

(2013) 02 BOM CK 0114

In the Bombay High Court

Case No : Customs Appeal (LOD) No. 63 of 2012

Mavi Industrial Ltd. (formerly known as Krishna Filaments Ltd.)

APPELLANT

Vs

The Commissioner of Customs and Central Excise, Thane-II,
4th Floor, Nav Prabhat Chambers, Ranade Road, Dadar (W),
Mumbai - 400018 and The Development Commissioner,
SEEPZ Special Economic Zone, Ministry of Commerce and
Industries, Andheri (East) Mumbai - 400096

RESPONDENT

Date of Decision : 14-02-2013

Acts Referred:

Customs Act, 1962 — Section 58, 61, 68, 72

Citation : (2013) 2 ABR 658 : (2013) 7 BomCR 299 : (2013) 197 ECR 254 :
(2013) 289 ELT 15

Hon'ble Judges : M.S. Sanklecha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : V. Sridharan, with Prakash Shah, Jas Sanghavi, Uchit Sheth and
Durga Prasad instructed by PDS Legal, for the Appellant; Pradeep S. Jetly,
Advocate for the Respondent No. 1 and Mr. A.S. Rao, Advocate for the
Respondent No. 2, for the Respondent

Judgement

J.P. Devedhar, J.—The question that is to be considered in this appeal is as follows:-

When the Development Commissioner, SEEPZ, Mumbai by extending the letter of permission has extended the 100% EOU status of an assessee for a further period of five years, then, before the expiry of the extended period, is it open to the customs authorities to recover customs duty with interest, penalty and fine in respect of the capital goods, spares and raw materials imported by the said 100% EOU, solely on the ground that, non fulfilment of the export obligation within the first block of five years constitutes violation of the bond executed under notification No. 53 of 1997 and violation of Sections 61 & 72 of the Customs Act, 1962 ?

The appeal is admitted on the above question and taken up for hearing by consent of parties.

2. The relevant facts are that the appellant-assessee originally known as Krishna Filaments Ltd. carried on the business of manufacturing HDPE ropes. By a letter of permission (LOP) dated 9th September, 1998 the Government of India permitted the assessee to establish a 100% Export Oriented Unit (100% EOU) to manufacture HDPE ropes in their factory at Betegaon, Boisar (E), Thane, Maharashtra in terms of the Export-Import Policy, 1997-2002. The said unit at Betegaon was duly approved by the customs authorities as a private bonded warehouse u/s 58 of the Customs Act, 1962 on 22nd October, 1997.

3. The LOP dated 9th September, 1998 which was valid for three years stipulated that within the validity period of three years of the LOP, the assessee shall implement the project by importing capital goods/raw materials and on commencement of the commercial production export its entire production for a period of five years subject to achieving the minimum net Foreign Exchange Earnings as a percentage of Export (NFEP) and also export performance as prescribed in the Export-Import Policy, failing which the unit would be liable for penal action. The LOP further provided that the unit shall furnish a legal undertaking as prescribed in the Handbook of Procedure (Vol-1) to the Development Commissioner and that the unit would have the option to renew its EOU status or debond the unit for production in the domestic market as per the industrial policy in force at the relevant time.

4. Accordingly, the assessee imported capital goods valued at Rs. 120.29 crores as permitted under the LOP, cleared the same duty free by executing a bond under customs Notification No. 53/97 dated 3rd June, 1997 and installed the same in the aforesaid private bonded warehouse which was duly approved by the customs authorities. It is not in dispute that the assessee commenced the commercial production on 27th April, 1999 and the assessee exported all its products during the period from 1999-2000 valued at Rs. 2.95 crores.

5. Sometime in August, 2000, IDBI filed a Suit bearing No. 1990 of 2000 against the assessee in this Court and in that Suit Court Receiver was appointed in respect of the assets of the assessee. Consequently in September, 2000, the unit at Betegaon was attached and possession of that unit was taken over by the Court Receiver appointed by this Court on 3rd August, 2000 in the said suit filed by the IDBI against the assessee. Thus, the operations in the unit were stopped abruptly from September, 2000 on account of the Court Receiver taking over possession of the unit at Betegaon.

