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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-28-1998

Reported in : (1999)(112)ELT453TriDel

Appellant : Yuil Measures Pvt. Ltd.

Respondent : Commr. of Customs

Judgement :

1. In this case, a duty demand of Rs. 2,09,54,801/- has been confirmed against M/s. Yuil Measures India (hereinafter referred to as applicant No.1) and a penalty of Rs.10 lakhs has been imposed upon this applicant. A penalty of Rs.1 lakh has been im-posed on Shri S.K. Gupta, Director of the first applicant (hereinafter referred to as second applicant). The demand arises from the denial of the banefit of duty free import of capital goods and raw materials in terms of Notification 339/85 and 133/94, for the reason that the capital goods and raw material imported free of duty by the first applicant were found to be lying unutilised for a number of years, thereby violating the conditions of the above mentioned Notifications. The Department has invoked the provisions of Section 111(o) of the Customs Act, 1962 and Rule 173Q(2) of the Central Excise Rules, 1944.

2. Learned Counsel, Shri J.S. Sinha, submits that the applicant No. 1 had imported both capital goods viz. clinical theremometer machinery for initial setting up of plant and raw material for example, capillary glass tubings and mercury for the manufacture and export of thermometers in their 100% export oriented unit, and installed the capital goods and utilised the capital goods and raw materials for

manufacture of clinical thermometers and partially fulfilled the export obligation of Rs. 1150 lakhs for the first five years as stipulated in the letter of approval dated 28-7-1989, by exporting thermometers worth Rs. 57 lakhs. He submits that due to problems in procuring permanent electricity and LPG connections, there was delay in production; that in the meanwhile their collaborators established programme base in China and in 1993, China introduced a very cheap thermometer in the international market which affected the thermometer prices all over the World, and the applicant unit became in-competitive. He submits that there is no condition in either of the relevant Notifications that there must be continuous usage of the capital goods and raw materials and since there is no dispute that the capital goods imported were installed and capital goods and raw materials were utilised for some period, the conditions of the Notifications have been satisfied and, therefore, duty liability does not arise. Moreover he submits that under the Notification 133/94, it is the Assistant Collector who is the prescribed authority while in this case, the Commissioner has exercised the powers, which is not permissible. Lastly he submits that the first applicant company has filed an application for being declared a sick company, has been registered by BIFR. In these circumstances, he prays for waiver of predeposit and stay of recovery of duty and penalty.

3. Shri Lakhinder Singh, learned JCDR opposes that prayer of the applicants, drawing our attention to the impugned order from which it is seen that the first applicant could not use the capital goods for the purpose for which they were imported as is evident from the production performance of the Unit which could export goods worth Rs. 57 lakhs only, which forms only 5% of the total export obligation of Rs. 1150 lakhs. He submits that the Unit is lying closed and the capital goods and raw materials have not been utilised for a number of years and, therefore, the conditions of the Notifications have not been fulfilled and, therefore the duty demand has been rightly confirmed. He submits that what is to be seen is not only the satisfaction of the conditions of the Notification at the time of import but continuous usage of capital goods and raw-materials for production of export goods. In this connection, he relies upon the judgment of the Hon'ble Supreme Court in the case of *Mediwell Hospital v. Union of India* reported in 1997 (89) E.L.T. 425. Regarding the jurisdiction of the Commissioner, under Notification

133/94, he draws our attention to paragraph 11 of the impugned order in which it has been held that the Commissioner who is an officer superior to the Assistant Commissioner can exercise powers conferred on his subordinate, the Assistant Commissioner. From the balance sheet for the year 1996-97, he submits that no serious financial hardship is made out because the current assets of the company exceed its liabilities by Rs. 48 lakhs and mere registration by BIFR of the company's application for being declared sick, is not by itself sufficient to warrant waiver and stay. He, therefore, urges that the applicants may be directed to deposit the duty and penalty which is justified in view of the violation of the conditions of the exemption Notifications.

4. We have considered the rival submissions. It is an admitted position that the capital goods and raw materials imported during the period from 1989 to 1994 were installed and utilised for some time. However, this by itself is not prima facie sufficient to hold that the benefit of duty free import is available under the relevant Notifications.

Prima facie their continuous use is necessary for the purpose of claiming the benefit of Notifications. The judgment of the Apex Court cited by the learned JCDR is very relevant in this context as the Court has held, in the context of Notification 64/88 which grants exemption from customs duty to hospital equipments imported by specified categories of hospitals that the objective of the Notification must be achieved and the authorities who have granted the certificate of exemption should ensure that the obligation imposed are continuing to be carried out and on being satisfied that the obligations have not been discharged, customs duty can be realised from the importers. In the present case, the objective of allowing duty free import is obviously for the manufacture of export goods in the Noida Export Processing Zone. Since the goods in question were not being continuously used for achieving this objective, prima facie, we cannot hold that the applicants have made out a strong case for waiver. Viewed from this angle and noting all aspects including the plea of financial hardship, we direct applicant No. 1 to deposit a sum of Rs. 50 lakhs towards duty and Rs. 1 lakh towards penalty, and applicant No. 2 to deposit Rs. 10,000/- towards penalty within 12 weeks from the date of receipt of this order. On such deposit, the requirement of predeposit of balance duty and

penalty shall stand waived and their recovery stayed pending the appeals. Failure to abide by this condition shall result in vacation of stay and dismissal of appeals without prior notice. Matters to come up for ascertaining compliance on 3-8-1998.

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