

EY Tax Alert

HC quashes Customs Instruction mandating review of MOOWR licenses granted for solar power generation

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Executive summary

This Tax Alert summarizes a recent judgement of the Delhi High Court (HC)¹ dealing with the validity of the Instruction² insofar as it mandates review of existing licences given for setting up solar power generation units under Manufacture and other Operations in Warehouse Regulations, 2019 (MOOWR) and taking follow-up action.

HC observed that:

- ▶ The power to issue instructions or circulars under section 151A of the Customs Act, 1962 are only confined to the broad directives concerning the working of the Act.
- ▶ Proviso to section 151A proscribes issuance of orders, instructions or directions, which may require an officer of Customs to make a particular assessment or to dispose of a particular case in a particular manner.
- ▶ The Board cannot issue directives that curb the discretionary powers of the Principal Commissioner of Customs or Commissioner of Customs (Appeal) in his appellate role.
- ▶ The instruction impinges the licensing authorities' discretion to independently determine the suspension or cancellation of licenses. The instruction clearly exceeds the Board's advisory and clarificatory role entrusted by virtue of section 151A.
- ▶ The scope of section 61 and 65 of the Customs Act cannot be restricted or limited to a particular genre of goods or type of manufacturing activity.
- ▶ The construction of a statute cannot be guided or influenced by the subsequent experience of the executive or of discerned inequitable results.

Accordingly, HC quashed the impugned Instruction insofar it mandates review of existing licenses and taking follow up action.

¹ TS-168-HC-2024 (DEL)

² Instruction No. 13/2022-Customs dated 9 July 2022

Background

- ▶ Section 58 of the Customs Act, 1962 provides for licensing of private warehouse.

Further, Section 65 provides that the owner of warehoused goods may undertake manufacturing process or other operations in the warehouse.

Manufacture and Other Operations in Warehouse (No. 2) Regulations (MOOWR) came into effect from 1 October 2019. It provides for duty deferment on import of capital goods and inputs used in the manufacturing and other operations within the custom bonded warehouse in terms of section 65 of the Customs Act.

- ▶ Central Board of Indirect Taxes and Customs (CBIC) had issued Instruction in exercise of the powers conferred under section 151A regarding warehousing of imported capital goods used in the generation of solar power and asserted inapplicability of MOOWR.

Regulation 15 of MOOWR provides for affixation of one-time lock on the load compartment of the means of transport in which such goods are removed in case of export.

The instruction mentioned that since the requirement of one-time lock cannot be complied in case of supply of electricity, it would consequently fall outside the scope of the MOOWR.

Instruction further provided that the grant of any permission under MOOWR to solar power generating units would not be in accordance with law and therefore the permissions, if any granted, are liable to be immediately reviewed and follow up action be taken.

- ▶ Basis Instruction, show cause notices (SCN) were issued to the petitioners calling upon them to explain why the licenses granted under MOOWR should not be cancelled.
- ▶ Writ petition was filed challenging the validity of the Instruction and SCN.

HC ruling

- ▶ Section 151A of the Customs Act gives power to the Board to issue appropriate instructions or clarification with respect to classification of goods or any other measures pertaining to uniform implementation of the provisions of Customs Act.

Proviso to section 151A proscribes issuance of orders, instructions or directions, which may require an officer of Customs to make a particular assessment or to dispose of a particular case in a particular manner.

Further, the Board cannot frame instructions, orders or direction which interfere with the discretion vested with the Principal Commissioner of Customs

or Commissioner of Customs (Appeal) in exercise of its appellate function.

Thus, the powers are only confined to broad policy directives concerning the working of the Act.

- ▶ The Board appears to have understood the scope of MOOWR as invariably requiring the affixation of a one-time-lock at the stage when the resultant goods are being removed from the warehouse.

The Board interpreted Regulation 20 of the MOOWR to state that since electricity is not explicitly exempted from the operation of Regulations, solar power generating units are not envisaged to be covered under Section 65 of MOOWR.

Accordingly, it directed the customs authorities to undertake an immediate review of all the permission granted to solar power generating units and to take necessary follow up action.

- ▶ The instruction clearly impinges upon the discretion which otherwise stood placed in the hands of licensing authorities to independently consider whether a license or permission granted were liable to be suspended or cancelled.
- ▶ Section 58B of the Customs Act give powers to the proper officer of customs to cancel a license. It can be exercised where it is found that the licensee has either contravened with the provisions of the law or breached any of the conditions of the license.
- ▶ In the instant case, the petitioners had neither contravened with any of the provisions of the Act nor had acted contrary to any of the conditions contained in the license.
- ▶ Also, it is not a case where the petitioners have failed to disclose or concealed the purpose for which capital goods were being imported.