6. The assessee contested the Civil Suit and took steps for lifting the attachment, however, the same took considerable time and it is only on 3rd December, 2007, the assessee could get back the unit at Betegaon from the Court Receiver.

7. In the meantime, the assessee took steps to get extension of the LOP from the Development Commissioner and also extension of the private bonded

warehouse licence from the customs authorities from time to time. It is not in dispute that the private bonded warehouse licence originally granted on 22nd October, 1997 was extended by the customs authorities from time to time upto 31st December, 2001. It is also not in dispute that before the expiry of the said warehouse licence on 31st December, 2001, the assessee by its letter dated 26th November, 2001 had sought further extension of the private bonded warehouse licence but the same was not considered by the customs authorities probably because the unit was not functional at that time.

8. As regards extension of the LOP dated 9th September, 1998 is concerned, the assessee under the LOP was obliged to export all its products for a period of five years from the date of commercial production. Since the commercial production of the unit commenced on 27th April, 1999, the 100% EOU status of the assessee was to expire on completion of five years from the date of commercial production i.e. on 26th April, 2004. Before expiry of the said period, the assessee by its letter dated 20th April, 2004 had sought extension of the LOP so that on lifting the attachment, the balance export obligation under the LOP dated 9th September, 1998 could be achieved. Thus, the assessee while negotiating with IDBI for settlement of the Suit/lifting the attachment, took steps to keep the unit alive by seeking extension of the LOP as well as the private bonded warehouse licence in respect of the unit at Betegaon.

9. However, the Development Commissioner as also the customs authorities did not consider it proper to consider the issue relating to the grant of further extension as the unit was not functional and was in possession of the Court Receiver. With a view to save the unit from the penal liability, the assessee initiated proceeding before BIFR seeking rehabilitation of the unit.

10. In the meantime, by a show cause notice dated 27th February, 2004, the Assistant Commissioner of Central Excise, Thane called upon the assessee to show cause as to why action should not be initiated against the assessee under the Customs Act, 1962 for non fulfilment of the export obligation under the LOP dated 9th September, 1998.

11. Before proceeding with the adjudication of the aforesaid show cause notice dated 27th February, 2004, the customs authorities had sought the status report from the Development Commissioner. In view of the fact that as on that date, the unit was in possession of the Court Receiver and the final rehabilitation order was not passed by the BIFR, the Development Commissioner by his letter dated 25th August, 2006 permitted the customs authorities to proceed with the adjudication of the aforesaid show-cause notice dated 27th February 2004 on the ground that the assessee had failed to fulfill the export obligation under the LOP dated 9th September 1998.

12. Accordingly, by an Order in Original dated 29th September, 2006 the matter was adjudicated wherein the customs duty demand with interest and penalty were confirmed. The appeal filed by the assessee against the said order-in-

original was dismissed by the CESTAT on 14th August, 2008. On a Writ Petition filed by the assessee, this Court by an order dated 17th December, 2008 set aside the above orders and restored the matter for fresh adjudication.

13. Thereupon the matter was heard afresh and by an order in original dated 16th March, 2009 the customs duty demand of Rs. 61.24 crores on capital goods, spares and raw materials was confirmed with interest and penalty. Further, by the said adjudication order, the capital goods, spares and raw materials were confiscated and were allowed redemption on payment of fine in lieu of confiscation.

14. In the meantime, the assessee had moved the Board of Approval seeking revival of the unit under Appendix-X of the Handbook of Procedure. Since the assessee by then had discharged the liability of the IDBI and had received back the possession of the unit from the Court Receiver, the Board of Approval by its letter dated 9th March 2009 informed that the assessee cannot be considered as a sick unit and, hence, revival of the unit under Appendix X cannot be considered. However, by the said letter the assessee was directed to approach the Development Commissioner, SEEPZ, Mumbai, seeking extension of the LOP dated 9th September 1998 in the prescribed format.

15. Accordingly, on 10th March, 2009 the assessee applied for extension of LOP dated 9th September, 1998 in the prescribed format. On 27th April, 2009 the Assistant Development Commissioner, SEEPZ (SEZ), Mumbai granted extension of the LOP dated 9th September, 1998. The said letter dated 27th April, 2009 reads thus:-

Government of India Office of the Development Commissioner, SEEPZ, Special Economic Zone, Ministry of Commerce & Industry, Andheri (East), Mumbai - 400096.

