



GN LAW ASSOCIATES

ARTICLES 2008

www.gnlawassociates.com

PREMATURE WITHDRAWAL



Author: G. Natarajan

Notification 108/95 CE Dated 28.08.1995, provides for exemption from payment of duty of excise, for all goods when supplied to United Nations or an International organization for their official use or **supplied to the projects financed by the said United Nations or an International organization and approved by the Government of India.** Due the boom in infrastructural sector, several infrastructural development works, such as road projects, etc. are being carried out by the Central Government / various State Governments, with financial assistance from various International organizations. The exemption is subject to a condition that if the goods are thus supplied to a project, a Certificate from an officer not below the rank of Deputy Secretary to the Government of India, in the Ministry of Finance should be furnished certifying that the said goods are **required for the execution of the said project and that the said project has duly been approved by the Government of India.**

Claiming the said exemption for consumable goods such as cement, steel, etc., which would be used in the project does not have any problem. But, when some capital items, such as cranes, crushers, machineries, etc. are required for execution of the said project, there is a possibility that the contractor may claim exemption for such goods and after using it in the said project for namesake, divert the same to his any other contracts, which are not entitled for the benefit of exemption. By this ingenious method, a contractor may procure all his capital equipments required for all his contracts, claiming exemption under this notification on the basis of the Certificate as envisaged and immediately withdraw the capital equipments from the said project and divert the same to his other projects.

In order to avoid such dubious practices, an Explanation has been inserted in Notification 108/95, vide Notification 1/2008 CE Dated 01.03.2008, which reads as below:

*'Explanation 2.-For the removal of doubts, it is hereby clarified that the benefit under this notification, in the case of goods supplied to the projects financed by the United Nations or an international organisation, is available when the goods brought into the project are not **withdrawn** by the supplier or contractor and the expression "goods are required for the execution of the project" shall be construed accordingly.'*

The purpose of this amendment has also been explained in the following words, in the Explanatory Notes to the budget provisions, as below:

*An Explanation has been inserted in Notification 108/95 CE Dated 28.08.1995 clarifying that the benefit of the notification, in the case of goods supplied to projects financed by the United Nations or an international organization, is available when the goods brought into the project **are not withdrawn by the supplier or contractor** and to prescribe that the expression "goods are required for the execution of the project" shall be construed accordingly. **This has been done to reflect the intention that the benefit of the exemption is not available if goods are supplied to a project for temporary use.***

From the above, it may be observed that the intention is only to disentitle the exemption in respect of the items which are **temporarily used** in the said projects. In case of items of capital nature, like cranes, crushers, machines, etc. the exemption cannot be denied, if these items are used in the project, till the completion of the project and not withdrawn in between and the exemption cannot be denied, if such capital items are transferred to any other projects, after completion of the specified projects. In other words, the vice of this explanation would get attracted **only in case of premature withdrawals.**

But, as usual, the field officers are not always concerned with the development of infrastructure, intention behind exemptions, national development, etc. and their only botheration is revenue, at any cost. It is understood that the exemption is being denied to all such items of capital nature and the manufacturers are forced to pay duty on the capital items after the completion of the projects, citing this explanation. It is also understood that the department busy in collecting information in respect of all such projects and contemplating issue of show cause notices for five years period, alleging suppression (!?), to deny the exemption availed, on the ground that items of capital nature, have not been **permanently** used in the project, but have been withdrawn after completion of the project.

The very word "withdraw" signifies something done premature. When something is "removed from use", it can be said to be withdrawn. But, when it is "removed after use", it is not withdrawal. For example, if a person draws money from his bank account, it is withdrawal. But, if he gets back all his money, upon closure of account, it is not withdrawal. To cite another example, troops can be said to be "withdrawn" if they are retreated during the course of the battle and cannot be said as "withdrawn" upon their victorious return. Taking back the machineries after completion of the project is a natural consequence and cannot be considered as a "withdrawal". Had it been the intention of the Government not to allow exemption to such capital items, which are capable of being further used in other projects, after completion of the specified projects, the exemption could have been restricted only for items which are in the nature of inputs. When the exemption is available to all goods, interpreting the same in the above manner, would render the exemption itself nugatory.

Before parting...

If the departmental interpretation is allowed to sustain the contractors have no other option but to build a museum in the respective sites, after completing the project and keep all items procured without payment of duty of excise, for execution of the project and make them a monument!

