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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/2086/2010-2087/2010,2385/2010 - EX[DB] Date **15/02/2012**
E/S/1997-1998,2385/2010-EX

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

To :
SH MOHD TARIQ ABBASI
2598, IIND FLOOR, AASHIANA APARTMENTS, NEAR
RAZAK SAHIB SCHOOL, NOOR NAGAR, JAMIA
NAGAR,OKHLA, N DELHI.
110025

SH MOHD TARIQ ABBASI Appellant

Vs

C.E.E. MEERUT I **STAY ORDER NO. 221-223/2012-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/131-133/ 2012 EX|DB|** dated 08-2-12 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. MEERUT I
EXCISE CHOWK,OPPOSITE
CHOUDHARY CHARAN SINGH
UNIVERSITY MANGAL PANDAY
NAGAR, MEERUT - 250005.
2. Adv. / Consult
MR.PRADEEP KUMAR MITTAL
171, CHITRA VIHAR, DELHI-110092
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Excise Appeal Branch)

P.T.C.-2,

14. SH JAWAD AHMAD SIDDIQUI
274-A, JAMIA NAGAR,OKHAL ,DELHI.

15. M/S AL-FALAH BLOSSOMS LIMITED
274-A, JAMIA NAGAR, OKHLA, DELHI

16. SH. V. K. AGRAWAL, ADV,
B-82, LAJPAT NAGAR
PART-II, N. DELHI-24

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 28/11/2011.
DATE OF DECISION : 28/11/2011.

Excise Stay Application No. 1997 of 2010 in Appeal No. 2086 of 2010

Mohd. Tariq Abbasi — Appellant

Versus

CCE, Meerut – I — Respondent

Excise Stay Application No. 1998 of 2010 in Appeal No. 2087 of 2010

Shri Jawad Ahmad Siddiqui — Appellant

Versus

CCE, Meerut – I — Respondent

Excise Stay Application No. 2216 of 2010 in Appeal No. 2385 of 2010

M/s Al-Falah Blossoms Limited — Appellant

Versus

CCE, Meerut – I — Respondent

[Arising out of the Order-in-Original No. 02/COMM/MRT-I/2010 dated 29.01.2010/29.03.2010 passed by The Commissioner, Central Excise, Meerut – I.]

For Approval and signature :
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri 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? :

Appearance

S/Shri V.K. Agarwal, P.K. Mittal, Advocates – for the appellant

Shri I. Beg, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
Hon'ble Shri Rakesh Kumar, Member (Technical)

STAY ORDER No. 221-223/2012-EX(BR)
FINAL Order No. A/131-133/2012-EX(BR) Dated : ____________

Per. Rakesh Kumar :-

The facts leading to these appeals and stay applications are, in brief, as under.

1.1 M/s Al-Falah Blossoms Limited, Meerut (hereinafter referred to as the appellant company) are a 100% Flori-Culture EOU. Shri Jawad Ahmad Siddiqui is the Managing Director and the other appellant Shri Mohd. Tariq Abbasi is the Director of the appellant company. In August, 1996 they were issued a LOP dated 16/8/96 for setting up a floriculture 100% EOU and for this purpose they were entitled to import free of duty or procure indigenously free of Central Excise Duty, the capital goods, components, consumables and raw materials subject to condition that the same are used for production of flowers for export. The flowers produced were to be exported to general currency area countries/hard currency area for a period of 10 years with positive NFE. On the basis of the above LOP, the appellant company were issued a private bounded warehouse licence under Section 58 of the Customs Act, 1962 and also the permission for manufacture under bond under Section 65 ibid by the Jurisdictional Assistant Commissioner of Customs. The appellant company imported capital goods and also some capital goods were domestically procured during June 1997 to July 1998 period. The Customs duty forgone on the imported capital goods was Rs. 2,77,61,571/- and these capital goods were imported by availing duty exemption under Notification No. 53/97-CUS dated 3/6/97. The Central Excise duty forgone on the indigenously procured capital goods procured free of Central Excise duty under exemption Notification No. 136/94-CE was Rs. 4,05,785/-. In September, 2002, the Jurisdictional Central Excise Officers visited the appellant's premises and during visit, it appeared that they had not made any exports since 1998, and as such, they had not fulfilled the export obligation. The capital goods imported as well as domestically procured totally valued at Rs. 3,85,29,053/- were placed under seizure. Thereafter a show cause notice dated 25/2/03 was issued to the appellant company as well as its Managing Director for -

(a) terminating the private bonded warehouse licence issued to them;

(b) recovery of Customs duty amounting to Rs. 2,77,61,571/- alongwith interest as per the conditions of the Notification No. 53/97-CUS which had been violated,

(c) recovery of Central Excise duty amounting to Rs. 4,05,785/- in respect of indigenously manufactured goods procured free of excise duty for violation of the provisions of the exemption Notification No. 136/94-CUS, as amended, alongwith interest on this duty ;

(d) confiscation of the goods placed under seizure under Section 111 (o) of Customs Act, 1962 ; and

(e) imposition of penalty under Section 112 of Customs Act, 1962 as well as 114A of Customs Act, 1962 on the appellant company and also on its Director and Managing Director.

