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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Apr-09-2002

Reported in : (2003)(159)ELT319Tri(Mum.)bai

Judge : J Balasundaram, S T S.S.

Appellant : Vikram Green Tech (i) Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. For reasons recorded below, we waive the pre-deposit of duty of Rs. 15,04,590/- and penalty of Rs. 10,000/- and proceed to dispose of the appeal itself with the consent of both sides.
2. The appellants herein are 100% EOU engaged in producing cut flowers for export purpose. Fresh cut flowers are covered under Chapter Heading 06.03 of the Schedule to the Customs Tariff Act, 1975, whereas, they are not covered by any of the entries in the Schedule to the Central Excise Tariff Act, 1985 and are hence non-excisable goods. The appellants had cleared part of their produce to Domestic Tariff Area in terms of Sub-clause (b) to Clause II of Sales of Agro Products Guidelines for sale of goods in DTA and in terms of Appendix 42 of Hand Book of Procedures 1997-2000 as amended, without payment of any duty of excise or customs during the period April, 1998 to December, 1999. 4 show cause notices were issued to them proposing recovery of duty and imposition of penalty on the grounds inter alia, that goods had been cleared in DTA without payment of

excise duty equivalent to basic customs duty of 10% + 5% special customs duty as per Section 3 of the Central Excise Act, as per provision contained in Para 3 of the Notification No. 126/94-Cus., dated 3-6-94, that permission for clearance to DTA had not been obtained from the Development Commissioner of the Export Processing Zone and that the appellants had not followed Central Excise procedure while clearing goods to DTA. The Dy. Commissioner adjudicated the notices holding that goods cleared from 100% EOU for home consumption is to be deemed as import into India, DTA clearance is to be equated with imported goods for the purpose of levy of duty and hence cut flowers in DTA have to be treated as imported into India and central excise duty equal to the customs duty payable under Section 12 of the Customs Act, 1962, is required to be paid. He confirmed the demand of Rs. 15,04,590/- and imposed penalty of Rs. 10,000/-. Aggrieved by the adjudication order, the appellants filed an appeal before the Commissioner (Appeals) along with an application in terms of Section 35F of Central Excise Act for waiver of pre-deposit of duty and penalty. The stay order dated 22-4-2000 was passed by the Commissioner (Appeals) directing pre-deposit of the entire duty amount within 15 days. On receipt of the same, the appellants filed an application for modification pleading financial hardship. The final order was passed by the Commissioner (Appeals) dismissing the appeal for non-compliance with the stay order without going into the merits of the case.

3. We find that the issue in dispute stands prima facie settled in favour of the appellants by the decision of the Larger Bench of the Tribunal in the case of *Vikram Ispat v. Commissioner* [2000 (120) E.L.T.800] which has been followed in the case of *Winsome Yarns Ltd. v. Commr. of Cen. Excise; Chandigarh* [2001 (127) E.L.T. 833]. It has been held in the case of *Winsome Yarns Ltd.* cited supra that as Notfn. No.8/96-C.E. provides Nil rate of duty in respect of all goods produced or manufactured by 100% EOU and allowed to be sold in India, no customs duty under Section 12 of the Customs Act will be leviable thereon. In the present case, the relevant provision for levy of duty under Central Excise Act is in Section 3. This section provides for levy of duty specified in the first schedule and second schedule to the CETA, 1985.

Therefore, in order to attract the provision of Section 3, the goods must be excisable goods. In this case, cut flowers are not specified in any of the entries in the schedule to the CETA, 1985 and hence provisions of Section 3 are not applicable for levy of duty on cut flowers cleared to DTA.4. Since the issue in dispute is prima facie settled in favour of the appellants, we are of the view that a strong prima facie case for total waiver has been made out and therefore, waive the pre-deposit of duty and penalty amounts. Further since the lower Appellate Authority has not recorded any finding on the merits of the case, we are of the view that this is an appropriate case for remand for fresh decision by Commissioner (Appeals) without insisting on pre-deposit. We order accordingly. In the result, we set aside the impugned order and allow the appeal by remand.

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