The petitioners in their application had declared that the imported capital goods will be used to set up a power plant for generating electricity.

- ▶ Since the Instruction explicitly directs licensing authorities to consider electricity generation as outside the scope of MOOWR and states that all existing and future licenses will be subject to this Instruction, it clearly exceeds the Board's advisory and clarificatory role entrusted by virtue of section 151A of Customs Act.
- ▶ Division Bench of P&H HC in case of The Bullion and Jewellers Association³ had dealt with the scope of circular issued under Section 151A of Customs Act.

The Court observed that the scope of an exemption cannot be whittled down on the basis of an instruction issued by the Board.

- ▶ Supreme Court in case of Karvy Stock Broking Ltd.⁴ held that a circular which amounts to foreclosing or impinging upon the discretionary judgment that may

³ 2016 SCC Online Del 2437

⁴ (2015) 39 STR 705 (SC)

otherwise be exercised by a quasi-judicial authority, would not sustain.

- ▶ Instruction contradicts the administrative law principles by undermining independent decision-making and forcing a quasi-judicial authority to follow orders.
- ▶ It is clearly impermissible for the Board by way of Instruction to have trampled over the power of cancellation independently placed in the hands of the customs officer by virtue of Section 58B.
- ▶ The customs officer clearly perceived and understood the intent of the impugned Instruction to be the initiation of proceedings for cancellation of the license is evident from the extracts of the SCN.
- ▶ Section 61 of the Customs Act enables a person to import capital goods or other goods and place them in a licensed warehouse and to undertake manufacturing process or other operations therein.

There is no time frame prescribed in section 61 for warehousing of capital goods. The capital goods can be retained in the warehouse till they are cleared for home consumption.

Further, the FAQs and the declaration of intent appearing on the "Invest India" portal clearly provides that the capital goods are capable of being warehoused for an indefinite period.

- ▶ Plain reading of section 65 suggests that manufacturing activities can be conducted in a licensed warehouse for any type of goods, without any restriction on the kind of goods or the manufacturing processes involved.

The scope of section 61 and 65 cannot be restricted or limited to a particular genre of goods or type of manufacturing activity.

- ▶ Regulation 14 of MOOWR requires that the Bill of Entry must specify the proportion of warehoused goods included in the final goods when these goods are cleared for home consumption.

Regulation 14 only caters to a situation where the resultant goods comprise of goods which had been imported and placed in the warehouse.

It does not appear to extend to a situation where the imported goods do not form part of the resultant goods or remain unused in the course of manufacture.

The mere fact that in case of solar generation, it would be impossible to stipulate an input output ratio, would hardly be decisive factor.

Thus, it would be wholly incorrect to understand the scope of Section 61 and 65 as being limited only to those categories of goods which ultimately get subsumed in the resultant goods.

The manufacturing activity undertaken with the aid of capital goods may not necessarily result in the

capital goods being consumed in the course of manufacture.

- ▶ Department's contention that section 65 only contemplates those categories of goods which are capable of being consumed in the manufacturing process is fundamentally flawed and misconceived.
- ▶ Further, the expression "in relation to" used in section 65 only creates a causal link between the imported capital goods and the manufacturing activity that may be undertaken in the warehouse.

The qualifying criteria for the applicability of section 65 would stand fulfilled as long as these capital goods are found to have contributed to the process of manufacture.

- ▶ The phrase "other operation" used along with "manufacturing process" in section 65 is clearly intended to expand the meaning ascribed to the word "manufacture".
- ▶ The construction of a statute cannot be guided or influenced by the subsequent experience of the executive or of discerned inequitable results.
- ▶ It would be wholly incorrect for the Court to recreate or reassemble Section 65 so as to exclude a particular category of activity based upon the experience of its working or its perceived negative impact on domestic industry.
- ▶ Accordingly, HC quashed the impugned Instruction insofar it mandates review of existing licenses and taking follow up action.

Comments

- a. The ruling is likely to provide relief to the existing license holders under MOOWR who are engaged in the generation of solar power.
- b. Earlier CBIC had amended Project Imports Regulations to exclude solar power plants from the list of eligible projects. (Notification No. 54/2022 - Customs dated 19 October 2022 and 7/2023-Customs dated 1 February 2023).
- c. It would be interesting to analyse whether businesses involved in solar power generation can obtain new licenses under MOOWR since the Court has not quashed the entire Instruction but only to the extent it mandated review of existing licenses and taking follow up actions.

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