No. SEEPZ-SEZ/EOU/ 28/44/98-99/Vol-II 14104

(27th March, 2009) 27th April, 2009

M/s. Mavi Industries Ltd. Mahagaon Road, Betegaon, Near Guashala, Boisar (E) Thane - 401501.

Sub: Your request for extension of Letter of Permission No. PER:228(1998)/EOB/180/98, dt. 09-09-1998 for manufacture and export of HDPE/PP Ropes. ---

Sirs,

Kindly refer to your letter dated 10-03-2009 requesting for extension of Letter of Permission No. 09.09.1998 referred to above for a further period of 5 (five) years i.e. 2009-10 to 2013-14.

1. It is noted that you have commenced production w.e.f. 27-04-1999.

2. In view of the position explained by you, the Development Commissioner, SEEPZ, SEZ approves of your request for extension of letter of permission dt.

09.09.1998 for a period of 5 years effective from 01-04-2009 and also approve the fresh projections for the 2nd block of 5 years i.e. from 2009-10 to 2013-14 with export performance of US \$5,06,07,290/- (US \$ five crore six lakhs seven thousand two hundred and ninety only), RM & Components of US \$3,54,25,100/- (US \$ Three crore fifty four lakhs twenty five Thousand one hundred only), Spares & Consumables of US \$20,24,290/- (US \$ Twenty lakh twenty four thousand two hundred and ninety only) and Net Foreign Exchange Earnings of US \$1,29,55,470/- (US \$ one crore twenty nine lakhs fifty five thousand four hundred seventy only).

3. This approval is subject to the following conditions.

(a) The entire (100%) production excluding rejects and sales in the Domestic Tariff Area (DTA) as per provision of Foreign Trade Policy 2004-09 shall be exported.

(b) The unit would be required to achieve positive Net Foreign Exchange (NFE) as prescribed in the EOU scheme, failing which; it would be liable for penal action.

(c) The benefit provided in Appendix 14-I-M of HBP 2004-09 as amended shall not be applicable.

(d) This approval is without prejudice to any action that may be taken in respect of your EOU operations prior to 01/04/2009 under Foreign Trade (Development & Regulation) Act, 1992, Customs Act, Central Excise & any other law for the time being in force.

4. The Letter of Permission PER: 228 (1998)/EOB/180/98, dtd. 09/09/1998 as amended to the above extent.

5. All other terms and conditions mentioned in the Letter of Permission No. PER: 228 (1998)/EOB/180/98, dtd. 09-09-1998 as amended shall remain unchanged.

6. You are requested to confirm acceptance of the above terms and conditions to the undersigned within 45 days.

7. You are requested to execute Legal Agreement as per the format prescribed in Appendix 14-I-F of Handbook of Procedures 2004-09.

8. Please keep this letter attached to the original Letter of Permission PER: 228(1998)/EOB/180/98, dtd. 09-09-1998 as amended and acknowledge the receipt.

Yours faithfully, sd/- (Alka G. Satghare) Asstt. Development Commissioner, SEEPZ, SEZ.

16. At this stage, we may note that by a letter dated 24th April, 2009, the office of the Development Officer, SEEPZ, Mumbai had approved the change in the name of the assessee company from Krishna Filaments Ltd. to Mavi Industries Ltd. in terms of para 6.34(6) of the Handbook of Procedure 2004-09 as amended. It was made clear in the said letter dated 24th April, 2009 that except

the name, all other terms and conditions mentioned in the LOP dated 9th September, 1998 remain unchanged.

17. In terms of extension of LOP granted by letter dated 27th April 2009 the assessee on 10th June, 2009 executed a legal undertaking before the Development Commissioner, SEEPZ, Mumbai thereby agreeing to comply with the terms and conditions of the LOP as amended on 27th April, 2009.

