

Customs, Excise and Gold Tribunal - Bangalore

Noel Agritech Limited vs The Commissioner Of Central ... on 11 November, 2005

Equivalent citations: 2006 (104) ECC 225, 2006 (105) ECC 225, 2006 ECR 225 Tri Bangalore, 2006 ECR 225 Tri Bangalore, 2006 (195) ELT 88 Tri Bang

Bench: R Abichandani, J T T.K.

ORDER T.K. Jayaraman, Member (T) Page 0227

1. This appeal has been filed against Order-in-Original No. 5/03-04 dated 26.2.2004 passed by the Commissioner of Central Excise, Mangalore. The brief facts are as follows:

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2. The appellants are 100% Export Oriented Unit. They imported capital goods, consumables, spares, raw materials, equipment, totally valued at Rs. 2,62,83,048/- availing exemption from excise duty in terms of the Notification No. 13/81-Cus dated 9.2.1981 as amended and Notification No. 53/97-Cus dated 3.6.1997 during the period 1995-99. As per the contention of the exemption Notification, the appellants are to carry out the manufacturing operations and export 100% or such other percentage as fixed by the Department of Industrial Development Secretariat of Industrial Approvals of the goods manufactured. It was seen that the appellants failed to fulfill the export obligation and to fulfill all the conditions of the Notification by which the goods were procured. Hence Revenue proceeded against them by issue of show cause notice dated 12.1.2000. The show cause notice demanded the duty foregone. The goods were proposed to be confiscated under Section 111(o) of the Customs Act 1962, penalty under Section 112 of the Customs Act 1962 was also proposed. The adjudicating authority had given opportunities to the appellant to present their case. The Authorised Signatory who appeared before the adjudicating authority stated that the plant and machinery erected at their factory had become defunct and they started incurring heavy losses on the project. After examining the issue, the adjudicating authority has found that the appellants should have exported goods of value US \$ 0.5 million or five times the CIF value of the capital goods imported, whichever is higher. These stipulations are given in the order of the Development Commissioner dated 11.6.2002. Since the appellants failed to comply with the post-importation conditions of the relevant notification, the adjudicating authority held that the goods are liable for confiscation under Section 111(o) of the Customs Act 1962. Further, he held that the appellants are liable for penalty under Section 112 of the Customs Act 1962. Consequently, he passed the impugned order demanding a duty of Rs. 2,33,52,317/-. The capital goods, spares, accessories, implements, tools, etc., valued at Rs. 2,62,83,048/-, were confiscated under Section 111(o) of the Customs Act, 1962 and penalty of Rs. 20,00,000/- was imposed under Section 112 of the Customs Act, 1962. The adjudicating authority gave an option to the appellant to redeem the goods on payment of fine of Rs. 50 lakhs under Section 125(2) of the Customs Act, 1962. The appellants are aggrieved over the impugned order of the adjudicating authority. They have urged the following points in their grounds of appeal.

(i) The adjudicating authority ignored the fact that the appellant exported goods valued at Rs. 42.3 lakhs approximately to countries outside India. However, the appellant could not fulfill the total export obligation fixed by the Development Commissioner as the installed machineries, capital

goods could not bring in the desired climatic condition leading to non production of flowers of export quality.

(ii) The appellants took up the matter with the Development Commissioner regarding the problems faced by them.

(iii) The appellants never mis-utilised or manufactured any products clandestinely by using the imported goods.

(iv) The appellants at no point of time indulged in any malpractice by removing the imported goods from the bounded warehouse.

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(v) The learned Counsel failed to appreciate that the appellants incurred heavy losses.

(vi) The appellants relied on the decision of Hon'ble Supreme Court's decision in the case of Hindustan Steel v. State of Orissa reported in 1978 (2) ELT (J159), wherein it has been held that no penalty should be imposed, where there is a technical or venial breach of the provisions of the Act.

(vii) In the absence of mens rea imposition of penalty under Section 112 is not justifiable in view of the Supreme Court's decision in the case of Akbar Badrudin Jiwani v. Collector of Customs .

3. The learned SDR brought out to our attention the recent decision of the larger bench in the case of Bombay Hospital Trust v. Commissioner of Customs, Sahar, Mumbai, wherein it is held that when a post-importation condition in an exemption notification is not fulfilled, the Department has the power to recover the escaped duty in terms of Section 12 of the Customs Act 1962. Paragraph 12 of the Apex Court decision in Mediwell Hospital and Health Care Pvt. Ltd. v. Union of India also provides an authority for such recovery. He said that the ratio of this case is squarely applicable to the present case. He requested the bench to uphold the demand of duty.

4. We have gone through the records of the case carefully. The fact that the EOU has imported goods worth Rs. 2,62,83,048/- is not in dispute. Due to certain difficulties, they were not in a position to produce the items to be exported. Hence they could not completely fulfill, the export obligations. Since they have failed to fulfill the export obligation they were not entitled for the benefit of the exemption notifications. Hence the imported goods are liable for confiscation under Section 111(o) of the Customs Act 1962. The order of the commissioner as regards the liability to confiscation and demand of duty is legal and proper. We do not have any reason to interfere with the same. However, as regards the penalty, we do not find any malafide. In view of the vicissitudes of business environment, the appellants were unable to fulfill export obligation. Hence imposition of penalty is not justifiable. As far as the redemption fine is concerned, we feel that in the interest of justice, it could be reduced to Rs. 10,00,000/- (Rupees Ten Lakh only). The appeal is disposed of in the above matter.

(Pronounced and dictated in open Court)