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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/123 /2008-126 /2008 Date 22/07/2008

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

To :
M/S L.R.BROTHERS, INDO FLORA LTD.
CHAKRATA ROAD, SAHARANPUR-247001
(Remaining Addresses at back).

M/S L.R.BROTHERS, INDO FLORA LTD. Appellant
Vs
C.C.E. MEERUT I Respondent

I am directed to transmit herewith a certified copy of Final order No. C/222-225/08-CUSTOMS DT.04.07.08 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. MEERUT I
EXCISE CHOWK. UNIVERSITY ROAD,
MANGAL PANDEY NAGAR. MEERUT - 250005.

2. Adv. / Consult
MR.J M SHARMA, CONSLT.
G-31, BASANT ENCLAVE, 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. Office Copy
15. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

Customs Appeal Nos.123-126/08

[Arising out of Order-in-Original No.13/COMM/MRT-1/2004 dt.8.7.04 passed by the Commissioner of Customs & Central Excise, Meerut)

For approval and signature:

Hon'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER TECHNICAL

1. Whether Press Reporters may be allowed to see: the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?

2. Whether it would be released under Rule 27 of : the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether their Lordships wish to see the fair : copy of the order?

4. Whether order is to be circulated to the : Department Authorities:

M/s. L.R.Brothers, Indo Flora Ltd. & Others Appellant

Versus

CC, Meerut-I Respondent

Appearance

Shri J.M.Sharma, Consultant for appellant
Sh. R.C.Sankhla, Authorised Departmental Representative(DR) For respondent

Coram: Hon'ble Mr. S.S.KANG, VICE PRESIDENT
Hon'ble Mr. RAKESH KUMAR, MEMBER TECHNICAL

Final

Date of decision: 4.7.08
Order No. C/222 to 225/08

Per Rakesh Kumar:

The main appellants – M/s. L.R.Brothers, Indo Flora Ltd., Rasulpur, Saharanpur are a floriculture 100% EOU, who started their operation in June,1996 on the basis of LOP No.Per/119(1994)/EOB/84/94 dt.4.5.94 issued by the Secretariat for Industrial Approvals(EOU Section), Deptt. of Industrial Development, Ministry of Industry, New Delhi. The other appellants – Shri Vijay Kumar Garg, Mrs. Vijaya Garg and Shri Anupam Sushil Garg are the Managing Director/Directors of this company. The appellant company had imported capital goods involving Customs Duty of Rs.6,78,63,747/- free of duty under Notification No. 126/94-Cus and also procured indigenously manufactured capital goods involving Central Excise duty of Rs.3,08,109/- free of Central Excise Duty, under Notification No.136/94-CE for use in the production of cut flowers for export. The export obligation, as mentioned in the LOP was to be discharged within a stipulated period. The Commissioner of Central Excise, Meerut-I, by the impugned order dt.8.7.04 has -

(a) confirmed the customs duty demand of Rs.6,78,63,747/- under section 72(b) of the Customs Act, read with Notification No.126/94-Cus dt.3.6.94, alongwith interest on this duty at the rate of 24% p.a. as per the provision of Section of the Act;

(b) confirmed the central excise duty demand of Rs.3,08,109/- under Notification No.136/94-CE dt.10.11.94 read with Rule 196 of the Central Excise Rules,1944, and condition of the Bond and Section 38-A of the Central Excise Act alongwith interest at the applicable rate on this duty as per the provisions of Section 11AB of the Central Excise Act;

(c) ordered confiscation of the goods under Section 111(o) of the Customs Act,1962 and Rule 196 of the Central Excise Rules, read with Section 38A of the Central Excise Act,1944;

(d) imposed penalty of Rs.one crore on the Appellant company under Section 112(a) of the Customs Act,1962 and

(e) imposed penalties under Section 112(b) of the Customs Act,1962 on the Managing Director and Directors of the Appellant Company as under:

Shri Vijay Kumar Garg	Rs.25,000/-
Mrs. Vijaya Garg	Rs.10,000/-
Shri Anupam Sushil Garg	Rs.10,000/-

The above duty demands were confirmed and the penalties were imposed on the ground that the Appellant company failed to meet the export obligation within the stipulated period and thereby violated the conditions subject for which duty free import of the capital goods and purchase of indigenously manufactured excisable goods free of Central Excise Duty had been allowed.