18. Thereafter, on the basis of the extension of LOP granted by the Development Commissioner, the assessee once again addressed a letter on 12th June, 2009 seeking renewal of the private bonded warehouse licence from the customs authorities in respect of the unit at Betegaon, Boisar. As noted earlier, the private bonded warehouse licence in respect of the factory at Betagaon was renewed upto 31st December, 2001 and before expiry of the said extended period, the assessee had made an application for renewal of the licence on 26th November, 2001 but the same was not considered by the customs authorities as the unit was not operational and was in possession of the Court Receiver.

19. However, instead of considering the application for renewal of the private bonded warehouse licence, the customs authorities insisted on enforcing the duty demand with interest and penalty confirmed by order-in-original dated 16th March 2009.

20. In the appeal filed before the CESTAT against the order-in-original dated 16th March, 2009 the assessee contended that in view of the extension of the LOP granted by the Development Commissioner, the customs authorities were not justified in declining to extend the private bonded warehouse licence and enforcing the duty demand on the ground that the export obligation under the LOP dated 9th September 1998 had not been fulfilled. The Tribunal by its order dated 31st March, 2011 set aside the order-in-original dated 16th March, 2009 and restored the matter for fresh decision by the Commissioner. On a Writ petition filed by the revenue, this Court on 16th August, 2011, by consent set aside the order of the Tribunal dated 31st March, 2011 and directed the Tribunal to pass fresh order on merits.

21. Accordingly, the matter was heard afresh and by an order dated 1st March 2012 the CESTAT upheld the decision of the adjudicating authority in confirming the duty demand, but held that the rate of duty shall be the rate prevailing on the date of deemed removal of the capital goods and raw materials, u/s 72 of the Customs Act. The CESTAT has also upheld the interest on the duty amount and reduced the penalty and fine in lieu of confiscation to Rs. 1 crore each. Challenging the aforesaid order, the assessee has filed the present appeal.

22. We have heard Mr. Sridharan, learned Senior Advocate on behalf of the assessee, Mr. Jetly, learned Advocate for the respondent No. 1 and Mr. Rao learned Advocate for respondent No. 2.

23. The basic argument advanced on behalf of the assessee is that once

extension of the letter of permission is granted by the Development Commissioner, the customs authorities are bound to grant extension of the private bonded warehouse licence so that within the extended period the assessee could fulfil the unfulfilled export obligation of the first block of five years as also the export obligation imposed while granting extension of the LOP. It is only if the assessee fails to fulfill the above obligation within the extended period, the customs authorities could initiate proceedings to enforce the duty demand on account of the non fulfilment of the export obligation as it constitutes violation of the bond executed in terms of the Notification No. 53/97- cus dated 3rd June 1997. In the present case, even before the expiry of the extended period of LOP, the customs authorities have purported to demand duty which is totally improper and contrary to law.

24. It is further contended on behalf of the assessee that the CESTAT was in error in relying upon the decision of the Apex Court in the case of *Kesoram Rayon (A Unit of Kesoram Industries Ltd.) Vs. Collector of Customs, Calcutta*, and confirming the duty demand by holding that on expiry of the private bonded warehouse licence, the goods lying in the warehouse should be deemed to have been improperly removed from the warehouse u/s 72 of the Customs Act, 1962. It is contended that Section 72 of the Customs Act is not applicable in the present case as the assessee has been consistently seeking extension of the private bonded warehouse licence and once extension of the LOP is granted, the customs authorities were bound to renew the bonded warehouse licence and consequently the customs authorities could not have invoked the deeming fiction contained in Section 72 of the Customs Act before the expiry of the period extended by letter dated 27th April, 2009. It is contended that as per the policy circulars issued by the CBEC, extension of the warehousing period should be granted liberally in the case of EOUs and duty can be demanded only at the time of exit from the scheme/debonding of the unit and, therefore, in the present case, confirmation of the duty demand with interest and penalty prior to debonding of the unit is illegal.

25. On the other hand, it is contended by counsel for the customs authorities that the assessee was permitted to clear the capital goods and raw materials on execution of a bond without payment of duty under Notification No. 53/97 subject to fulfilling the export obligation contained in the LOP dated 9th September 1998. Admittedly, the assessee has not fulfilled the export obligation and, therefore, the customs authorities are justified in seeking to recover the duty with interest and penalty.

