Sterlite Optical Technologies Vs. Commissioner of Cen. Excise and

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-10-2003

Reported in : (2004)(165)ELT467Tri(Mum.)bai

Judge : J Balasundaram, A M Moheb

Appellant : Sterlite Optical Technologies

Respondent : Commissioner of Cen. Excise and

Judgement :

1. The applications for waiver of pre-deposit and stay of recovery arise out of the Commissioner of Cen.Excise & Customs, Aurangabad who has confirmed the following demands and imposed penalties as under:- (1) Central Excise duty of Rs. 21,54,92,842/- on a quantity of 3,35,632.418kms of optical fibres manufactured in the 100% EOU unit of the applicants (this unit was set up in March 2001)cleared clandestinely to their DTA unit (set up in 1993 and in 1995) and merged in a single DTA unit in January 1998) for further clearance to domestic market.

(2). Central excise duty of Rs. 51,69,39,050/- on a quantity of 635625.7 kms of optical fibres manufactured in the 100% EOU unit and clandestinely cleared to the domestic market under the invoices to the DTA to show as if the same were manufactured in the DTA unit; (3). Central Excise duty of Rs. 21,63,60,797/- on a quantity of 9913kgs of preforms manufactured in the 100% EOU unit and cleared clandestinely to DTA unit. All the above demands have been confirmed together with interest in terms of Section 11AB of the Central Excise Act, 1944 and extended period of limitation has been invoked in the case of the above 3 demands.

(4). Customs duty of Rs. 6,93,81,856/- on raw material, with interest, in terms of Notification No. 53/97-Cus (5) Penalty of Rs. 94,87,92,689/- on the 100% EOU unit under Section 11AC of the Central Excise Act, and Penalty of Rs. One Crore Fifty Lakhs under Section 112(a) of the Customs Act on the 100 % EOU Unit.

(6) Penalty of Rs. 10 Crores & Rs. 75 lakhs on Shri Navin Agarwal, Director of SOTL (7) Penalty of Rs. 25 lakhs & 5 lakhs on Shri L.Ramkumar, Chief Executive Officer (8) Penalty of Rs. 25 lakhs & Rs. 5 lakhs on Shri S.L.Bajaj, Vice President(Finance) (9) Penalty of Rs. 5 lakhs & Rs. One lakh on Shri Abhay Kalkar, Chief Manager (Commercial) (10) Penalty of Rs. 5 lakhs & One lakh on Shri Venkatesan Babu, Manager(Commercial) and (11) Penalty of Rs. 5 lakhs & Rs. One lakh on Pramod Unde, CEO. Penalties on the individuals have been imposed under Rule 26 of the Central Excise Rules, 2002. & Section 112(b) of the Customs Act respectively.

2. The demands of Central Excise duty have been confirmed in terms of the proviso to Section 3(1) of the Central Excise Act, 1944, which provides that the Central Excise duty leviable on goods manufactured by 100% EOU and brought to any other place of India shall be the amount equal to the aggregate of the duties of Customs which would be leviable under the Customs Act, 1962 or any other law for the time being in force. Since the optical fibres fell for classification under Chapter Heading 9001.10, duty for the period upto 1.3.02 has been levied at the rate of 35% BCD + 16% CVD + 4% SAD aggregating 62.864% and for clearances effected subsequent to 1.3.02, the rate of duty applied is 30% BCD + 16% CVD + 4% SAD aggregating to 56.832%. The Commissioner has rejected the claim of the company that the rate of duty payable and which has been paid is only 16% CED under Section 3(1) of the Central Excise Act. He has also rejected the plea of the manufacturer that the benefit of concessional rate of duty at the rate of 5% for optical fibre which is their final product and 15% on preforms which is their intermediate produce is available in terms of Notification Nos,17/2001 Cus and

21/2002/Cus on the ground interalia of non fulfillment of the condition of following the procedures set out under the Customs(Import of goods at Concessional rate of duty for manufacture of Excisable Goods) 1996 which could not be followed by the company as they are deemed exporters, and not importers.

3. We have heard Shri Joseph Vellapally, Sr.counsellor the applicants and Shri M.I.Sethna, Sr.counsel for the Revenue. The question as to whether the proviso to Section3(1) of the Central Excise Act is attracted to the facts of the present case is a debatable one. The issue of eligibility to the benefit of concessional rate of duty in terms of Notification No. 17/2001-Cus and 21/2002 Cus is also debatable. The plea of the applicants that they had applied for debonding of their 100% EOU in October, 2001 which was ultimately granted in July, 2003 and therefore, they are to be treated as other than 100% EOU through out this period is also contentious, particularly in view of the fact that the debonding order itself states that the order will have immediate effect which would prima face indicate that it is prospective and not retrospective in operation. The Ld. Counsel for the Revenue also submits that as per Appendix 14-I-L of the Exim Policy prescribing guidelines for exit of EOU unit, the unit will continue to be treated as EOU till the date of final exit order.

However, we note that out of the total duty demand of approximately Rs. 79 crores, waiver of pre-deposit of which is sought by the applicants, Rs. 10 crores stands paid as excise duty at the rate of 16%. A further sum of Rs. 3 crores has been paid by the applicants at the stage of investigation. A Bank Guarantee covering Rs. 11.74 crores has been furnished and continues to be in force under direction of the Bombay High Court in its order dated 13.8.03 in W.P No. 5884 of 2002 directing the guarantee to be in force and subject to further orders that may be passed by the Tribunal in the appeal against the present impugned order (although the guarantee has not been furnished to cover the demands raised in the impugned order). We are taking this factor into account as the High Court has directed that the Bank Guarantee shall remain in force until further orders of the Tribunal in the above appeal.

Further, goods valued at approximately Rs. 37.60 crores i.e. optical fibres seized from DTA unit are in the custody of the department. In view of the above, the interest of the Revenue is prima face adequately safeguarded. We, therefore, waive the pre-deposit of duties and penalties and stay recovery thereof pending the appeals without expressing any prima facie opinion on merits of the demands.

4. As the appeals involve heavy stakes and important issues, we fix the appeals for final hearing on 19.1.04 and 20.1.04.