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Commissioner of Central Excise Vs. Shrishti Impex Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-29-2003

Judge : S T S.S., K Kumar

Appellant : Commissioner of Central Excise

Respondent : Shrishti Impex Pvt. Ltd.

Judgement :

1. This stay application is filed by Revenue was heard and the matter considered and it is found:- (a) The respondents are in E.O.U. engaged in the manufacture of Grey Fabrics and are also having permission to get their work done on job work basis. The appellants cleared their production to DTA, as permitted under Exim Policy against foreign exchange, advance release order, Duty Free Replenishment Certificate (DFRC) (for short). The officers of the Central Excise visited the unit and detained 1173.283 Kgs. Of yarn containing 333 lumps of grey fabrics, for want of clarification. The appellants clarified the issues and DCCX, Kalyan II Division was pleased to release the detained fabrics with the direction to clear the goods on production of valid licence and after payment of appropriate duty. The appellants made submission as regards the duty applicable and requested to endorse the subject DFRC as per their interpretation and allow the assessees to make the clearance of the detained goods ordered to be released.

The Dy. Commissioner, therefore informed the assessee that - "Notification No. 125/84-CE dated 26/05/1984 was not applicable for the goods allowed to be removed in India. He observed that the contention of the assessee that the sales

under para 9.10 of the EXIM Policy, 1997-2002 was a supply to others and not allowed to be removed in India category was not acceptable & held that as all such sales/supplies were under the DTA sale category of the EXIM policy, the clearances under DFRC was also a permission allowed to be sold or cleared in India & therefore, the benefit of Notification No. 125/84-CE could not be applied to such sales.

Thereafter, the Range Supdt. Vide his aforementioned letter No. C.Ex./R-X/Shrishti/EOU/2000 dated 11.03.2002 informed the assessee that as per his letter dated 20.02.2002, the assessee were directed to clear the detained goods under DFRC licences after making payment of Central Excise duty @ 16% adv. & Cess @ 0.50% & as per the aforementioned letter dated 07.03.2002, the D.C.C.Ex. Kalyan-II Division had rejected the request of the assessee for non-payment of duty under Notification No. 125/84-CE. He therefore informed that under the circumstances, the DFRC licences could be endorsed only after payment of appropriate Central Excise duty, as such, he returned the DFRC licences without endorsement & retained the Xerox copies of the said DFRCs for his records." Aggrieved by this decision communicated by the orders of the Dy.

Commissioner and Range Superintendent, the manufacturer filed appeals with the Commissioner (Appeals), who vide his impugned order allowed the appeals setting aside the communication of the Dy.

Commissioner and the Range Superintendent and ordered that benefit of Notification No. 125/84 CE Dtd. 26/05/1984 should be extended to the appellants under Notification No. 28/2001 CE Dtd. 16/05/2001 subject to the conditions as laid down therein. After coming to the following finding - "It is seen that by Notification No. 125/84-CE dated 26/05/1984, the Central Government has exempted all excisable goods produced or manufactured in a 100% EOU from the whole of the duty of excise leviable thereon under Section 3 of the CEA 1944, provided that the exemption contained in this notification shall not apply to such goods if allowed to be sold in India. The Hon'ble Supreme Court while considering the policy of the Central Government since the EOU scheme came into operation at para 18 have observed that - "..... It also becomes apparent that in view of the

EOU scheme as modified from time to time and corresponding amendments to Section 3 of the Act the expression 'allow to be sold in India' IN PROVISO TO Section 3(1) of the Act is applicable to only to sales made up to 25% of production by 100% EOU in DTA and with permission of the Development Commissioner".