26. With reference to the extension of LOP granted by the Development Commissioner on 27th April 2009, it is contended that the said extension operates for a period of five years from 1st April 2009 (2009-2010 to 2013-2014) and not for the period from 27th April 2004 to 1st April 2009. The submission is that as per the original LOP dated 9th September 1998 the assessee as a 100% EOU was required to export goods for a period of five years

from the date of commercial production. Admittedly, the commercial production commenced on 27th April 1999 and, hence, the five year period would come to an end on 26th April 2004. Since the extension of the letter of permission granted on 27th April 2009 is for a period of five years from 1st April 2009, it is evident that during the period from 27th April 2004 to 1st April 2009 the assessee had ceased to be a 100% EOU and, therefore, the custom authorities were justified in demanding the customs duty with interest and penalty on the assessee ceasing to be a 100% EOU after the expiry of five years i.e. on 26th April 2004. In other words, according to the revenue, the extension granted on 27th April 2009 amounts to issuing a fresh LOP from 1st April, 2009 and, therefore, the customs authorities were justified in enforcing the duty liability crystallised on expiry of the original LOP on 26th April, 2004.

27. It is further contended by the counsel for the customs authorities, that even the letter dated 27th April 2009 specifically records that the extension is granted without prejudice to any action that may be taken against the assessee in respect of the 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. Therefore, when the Development Commissioner while granting extension of LOP has specifically permitted the customs authorities to initiate proceedings for violation of the provisions of Customs Act, no fault can be found with the decision of the CESTAT in upholding the duty demand with interest and redemption fine confirmed in the order-in-original dated 16th March, 2009.

28. Counsel for the Development Commissioner, SEEPZ (SEZ), Mumbai submitted that for non-fulfilment of the export obligation stipulated in the LOP dated 9th September 1998, the Joint Development Commissioner, SEEPZ, SEZ, Mumbai had issued a show-cause notice on 11th April 2002, calling upon the assessee to show-cause as to why penal action should not be initiated under the provisions of the Foreign Trade (D & R) Act, 1992. He submitted that even though the assessee had not fulfilled the export obligation in the initial five years on account of the Court Receiver taking over possession of the unit, in view of the directions given by the Board of Approval for EOU Scheme, the Development Commissioner considered the case of the assessee and on 27th April 2009 granted extension of LOP dated 9th September 1998 for a further period of five years from 2009-10 to 2013-14. He submitted that since the request for extension of LOP was being considered in 2009, granting approval for the interim period when the unit had not manufactured or exported any goods was not considered by the Development Commissioner. He submitted that the letter dated 27th April 2009 is in the nature of renewal of LOP on fresh terms and conditions and accordingly submitted that appropriate orders be passed in the matter.

29. We have carefully considered the rival submissions.

30. The first question to be considered herein is, where a 100% EOU set up in a

private bonded warehouse duty licenced by the customs authorities is granted extension of the 100% EOU status for a further period of five years by the Development commissioner, whether the customs authorities are bound to grant extension of the private bonded warehouse licence for a further period of five years ?

31. Para 9.2 of the Foreign Trade Policy 1997-2002 permitted the eligible 100% EOU to import capital goods, spares and raw materials duty free to the extent permitted subject to executing a legal undertaking in favour of the Development Commissioner and subject to the unit achieving minimum NFEP and minimum export performance as specified in the policy. Notification No. 53/97-cus dated 3rd June 1997 exempts whole of duty of customs and the additional duty, if any, leviable on capital goods, spares and raw materials imported by a 100% EOU under a LOP granted by the Development Commissioner, subject to the importer executing a bond to the effect that the export obligation and conditions stipulated in the said notification as also under the said Export and Import Policy would be fulfilled. One of the specified conditions in the notification No. 53 of 1997 is that the importer would carry out the manufacture of goods in a customs bond. Thus, it is evident from the Foreign Trade Policy and the exemption notification issued under the Customs Act, 1962 that a 100% EOU availing the duty free import facility must be set up in a bonded warehouse approved by the customs authorities. Consequently, where the 100% EOU status of an assessee set up in a private bonded warehouse valid for a period of five years is extended by the Development Commissioner for a further period of five years, it would be obligatory on the part of the customs authorities to extend the private bonded warehouse licence for a further period of five years unless the assessee has violated the provisions of the Customs Act in the first block of five years.

