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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-08-2007

Judge : J Balasundaram, Vice-, A T K.K.

Appellant : Nitco Tiles Ltd.

Respondent : Commissioner of Customs (import)

Judgement :

1. The above application for waiver of pre-deposit of Anti Dumping Duty of Rs. 5,18,26,066/- levied on Vitrified Tiles manufactured by M/s.

Nanhai Shangyuan Oulian Construction Ceramic Co. Ltd. China, (hereinafter referred to M/s. Nanhai) and exported by M/s. Prestige General Trading, Dubai, U.A.E. to the applicants herein during the period November 2002 to February 2003 arises out of the order of the Commissioner of Customs (Appeals) Mumbai.

2. The brief facts required for prayer appreciation and understanding of the issue in dispute are as under: On 2nd May 2002, Central Government issued Notification No. 50/2002-Cus. imposing provisional anti dumping duty in respect of Vitrified/Porcelain Tiles originating in, or exported from China & U.A.E. This notification was valid upto 1-11-2002. During the period 6-11-2002 to 27-2-2003, the applicants imported such tiles from China under cover of Bills of Entry. On 1-5-2003, the Central Government issued Notification No. 73/2003-Cus. imposing final anti-dumping duty on vitrified/porcelain tiles originating in, or exported from China, and this notification was effective from 2-5-2002 i.e. from the date of imposition of

provisional anti dumping duty. On 9th June 2003 a demand notice was issued to the applicants under Section 28 of the Customs Act, proposing recovery of Rs. 5,18,26,066/- as anti dumping duty on the tiles imported during the interregnum period i.e. subsequent to the expiry of the provisional anti dumping duty notification but prior to issue of final anti dumping duty of notification. On 1st July 2003 Notification No. 89/2003-Cus. was issued by the Central Government ordering provisional assessment of imports of vitrified/porcelain tiles from M/s. Nanhai under the New Shipper Provisions. Vide order dated 5th March 2004 the Dy. Commissioner of Customs passed the adjudication order confirming the duty demand raised in the show cause notice; this order was set aside by the lower appellate authority vide order dated 2-7-2004 and the case was remanded to the Dy. Commissioner for de novo adjudication.

3. On 28-7-04 the Central Government issued a Notification No.80/2004-Cus. amending notification No. 73/02-Cus. by inserting proviso to the effect that no anti dumping duty was leviable in respect of vitrified/porcelain tiles imported into India from M/s. Nanhai of China. The amendment was effective from 11-7-2003 i.e. from the date of issue of Notification No. 98/2003. On 6th March 2006 the applicants filed a representation before the Deputy Commissioner that no anti dumping duty can be imposed in terms of Section 9A(1) the Customs Tariff Act, 1975 could be imposed on imports made by them from M/s.

Nanhai, China, in view of the finding of the designated authority in the Anti Dumping Duty Directorate, that there was no dumping by M/s.

Nanhai Ltd. (the anti dumping duty leviable on import from M/s. Nanhai amounts to Rs. 4.59 crores approximately). However, the entire demand was confirmed by the Dy. Commissioner's order dated 31-3-2006; the applicants filed an appeal and stay application before the Commissioner of Customs (Appeals) who vide stay order dated 23-8-2006, dispensing with pre-deposit of the duty demanded on imports made from M/s. Nanhai and directed pre-deposit of 25% of duty of Rs. 58,28,761/- relating to imports from M/s. Al Khaleej Ceramics. The applicants complied with above order by depositing of Rs. 14,57,190/-. The stay was vacated by order dated 19-10-2006 on an application filed by the Revenue and the applicants were directed to deposit the entire duty leviable on imports from M/s. Nanhai. The applicants filed Writ Petition before the Hon'ble Bombay High Court against the order vacating the stay and the High Court set aside the vacate stay order, and restored the initial stay order and also directed that the stay order passed by the Commissioner (Appeals) would be valid for a period of three weeks from the date of disposal of the appeal by the Commissioner (Appeals). The impugned order was passed on 8-12-2006 confirming the entire demand; hence this appeal and stay application.

5. We find that the period of investigation for Review as per Notification is 1st July 2002 to 30th June 2003. In other words, the designated authority was to examine the exports made by M/s. Nanhai during the above period to verify whether the exports were at dumped price. The details of exports made available for verification by the designated authority tallies with the details of import made by the applicant from M/s. Nanhai Ltd Therefore, the very imports which are the subject matter" of the present impugned order are those investigated by the designated authority under the New Shipper Review, and the designated authority vide notification dated 30-6-2004 concluded that exports by Nanhai during the period under investigation were above the normal value and recommended that no anti dumping duty be imposed on such exports. As a consequence, notification No. 80/04 was issued by the Ministry of Finance amending Notification No. 73/03 by which anti dumping duty was imposed on imports from M/s. Nanhai, by inserting the following explanation thereto: Provided that no Anti Dumping Duty shall be imposed on imports into India of subject goods falling under Chapter 69 of the first Schedule to the said Customs Tariff Act produced by M/s.

Nanhai...and exported by M/s. Prestige General Trading, Dubai, U.A.E.6. As per the provisions of Section 9A of the Customs Act, 1975 Anti Dumping Duty can be imposed on any article exported from any country or territory to India at less than its normal value, and such a levy shall not exceed the margin of dumping in relation to such goods. If there is no (dumping by exporter, then no anti dumping duty is leviable. Section 9AA provides for refund of Anti Dumping Duty paid in excess of the actual margin of anti dumping duty in relation to an article. Since the designated authority has found that the exports by M/s. Nanhai to the applicants during the period in dispute were not at dumped prices i.e.

at a price less than its normal value, prima facie no anti dumping duty can be imposed on the goods in question irrespective of the fact that notification No. 80/04 states that Notification No. 73/03, by way of amendment, shall be effective from the date of the issue of the notification ordering provisional assessment i.e. 1-7-2003. The decision of the Anti Dumping bench of the Tribunal in the importer's own case relied upon by the Revenue prima facie not applicable to the facts of the present case for the reason that the issue in dispute in this case namely leviability of anti dumping duty on goods exported by M/s. Nanhai during the period of investigation under Review by the designated authority was not the issue before the anti dumping bench - the issue therein was liability to anti dumping duty of imports during the period after expiry of the provisional duty and prior to the levy of final anti dumping duty which liability was upheld by the Tribunal which also rejected the challenge to Rule 20(2)(a) of the Customs Tariff (Identification....Anti Dumping Duty on Dumped Articles....) Rule 1995.

7. In the light of the above discussion, we are of the view that the applicants have made out a strong prima facie case for waiver and hence dispense with pre-deposit of duty of Rs. 4.59 crores being the duty levied on exports from M/s. Nanhai during the period November 2002 to February 2003 and stay recovery thereof pending the appeal. As regards exports from A1 Khaleej we accept the payment of 25% out of the demand of approximately Rs. 58 lakhs on such exports as sufficient compliance with the provisions of Section 129E of the Customs Act, 1962.