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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-25-2002

Reported in : (2003)(155)ELT60TriDel

Judge : A T V.K., K Kumar

Appellant : imaging Software Ltd.

Respondent : Commissioner of Customs

Judgement :

1. This is an appeal against the order dated 24-3-2001 passed by the Commissioner of Customs, ICD, Tughlakabad, New Delhi. Under challenge is the redemption fine of Rs. 4 lakhs plus Rs. 1,50,000/-, penalties of Rs. 1 lakh and Rs. 50,000/- imposed under the impugned order.

2. Shri Rajendra Katyar, learned Advocate, has appeared on behalf of the appellants. The learned Counsel submitted that the appellants have a unit set up in NEPZ Noida approved by the Ministry of Commerce vide letter of approval No. 3/2/95-NEPZ-Auto dated 9-5-95, issued by the Development Commissioner, NEPZ, Noida as per provisions of Export-Import Policy, for manufacture and export of software from the Zone. The appellants imported capital goods (Computer and Accessories) free of customs duty in terms of Notification No. 133/94-Cus. dated 22-6-94 and indigenously manufactured capital goods (Air-conditioners) without payment of excise duty in terms of Notification No.126/94-C.E., dated 2-9-94 during the period from 27-2-96 to 30-4-96.

The capital goods had been used in the manufacture of software which were exported out of India between 30-8-96 and 18-11-97. The Customs Department had, however, gathered that the capital goods so procured free of duty had not been used in the manufacture of export goods and the appellants did not follow the conditions of the said exemption Notification No. 133/94-C.E. and were not eligible for duty concession.

Therefore, a show cause notice was issued to the appellants which culminated in the impugned order. The learned Counsel submitted that the appellants had produced ample evidence to show that the capital goods were procured between 22-4-96 to 30-4-96 and the end-products were exported between 30-8-86 to 18-11-97. The Adjudicating Authority has wrongly held that the capital goods in question have not been used for the manufacture of the export goods. In respect of the capital goods, there is only one condition that it should be used within one year. This condition has been complied with by the appellants. There being no violation of the condition of the exemption notification, the said goods are not liable for confiscation. The appellants had moved an application to the Development Commissioner, NEPZ, Noida on 17-4-97 and 4-4-2000 for demanding transfer of the capital goods and on 21-1-98 for transfer of the premises to M/s. Indo Widecom International Ltd. with assets and liabilities. On direction of the Development Commissioner, NEPZ, Noida, the appellants deposited the rental dues, etc. and on 4-5-98, the premises were given possession of to M/s. Indo Widecom International Ltd. by the Estate Manager, NEPZ, Noida. The said capital goods remained installed where they were initially installed and are being used for the manufacture of the export goods. The NEPZ Authorities did not require the appellants to apply to customs, so the appellants presumed that the Customs formalities are automatically covered when the Development Commissioner took up the said activities of transfer of premises (as customs area part of the office of the Development Commissioner). The directions in the impugned order that the appellants to apply to the Deputy Commissioner of Customs for transfer of capital goods, a technical requirement, which the appellants may failed to apply wilfully. The learned Counsel finally submitted that in view of the facts and circumstances of the case, the balance of convenience lies in setting aside the impugned order.

3. Shri M.P. Singh, learned DR, has appeared on behalf of the Revenue and he submitted that the appellants imported capital goods valued at Rs. 21,97,861/- without payment of customs duty amounting to Rs. 8,75,449/- in terms of Notification No. 133/94-Cus., dated 22-6-94 (as amended). The appellants also procured capital goods worth Rs. 6,66,608/-from DTA under CT-3 procedure without payment of Central Excise duty amounting to Rs. 21,13,314/- availing the exemption under Notification No. 126/94-C.E., dated 2-9-94 (as amended) for manufacture and export of software. The learned DR reiterated the points and submitted that the un-utilised non-duty paid capital goods were liable to confiscation under the provisions of Section 111(o) of the Customs Act, 1962 read with provisions of the bond executed with NEPZ Customs and Rule 209 of the Central Excise Rules, 1944 for the violation committed by the appellants. He therefore, finally submitted that the appeal of the appellants may be dismissed.

4. We have heard the rival submissions and carefully perused the records. We find from the facts of the case that the Department has not been able to prove beyond reasonable doubt the non-utilisation of the capital goods by the appellants. Besides this, the Import-Export Policy of April, 1997 to 31st March, 2002 para 19.16(b) permits inter-Unit transfer of goods imported by an EOU/EPZ/EST/STP or given on loan to another EOU/EPZ/ESTP/STP Unit which shall be duly accounted for but not accounted towards the discharge of export obligations. Sub-clause (iii) of Clause (6) of General Exemption No. 74 of Notification No.133/94-Cus., dated 22-6-94, as amended relating to exemption of specified goods imported for use in the articles, etc., meant for export/export promotion/processing (including repairing, re-conditioning, etc.) of export articles by units in EPZ or ATZ provides that - "the Assistant Commissioner of Customs or Deputy Commissioner of Customs may subject to such conditions and limitation as may be imposed by him and subject to the provisions of Export/Import Policy permit the said goods or goods manufactured, produced, processed or packed, to be transferred from a unit in the zone to another unit in the same zone or to the unit in any other zone or to a 100% export-oriented manufacturer for the purpose of manufacture and export or for use within the said unit; provided that Clause (iii) shall not apply to goods manufactured for repairs, reconditioning or re-engineering and which have been so repaired, so conditioned, so engineered." 5. The Commissioner has given a

finding that under the provisions of Notification in question, such transfer also requires the permission of the Assistant Commissioner of Customs. The records show that the unit has not obtained the permission of the Assistant Commissioner as yet.

The liability to pay the duty demanded in the show cause notice should, therefore, arise if the transfer is not permitted.

6. Thus, it is clear from the above that the transfer has not been permitted. Keeping in view the above, we uphold the impugned order but redemption fine and the penalties are reduced as under :-