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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/16 /2005 Date 04/09/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
SALORA FLORITECH PVT.LTD.
VILLAGE SURAJPUR TEHSIL:DADRI
GREATER NOIDA U.P.

SALORA FLORITECH PVT.LTD. Appellant

Vs

C.C.E. NOIDA Respondent

I am directed to transmit herewith a certified copy of **Final order** No.C/330/08-CUS. DATED 02.09.08

passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent

   C.C.E. NOIDA

   B-123, SECTOR 5, NOIDA.
2. Adv. / Consult MR.RAMESH SINGH, CHAMBER NO 342,
   NEW LAWYERS CHAMBER,
   BHAGWAN DAS ROAD NEW DELHI
3. S.D.R.
4. J.C.D.R.
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15
15. Office Copy
16. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Customs Appeal No. 16 of 2005

[Arising out of Order-in-Original No. 64/Commr/NOIDA/2004 dated 29.9.2004 passed by Commissioner of Customs & Central Excise NOIDA]

For approval and signature:
Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : Yes
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
3. Whether Their Lordships wish to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental authorities? : Yes

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M/s. Salora Floritech P.Ltd. — Appellant

Vs.

Commissioner of Customs NOIDA — Respondent

Appearance: Mr. Ramesh Singh , Advocate for the Appellant
Mr. R.K. Verma , DR for the Respondent

<u>CORAM</u>: Hon'ble Mr. Justice S.N. Jha, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

Date of Hearing : 6 & 7.8.2008
Date of Decision: 2-9-2008

Final **ORDER NO. C/330/08**

Per M. Veeraiyan (for the Bench):

This is an appeal against the order of the Commissioner No. 64/Commr/NOIDA/2004 dated 30.9.04.

2. Heard both sides.

3. The relevant facts, in brief, are as follows:-

(a) The applicant has been approved as a 100% EOU in floriculture sector for cultivation of roses and export of cut roses as per LOP dated 16.4.96.

(b) They imported capital goods and raw materials, without payment of duty under Notification No. 126/94 and the duty foregone on such imports is Rs. 1,87,84,617/- . They also procured inputs locally without payment of duty and duty foregone amounts to Rs.1,41,442/-.

(c) The appellant was required to export roses worth about Rs.11.2 crores in five years.

(d) They commenced production on 6.7.97. From date of commencement till March, 2001, they exported roses valued about 3.02 crores.

(e) Since they did not fulfil proportionate export obligation and since they did not achieve net foreign exchange addition as per norms, they were issued with a notice dated 3-11-2001 by Development Commissioner proposing penal action and by his order dated 27.1.03, the Development Commissioner imposed a penalty of Rs. One lakh.

(f) Company closed their operation on 1.4.03.

(g) Show cause notice dated 12-9-2003 was issued demanding duty on the imported/ locally procured capital goods and raw materials on the ground that they have not fulfilled the export obligation and by order-in-original dated 29.11.04, the demand of Rs.1,87,84,617/- was confirmed as Customs duty and a sum of Rs.1,41,442/- was confirmed as excise duty. In addition, penalties were also imposed.

(h) In December, 2007, the appellant has applied for de-bonding of the warehouse to the Development Commissioner and no decision has been received from the Development Commissioner so far.

4. Learned advocate made the following submissions:-

(a) The entire capital goods, inputs, raw materials procured duty free by the 100% EOU has been put to use; there is no diversion of such goods procured duty free. As the entire capital goods and inputs have been utilised, condition No.4, in Notification 126/94-Cus stands fulfilled.

(b) They produced roses up to March, 2001 and exported the entire production which comes to Rs.3.02 crores.

(c) They were not able to fulfil the export obligation as the floriculture sector was badly affected by unprecedented and unexpected difficulties. However, it was not a case of deliberate attempt to misuse the benefits of EOU scheme. The floriculture sector was badly affected by unexpected difficulties, and they were not able to fulfil the export obligation. It was a case of failure of enterprise which was beyond the circumstances of the management.

(d) It cannot be said that goods procured duty free were not used for the intended purposes. The entire capital goods and inputs have been utilised thus fulfilling condition No.4 in Notification 126/94-Cus. Further the entire goods produced have been exported, and no finished goods have been diverted. Therefore the conditions of the notification have been satisfied, in spite of short fall in fulfilment of export obligation, The object of the notification has been fulfilled.

