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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 52 of 2011

(Arising out of Order-in-Original No. KOL/CUS/Airport/Admn/08/2010 dated 28.04.2010 (issued on 30.04.2010) passed by the Commissioner of Customs (AP & ADMN.), 15/1, Strand Road, Custom House, Kolkata – 700 001)

M/s. Jayashree Tea and Industries Limited : Appellant
(M/s. Jayashree Infotech Consultants)
Plot: Y-13, Block-EP, Salt Lake, Sector-V,
Kolkata – 700 091

VERSUS

Commissioner of Customs (AP & ADMN) : Respondent
15/1, Strand Road, Custom House,
Kolkata – 700 001

APPEARANCE:

Smt. Sweta Mukherjee, Advocate for the Appellant

Shri Subrata Debnath, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.75738/ 2024

DATE OF HEARING / DECISION: 21.03.2024

Order: [PER SHRI K. ANPAZHAKAN]

M/s. Jayashree Infotech Consultants, Prop. M/s. Jayashree Tea and Industries Ltd. [hereinafter referred to as 'unit'] was granted a Customs Warehousing Licence for warehousing, manufacturing and export of software against LOP reference no. STPK: DIR:327:2001-02:539 dated 12.02.2002 issued by the Director, STPI, Kolkata. M/s. Jayshree Infotech Consultants also executed a B-17 Bond dated 18.07.2002 with the Customs authorities binding themselves to fulfil their export obligations and the conditions stipulated in the Customs Notification.

2. As per the performance report forwarded by STP, Kolkata vide their letter No. STPK:MGR:327 2007-08:519 dated 12.07.2007, it was observed as under: -

i) That the unit failed to achieve minimum required export obligation (EO) in two out of five financial years and during five years as a whole.

ii) That the unit failed to meet the required annual NFE and NFEP in three out of five financial years and average NFE and NFEP at the end of five years.

iii) That the unit executed DTA sales in the financial year 2003-04, 2004-05 and 2005-06 without permission of STP Kolkata.

2.1 In view of the above, it appeared that the unit had not achieved export obligation cumulatively or annually. Accordingly, as per paragraph 3(d)(ii) of Notification No. 52/2003-Cus. dated 31.03.2003, it appeared that the appellant was liable to pay duty along with interest on the imported and domestically procured goods.

3. In view of the above, a Show Cause Notice dated 23.10.2007 was issued to the appellant proposing as follows:-

4. The Notice was adjudicated vide impugned order dated 30.04.2010 wherein the ld. adjudicating authority has passed the following order: -

"15. …

(a)(i) Computer hardware and accessories, valued at Rs. 2,74,99,090,28 (Rupees two crore seventy four lakh ninety nine thousand ninety & paisa twenty

eight only) are confiscated under section 111(0) of the Customs Act, 1962.

(a)(ii) However an option is given to the owner of the impugned goods M/s Jayashree Infotech Consultants to redeem the goods valued at Rs. 2,74,99,090.28 (Rupees two crore seventy four lakh ninety nine thousand ninety & paisa twenty eight only) on payment of a redemption fine of Rs. 75,00,000/- (Rupees seventy five lakh only) in terms of Section 125 of the Customs Act, 1962.

(b)(i) Computer hardware and accessories valued at Rs. 40,10,062.00 (Rupees forty lakh ten thousand sixty two only) are confiscated under Rule25(1) (d) of Central Excise Rules, 2002.

(b)(ii) However an option is given to the owner of the impugned goods M/s Jayashree Infotech Consultants to redeem the goods valued at Rs.40,10,062.00 (Rupees forty lakh ten thousand sixty two only) on payment of redemption fine of Rs. 10,00,000/- (Rupees ten lakh only) in terms of Section 34 of the Central Excise Act, 1944.