It is not disputed that the clearances effected by the appellants were not allowed to be sold in India by the Development Commissioner and these sales were not DTA sales, hence the exemption as envisaged under Notification No. 125/84-CE dated 26.05.1984 was available to the appellants. The interpretation of the D.C.C.Ex. Kalyan-II Division in his letter No. IV/C.Ex./K-II/EOU/2002 dated 07.03.2002 addressed to the appellants contending that the sales under para 9.10 of the EXIM Policy, 1997-2002 cannot be treated as supply to others; that all such sales/supplied were under the DTA sale category of EXIM Policy and the clearance under DFRC was also a permission to be sold or cleared in India, and hence the benefit of Notification No. 125/84 cannot be applied to such sales, is contrary to the interpretation of the term "such goods if allowed to be sold in India" as accepted by the Hon'ble Supreme Court at para 18 in the case of M/s. SIV Industries, 2000 (117) E.L.T. 281 (S.C.). Thus, the contention of the D.C.C.Ex. Kalyan-II Division in his letter F. No. V/C.Ex./K-II/EOU/2002 dtd. 07/03/2002 & subsequent communication of the Range Suptd. Vide his letter No. C.Ex./R-X/Shrishti/EOU/2000 dated 11.03.2002 reiterating the aforementioned instructions and returning the DFRC licences without endorsement in the absence of alleged payment of appropriate Central Excise duty, are legally not correct & proper and are required to be set aside being contrary to the settled law." (b) The grounds taken by the Revenue in the present stay application are as follows:- (i) The goods manufactured in 100% EOU and cleared in DTA has to be treated as import. As such the duties under Customs Act, are required to be levied thereon. The goods manufactured in 100% EOU and cleared to person holding advance release order issued by licensing authority against DFRC are exempted from basic Customs duty and special Additional duty of Customs has leviable under the first schedule to the Customs Tariff Act and special additional duty of Customs leviable under Section 3A of the said Customs Tariff Act.

But no exemption is applicable for additional duty leviable under Section 3(1) of the Customs Tariff Act which is equivalent to Excise duty leviable on the goods. However, there is no exemption for additional Custom duty (CVD). The additional customs duty cannot be recovered under Central Excise Act, which is why equivalent duty under Central Excise Act, is recoverable.

(ii) The Commissioner (Appeals) has erred in holding the clearance of said goods to DTA in the category of "allowed to be sold in India" as envisaged in Notfn. No. 125/84. He therefore held that the benefit of Notfn. No. 125/84 should be extended to the applicants under Notification No. 28/2001 Central Excise dtd. 16/05/2001 subject to the conditions as laid down therein. The case cited and relied upon by the Commissioner (Appeals) in r/o the interpretation "allowed to be sold in India" by the Hon'ble Supreme Court in the case of M/s. SIV Industries, 2000 (117) ELT 281 (S.C.) cannot be made applicable to this case as the assessee had cleared the goods against DFRC Holders, which is not the case in the Hon'ble Supreme Court's order.

(iii) Notfn. No. 125/84 CE dt. 26.05.84 exempts all excisable goods produced or manufactured in a hundred percent export oriented under taking from whole of the duty of excise leviable thereon under Section 3 of Central Excise Act, 1944. However the said exemption is not applicable to such goods which are allowed to be sold in India.

(DTA clearance) (iv) The goods cleared by the assessee to DFRC holder are nothing but of the category "allowed to be sold in India" and as such the exemption envisaged in Notfn. No. 125/84 dt. 26.05.84 is not applicable to those goods.

(v) Para 9.9 of the policy prescribes the mode of disposal of the goods manufactured by a hundred percent export oriented undertaking.

As per that provision entire production shall be exported. However same exceptions are given thereunder. Accordingly unit may sell goods upto 50% FOB value of export on payment of applicable duties, in DTA. However, the clearance of goods manufactured in 100% EOU to DFRC holders has to consider as import only and therefore CVD is payable in terms of Notfn. No. 28 Dt. 16.05.01.

(vi) Para 9.10 of the policy consists of series of deeming provisions. One of such provision is that the supplies to domestic tariff areas made against payment in foreign exchange shall be counted towards fulfillment of export performance. The object behind the provision of para 9.10 appears to be earning foreign exchange.

Therefore, the goods manufactured in 100% EOU appears to have been exempted from payment of Central Excise duty under notification No. 125/84 dt. 26.05.84. However, the goods cleared by the assessee are neither earning foreign exchange nor revenue for exchequer. This may not be the intention of the Govt. Therefore, the decision of Commissioner (Appeals) passing the benefit of exemption Notfn. No. 125/84 dt. 26.05.84 to those goods does not appear to be correct & is contrary to the provisions of law." 2. The matter was heard and after hearing and considering the issues and records it is found:- (a) As regards ground (i), it is found that the Larger Bench decision in the case of Vikram Ispat v. C.C.E. Mumbai-III - 2000 (120) E.L.T. 800 in para 16 of the reported decision have held as under:- "16. .....The Revenue wants to restrict the availment of Modvat credit to the components of additional duty to customs paid under Section 3 of the Custom Tariff Act by bringing the fiction that 100% E.O.U. is a place which is not in India and the sale therefrom within India is akin to import into India. We do not find any substance in this view of the Revenue. The clearance of the goods by 100% E.O.U. are not import in the terms in which it has been defined under Section 2 (23) of the Customs Act. .....

