IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Appeal No. C/51274/2015-CU(DB)

[Arising out of Order-in-Appeal No. JAI/EXCUS/001/COM/73/14-15 dated 30.12.2014, passed by the Commissioner of Central Excise, Jaipur]

M/s Ahimsa Mines & Minerals Ltd. **....Appellant**

Vs.

C.C.E, Jaipur **....Respondent**

Appearance:

Sh. Nemi Chand Jain, Managing Director for the Appellant
Sh. S. Nunthuk, DR for the Respondent

CORAM:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 06.04.2017

FINAL ORDER NO. 53003/2017-CU[DB]

Per Archana Wadhwa:

After hearing both the sides we find that the appellant is a 100% EOU and for the said purpose procured capital goods indigenously, free of duty in terms of notification 53/97-Cus. They also procured the raw material free of cost. The said raw material, components and samples along with capital goods were being used by the appellant for manufacture of their final product which was being exported by them. However, as they were unable to procure the requisite foreign exchange in the initial period of LOP, fixed by the development commissioner, proceedings were initiated against them for confirmation of demand and duties, resulting in passing of the present impugned order.

2. It is seen from records that the appellant had been taking up the matter with the development commissioner who has extended the EOU status of the appellant from time to time and the same is now extended upto 31.03.2019. The appellant's contention is that they are still using the capital goods as also the raw material in the manufacture of their final product which is being exported by them. On the other hand, the adjudicating authority has observed that the appellants have not been able to achieve minimum foreign exchange even within a period of five years from the date of Commercial production and they have not fulfilled the complete export obligation during the said period, they are liable to pay duty. He has also observed that the matter is very old and development commissioner has not concluded any findings regarding non fulfilment of export obligation by the assessee and as such there is no option but to decide the case.

3. It is clear from the above observation of the adjudicating authority that the matter is still pending before the development Commissioner. In fact, on the contrary he has extended the appellant's EOU status till 31.03.2019. Tribunal in the case of ***Mantra Broadband Pvt. Ltd. Vs. CCE Bangalore 2011 (272) ELT 243 (Tri-Bang.)*** has held that customs cannot initiate recovery proceedings without concurrence of development

commissioner especially where the capital goods were not removed clandestinely and the goods were still in the warehouse and were being used. We also note that the Central Board Of Excise And Customs vide its circular no. 21/95-Cus dated 10.03.1995 has clarified that the liability of customs duty on goods imported by 100% EOU arises either at the stage of the unit being debonded or if any of the conditions of customs notification stand violated or remain unfulfilled. It is thus clear, that if the competent authority namely board of approval or the development commissioner **DETERMINES** that the unit has failed to export the fixed percentage of the article for the specific period then in such a case it may be held that the condition of the exemption notification has been violated.

As such even in terms of the said circular, the department can proceed ahead to recover the foregone duty only after the development commissioner determines the non fulfillment of export obligation. Admittedly in the present case, the development commissioner has extended the EOU status of the appellant till 2019 and hence it is not only pre mature on the part of the adjudicating authority to confirm the demand but is also without any basis. Accordingly, the impugned order is set aside and appeal is allowed with consequential relief.

5. However, we make it clear that if in future, the development commissioner passes an order against the assessee as regards non fulfillment of export obligation, revenue would be at liberty to

initiate proceedings against them based upon the new facts and new cause of action. Appeal is disposed of in above terms.

[Dictated and Pronounced in the open Court]

(V. Padmanabhan)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

Bhanu