32. Various circulars issued by the CBEC from time to time particularly the circular dated 3rd December, 1985 specifically provide that in so far as 100% EOU are concerned a policy decision has been taken to liberally grant extension of the bonding/warehousing period as also waiver of interest arising on the goods kept in the warehouse. Similarly CBEC circular dated 27th December, 1993 provides that with a view to obviate the difficulty of the 100% EOU, a policy decision has been taken by the Board for grant of licences to 100% EOUs u/s 58 of the Customs Act valid for a period of five years and such licences may be extended for a further period of five years or for such period as prescribed by the Secretariat of Industrial Approvals. Thus, various circulars issued by the CBEC from time to time clearly show that where extension of LOP is granted by the Development Commissioner, the customs authorities are required to grant extension of the private bonded warehouse licence, unless the assessee has violated any other provisions of law.

33. The question then to be considered is, where the Development Commissioner considers the cause shown by the assessee for not fulfilling the export obligation and on being satisfied grants extension of the LOP for a further period of five

years, whether the customs authorities on expiry of the first block of five years can demand customs duty on the capital goods, spares and raw materials imported by that assessee in the first block of five years on the ground that the failure to fulfil the export obligation in the first block of five years constitutes violation of the terms of the bond executed by the assessee under the exemption notification No. 53/97-Cus dated 3rd June, 1997 ?

34. As per the Export-Import policy framed by the Government from time to time, the Development Commissioner is required to grant LOP valid for a period of five years and if the assessee on expiry of first block of five years opts to continue, then the same may be extended by the Development Commissioner for a further period of five years at a time. Where the assessee fails to achieve minimum NFEP or minimum export obligation without any reasonable cause or where the assessee is found to have violated the provisions of the policy or the provisions of the Customs Act, it would be open to the Development Commissioner to deny extension to the assessee. But where reasonable cause for not fulfilling the minimum NFEP/export obligation is shown and the Development Commissioner on noticing that there is no other violation committed by the assessee grants extension of the LOP, then, non fulfilment of the export obligation in the first block of five years cannot be a ground for initiating action against the assessee, because, the very purpose of granting extension is to enable the assessee to make good the deficiency within the extended period. In other words, where on expiry of the first block of five years extension of LOP is granted, then, the balance export obligation, if any, remained to be fulfilled in the first block of five years has to be fulfilled within the extended period of LOP. On expiry of the extended period, if it is found that the assessee has not discharged its obligation, then it would amount to violating the terms of the bond executed by the assessee in favour of the Development Commissioner/ customs authorities and accordingly it would be open to them to initiate penal action against the assessee.

35. If extension of the LOP is granted by the Development Commissioner subject to fulfilling the additional export obligation, then during the second block of five years, the assessee is required to fulfil the balance export obligation of the first block of five years as also the additional export obligation imposed while granting the extension. Therefore, till the expiry of the extended period of LOP, balance export obligation of the first block of five years cannot be considered as violation of the policy or violation of the terms of the bond executed in favour of the Development commissioner and the customs authorities. In other words, once the LOP is extended, it is neither open to the Development Commissioner nor it is open to the customs authorities to initiate penal action against the assessee before the expiry of the extended period of the LOP, on the ground that the assessee has failed to fulfill the export obligation in the first block of five years.

36. In the present case, the Development Commissioner by his letter dated 27th April, 2009 has granted extension of LOP for the second block of five years with

effect from 1st April, 2009 whereas the LOP granted on 9th September, 1998 expired on 26th April, 2004. The question therefore to be considered is, whether during the period from 27th April, 2004 till 31st March, 2009 the assessee should be deemed to have ceased to be a 100% EOU ?