2. Heard both the sides.

3. Shri J.M.Sharma, Consultant, Ld. Counsel on behalf of the

Appellant made the following submissions:

(1) The duty demands have been confirmed against the Appellant Company and penalties have been imposed on the Appellant on the ground that the Appellant company did not fulfil the export obligation and thereby contravened the provisions of the Exim Policy and also the conditions of the Notification No. 126/94-Cus and No.136/94-CE. The point as to whether a 100% EOU has failed to fulfil the export obligation is to be decided by the Development Commissioner and in the case of the Appellant Company, no decision in this regard has been taken by the Development Commissioner. The Asstt. Development Commissioner vide letter dt.10.1.03 addressed to the jurisdictional Asstt. Commissioner of Central Excise had informed in this regard that though a SCN dt.20.1.01 had been issued by the Development Commissioner to the Appellant company for non-fulfilment of the export obligation and Net positive foreign exchange earning (NFEP) condition, on receipt of reply from the Appellant company, the proceedings were put in abeyance and that in this connection, a formal communication has been received from the Ministry of Commerce to keep the proceedings in respect of the Appellant company in abeyance, as a rehabilitation package is under consideration by the Committee on Floriculture constituted by the Min. of Commerce. Besides this , Agricultural and Processed Food Products Export Development Authority (APEDA)under Min. of

Commerce vide letter dt.18.10.07 addressed to the Commissioner of Central Excise & Customs, Meerut had informed the Commissioner that the Appellant company is presently undergoing rehabilitation and in view of this, the decision with regard to meeting the export obligation will be kept in abeyance. In view of this, the decision on part of the Commissioner that the Appellant company has failed to meet the export obligation and on this basis confirming the duty demand against them and imposing penalties and ordering confiscation of the capital goods is pre-mature and totally wrong.

(2) The Commissioner has erred in ~~maturely~~ prematurely confirming the duty demand without debonding of the unit by the Development Commissioner/Board of Approval. The duty on capital goods has to be confirmed only after debonding on the EOU in accordance with the Exim Policy. The Customs authorities do not have the power to debond the EOU. In the case of **Commissioner of Customs, Guntur vs Regency Ceramics Ltd. reported in 2000(121)ELT.384**, the Tribunal in para 6 of the order has held that the Customs have no authority under law to close or unclose a 100% EOU and bestow or remove the 100% EOU status to any industry. In view of this the Commissioner's order demanding the duty on the imported capital goods or indigenously procured capital goods free of duty is pre-mature as the Development Commissioner, who is the competent authority has not ordered or approved the demanding of the unit. For the same reason, there is no justification either for

confiscation of the goods or for imposition of penalty on the Appellant company and its Managing Director and Directors.

(3) Even the quantification of duty demand is incorrect as the same has been determined without giving the permitted depreciation, which has to be allowed for calculation of duty on the capital goods at the time of debonding.

4. Shri R.C.Sankhla, the Ld. Departmental Representative reiterating the grounds for confirming the duty demands, confiscation of the goods and penalty on the Appellant company, and its Managing Director and other Directors, as given in the impugned order, pleaded that since the duty free procurement of imported capital goods under Notification No.126/94-Cus and of the indigenous capital goods under Notification No.136/94-CE was subject to the condition of meeting the export obligation within the stipulated period and achieving the net positive foreign-exchange earning and since both these conditions have not been fulfilled by the Appellant company, the Revenue is justified in confirming the duty demand, confiscating the goods under Section 111(o) of Customs Act and imposing penalties on the Managing Director and other Directors of the company under Section 112 of the Customs Act.