(e) The confirmation of demand on the entire value of imported capital goods is totally unjustified. The EXIM policy envisages that in respect of capital goods, on de bonding duty shall be payable only

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on the depreciated value. They have applied for de bonding and the same has not yet been granted. The permission for granting the de-bonding is not in the appellant's hand.

(f) They were required to fulfil export obligation to the tune of Rs.11.2 crores. They have exported to the tune of Rs.3.02 crores. Demand of duty if any, should be restricted to the short fall in export obligation.

(g) At any case, there is no cause for imposition of penalties; the short fall in export obligation was due to failure in floriculture sector as a whole and due to genuine difficulties faced by EOU; and no wanton failure to fulfil the export obligation can be attributed to them. It cannot be said that goods procured duty free were not used for the intended purposes. Further the entire goods produced have been exported, and no finished goods have been diverted.

(h) In support of his above submissions, he relied on the following decisions:

(1) Khabros Steel (I) Ltd. Vs. CCE, Jaipur I [2002(141)ELT 257(Tri-Del)];

(2) Asian Exports vs. CC, ICD,TKD [2002 (145)ELT 702(Tri-Del);

(3) CC&CE, Vadodara Vs. Solitaire Machine Tools P. Ltd. [2003(152)ELT 384(Tri-Mum)];

(4) Natural Stone Exports Ltd. vs. CC(Appeals), Bangalore [2006(198) ELT 440 (Tri-Bang)]

5.1. Learned DR that their condition (1) by Notification No. 126/94 envisages that "100% or such other percentage as specified by the Development Commissioner should be exported within the specified period. The export obligation has been fixed as Rs.11.2 crores and as they have not fulfilled the same, duty is demandable.

5.2. The legal undertaking has been given by them to the Development Commissioner and as per the said undertaking "on the instruction of the Development Commissioner" duty leviable at the relevant time shall be payable by the 100% EOU on their failure to fulfil the export obligation. He submitted that the relevant time, in the present case, should be the time of import.

5.3. The learned DR relies on the following judgements:-

(1) CC, New Delhi Vs. C.T. Scan Research Centre (P) Ltd.
[2003(155) ELT 3(S.C)];

(2) CCE, Jaipur I Vs. Autolite Ltd.
[2003 (159) ELT 308 (Tri-Del)

5.4. Learned DR submits that the collection of duty at depreciated value will arose only when an order of de-bonding was granted by the Development Commissioner. In other cases such a benefit cannot be extended.

6.1. We have carefully considered the submissions from both the sides. The following are not in dispute; that the appellant as 100% EOU availed

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exemption under the Customs notification and Excise Notification for procuring capital goods and inputs; that they were required to fulfil export obligation to the tune of Rs.11.2 crores within five years i.e. by 5.7.2002; that due to failure in floriculture sector, they were able to fulfil export obligation only to the tune of Rs.3.02 crores; that till March, 2001 whatever has been produced by them, has been exported.

6.2. At the outset, we agree with the contention of the Ld Advocate that the short fall in export obligation was due to failure in floriculture sector as a whole and due to genuine difficulties faced by EOU; and no wanton failure to fulfil the export obligation can be attributed to them. It cannot be said that goods procured duty free were not used for the intended purposes. Further the entire goods produced have been exported, and no finished goods have been diverted. This is not a case of not using the capital goods and the inputs for intended purpose, not withstanding the failure to fulfil the entire export obligation. Therefore, no penalty is warranted under the Customs Act.

6.3. We proceed to examine the issue relating to demand of duty. The benefit of exemption for procuring the capital goods and inputs are given both under the Customs Act and the Central Excise Act primarily to enable export obligation as stipulated; the duty free importation and duty free procurement locally were in order; there is no violation at the time of procurement of the capital goods and inputs in availing the exemptions;

the exemptions are subject to end use conditions as they are to be used only for "the intended purpose"; no doubt that the said goods have not been diverted; mere use of the capital goods and inputs for the purpose of manufacture of the goods to be exported is not sufficient compliance of the conditions of the Notifications as claimed on behalf of the appellant. We are of the considered view that "the intended purpose" shall be served only when the export obligation is fulfilled that too within the specified time limit. When there is shortfall in fulfilment "the intended purpose" has been fulfilled only partially. Hence the consequences follow. Demand of duty is one of the consequences.