37. In the affidavit in reply filed on behalf of the Development Commissioner, it is specifically stated that since the request for extension of LOP was being considered in the year 2009, granting approval for the interim period was not considered, as during that period the assessee had not manufactured or exported any goods. It is relevant to note that as per Notification No. 53/97- cus dated 3rd June, 1997 liability to pay customs duty on capital goods, spares and raw materials arises only at the time of debonding. Moreover, as per the said notification, the customs duty on capital goods at the time of debonding is liable to be recovered not on the import value but on the depreciated value of the capital goods but at the rate prevalent at the time of import. In respect of the unused spares and raw materials lying on the date of debonding the customs duty is payable on the value at the time of import but at the rates in force at the time of clearance. Since the assessee had neither manufactured nor exported goods during the period from 2004 to 2009, the Development Commissioner had not considered granting approval for that period, so that the assessee does not get depreciation on the imported capital goods for that period and in the event of the assessee not fulfilling the export obligation at the end of the extended period, the assessee pays the customs duty on the depreciated value of the capital goods except for the period from 2004 to 2009. Therefore, not granting approval for the period from 2004-2009 is with a view to deprive depreciation to the assessee during that period and not with a view to deny the 100% EOU status during that period.

38. The very fact that the Development Commissioner has on 27th April, 2009 granted extension of the LOP dated 9th September, 1998 which admittedly expired on 26th April, 2004 clearly shows that the extension has been granted to a 100% EOU which is required to fulfill the entire export obligation i.e. balance export obligation of the first block of five years and the additional export obligation of the second block of five years within the five years commencing from 1st April, 2009. Since the extension was granted in the year 2009, the balance export obligation of the first block of five years could be fulfilled only in the second block of five years commencing from 1st April, 2009. Therefore, the contention of the customs authorities that the extension of LOP granted by the Development Commissioner on 27th April, 2009 renders the assessee to be a non 100% EOU during the period from 2004 to 2009 cannot be accepted.

39. Moreover, in the present case, it is the Board of Approval for EOU Scheme which looking to the facts and circumstances of the case under which the assessee could not fulfil the export obligation has directed the assessee to approach the Development Commissioner seeking extension of LOP. Accordingly, the Development Commissioner considered the case of the assessee and on

being satisfied that the non fulfilment of the export obligation in the first block of five years was due to bonafide reasons beyond the control of the assessee has granted extension of LOP. Therefore, when the Board of Approval for EOU scheme as also the Development Commissioner have considered it fit to grant extension of the LOP, the customs authorities are not justified in treating the extension of the LOP as a fresh LOP and seek to enforce the penal liability imposed against the assessee on the footing that the assessee had ceased to be a 100% EOU during the period from 26th April, 2004 to 31st March, 2009.

40. Apart from the above, it is relevant to note that in the present case, the office of the Development Commissioner had issued a show cause notice to the assessee on 11th April, 2002 calling upon the assessee to show cause as to why for non fulfilment of the export obligation penal action should not be initiated against the assessee and why customs duty foregone at the time of import of capital goods/raw materials should not be recovered. The said show cause notice was not adjudicated even after the expiry of the first block of five years on 26th April, 2004. Moreover, even after granting extension on 27th April, 2009, no penal action has been taken by the Development Commissioner against the assessee. In these circumstances, when the Development Commissioner after considering the facts has held that non fulfilment of the export obligation in the first block of five years was due to bonafide reasons and, therefore, instead of taking penal action, the assessee should be given extension of time to fulfill the export obligation during the second block of five years commencing from 1st April, 2009, it is totally improper on the part of the customs authorities to treat that the assessee had ceased to be a 100% EOU during the period 2004-2009 and take penal action against the assessee on the ground that the assessee has failed to fulfil the export obligation during the first block of five years.

41. It is true that the show cause notice issued by the customs authorities on 27th February, 2004 was adjudicated after receiving approval from the Development Commissioner and on the date of passing the order-in-original on 16th March, 2009, extension of LOP was not granted by the Development Commissioner. However, once extension of LOP was granted on 27th April, 2009, the Tribunal ought to have held that the customs duty could be demanded on the depreciated value of the capital goods at the time of debonding and that penal action could be taken against the assessee only if there was failure to fulfill the export obligation at the time of ex-bonding.

42. 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 fulfill 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.

43. 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 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.

44. 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 bonafides/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 fulfill 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.

