CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.405

Custom Appeal No. 85845 of 2013

(Arising out of Order-in-Appeal No. BC/376/2012-13 dated 31/10/2012 passed by the Commissioner of Central Excise (Appeals), Mumbai III)

M/s Lizer Technologies Ltd. ....Appellant
Plot No. EL-177 Electronic zone MIDC-TTC
Indl. Area Mahape Navi Mumbai 400710

VERSUS

Commissioner of Central Excise, Belapur ....Respondent
1st Floor CGO Complex CBD
Belapur Navi Mumbai 400614

APPERANCE:

Shri T. Vishwanathan, Srinidhi Ganesha, Advocates for the Appellant
Shri Manoj Kumar, Asst. Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)
HON'BLE P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86240 / 2019

Date of Hearing: 15.04.2019
Date of Decision: 15/07/2019

PER: CORAM

The order dated 31/10/2012 passed by the Commissioner of Central Excise (Appeals), Mumbai III in Order-in-Appeal No. BC/376/BEL/2012-13 has been assailed in the instant Appeal filed by the Appellants. The issue to be decided is whether the Appellant is covered under the exemption Notification No. 53/97-CUS, which exempts the goods specified in the table annexed thereto, when imported into India for the purpose of manufacture of articles for export of India or for being used in connection with the production or packaging or job work for export of goods by a 100% Eou, approved by the board of Approvals, subject to conditions?

2. The facts of the Appeal in brief are as follows. The Appellants, an 100% EOU, had imported an Elevator on 1.10.2001 valued at Rs.5,91,365/- duty free by availing the benefit of Notification No. 53/97-Cus. as amended. Since according to the department, the said Elevator was not used in the manufacture of export goods and therefore denying the benefit of the aforesaid exemption notification, a show cause notice dated 15.10.2004 was issued as to why the duty of Rs.3,00,551/- be not recovered in terms of Notification No. 53/97-Cus. together with interest and penalty under the provisions of Section 117 of the Customs Act, 1962. The said show cause notice was adjudicated vide Order-in-Original dated 26.11.2008 by the Assistant Commissioner Central Excise, Belapur-III Divn. by confirming the duty liability of Rs.3,00,551/- alongwith interest and also penalty of Rs.10,000/- u/s. 117 ibid. Aggrieved, the Appellants preferred Appeal before the Commissioner (Appeals). Learned Commissioner (Appeals) vide impugned order dated 22.11.2012 rejected the Appeal filed by the Appellants.

3. We have heard learned counsel for the Appellant and learned Authorised Representative for the Revenue and perused the records of the case. The learned counsel would submit that the impugned order was passed by the learned commissioner without appreciating all the submissions of the Appellants. He also termed the impugned

order as a non speaking order. He submitted that lift/elevator imported is a Capital Good and thus entitled for exemption as per notification No. 53/97-Cus. under Sl.No.1 of the Table. According to him, the appellants are manufacturing CDs. These CDs are required to be manufactured in a '*clean room'*. The elevator, imported by the appellants, is used for carrying the raw material for transporting them to the *clean room* and for carrying the finished goods to the storage area at different floor within the factory premises of the appellant and therefore it is being used as material handling equipment. He further submitted that the elevator was used exclusively for material handling only. He also submitted that even if it is not held to be a capital good, still the Appellants are entitled for the exemption notification aforesaid, as the import of the elevator in question has been approved by the Board of Approval. He referred to the communication dated 3.1.2005 received by the Appellants from the office of the Development Commissioner, SEEPZ SEZ, Ministry of Commerce & Industry, Mumbai. He also brought to our notice that thereafter on 5.9.2005 in the Meeting of the *Combined Board of Approvals for EOU/SEZ Schemes* under the chairmanship of the Additional Secretary, Ministry of Commerce & Industry, New Delhi, the Board decided to approve the duty free import of the Elevator, subject to Development Commissioner SEEPZ SEZ certifying that the elevator is being used within the premises of the unit as a freight elevator. According to the learned counsel, since the Development Commissioner, SEEPZ-SEZ has already certified about the use of the elevator as the freight elevator only therefore as per the Minutes of the Meeting dated 5.9.2005 the duty free import of the elevator already imported by the Appellant was approved and the said approval will have to be effective from the date of import. Thus the import has been expressly permitted under the aforesaid Notification. Learned counsel also submitted that a certificate dated 29.10.2001 for procurement and movement of the Elevator in question was issued by the office of the Commissioner of Customs, Mumbai mentioning the model number of the Elevator on it and on the basis of this certificate only the appellant effected duty free import of the elevator and therefore once the procurement certificate has been issued and the elevator has been imported, the customs department cannot sit and examine whether the goods imported are entitled for exemption. In support of his aforesaid submission, learned counsel relied upon the decision of a co-ordinate Bench of the Tribunal in the matter of *GE India Technology Centre vs. Commr.of Cus., Bangalore; 2009(247) ELT 402 (Tri.Bang.)*. He also submitted that the elevator was imported on in the month of October, 2001 whereas the audit letter demanding duty/show cause notice, has been issued on 15.10.2004, which is beyond the normal period of limitation. According to learned counsel since there was no allegation of any suppression of facts or mis-statement in the show cause notice therefore the same is liable to be quashed on this ground alone. Per contra, the learned Authorised Representative reiterated the findings recorded in the impugned order and prayed for dismissal of appeal filed by the Appellant.