This is also apparent from the fact that when the goods are cleared from 100% E.O.U. to any place in India, central excise duty under Section 3(1) of the Central Excise Act is levied and not the customs duty under the Customs Act. .....Revenue, it seems is confusing the measure of the tax with the nature of the tax. The nature of the duty levied on the goods form 100% E.O.U. is excise duty and nothing else, whereas for determining the quantum of duty the measure adopted is duty leviable under Customs Act as held by the Supreme Court in many cases referred to above. The method adopted by the law makers in recovering the tax cannot alter its character. Once it is held that the duty paid by the 100% E.O.U. in respect of goods cleared to any place in India is excise duty, the question of dissecting the said duty into different components of basic customs duty, auxiliary

duty, additional duty of Customs or any other customs duty does not arise ....." From the portion underlined, of the binding decision of the Larger Bench, the plea of treating the clearance of the subject goods as import and 'dissecting' the 'measures of duties' into different components would not be permissible and also that the duty levied in this case is a Central Excise duty and not Customs duty. In this view of the matter, there is no force in the ground No. (i) (b) As regards of ground taken at Sr. No. (ii), it is found that in the case of SIV Industries - 2000 (117) E.L.T. 281 (S.C.) in Para 18 thereof the term 'allowed to be sold' has been interpreted by the Hon'ble Apex Court, relating to its use in the Exim Policy and in the law relating to an E.O.U. as follows:- "18. .....It also becomes apparent that in view of the EOU scheme as modified from time to time and corresponding amendments to Section 3 of the Act the expression "allowed to be sold in India" in proviso to Section 3(1) of the Act is applicable only to sales made up to 25% of production by 100% EOU in DTA and with permission of the Development Commissioner. No permission is required to sell goods manufactured by 100% EOU lying with it at the time approval is granted to debond." In this view of the matter, we can not uphold the ground No. (ii) at this prima facie stage. Since the removals against DFRC are not covered by the relevant para of the Exim Policy applicable to DTA sales permissible and 'allowed to be sold' as interpreted by the Hon'ble Supreme Court. Since DFRC removals are not within the 25% quota. When the provision of the policy para 9.9, 9.10 and Chapter 10 and Appendix 42 of the Exim Policy are read & the fact that as per Appendix 42, DFRC removals under Chapter 10 i.e. Para 10 onwards would count towards determining the 25% of production of and EOU, which is 'allowed to be sold' in DTA vide Para 9.9, therefore clearance under Para 9.9 and Para 9.10 and/or Para 10 of the Exim Policy cannot be equated. There is no force in Ground No. (ii) found to stay order or learned Commissioner (Appeals).

(c) As regards ground No. (iii), the reading of Notification No. 125/84 which very clearly exempts 'all goods manufactured in an EOU' from the levy under Section 3, other than goods which are 'allowed to be sold'. The term 'allowed to be sold' in this notification have to be interpreted as per Para 18 of SIV Industries - 2000 (117) E.L.T. 281 (S.C.) (Supra). There is no force therefore in ground (iii) to stay the order of the Commissioner (Appeals).

(d) We also do not find any force in Ground No. (iv), (v) considering that in ground No. (vi), the reading thereof reveals that the grounds accepts the following proposition.

".....Therefore, the goods manufactured in 100% EOU appears to have been exempted from payment of Central Excise duty under notification No. 125/84 dt. 26.04.84."....

In this view of the matter one can safely conclude that stay application has been made on conflicting ground itself whereas in ground (iii), (iv) & (v) a strong plea is made of that notification No.125/84 is not applicable, while in ground No. (vi) a contrary admission is made. If it is the case of Revenue, that the goods are exempted under Notification No. 125/84, they why are they challenging this order in Appeal is not known. It is, therefore, required that such stay applications made on conflicting grounds on a possible intention of the Government cannot be accepted.

3. Since none of the grounds could be sustained on the prima facie reading of the law laid down by the Larger Bench of this Tribunal & Supreme Court, we find no reason to invoke our inherent jurisdiction to stay operation of the Commissioner (Appeal)'s order, and grants the benefit of an exemption Notification No. 125/84 which as per the submission of Revenue in this case is applicable & also the fact that there is no refund which is required to be stayed as no quantification has been arrived at.

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