45. The fact that clause 3(d) in the letter dated 27th April, 2009 is relatable to cases other than non fulfilment of the export obligation/performance in the first block of five years can be demonstrated from the following illustrations. Suppose a 100% EOU is found to have imported capital goods by under invoicing the value of the said capital goods for which penal action is initiated. In such a case, granting extension of LOP would not absolve the 100% EOU from the penal consequences. That is why clause 3(d) in the letter dated 27th April, 2009 provides that granting extension is without prejudice to any action that may be taken in respect of EOU operations prior to 1st April, 2009. If the extension granted was subject to taking penal action for non fulfilment of the export obligation, then Development Commissioner would have initiated penal action in respect of the above violation. The very fact that the Development Commissioner has neither initiated any penal action nor continued with the show cause notice dated 11th April, 2002 against the assessee after the grant of extension on 27th April, 2009, clearly shows that clause 3(d) in the said letter refers to violations other than the violation of not fulfilling the export obligation in the first block of five years.

46. It is relevant to note that it is neither the case of the Development commissioner nor the case of the customs authorities that the assessee has violated any of the provisions contained in the Foreign Trade (Development & Regulation) Act, 1992 or the Customs Act or the Central Excise Act. Admittedly, save and except the non fulfilment of the export obligation on account of the Court receiver taking over possession of the unit pursuant to an attachment order passed by this Court in a Suit filed by IDBI, there is no allegation whatsoever that the assessee has violated any of the provisions of the aforesaid Acts. Therefore, once the Development Commissioner on consideration of the facts of the case comes to a conclusion that non fulfilment of the export obligation was on account of bonafide reasons and accordingly permits the assessee to continue to function as a 100% EOU for a further period of five years, the customs authorities were not justified in refusing to renew the warehouse licence and enforcing the duty demand on the ground that the assessee has failed to fulfil the export obligation within the first block of five years.

47. Strong reliance was placed by the counsel for the customs on the decision of the Apex Court in the case of Kesoram Rayon (supra) in support of his contention that in the present case, Section 61 read with Section 72 of the Customs Act has been violated and, therefore, the customs authorities were justified in enforcing the duty demand with penalty. We see no merit in the above contention, because, in the case of Kesoram Rayon (supra) the issue before the Supreme Court was not relating to goods imported by a 100% EOU, whereas in the present case the issue relates to goods imported by a 100% EOU. Section 61 of the Customs Act distinguishes between the imports made by a 100% EOU and the imports made by a non 100% EOU and accordingly permits different period for warehousing in respect of imports by 100% EOU and imports by others. Apart from the above liability to recover duty in the case of imports by a 100% EOU, if any, arises only at the time of ex-bonding sought either by the assessee or by the Development Commissioner within six months of the expiry of the bonding period. In the present case, neither the assessee has opted for debonding nor the Development Commissioner has initiated any proceedings on the footing that the assessee has ceased to be a 100% EOU. Moreover, in the case of Kesoram Rayon (supra) there was nothing on record to suggest that extension of the warehousing period has been granted or clearance u/s 68 of the Customs Act has been ordered and, therefore, in those circumstances, the Apex Court held that Section 72 of the Customs Act was attracted. In the present case, admittedly, extension of the 100% EOU status has been granted to the assessee by the Development Commissioner on 27th April, 2009. Therefore, the argument of the customs authorities based on the decision of the Apex Court in the case of Kesoram Rayon (supra) that the assessee has violated the provisions of Sections 61 & 72 of the Customs Act cannot be accepted.

48. In the result, we set aside the order of CESTAT dated 1st March, 2012 as also the order in original dated 16th March, 2009. Since the assessee could not resume its operations even after extension of the LOP on 27th April, 2009 on account of the customs authorities not renewing the private bonded warehouse licence, we direct the Development Commissioner to pass a fresh order within eight weeks from today, specifically stating therein the date on which the extended period of LOP for five years would commence and the minimum export obligation/NFEP required to be achieved by the assessee in the said extended period of five years. Thereupon the customs authorities shall renew the private bonded warehouse licence for the period extended by the Development Commissioner. Needless to state that penal action, if any, may be initiated against the assessee either by the Development Commissioner or the customs authorities only if the assessee is found to violate the Foreign Trade (Development & Regulation) Act, 1992, Customs Act, 1962, Central Excise Act or any other law for the time being in force during the extended period of five years. The appeal is allowed in the above terms with no order as to costs.