IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.I

APPEAL NO.C/866 & 867/2012-MUM

(Arising out of Order-in-Original No.18/CEX/2012 dated 28.05.2012 passed by the Commissioner of Central Excise Pune I Commissionerate)

M/s. Horizon Flora (I) Ltd. **Mr. Dinesh Bheda, Director**	:	**Appellant**
VS		
Commissioner of Central Excise, Pune I	:	**Respondent**

Appearance

Shri H.G. Dharmadhikari for Appellant

Shri Bhushan Kamble, AC (A.R) for respondent

CORAM:

Hon'ble Shri S. K. Mohanty, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 29/01/2019
Date of decision : 09/04/2019

ORDER NO.A/85758-85759/2019

Per: **Shri P Anjani Kumar, Member (Technical)**

1. This appeal is directed against order-in-original No. 18/CEX/2012 dated 28-5-2012 (issued on 29-05-2012) passed by Commissioner of Central Excise, Pune-I.

2. This is second round of litigation. Briefly stated the facts of the case are that the Appellant M/s. Horizon Flora (India) Ltd. engaged in business of Floriculture and registered as 100% EOU under letter of permission (LOP) bearing No.PER:121(1997)/EOB/82/97 dated 17.4.1997. The Appellants approached the Development Commissioner for clearance of cut roses (not fit for export) to domestic market and pending the approval, the Appellant cleared cut roses to Domestic market without payment of excise duty being perishable non-excisable goods. Department issued six different Show Cause Notices demanding excise duty (equivalent custom duty leviable on importation of cut flowers) on cut flowers cleared to domestic market pending the permission from development commissioner. The said Show Cause Notices were confirmed in 6 Order in Original's and have been set aside by the Commissioner (Appeals) vide Order in Appeal No. Order-in-Appeal No. P-I/54-59/2004 dated 16.6.2004. During the same period, another Show Cause Notice, to demand custom duty forgone on capital goods and inputs imported duty free, in contravention of exemption Notification No.126/1994, was issued and confirmed. On an appeal made by the appellants, CESTAT, vide order No A/520& S/21/2011/CSTB/C-I dated 17.11.2011, remanded the matter back to Original Adjudicating Authority to consider the Order passed by Development Commissioner. Accordingly, the Commissioner has passed the impugned order, after considering the order of development commissioner Original Adjudicating Authority has set aside duty on capital goods but erroneously confirmed the demand of duty on inputs amounting to Rs.2,97,419/- and imposed equal amount of penalty under Section 112(a) and Rs.1, 00,000 penalty on director of Appellant without considering the submissions of Appellant. Hence, the present appeals.

3. The appellants contend that the confirmation of demand is without authority of law as no Section of Custom Act or Central Excise Act, has been invoke while confirming demand of duty. The impugned Show Cause Notice is barred by limitation, since for the same period 6 different Show Cause Notices were issued earlier, in view of the following.

i. Maruti Cottex Ltd Vs CCE, Hyderabad, 2006 (199) ELT263 (Tri. Bang.)
ii. SAP Bagging Vs CCE, Bhubaneswar, 2000 (123) ELT669 (Tribunal)
iii. Nizam Sugar v/s CCE. A.P. 2008 (9) S.T.R. 314 (S.C.)

3.1. They further submitted that penalty under Section 112(a) of Customs Act is not imposable in absence of confiscation of goods under Section 111 of Customs Act.

i. Fal Industries Ltd v/s Commissioner of Customs, Chennai 2003 (159) E.L.T. 215 (Tri. – Chennai)
ii. Avlon Syntex P. Ltd v/s Commissioner of C.Excise, Rajkot 2007 (213) E.L.T. 706 (Tri. – Ahmd.)
iii. CCE v/s HMM Limited 1995 (76) ELT 497 (SC)
iv. CCE, Raigad v/s. Positive Packaging Indus. Ltd 2008 (224) ELT 100 Maintained by Hon'ble Bombay High Court in Positive Packaging Industries Ltd 2010 (253) E.L.T. A112 (Bom.)

4. Learned Authorised Representative for the department reiterated the findings of OIO and relied upon L R Brothers, Indo Flora Ltd 2009(235) ELT 324 (Tri-Delhi).

5. Heard rival submissions and perused the records of the case. The Learned Commissioner in the *De novo* adjudication has draft the demand pertaining to custom duty under “capital goods” cleared by the Appellants and has confirmed the demand to the extent of customs duty equivalent to that leviable on the input obtained as per para 3 of notification No.126/94 dated 03.06.1994. The inputs/consumables were used in the production of cut roses that were cleared in domestic market. The commissioner held that the Appellants have made, *inter alia*, the following omissions or commissions.

(i) Mother plants worth Rs.85,74,632/- were uprooted, removed and burned without informing the Development Commissioner.

(ii) Imported inputs / consumables valued at Rs.18,78,079/- was utilized for production of cut roses that were cleared in the domestic market without permission giving rise to a duty liability of Rs.2,97,419/- .

(iii) The Appellants did not recover Rs.43.48 Lakhs during the period 2000-2001 to 2002-2003 on export of fresh / harvested cut flowers in terms of para 9.10 (b) of Exim Policy 1997 to 2002 in convertible foreign exchange.

5.1 The Appellants submits that the demand by the Appellants is without authority of law in as much as no section/authority has been quoted. We find that the Show Cause Notice is issued in terms of the B-17 Bond executed by them with the customs authorities. We find that in terms of the Bond provisions of recovery of interest and penalty are available. Therefore the Show Cause Notice or the Order is not vitiated by the non-mentioning the particular authority in the form of Section or Rule. Non-quoting or mis-quoting of the provisions of law will not make Show Cause Notice or adjudicating order invalid or illegal. We find that the Appellants contention in this regards is not acceptable for the reason that the Show Cause Notice issued for enforcement of the conditions of Bond, we find that the Show Cause Notice is not time barred. We find that as submitted by the Learned Authorised Representative it was held in the case of LR Brothers, Indo Flora Limited (supra) customs duty is chargeable on inputs gone into production of such non-excisable goods clear to DTA. In the result we uphold demand of duty of Rs.2,97,419/- along with interest.

5.2 Coming to the issue of imposition on penalty on Shri Dinesh Bheda (Appeal No.C/867/2012). The Appellants submitted that when there is no seizure of goods provisions of Section 112 are not attracted. We find that the Learned Commissioner has dropped the seizure portion of the notice. Moreover, the issue was about the interpretation of provisions of custom Act, Exim Policy and the notification issued thereof. Learned Commissioner has dropped substantial portion of the demand as per the directions of CESTAT and on the basis of permission granted by the Development Commissioner at a later date. Therefore we find that there is no need to impose any penalty on Shri Dinesh Bheda and M/s. Horizon Flora (I) Limited is not maintainable in view of the case law cited above.

6. We hold that the Appellant M/s. Horizon Flora (I) Limited are required to pay duty of Rs.2,97,419/- along with interest.

However, the penalty imposed on them is set aside (Appeal No.C/866/2012). Appeal filed by Shri Dinesh Bheda (Appeal No.C/867/2012) is allowed.

(Order Pronounced in the open court on 09/04/2019)

(P Anjani Kumar)
Member (Technical)

S. K. Mohanty,
Member (Judicial)

HM