4. In order to appreciate the issues involved, we have gone through the Notification No.53/97-cus.dated 3.6.1997. The said notification allows exemption on goods imported by EOUs. The relevant portion of the said notification, as amended, is reproduced as under:-

> *"**Exemption to specified goods imported for production of goods for export or for use in 100% Export-Oriented Undertakings.-** In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in the Table below (hereinafter referred to as the goods), when imported into India, or procured from a Public Warehouse or Private Warehouse appointed or licensed, as the case may be, under section 57 or section 58 of the said Customs Act, or procured from international exhibitions held in India for the purpose of manufacture of articles for export out of India, or for being used in connection with the production or packaging or job work for export of goods or services out of India by hundred percent Export Oriented Units approved by the Board of Approvals for hundred percent Export Oriented Units, appointed by the notification of Government of India in the Ministry of Industry, Department of Industrial Policy and Promotion or the Development Commissioner concerned, as the case may be, for this purpose (hereinafter referred to as the said Board), from the **whole of duty of customs** leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the **additional duty**, if any, leviable thereon under section 3 of the said Customs Tariff Act subject to the following conditions, namely.......................*

THE TABLE

Serial No. (1)	*Description of goods (2)*
1.	*Capital goods.*
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4.	*Material handling equipments, namely, forklifts, overhead Cranes, mobile cranes, crawler cranes, hoists and Stackers.*
......	
17.	*Any other item required in relation to production of export Goods with the prior*

approval of the Board of Approval."

While interpreting the aforesaid notification, the Hon'ble Supreme Court in the matter of *Moser Baer India Ltd. v. Commr. of Customs, Noida; 2015 (325) E.L.T. 236 (S.C.)* set aside the order of the Tribunal denying the benefit of the aforesaid Exemption Notification to the appellant and held that a reading of the aforesaid notification clearly manifests that it is not necessary that the material which is imported into India has to be used in the manufacture of articles which are to be exported out of India. Even if the said material is used "for the purpose of manufacture of articles" or "for being used in connection with the production or packaging or job work", the same shall still be covered by the aforesaid notification and thus would not attract any customs duty. The Hon'ble Supreme Court further held that it could not be disputed that the good were imported by the appellant-assessee for construction of its unit from where the goods meant for export were to be manufactured and therefore, these goods are in the nature of capital goods. In the instant Appeal, we have considered the submission of the learned counsel that the impugned order is a non-speaking order and that the same has been passed in gross violation of the principle of natural justice. When we tested the aforementioned submission we find that so far as the issue of prior approval is concerned, the learned commissioner while passing the impugned order, failed to take into consideration the certificate dated 29.10.2001 issued by the office of the Commissioner of Customs, Mumbai mentioning the model number of the Elevator in question on it, on the basis of which the appellant effected duty free import of the elevator. According to us it is very vital point in view of decision in the matter of *GE India Technology Centre (surpa)* as cited by the learned counsel since it goes to the root of the matter. So far as the extended period is concerned, we have gone through the letter/show cause notice dated 15.10.2004 and found that it nowhere used the word 'suppression' or 'mis-statement' but only mentioned that *the concession availed is irregular.* But this submission has been casually brushed aside by the learned commissioner by citing the head-note of the decision of the Hon'ble Gujarat High Court in the matter of *Neminath Fabrics Pvt. Ltd. 2010(256) ELT 369 (Guj.)* without discussing the decision any further as to how the same is applicable in the light of the facts of the instant matter nor he mentioned as to whether in that decision also the issue was about some irregularity or otherwise. Learned counsel also submitted that various other submissions as well as decisions were cited before both the authorities below but they were not considered by either of them. This submission, according to us, is true to some extent.

5. Under these circumstances, we are of the opinion that the matter is required to be remanded to the Adjudicating authority to decide the issue afresh in accordance with law, after dealing with all the submissions which may be raised and after dealing with the decisions cited by the Appellant. While passing the order, the Adjudicating Authority shall also take into consideration those decisions also which have been discussed hereinabove.

6. Accordingly, the impugned order is set aside and the matter is remanded back to the adjudicating authority to decide the issue afresh, after following the principles of natural justice. All the issues have kept open. We make it clear that we have not expressed any opinion on the merits of the case. Since this is quite old issue, the Adjudicating Authority should take up the matter at the earliest and decide the same within a period of three months from the date of production of certified copy of this order.

7. Appeal is therefore allowed by way of remand.

(Order pronounced in the open Court on 15/07/2019)

(Ajay Sharma)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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