery, cost of building and working capital were raised as a long term loan from European Economic Community which was to be repaid in ten installments with interest. Thus, the import could not be

treated as a free gift to enable the appellant to claim the benefit of the exemption notification.

6. It is against this order of the Commissioner (Appeals) that the appellant preferred an appeal before the Tribunal. The appeal was allowed by order dated 07.12.2017 and the impugned order dated 12.04.2007 was set aside. The Tribunal placed reliance upon the Certificate dated 09.11.1999 issued by the European Union which certified that the plant and machinery was gifted free of cost under the bilateral agreement between the Government of India and the European Union. Paragraphs 5 and 6 of the order passed by the Tribunal are reproduced below:

"5. We have perused the appeal record and considered the submissions made by both sides. In terms of the Notification No. 148/1994 dated 13.07.1994 (Sl. No. 8), the only condition which needs to be satisfied for the goods to be eligible for duty free clearance is that the goods should be gifted free of cost under a bilateral agreement between Government of India and the Foreign Government. In this regard we have perused the certificate issued by the European Union dated 09.11.1999. The certificate categorically states the plant and machinery under import is meant for the pilot project being set up by the appellant at Muvattupuzha, Ernakulam, Kerala and further that the equipments were supplied free of cost in terms of the bilateral agreement between the Government of India and European Union. After perusal of the said certificate, we are of the view that the goods under import by the appellant satisfied the condition specified in the Notification No. 148/1994. Consequently the goods are entitled to duty free clearance under the Notification and we order accordingly.

6. In the result, the impugned order is set aside and appeal allowed."

7. Feeling aggrieved, the Department filed Customs Appeal No. 25 of 2018<sup>4</sup> before the Kerala High Court. The High Court, by judgment and order dated 29.08.2022, allowed the appeal and remanded the matter to the Tribunal. The relevant portion of the judgment is reproduced below:

"8.1 The Primary Authority and the Commissioner of Customs, from the record available, noted that the plant imported was under an agreement with European Union. The finance for purchasing the plant has been made available by the European Union, which is repaid as a long-term loan by the respondent. Whether the repayment in future as a lump sum or in instalments etc., is a crucial factor for deciding whether the goods are imported free of cost or not. The appellant's grievance is that the documents which have bearing on the import and the implication on cost contributed by the European Union can be found out from the primary documents. The primary documents are not available with the Department, and the CESTAT still recorded a finding in favour of the respondent by relying on the statement of the respondent.

9. After appreciating the totality of circumstances, we are of the view that the CESTAT has not appreciated the sequence of circumstances culminate in the import of plant and whether a future obligation is fastened on the respondent for repayment of the cost incurred for the purchase of the plant or not. Therefore, the finding is recorded by not considering the circumstances and documents which have a bearing on the issue. For the above reasons, we are of the view that the findings of fact recorded are perverse and unavailable and therefore, not binding on this Court. Hence the second objection raised is also without merit, accordingly rejected.

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11. The case of the appellant is that the respondent may not be paying the consideration, but the

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4. **The Commissioner of Customs vs. M/s. Kerala Horticultural Development Programme decided on 29.08.2022**

consideration payable by the respondent is paid by a third party and the amount so paid is treated as a long-term loan. Therefore, the import of plant may not be treated as free of cost.

12. We have appreciated the distinction on which the exemption is claimed and also the findings recorded by the CESTAT. **Prima facie, we are of the view that the findings recorded in para 5 of the order under appeal are certainly unsustainable, for it has been recorded by the CESTAT as a general application of the exemption notification. The relevant circumstances should have been placed before the CESTAT before inviting the findings in this behalf.** We believe that the CESTAT ought to be called upon to decide the merits of the appeal filed by the respondent herein and decide the core issue.

13. For the above purpose, the order under appeal is set aside, and the matter is remitted to CESTAT for consideration and disposal afresh as per law within four months from the date of receipt of copy of the judgment.”

**(emphasis supplied)**

8. This is how the matter has been placed before the Tribunal. The aforesaid judgment of the High Court was received by the Tribunal on 17.10.2022.

9. Shri Kurian Thomas, learned counsel appearing for the appellant submitted that the finding recorded by the Commissioner (Appeals) that the plant and machinery that was imported in terms of the Agreement was not supplied free of cost is factually incorrect for the following reasons:

- (i) The Appellate Commissioner had relied upon the pre-amended clauses 3(b), 3(c) and 3(d) whereas the said clauses had been amended on 08.03.2002 by Amendment No. 3 and from the amended clauses it

would be clear that the plant and machinery was provided to the appellant free of cost;

**(ii)** The Certificate dated 19.11.1999 issued by the European Union also supports the fact that the plant and machinery was supplied free of cost to the programme under the Agreement; and

**(iii)** The appellant was, therefore, clearly entitled to the benefit of the exemption notification as clause 8 was satisfied.

10. Shri K. A. Jathin, learned authorised representative appearing for the department, however, supported the impugned order and made the following submissions:

**(i)** The benefit of the exemption notification could have been extended to the appellant only if the goods were supplied free of cost, but in the instant case the goods were not supplied free of cost and were covered by a grant under the Agreement; and

**(ii)** The exemption notification has to be strictly construed and as the loan has to be repaid, it cannot be said that the goods had been supplied free of cost.