1.2 The show cause notice was adjudicated by the Commissioner vide order-in-original dated 11/3/04 by which the private bonded warehousing licence of the appellant company was cancelled, the duty demands as proposed in the show cause notice were confirmed alongwith interest, the goods under seizure were confiscated with option to be redeemed on redemption fine of Rs. 50,00,000/- and while penalty of Rs. 50,00,000/- and Rs. 2,77,61,571/- were imposed on the appellant company under Section 112 and 114A respectively, penalty of Rs. 10,000/- each was imposed on Shri Jawad Ahmad Siddiqui and Shri Mohd. Tariq Abbasi, Directors of the appellant company. The appellants filed an appeal before the Tribunal against the above order and the Tribunal vide final order No. 619-620/2005 dated 6/4/05 set aside the Commissioner's order dated 11/3/04 and remanded the matter for denovo adjudication after granting personal hearing to the appellants, as the [illegible] order had been passed ex-parte. As per the Tribunal's direction, the matter was adjudicated denovo by the Commissioner vide order-in-original dated 31/8/06 by which same order as that passed by the earlier Commissioner was passed except for change that in this order, the penalties imposed on Shri Jawad Ahmad Siddiqui and Shri Mohd. Tariq Abbasi was Rs. 1,00,000/- each under Section 117 of Customs Act, 1962 and Rule 26 of the Erstwhile Central Excise Rules, 1994.

1.3 The appellant again filed appeal before the Tribunal against this order and the Tribunal remanded the matter for denovo adjudication after fresh hearing on the ground that during hearing before the Tribunal, the appellant company had produced a letter dated 21/5/07 of the Assistant Development Commissioner, NEPZ, which mentioned that the appellant company had fulfilled the export obligation as per the terms and conditions of the LOP. Accordingly, the matter was adjudicated denovo once again by the order-in-original No. 2/COMM/MRT-I/2010 dated 29/1/10. Before these denovo adjudication proceedings, it was found that the letter dated 21/5/07 issued by the office of Development Commissioner had been withdrawn by them, but taking into consideration the appellant's contention that initially they had made sincere efforts to meet the export obligation and some exports had been made, but subsequently on account of arrest of the Managing Director as well as Director of the appellant company for alleged financial fraud and their subsequent imprisonment, the unit could not meet the export obligation, the Development Commissioner vide letter dated 12/6/09 allowed debonding and cancelled the LOP. At the time of debonding the appellant company was required to pay the duty on the capital goods as per the provisions of the Notification. The Commissioner while adjudicating this matter denovo vide order-in-original dated 29/3/10, keeping in view the debonding allowed by the Development Commissioner, confirmed the duty demand of Rs. 1,22,92,703/- in respect of the capital goods after allowing the depreciation. However, the seizure of the capital goods was vacated and the unit was allowed to be debonded after payment of the proper Customs Duty alongwith the interest. Penalty of Rs. 50,000/- each was also imposed on the Managing Director and Director of the appellant company. The Commissioner in this order determined depreciation as per the provisions of Notification No. 52/03-CUS and 22/03-CE holding that it is these notifications which would be applicable and not the Notification No. 53/97-CUS and 136/94-CE. Against this order of the Commissioner, these appeals alongwith stay applications have been filed.

2. Heard both the sides.

3. Though these matters were listed for hearing of the stay applications only, after hearing the same after some time, we are of the view that the matter can be finally disposed of and

accordingly with the consent of both the sides, the appeals were heard for final disposal.

