IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No.C/124/2011

(Arising out of Order-in-Original No.KOL/CUS/Airport&Admn./26/2010 dated 24.12.2010 passed by the Commissioner of Customs (Airport & Admn.), Kolkata)

M/s. Amarnath Overseas Ltd.

Applicant (s)/Appellant (s)

Vs.

Commissioner of Customs (Port), Kolkata

Respondent (s)

Appearance:

Shri Sukhendu Bhattacharya, Advocate & Shri R.N.Bandopadhyay, Consultant for the Appellant (s)
Shri S.N.Mitra, AC(AR) for the Respondent (s)

CORAM:
Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)
Hon'ble SHRI Bijay Kumar, Member (Technical)

Date of Hearing:- 14.05.2018

Date of Pronouncement: 18.05.2018

ORDER NO.FO/76052/2018

Per Shri Bijay Kumar

The present appeal has been filed by the appellant against the impugned order where the Ld. Adjudicating Authority has confirmed the demand against the appellant. This is second round of litigation before the Hon'ble Tribunal. Hon'ble Tribunal vide its Order No.S-822/A-1950/KOL/07 dated 28.11.2007 has remanded the matter back to the Adjudicating Authority with the observation as contained in paragraph -4 of the Order, which is reproduced as under:

> *"4. Taking into account the submissions made by the ld. Consultant, on behalf of the appellants and also taking into account the letter of the Development Commissioner dated 13.7.06 which was not before the original authority, we are of the view that the original authority need to verify from the Development Commissioner as to whether the export obligation period has indeed been extended and whether the appellants have fulfilled the export obligation within such extended period and have also achieved positive NFE for the relevant period. The original authority also needs to give an opportunity to the appellants for producing the documentary evidence in support of their claim of fulfilling export obligation by December, 2005. Accordingly, we set aside the impugned order and remand the matter to the original authority with the above directions. In view of the remand, the requirement of predeposit stands waived in this case."*

Subsequently, by this remand order, the Adjudicating Authority has decided the appeal and has confirmed the demand after taking into consideration of letter dated 13.07.2006 issued by the Development Commissioner, wherein it is stated that the Development Commissioner has extended the LOA period w.e.f. 06.11.2005 on the terms and conditions mentioned therein. Ld. Adjudicating Authority has considered this letter and passed the impugned order.

2. Ld. Counsel for the appellant states that the Development Commissioner after taking the view of Approval Committee as well as after appreciating the difficulties faced by all plastic units during that material period. The Ld. Development Commissioner had also initially extended the LOP of the appellant's unit for a period up to 31.07.2006 giving effect from 06.11.2005 and subsequently extended till 05.11.2010 for fulfillment of the

export obligation and meet the foreign exchange earning criteria during the extended period.

Ld. Counsel also states that the Order of the Adjudicating Authority has travelled beyond the scope of the show cause notice for confirming demand of duty in terms of the conditions of the notifications and at the instance of the extension of time to achieve NFE by the Ld. Development Commissioner. Also the Development Commissioner has extended the LOP period. There is no case for the Customs confirming the demand as per Notification NO.137/2000-Cus. In this case the show cause notice was issued by the Development Commissioner for the violation of duty free import of various raw-material/capital goods of total assessable value of Rs.569.55 lakhs during the period from Nov'2000 to Nov'2005 on account of violation to achieve NFEP and Contravention of violation of the provisions of the Customs Act, 1962 read with Foreign Trade (Development & Regulation) Act, 1992. The same was adjudicated by the Development Commissioner vide Order-in-Original No.1(18)/2001/2719-2725 dated 02.08.2006. In the said order in paragraph -4, which is stated as under:

> *"4. In the above circumstances, after taking the view of the Approval Committee, as well as after appreciating the difficulties being faced by all the plastic units in achieving export target, it is felt that there is no justification to levy any fiscal penalty under provisions of FT(D&R) Act in terms of Appendix 14-IG, Para 7.14.1, 7.14.2 of Handbook of procedures, Vol.I(2004-2009) as well Rule 54 of SEZ Rules, 2006.*
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> *This is, however, without prejudice to any other action that may be taken against the unit under any other Act & Rules in force."*

Ld. Counsel further vehemently argues that in view of Development Commissioner's Order extending the LOP, there is no scope for the Adjudicating Authority to deny the benefit and recover the amount of customs duty for whom having failed to achieve positive NFE within the communicated period of 5 years from the date of commencement of production and this communicated period was supposed to be not extended to achieve the positive NFE.

In this regard ld. Counsel has relied on the decision of **Mavi Industrial Ltd. vs. Commissioner of Cus. & C.Ex, Thane-II** [2013(289) E.L.T. 15 (Bom.)] and in view of this judgment ld.Counsel states that the Adjudicating Authority has confirmed the demand of duty foregone in a wrong manner.

3. Ld. D.R for the Revenue has reiterated the grounds contained in the impugned order for confirmation of amount of customs duty foregone for contravention of above mentioned notification.

