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Right to electric power duty relief lost on merger

The Supreme Tax Court has upheld a Customs decision to refuse to allow transfer of a merged company's right to manufacturing relief from its electric power duty to the surviving entity.

A manufacturing company held a manufacturer's concession allowing it to draw electric power off the grid at a reduced rate of excise duty. The responsible customs office refused to allow transfer of this concession along with the other assets, rights and obligations of the company to the surviving entity on a merger with another group company. The company argued that nothing had changed in practice; the surviving entity continued to operate the manufacturing plant as before. The customs office, however, insisted that the concession had lapsed on the demise of its holder and the surviving company was essentially a new business and should apply for its own concession. Power drawn between the date of the merger and the application for a new concession was to be taxed at the normal, non-concessionary rate.

The Supreme Tax Court has upheld the position of the customs office. The concession was a precondition to drawing electric power at a reduced rate of duty. It was granted to manufacturers who could show that manufacturing formed the major part of their business activity and who could also show that they could be regarded as reliable from the point of view of regular fulfilment of their tax and duty obligations. Since the company remaining after the merger was a larger entity than the original holder of the concession, there was no reason to assume that it would also qualify. Manufacturing was not necessarily still the predominant activity and the larger organisation was not necessarily still to be considered reliable. Accordingly, a new application was necessary for Customs to reconsider the position from the new background. Until that application had been filed, the company had drawn electricity without a valid concession, that is, as a normal consumer required to pay duty at the normal rate.

From January 1, 2011, the concessionary rate system for manufacturers has been replaced with a refund based on the actual usage of the power and the purpose to which it was put. Thus, the manufacturer's relief from duty is decided after the event and is no longer dependent upon holding a concession or other form of prior authorisation. However, the case is still relevant to electric power concessions for those generating electricity and in certain fields of transport, and also confirms once again that rights granted individually are not generally transferable, even in cases of universal succession.

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