6.4. Then we come to the extent to which duty is required to be demanded. In a situation where the capital goods and inputs have been diverted, the entire duty requires to be demanded. In a situation where the capital goods and inputs have been diverted, after fulfilment of the entire export obligation even prior to the outer limit of time prescribed, no duty requires to be demanded. In a situation like the present one when the export obligation is only partly fulfilled only part of the duty requires to be demanded. As regards duty on inputs not used the duty is demandable in full. The policy stipulates that "Customs duty on unused raw materials and components on the value on the dates of import and at rates in force on the date of clearance" shall be payable.

6.5. As regards the duty on capital goods,.Ld advocate submitted that in the event of duty being demanded it should be demanded on the depreciated value of the capital goods and in proportion to the shortfall in export obligation whereas the Ld. DR submitted that the entire duty requires to be demanded; that only when de-bonding is allowed, depreciated value of the capital goods can be adopted for the purpose demanding duty.

6.6. It is not in dispute that the capital goods have been used in the production of goods which have been exported. There is no justification to treat a case where no export obligation is fulfilled on the same footing as a case where export obligation has been partly fulfilled. There is also no justification to treat a case where the capital goods have not been used at all on the same footing as a case where the capital goods have been used export obligation has been partly fulfilled. Therefore we hold that the duty should be demanded only on the depreciated value. The policy stipulates that " Customs duty on capital goods at the depreciated value but at the rates prevalent on the dates of import" shall be demandable.

6.7. We are of the considered view that the extending the benefit of duty calculation on depreciated value need not be linked to the actual order of de-bonding by the Development Commissioner. The appellant can not forced to continue as a 100% EOU; the Development Commissioner has no option but to allow the de-bonding but he may take such other action as deemed fit while allowing the de-bonding under the provisions of the Foreign Trade Development Act. We hold that the depreciation should be allowed and should not be denied on the ground that permission for de-bonding is yet to be granted by the Development Commissioner. We find that the Tribunal in the case of Solitare Machine Tools Pvt Ltd reported in 2003 (152) ELT 384 has extended such concession even when there was no order of de-bonding.

6.8. We are also of the considered view that once duty is demanded on the depreciated value of the capital goods, the question of further reducing the demand in proportion to the shortfall in export obligation may not be warranted as the same may lead to double benefits. Restriction of the demand on the depreciated value of the capital goods is necessary and sufficient to meet the ends of justice.

~~6.8.~~ The next question which arises for consideration is up to which date the depreciation should be granted. We find that the appellant has commenced production on 6.7.97 and they were required to fulfil the export obligation before 5.7.02. They have not sought for extension of time for fulfilling the export obligation. They have subsequently closed the business with effect from 1.4.03. They have not intimated such closure to the Customs department. In the present case the appellant has filed application for de-bonding rather belatedly and the Development Commissioner is yet to take a decision. On behalf of the appellant, it was submitted that the depreciation should be allowed till the date on which the Development Commissioner grants de-bonding permission. If this view is accepted then the same will lead to a situation that the delay in applying for de-bonding works to the advantage of the appellant. The delay by the appellant to apply for de-bonding and the time taken by the Development Commissioner can not lead to grant of additional benefit to the appellant. We hold that it would be just and proper that the depreciation should be allowed only till 5.7.02 date by which they ought to have fulfilled the export obligation.

6.9. It has been submitted that cause of action has arisen immediately after completion of five years and as show cause notice has been issued after one year from the said date the entire demand is time barred. They have not sought for extension of time beyond 5-7-2002 for fulfilling the export obligation. They have subsequently closed the business with effect from 1.4.03. They have not intimated these developments to the Customs department. The obligation to fulfil export obligation is a continuing one and persists till the same is completed. Therefore the claim that the demand is time barred is not acceptable.

7. The appeal is disposed of on the following terms:

a) It is a case of short fall in fulfilment of export obligation not involving any diversion of capital goods/inputs and shortfall is not due to any deliberate action or omission on the part of the appellant.

b) Customs duty on unused raw materials and components along with interest shall be payable on the value on the dates of import and at rates in force on 5-7-02.

c) Customs duty on the capital goods along with interest shall be payable at the depreciated value as on 5-7-02 but at the rates prevalent on the dates of import.

d) The penalty imposed is set aside.

8. The above order is without prejudice to any action that the Development Commissioner may take while allowing the de-bonding under the provisions of the Foreign Trade Development Act.

(Pronounced in the Court on 2nd Sept 2008

(Justice S.N. Jha)
President

(M. Veeraiyan)
Member(Technical)

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