11. To appreciate the submissions advanced by learned counsel for the appellant and the learned authorised representative appearing for the department, it would be necessary to examine the Agreement.

12. The Technical and Administrative provisions are contained in Annexure-A to the Agreement. Clause 1 deals with the Objectives of the Project and clause 2 deals with the Location and Content of the Project. Clause 3 deals with the total Project Cost to be financed by the European Union, including the Agro-Processing Component

involved in this appeal. The Channeling of funds of the Project is contained in clause 3 and is reproduced below:

"Project Cost and Financing

The total cost of the project to be financed by the EC is estimated at 28.7 million ECU and has the following components:

Overall Programme Costs by component in 4000 ECU

	<u>EEC</u>	<u>GOK</u>	<u>Priv.</u>	<u>Total</u>
1. xxxxxxxxxx				
2. xxxxxxxxxx				
3. xxxxxxxxxx				
4. xxxxxxxxxx				
5. xxxxxxxxxx				
6. xxxxxxxxxx				
7. xxxxxxxxxx				
8. xxxxxxxxxx				
9. Agro-Processing Component	4 108	747	125	4 980
10. xxxxxxxxxx				

Channeling of funds of the Projects.

The EC funds provided to the Government of India as a grant will be channelled in total as such to the project. Special arrangements have been established as follows:-

- a) xxxxxxxxxxxx
- b) the Agro-Processing component will be transferred to the project by the Government of India as a loan of 4.108 million ECU for the establishment of the KFAPC (15 years -10% -5 years grace), it will consist of 1.6 million ECU, contribution to equity share of farmers societies in paid up capital and company loan of 2.508 million ECU, contribution for equipment, building, miscellaneous;
- c) out of the Marketing Support and Development component, the Government of India will transfer to the project 0.970 million ECU as a loan (15 years -10% -5 years grace) for the privatization of the KHPDC. It will consist of 0.382 million Ecu as contribution to equity share for farmers societies in KHPDC paid -up capital and 0.588 million ECU as contribution to investments and costs of KHPDC;



- d) the programme expenses in foreign currency estimated at 4.358 million ECU (excluding contingencies) for imports, monitoring and expertise will be paid directly by the EC:

Seed processing equipment	0.031 million ECU
Agro-processing equipment	2.611 million ECU
European Monitoring and Expertise	1.716 million ECU

Repayments of loans provided for the establishment of KFAPC and KHPDC will be deposited on a special account in the co-operative banking system of Kerala and will constitute a revolving fund for further horticultural development in Kerala. The conditions for the operation of this revolving fund will be formalised and become effective after approval of the Commissioner.

13. The aforesaid Agreement was amended on 08.03.2002 by Amendment No. 3. Clause 3 deals with Project Cost and Financing and the relevant portion is reproduced below:

"3. Project Cost and Financing

The total cost of the project to be financed by the EC is estimated at 28.07 million euro and has the following components (see table annexed as Annex C)

Channeling of funds of the Project

[Paragraph 1 unchanged]

(a) xxxxxxxxxxxxxx

(b) In accordance with the Government of Kerala's timetable (as agreed on the 28<sup>th</sup> July 1997) for the administrative and legal procedures necessary to determine the ownership structure and managerial arrangements of the farmer owned NAPC, the EC funding of the Agro-Processing Component is to be increased from 4.108 million euro to 7.196 million euro. Out of this amount, the capital investment cost of the Agro-Processing Component (85%) is provided as a grant and the working capital (15%) is provided as a loan to be repaid in a revolving fund."

14. It would, thus be seen that in view of the amendment incorporated in clause (b) of clause 3 on 08.03.2002, the capital investment cost of the Agro-Processing Component (85%) was to be provided as a 'grant' and the working capital (15%) was to be provided as a loan to be repaid in a revolving fund.

15. In the present case, the machinery and plant was a capital investment and so the cost was provided as a grant. A grant has been defined in Chambers Dictionary as something bestowed, an allowance; 'a gift'.

16. It would be seen from the Agreement that though initially the cost of Agro-Processing Component under clause 3 of the Annexure-A (Technical and Administrative Provisions) was to be transferred to the Project by the Government of India as a loan of 4.108 million euro, but subsequently an amendment was incorporated on 08.03.2002. The amended clause 3 provides that the Agro-Processing Component was increased from 4.108 million euro to 7.196 million euro and out of this amount, the capital investment cost (85%) was to be provided as a 'grant' and the 'working capital' (15%) was to be provided as a loan to be repaid in a revolving fund. Thus, the plant and machinery, which would be included in the capital investment cost, was provided as a 'grant' which means as a gift. Clause 8 of the exemption notification would, therefore, be satisfied.

17. This factual portion is also reflected from the Certificate dated 09.11.1999 given by the European Union. The Certificate clearly mentions that the plant and machinery was gifted free of cost to the Programme under the bilateral Agreement between the Government of India and the European Union.

18. The Commissioner (Appeals) failed to notice the amendment made in clause 3(b) of Agreement while recording a finding that the plant and machinery was provided on a loan which was to be repaid.

19. On a plain reading of the Agreement, it is clear that clause 8 of the exemption notification stands satisfied.

20. The order passed by the Commissioner (Appeals), therefore, would have to be set aside and is set aside. The appeal is, accordingly, allowed.

(Order pronounced in the Open Court on **03.02.2023**)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(C.J. MATHEW)**  
**TECHNICAL MEMBER**