3.1 Shri M.K. Mittal, Advocate, the learned Counsel for the appellant, pleaded that the appellants after issue of the LOP and issue of the private bonded warehouse licence and procuring the capital goods other material free of Customs duty and Central Excise Duty, had installed those capital goods and all efforts had been made to meet the export obligation by exporting the flowers produced, that in January 2000 on account of a police complaint against the appellant company and its Directors regarding mis-appropriation of money, both the Director as well as Managing Director were arrested and put in the jail because of which the operations of their EOU stopped, that they were acquitted of all the charges only in 2006, that keeping in view these circumstances only, the Development Commissioner allowed the 100% EOU to be debonded vide letter dated 12/6/09, that since the capital goods had been imported by availing duty exemption under Notification No. 53/97-CUS, the duty payable on the capital goods at the time of debonding has to be determined in accordance with the provisions of this Notification only and not the Notification No. 52/03-CUS, that in terms of para 5 (a) of the Notification No. 53/97-CUS, on clearance of used capital goods to DTA, duty is payable on the depreciated value and at the rate in force the time on the date of payment of such duty, that depreciation is to be allowed from the date of commencement of commercial production, that the unit had commenced commercial production on 21/5/97 and the LOP was cancelled on 12/6/09, that depreciation is to be allowed from 21/5/97 at the rate prescribed in the Board Circular No. 29/03-CUS dated 3/4/03, that as per this Circular, there is no upper cap for depreciation and the depreciation up to 100% can be allowed, that the Tribunal in the case of **Khabros Steel India Ltd. vs. CCE, Jaipur** reported in **2006 (194) E.L.T. 117** has held that in view of the Board's Circular No. 27/98-CUS dated 21/4/98 and 43/98-CUS dated 26/6/98, at the time of debonding of 100% EOU, the depreciation on the capital goods must be allowed by straight line method upto 90%, that in view of this, the Commissioner's order restricting depreciation to 60% on the basis of his interpretation of the provisions of Notification No. 52/03-CUS, which are not even applicable to this case, is not correct, that the depreciation on the capital goods is to be allowed from the date of commencement of production which in the case of appellant is 21/5/97, till the date of debonding – 12/6/09, that no penalty is imposable on the Managing Director and Director of the appellant company as they had neither done nor omitted to do anything which Act or omission had rendered the goods liable for confiscation, that when the Commissioner has vacated the seizure of the goods and held the same not liable for confiscation, there is no justification for imposition of penalty on the Managing Director and Director of the appellant company and that in view of the above, the impugned order is not correct.

3.2 Shri I. Beg, the learned SDR defended the impugned order by reiterating the findings of the Commissioner in it and emphasized that the depreciation is to be calculated as per the provisions of Notification No. 52/03-CUS which was the Notification in force at the time of debonding.

4. We have carefully considered the submissions from both the sides and perused the records.

5. In this case, the appellant company - a 100% EOU, had commenced commercial production of flowers on 21/5/97 and there is no dispute about this. There is also no dispute that this unit was allowed to be debonded by the Development Commissioner on 12/6/09. At the time of debonding, the duty is required to be paid on the, imported/indigenously procured capital goods, inputs and finished products, if any. In this case the duty is required to be paid is only on the capital goods. There is no dispute that the duty is to be paid on the capital goods on the depreciated value. The dispute is only as to whether the depreciation is to be calculated as per the provisions of Notification No. 52/03-CE or as per the provisions of Notification No. 53/97-CUS. In this case, the Commissioner has calculated the quantum of depreciation as per the provisions of Notification No. 52/03-CUS holding that it is the provisions of this Notification, which would be applicable. In our view, since the

goods had been imported during June 1997 – July 1998 period by availing exemption under Notification No. 53/97-CUS dated 3/6/97, it is the provisions of this Notification, which would be applicable for determining the quantum of depreciation available to the appellant. In terms of para 5 (a) of this Notification, the duty on the used capital goods at the time of debonding is payable on the depreciated value at the rate in force on the date of payment of duty and in terms of explanation to para 5 (a) of the Notification, the depreciation is to be allowed for the period from the date of commencement of commercial production upto the date of payment of duty. If the date of debonding – 12/6/09 is treated as the date on which duty was payable, the depreciation has to be allowed at least for this period and since this Notification does not prescribe the rate of depreciation, the same has to be adopted from the Board Circular No. 305/136/92-FTT dated 5/6/92 and No. 27/98-CUS dated 21/4/98 and 43/98-CUS dated 26/6/98 and also the ratio of the Tribunal judgment in case of **Khabros Steel India Ltd. vs. CCE, Jaipur** (supra) in this regard. However for this purpose, the matter has to be remanded to the Commissioner for re-quantification of the duty demand.

6. As regards penalty on Shri Mohd. Tariq Abbasi and Shri Jawad Ahmad Siddiqui, under Section 117 of Customs Act and Rule 26 of the Central Excise Rules, 2001/202, the same has been imposed on the ground that their DTA clearances were in excess of the prescribed limit of 5% of export turnover and that

they did not intimation the Department regarding their export performance. But the order does not discuss as to how ..... acts or omissions constitute contravention of the provisions of Customs Act, so as to attract penalty under Section 117 of Customs Act, 1962 or are the acts attracting penalty under Rule 26 of Central Excise Rules 2001/2002, Without specific finding on these points penalty on the Managing Director and Director cannot be imposed. Under Section 117 of Customs Act, 1962 and Rule 26 of Central Excise Rules. This aspect also, therefore, requires de-novo examination.

7. The impugned order is, therefore, set aside and the matter is remanded to the Commissioner for de-novo adjudication for the purpose of re-quantification of the duty demand and deciding the question of penalty on Shri Mohd. Tariq Abbasi and Shri Jawad Ahmad Siddiqui as per our observations in this order. The appeals and the stay applications stand disposed of, as above.

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

(Archana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

PK