5. We have given careful consideration to the submissions of both the sides. There is no dispute about the fact that the duty exemption under Notification No.126/94-Cus and 136/94-CE is

available subject to certain conditions – i.e. meeting the export obligation within the stipulated period and achieving the net positive foreign exchange earning. The point of dispute is as to who is to determine as to whether a 100% EOU has fulfilled the conditions regarding meeting the export obligation and achieving net positive foreign exchange earning. We find that on this very issue, the Tribunal in the case of Vishal Footwear Ltd. vs CC, New Delhi reported in 1999(114)ELT.60, relying upon the Board's circular No.29/95-Cus dt.10.3.95 has held that it is only when the Board of Approval or Development Commissioner arrives at a find that the EOU has failed to fulfil export obligation, that duty demand can be confirmed by the customs authorities and when no such conclusion has been arrived at by the Development Commissioner, the Customs Commissioner's order confirming the duty demand on the capital goods is not sustainable. The Board's circular No.29/95-Cus, which has been relied upon in this order is reproduced below:

> "Issue of show cause notice for recovery of customs duty on goods imported by 100% EOU :
>
> A number of instances have come to the notice of the Board where 100% EOUs had imported capital goods, raw materials and other permissible items under Notification No.13/81-Cus/. Dt.9.2.81 but have failed to export any goods or have closed down after exporting a few consignments. A question has been raised as to the stage at which the customs authorities should proceed to recover duties on imported goods and other goods lying in the factory premises of the 100% EOU.

The matter has been examined by the Board in the context of an Audit objection and I am directed to say that the Board has taken a view that liability of customs duties on goods imported by 100% EOUs arises either at the stage of the unit being de-bonded or if any of the conditions of the exemption Notification No.13/81, dt.9.2.81 has been violated or remains unfulfilled. In this regard, it is seen that one of the conditions of the exemption notification is that the importer exports out of India 100% or such other percentage, as may be fixed by the Board of articles manufactured wholly or partly from the goods for the period stipulated by the Board or such extended period as may be specified by the said Board. It is thus clear that if the Board of Approval or the Development Commissioner concerned determines that the units failed to export the fixed percentage of articles for the specified period, then in such case it may be held that the conditions of the exemption notification has been violated. At this stage, it will be open for this Department to issue a show cause notice to the unit for demanding the due duty on the imported goods.

Normally the customs authorities should immediately inform the Development Commissioner in case a 100% EOU ceases production prematurely or fails to commence production or export within the stipulated period. In case the Development Commissioner initiates action against the unit for non-fulfilment of export obligation etc. simultaneously, the customs authorities should issue show cause notice for failure to comply with conditions of Notification 13/81-Cus., dt.9.2.81. The demand of duty should be confirmed only after a definite conclusion has been arrived at by the Development Commissioner".

6. In this case, there is no dispute about the fact that neither prior to issue of SCN nor prior to the adjudication by the Commissioner, the jurisdictional Development Commissioner had given any definite finding that the appellant company has failed to meet the export obligation. On the contrary, Agricultural and Processed Food

Products Export Development Authority vide its letter dt.18.10.07 has informed the Commissioner that M/s. L.R.Brothers Indo Flora Ltd., the Appellant company, is presently undergoing rehabilitation and was part of a study on sick floriculture units commissioned by APEDA in 2001(through M/s. Tata Economic Consultancy Services – TECS) and in 2006 through M/s. A.F.Ferguson & Co., that based on the report of Tata Economic Consultancy Services, a Committee on Floriculture was set up by the Government under the Chairmanship of DGFT for recommending a strategy for rehabilitation of sick floriculture units, that it has been decided that in order make the Indian Floriculture industry viable, it has to be nursed back to health through a Rehabilitation Package for the sick units as well as through other initiatives, and that since the unit of the Appellant company is covered under the Rehabilitation Package, the issue of meeting the export obligation is to be kept in abeyance. Thus even till Oct'07, the issue of meeting the export obligation or achieving positive net foreign exchange earning had not been decided by the Development Commissioner. In view of this, the Commissioner's order, confirming the duty demand on this ground, confiscating the goods and imposing penalty on the appellant is premature and not sustainable. We, therefore, set aside the impugned order and remand the matter to the Commissioner for denovo adjudication of this matter after ascertaining from the Development Commissioner/Board of Approval about their decision with regard to the question of fulfillment of the export obligation and achieving NFEP. The show cause notice issued to the Appellant is to be adjudicated only after the Development Commissioner/Board of Approval gives the findings on the issue of meeting the export obligation and achieving the NFEP. The appeals are disposed of in the above terms.

(Operative part of the order pronounced in the open Court).

(S.S.Kang)
Vice President

(Rakesh Kumar)
Member Technical

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