Ld. D.R. has stated that the Development Commissioner has only extended the LOP period but not the export obligation period and relied havily on the last paragraph of the Development Commissioner, wherein it is stated that as under:

> "*This is, however, without prejudice to any other action that may be taken against the unit under any other Act & Rules in force*"

He therefore concludes that the demand of the customs duty foregone is not the provision of the Customs Act and this Adjudication Order by the Development Commissioner not comes in any way for the demand of duty for not realization of net positive NFE.

4. We have heard both sides and considered the factual matrix of the case.

5. We have also considered the judgment of the Hon'ble High Court of Bombay in the case of **Mavi Industrial Ltd. vs. Commissioner of Cus. & C.Ex, Thane-II (Supra)** as referred by the Ld. Counsel on behalf of the appellant. The relevant portion of the order is reproduced as under:

> ***"43.*** *The argument that in spite of the extension of LOP granted by the Development Commissioner, the customs authorities could take penal action for non-fulfilment of the export obligation is accepted it would lead to an anomalous situations because, for non-fulfilment of the export obligation of the first block of five years, one authority grants extension of five years, whereas, another authority wants to penalise the assessee without giving an opportunity to fulfil the export obligation during the extended period. It is relevant to note that the assessee has executed the bond before the Development Commissioner as well as the customs authorities and both the authorities are entitled to take penal action if NFEP/export obligation is not fulfilled. Once the Development Commissioner after considering the facts of the case grants extension of LOP so that the needful could be done during the extended period, penal liability cannot be fastened upon the assessee by any authority before the expiry of the extended period. Therefore, the argument of the customs authorities which leads to an anomalous situation cannot be accepted.*
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> ***44.*** *The apprehension of the customs authorities that the assessee may seek extension at the end of each block of five years with a view to evade payment of customs duty is without any basis, because, the Development Commissioner would grant extension of LOP only if he is satisfied that non-fulfilment of the export obligation, if any, is on account of genuine reasons. When the legislature has cast that responsibility upon the Development Commissioner to grant extension to 100% EOU in appropriate cases it cannot be presumed that even if the assessee violates the provisions of law the extension would be granted. In other words, in a given case, if it is found that that the assessee has violated the provisions of law it would be open to the Development Commissioner to deny extension. Therefore, it is not open to the customs authorities to presume that extension of the LOP would be granted by the Development Commissioner to facilitate evasion of duty.*
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> ***45.*** *Strong reliance was placed by the counsel for the customs authorities on clause 3(d) of the letter dated 27th April, 2009 wherein it is stated that the extension granted is without prejudice to any action that may be taken in respect of EOU*

operations prior to 1st April, 2009 under the Foreign Trade (Development & Regulation) Act, 1992, Customs Act, Central Excise and any other law for the time being in force. Obviously, the above clause relates to violations of law other than non-fulfilment of the export obligation. It is only because, the assessee had shown bona fides/reasonable cause for non-fulfilment of the export obligation, the Development Commissioner had considered it proper to grant extension so that during the extended period the assessee could fulfil the balance export obligation as also the additional export obligation imposed while granting the extension. In other words, clause 3(d) is inserted with a view to ensure that on account of granting extension to fulfil the balance export obligation/performance, in the second block of five years, the assessee does not escape the penal liability for violating any other provisions of law committed by the assessee during the first block of five years or upto 1st April, 2009. Thus, clause 3(d) is intended to preserve the right of the Development Commissioner and customs/excise authorities to impose penal liability if the assessee has violated any provision of law other than the non-fulfilment of the export obligation for which extension has been granted. If the extension granted on 27th April, 2009 was not to operate as continuation of the 100% EOU status of the assessee, then, on expiry of the first block of five years, the development Commissioner would have imposed penal liability upon the assessee for non-fulfilment of the export obligation in the first block of five years. The very fact that the Development Commissioner has chosen not to continue with the penal action under the show cause notice dated 11th April, 2002 but to grant extension clearly shows that clause 3(d) in the letter dated 27th April, 2009 refers to any violation other than the violation relating to non-fulfilment of the export obligation for which extension of time has been granted by the Development Commissioner. Therefore, before expiry of the extended period of LOP it is neither open to the Development Commissioner nor to the customs authorities to treat that the assessee had ceased to be a 100% EOU after the expiry of the first block of five years and consequently the question of enforcing the penal liability before the expiry of the extended period does not arise at all."

6. The fact and issue before us is entirely on the same issue and we therefore inclined to accept the order of the Hon'ble High Court of Bombay wherein it is clearly stated that before expiry of the extended period of LOP it is neither open to the Development Commissioner nor to the customs authorities to treat that the assessee had ceased to be a 100% EOU after the expiry of the first block of five years and consequently the question of

enforcing the penal liability before the expiry of the extended period does not arise at all.

7. In the case of appellant it is also seen that earlier they were 100% EOU which were converted into SEZ unit after following appropriate procedure and obtaining permission of the competent authority. The matter before us is covered by the aforesaid judgment.

8. In the result, we therefore allow the appeal.

(Pronounced in the Open Court on 18.05.2018)

S/d.	S/d.
(P.K.Choudhary)	**(Bijay Kumar)**
Member (Judicial)	**Member (Technical)**

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