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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-11-2003

Reported in : (2004)(92)ECC768

Judge : P Bajaj, M T K.D.

Appellant : intelecom Ltd.

Respondent : Commissioner of Customs (import)

Judgement :

1. In this appeal which has been filed by the appellants against the impugned Order-in-Original dated 28.2.2003 passed by the Commissioner of Customs, the challenge has been made to the imposition of penalty on the appellants under Section 112(a) of the Customs Act.

2. The learned Counsel has contended that the provisions of Section 112(a) of the Customs Act are not attracted to the case of the appellants at all. The stand of the Department regarding the violation of the conditions of Exemption Notification No. 3/89-Cus dated 9.1.89 under which the goods were imported by the appellants free of customs duty, is contradictory as in the show cause notice it has been alleged that the exemption under this Notification was not available to the appellants at the time of import of the goods and even the Commissioner in the impugned order has also so observed, whereas on the other hand, the Commissioner has imposed the penalty by holding that the appellants had committed violation of the terms of the above said Notification by allowing the

commercial use of the goods to the Department of Telecommunication (in short DOT). He has also contended that inspite of alleging in the show cause notice that benefit of the above-said Notification was not available to the appellants, still no duty demand has been confirmed against them through the impugned order by the Commissioner and in the absence of confirmation of the duty, no penalty could be imposed under Section 112(a) of the Customs Act. The impugned order according to the Counsel being bad in law, deserves to be set aside.

3. On the other hand, the learned JDR has reiterated the correctness of the impugned order. He has contended that since the appellants allowed the commercial use of the imported goods to the DOT for whom the goods were imported for validation tests, in order to procure the order, they had violated the condition of the exemption Notification No. 3/89 and as such penalty has been rightly imposed on them.

4. We have heard both the sides. The facts are not much in dispute. The appellants are engaged in the manufacture and marketing of telecommunication equipment. They imported switching systems for demonstration and testing by DOT and availed complete exemption from payment of duty under Notification 3/89-Cus dated 9.1.89 subject to the condition that the imported equipments will be re-exported by them within six months or within the extended time. The benefit of this Notification was extended to them by the competent authority on the strength of certificate issued by DOT. They also executed bonds and bank guarantees in terms of the above-said Notification. It also remains undisputed that since validation and testing of the imported equipment was not completed by the DOT, the same could not be re-exported by the appellants within six months of the import. The Customs authorities when sought to enforce the bank guarantee, the appellants filed a writ petition in the Hon'ble High Court of Bombay for restraining the Customs authorities from enforcing the bank guarantee on the ground that the re-export as per the terms of the exemption Notification has to be made within six months only from the date of official closure of the event and that since the imported equipments, were still, in the possession of the Government of India, Department of Telecommunication for testing the closure of the event cannot said to have taken place for computing the period of six months for the purpose of re-

export. The Hon'ble High Court accepted the plea of the appellants but gave direction to them to re-export the goods within six months from 30th September 1994, the date by which the DOT was likely to return the equipment to them. It also remains undisputed that the appellants had re-exported the equipment in terms of the above-said order of the Bombay High Court.

5. The show cause notice was issued to the appellants on 2.2.2002 whereas the equipments were re-exported by them on 23.4.99. This show cause notice was issued when the appellants requested for the cancellation of the bank guarantee for having re-exported the equipments. No ground for inordinate delay in issuing the show cause notice demanding duty and proposing imposition of penalty on the appellants had been shown or brought on record. The show cause notice was required to be issued within a reasonable time, when no period was specified in the exemption Notification in that regard. In this context the observations of the Apex Court in Collector of Central Excise, Jaipur v. Raghuvar India case 2000 (70) ECC 1 (SC) : 2000 (118) ELT 311 can be read with the advantage wherein it has been observed that it is not for the Court to import any specific period of limitation by implication, where there is really none, still courts may always hold when any such exercise of power had the effect of disturbing rights of a citizen that it should be exercised within a reasonable period.

6. Apart from this, the stand taken up by the Department is also contradictory. In the show cause notice it had been alleged that the exemption from payment of duty under Notification 3/89-Cus was not available to the appellants and even the learned Commissioner in the impugned order has also so observed. But strangely enough no duty demand has been confirmed by the Commissioner against the appellants on that ground. In the absence of confirmation of any duty for having wrongly availed the benefit of the above said exemption Notification, no penalty could be imposed on the appellants.

7. The plea of the Department that the appellants had violated the terms and the conditions of the exemption Notification and for that reason, they are liable to be penalised cannot be accepted for the simple reason that when according to the Department the benefit of the above-said Notification is not available to them, then

the question of violation of its terms/conditions did not arise. Even the alleged violation of the condition of Notification does not also stand proved on the record. The condition of the Notification said to have been violated/infringed by the appellants, is that they allowed the commercial use of the equipments to the DOT, as DOT has paid some amount to them. But this circumstance itself did not lead any inference that the commercial use of the equipments was allowed to them by the appellants. That the amount as per the appellants, had been paid to them by the DOT towards depreciation of the equipments and the interest on their capital which was blocked on account of validation process carried out by the DOT for a very long time. The observations of the learned Commissioner that this amounted to allowing commercial use of the equipments by the appellants to the DOT, cannot be accepted.

Moreover, in the Notification itself, there is no clause which prevented the commercial use of the equipments. The Notification only imposed restriction that the goods shall not be loaned or used in any manner for hire or reward. There is no evidence on record to suggest if the equipments were loaned or given on hire or for reward to the Government of India, Department of DOT, by the appellants. The equipments were given to the DOT only for testing and validation purposes. No amount by way of lease or rent or reward has been received by the appellants from the DOT. Therefore, under these facts and circumstances, it could not be concluded by the learned Commissioner that the appellants allowed the commercial use of the equipments and thereby violated the conditions of the exemption Notification in question.

8. The goods had already been re-exported as per the directions of the Hon'ble High Court of Bombay. When no duty demand has also been confirmed against the appellants for having violated any condition of the above-said exemption Notification, it could not be concluded as done by the learned Commissioner, that the goods were liable to be confiscated under Section 111 (o) of the Customs Act. The provisions of this Section are not at all attracted to the facts of this case in the light of the facts and circumstances discussed above. The case of the appellants also does not fall under any of the clauses detailed under Section 112(a) of the Customs Act. Moreover, the exemption Notification also did not contain any

condition regarding imposition of penalty on the appellants in the event of their failure to re-export the goods within six months or within such extended period. Rather, the condition stipulated in this Notification, is that in the event of failure on the part of the appellants to re-export the goods within the stipulated period, they will be liable to pay customs duty which would have been levied thereon, but for this exemption Notification. Therefore, only duty could be demanded from the appellants in case of violation of this condition of the exemption Notification and no penalty could be imposed. The duty demand, as observed, has not been confirmed against them. Therefore no penalty could be imposed upon them under Section 112(a) of the Act. The ratio of law laid down in *J.K. Bardolia Mills v. M.L. Khunger*, Deputy Collector, 1994 (72) ELT 813 (SC) referred by the learned JDR is not attracted to the facts of the present case at all.

That was a case where the seizure of the goods was made under Section 110 of the Customs Act and it was observed that the power under this Section is distinct from the power of confiscation and imposition of penalty under Sections 111 and 112 of the Act. But no such issue is involved in the present case.

9. In the light of the discussion made above, the impugned order of the Commissioner cannot be legally sustained and is set aside. The appeal of the appellants is accordingly allowed with consequential relief, if any, permissible under the law.

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