16(i). In view of the aforesaid reasons, I confirm the demand of Customs duty amounting to Rs. 1,01,65,881.00 (Rupees one crore one lakh sixty five thousand eight hundred eighty one only) and the demand of Central Excise duty amounting to Rs.5,53,112.00 (Rupee five lakh fifty three thousand one hundred twelve only) in respect of the impugned goods.

16(ii) I also demand interest at the appropriate rate under Section 28AB of the Customs Act, 1962 and Section 11AC of Central Excise Act, 1944 on the Customs and Central Excise duty not levied on the impugned goods. The interest will be payable for the period starting from the day when the duties became

> *due and the date on which the payment of the demanded duty is made.*
>
> *17. For the aforesaid reasons, I also impose a penalty of Rs. 1,25,00,000 (Rupees one crore twenty five lakh only) under Section 112(a) of the Customs Act and Rule 25(1)(d) of the Central Excise Rules, 2002 on M/s Jayashree Infotech Consultants."*

5. Aggrieved against the impugned order, the appellant has filed by this appeal.

6. The appellant submits that they have faced certain difficulties, technical as well as procedural, for setting up of the 100% EOUs; that there were administrative and legal problems which took a longer time than expected to resolve; finally, commercial production was started at the unit with effect from 05th May, 2003.

6.1. It is submitted by the appellant that as per paragraph 6.6 of the Foreign Trade Policy, once a unit commences production, the letter of permission given would be valid for a period of five years for its activities and this period can be extended for a further period of five years by the Development Commissioner; the appellant is entitled for a period of five years from the date of commencement of its commercial activity to complete its export obligation.

6.2. The appellant submits that due to circumstances beyond their control, they could not fulfil the export obligation within the initial period of five years. They applied for extension to the Development Commissioner, STPI vide their letter dated 12.12.2006. The STPI, Kolkata initially rejected their application, however, later, on 12.03.2010, the letter of permission given to the appellant was extended for a period of five years from 05th May, 2008; the extension of the validity was granted with retrospective effect by the order dated 12.03.2010.

6.3. The appellant submits that when they were in the process of getting the extension from the Development Commissioner, STPI, the Department initiated proceedings for recovery of the duties foregone by issuing the Show Cause Notice. They had requested the Department to keep the adjudication proceedings in abeyance till a decision is taken by the Development Commissioner, STPI. However, the Ld. Commissioner went ahead and passed the impugned order dated 30.04.2010 without waiting for the decision of the Development Commissioner, STPI.

6.4. In view of the above, they submit that the entire demand confirmed in the impugned order is not sustainable as the Development Commissioner has granted extension retrospectively for fulfilment of export obligation vide order dated 12.03.2010.

7. The Ld. Authorized Representative for the Revenue reiterated the findings in the impugned order.

8. Heard both sides and perused the appeal records.

9. We observe that the appellant has obtained permission from the Development Commissioner, STPI for manufacture and export of software vide their letter dated 12.02.2002. They started commercial production with effect from 05th May, 2003. However, they could not fulfil their export obligation within the five-year time period given to them. Accordingly, the Department initiated action to recover the duty

foregone. The Notice was adjudicated and the demands raised in the Notice were confirmed.

9.1 The appellant submits that there were circumstances beyond their control for the delay in fulfilment of their export obligation. Accordingly, they applied for extension of the time-limit with the Development Commissioner, STPI, which was considered by the Development Commissioner vide order dated 12.03.2010. The validity of the extension was given retrospectively.

10. Thus, we observe that the appellant was granted time for another period of five years from 5th May, 2008 to fulfil their export obligation. Hence, the impugned order dated 30.04.2010 is premature. The ld. adjudicating authority could have waited for the final decision of the Development Commissioner, STPI, before passing the order. Since the appellant has received extension for another period of five years with retrospective effect, we hold that the demand confirmed in the impugned order is not sustainable. As the confiscation of the goods and the demand of duties are not sustainable, the question of imposition of redemption fine and penalty does not arise.

11. In view of the above, we set aside the impugned order and allow the appeal filed by the appellant.

(Operative part of the order was pronounced in open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd/rkp