(2010) 03 KAR CK 0075

In the Karnataka High Court

Case No : CSTA No. 27 of 2006

Commissioner of Customs APPELLANT

Vs

Zygo Flowers Ltd. RESPONDENT

Date of Decision : 18-03-2010

Acts Referred:

Citation : (2010) 255 ELT 40

Hon'ble Judges : K.L. Manjunath, J;H.S. Kempanna, J

Bench : Division Bench

Advocate : G. Lakshmi, for Y. Hari Prasad and R. Veerendra Sharma, for the Appellant; G.K.V. Murthy and P.E. Umesh, for the Respondent

Final Decision : Allowed

Judgement

K.L. Manjunath, J.—The Revenue has come up in this appeal challenging the order of the CESTAT dated 3.1.2006 passed in Appeal No. C/38/2003 raising the following substantial questions of law:

i) Whether the Tribunal was right in allowing the appeal, in spite of coming to the conclusion that duty could be demanded from the Respondent on the inputs used for manufacture?

ii) Whether the Tribunal was right in observing that the orders of the Adjudicating and Appellate Authority do not throw any light as to how the duty was arrived, in spite of the work sheet annexed to the show cause notice being produced before the Tribunal?

2. The facts leading to this appeal are as herein under:

The respondent-assesses is a 100% export oriented unit. The respondent is growing roses for the purpose of export. It had imported the goods without payment of duty in terms of notification No. 126/94-Cus dated 3.6.1994. The premises of the respondent was searched. Certain documents were seized, under the mahazar dated 7.1.1997 which discloses that the roses which were not suited for expert were sold in domestic tariff area. The cut flowers were sold for a value of Rs. 9,67,979/- between the period from 26.12.1995 to 28.2.1997. A show cause notice was issued on 3.7.1997 calling upon the assessee to show cause as to why the value of the cut flowers sold in domestic tariff area should not be confiscated and why duty and penalty shall not be levied for violating the customs law.

3. The assessee filed his reply contending that the rose flowers which were not suitable for export quality were sold in domestic tariff area under the bonafide belief that those roses can be sold instead of treating as waste. The Adjudicating Authority without considering the reply passed an order calling upon the assessee to pay the custom duty, however, no penalty was levied. Aggrieved by the same, an appeal was preferred before the Appellate Authority which appeal came to be dismissed on 15.11.2002. Thereafter, second appeal was preferred before the CESTAT which appeal came to be allowed on the ground that the Revenue did not consider the reply of the assessee properly since the order is passed without application of mind and held that the duty levied is unsustainable. Therefore, the appeal was allowed on 3.1.2006. Being aggrieved by the same, the Revenue has come up in this appeal.

4. The main contention of the Revenue is, even if the Tribunal was of the opinion that the authority did not consider the input used by the assessee in respect of the roses sold in domestic tariff area, it should have remanded the matter to the Adjudicating Authority. Therefore, the learned Counsel for the Revenue requests this Court to set aside the order and remand the matter.

5. Per contra, the learned Counsel for the assessee contends that no useful purpose would be served in remanding the matter as, the show cause notice issued by the Revenue was beyond the period of limitation. Accordingly, he requests this Court to dismiss the appeal.

6. After hearing the learned Counsel for the parties, we are of the opinion that without answering the questions of law raised in this appeal, the matter has to be remanded to the Assessing Officer for reconsideration for the following reasons.

7. The Tribunal has granted relief on the ground that the Adjudicating Authority did not consider the input used by the assessee in respect of the value of the flowers sold in the domestic tariff area. If so, it was for the Tribunal to remit the matter to the Assessing Officer for proper adjudication. In regard to the limitation is concerned; there is no finding either by the Assessing Officer or by the Tribunal. Even if we consider the said question, the said question has to be considered by the Assessing Officer since the Assessing Officer did not focus his attention on the question of limitation. Whether the duty was demanded within a period of six months or within a period of five years on account of the suppression of facts and whether there is suppression of facts or not, these are the things to be adjudicated by the Adjudicating Authority. Without having the

benefit of the order of the Adjudicating Authority, it would be improper for us to consider the same though it appears to us as a question of law, but according to us, it is a mixed question of fact and law. Whether there was suppression of fact or not has to be adjudicated by the Authority us, it is a mixed question of fact and law.

8. In the result, the appeal is allowed. The order passed by the all the authorities are set aside. The matter is remanded to the Adjudicating Authority granting liberty to the assessee to raise all the contentions available under law.

With the above observations, the appeal is disposed of.

