IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CUSTOMS)
ORIGINAL SIDE

CUSTA/92/2024
IA NO: GA/1/2024, GA/2/2024
COMMISSIONER OF CUSTOMS (AP AND ADMN)
VS
M/S JAYESHREE TEA AND INDUSTURIES LIMITED

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATE : January 10, 2025.

Appearance :
Mr. Uday Shankar Bhattacharyya, Adv.
Mr. Tapan Bhanja, Adv.
. …for appellant.
Ms. Sweta Mukherjee, Adv.
…for respondent.

The Court :- We have heard Mr. Uday Shankar Bhattacharyya and Mr. Tapan Bhanja, learned standing Counsel for the department and Ms. Sweta Mukherjee, learned Advocate appearing for the respondent/assessee.

Learned Advocate appearing for the respondent/assessee is permitted to file vakalatnama on behalf of the respondent.

This is an appeal filed by the revenue challenging the order dated 21.03.2024 in order No. 75738 of 2024 passed by the Customs, Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench (the Tribunal). The revenue has raised the following substantial questions of law for consideration:-

i) Whether the respondent is liable t pay all duties and charges together with interest under the provision of Customs Act, 1962/Central Excise Act, 1944 and the Export Import policy 2002-07 when the respondetn failed to fulfill the condition of the agreement entered with the Director, STP, Kolkata and also failed to fulfill the export obligation and condition stipulated in Customs Notification 52/03-Cus dated 31.05.2003 in terms of Bond executed with the Customs Department?

ii) Whether the order dated 21.03.2024 passed by the Learned Tribunal is contrary to the Customs Notification 52/03-Cus dated 31.05.2003?

iii) Whether the order dated 21.03.2024 passed by the Learned Tribunal suffers from perversity inasmuch as the Learned Tribunal wrongly set aside the order-in original dated 289.04.2010 by solely relying upon the order dated 12.03.2010 without appreciating that the said order dated 12.03.2024 is not the Order for extension of Letter of permission (Lop)?

iv) Whether the order dated 12.03.2010 of Software Technology Park (STP) is not the final order for extension of LO as the same is an intermediary order?

The admitted facts are that the respondent/assessee was granted a Customs Warehousing License for warehousing, manufacturing and export of software against the Letter of Permission dated 12.02.2002 issued by the Director of the Software Technology Parks of India (STPI) the assessee executed the bond dated 18th July, 2002 with the Customs Authority agreeing to fulfill the export obligation and conditions stipulated in the customs notification.

As the unit did not achieve the export obligation cumulatively or annually within the period for which LOP was granted show-cause notice dated 23.10.2007 was issued to the assessee. The assessee contended that they faced certain difficulties namely technical as well as procedural for setting up of the hundred per cent export oriented unit (EOU) and there were other administrative and legal problems which took longer time than expected to resolve and officially commercial production was started by the unit with effect from 5th May, 2003. It was further contended that in terms of the paragraph 6.6 of the Foreign Trade Policy once a unit commences production the LOP given will 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 and that the assessee is entitled for a period of five years from the date of commencement of its commercial activity to complete and/or fulfill its export obligation. It is an admitted fact that assessee could not fulfill the export obligation within the initial period of five years and they applied for extension to the Development Commissioner, STPI vide letter dated 12.12.2006. This application was rejected and subsequently representations were given and the Director of STPI drew a proceeding dated 12.03.2010 in which a fresh recommendation that the validity of the LOP issued to the respondent may be extended for a further period of three years with effect from 5.5.2008, after examining the scope of extension of the validity with retrospective effect. The learned Tribunal while considering the assessee's appeal took note of this proceeding dated 12.03.2010 and opined that the LOP has been extended with retrospective operation.

On a careful reading of the proceeding of the Director dated 12.3.2010 we find that it to be in the nature of a recommendation. Therefore, the said proceedings dated 12.3.2010 cannot be taken to be an order extending the Letter of Permission. This become amply clear from another communication sent to the Customs Authorities by the Director of STPI dated 5.9.2024 in which in no uncertain terms it has been stated that the LOP granted to the assessee was not extended beyond its validity. It is no doubt true that this communication dated 5.9.2024 is much after the order passed by the learned Tribunal which was passed on 21.03.2024. Nonetheless it is a fact that the LOP is not extended then the question would arise as to whether the order of adjudication is bad in law.

Ms. Mukherjee, learned Advocate appearing for the respondent/assessee would contend that the adjudicating authority passed the order much prior to the proceedings of the Director dated 12.3.2010 and, therefore, the learned Tribunal observed that the adjudicating authority could have waited for the authorities of the STPI to consider the prayer for extension. Though, this can be one way of looking at the matter the facts ought to be gone into. If the Director of the STPI has stated that the LOP has not been extended beyond its validity then a proceeding was drawn on 12.03.2010 which is in the nature of recommendation, the contention of the assessee is that the adjudication order is bad in law has to be reexamined.

Therefore, we are inclined to remand the matter back to the learned Tribunal for fresh consideration, since documents are to be examined and a factual finding has to be recorded.

For the above reasons, the appeal is allowed and the order passed by the learned Tribunal is set aside and the matter is restored to the file of the learned Tribunal to be heard and decided afresh.

The appellant/revenue is directed to file compilation containing all proceedings relating to the subject matter and placed the same before the learned Tribunal for consideration.

In the light of the above the substantial questions raised are left open.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

pkd/GH.