(2006) 04 BOM CK 0102

In the Bombay High Court

Case No : Writ Petition No. 1235 of 2006

Silicon Graphics System (INDIA) Private Limited APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 19-04-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 129

Citation : (2006) 204 ELT 247

Hon'ble Judges : R.M. Lodha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : S.N. Kantawala, Vinod Kothari, instructed by Yogesh Rohira, for the Appellant; A.J. Rana, H.V. Mehta, instructed by . T.C. Kaushik, for the Respondent

Judgement

R.M. Lodha, J.—We heard Mr. S.N. Kantawala, the advocate for the petitioner and Mr. A.J. Rana, senior counsel for the Revenue.

2. Rule. Returnable forthwith.

3. By consent of the parties, rule is heard finally at this stage.

4. The order-in-original dated 28th December 2005 passed by the Commissioner of Customs (Import) is impugned in the present writ petition. Vide order-in-original, the Commissioner has confirmed demand of differential duty of Rs. 2,99,91,236/- along with interest. The Commissioner ordered appropriation of Rs. 1.75 crores deposited by the petitioner on 6th July, 2002 and the recovery of the remaining amount. The Commissioner also ordered confiscation of the goods but since those were cleared provisionally, the order of redemption on payment of fine of Rs. 1,00,00,000/- in lieu of confiscation was made. The Commissioner further imposed penalty of Rs. 2,99,91,236/-.

5. That the order-in-original dated 28th December, 2005 is appealable u/s 129 is not in question. Ordinarily, we would have relegated the petitioner to pursue the statutory remedy of appeal u/s 129, however, in view of the facts that we

indicate hereinafter, we are convinced that this is a fit case where extraordinary jurisdiction under Article 226 of the Constitution of India should be invoked despite availability of statutory remedy of appeal u/s 129 of the Customs Act, 1962.

6. Bereft of unnecessary details, suffice it to observe that intelligence was gathered that the petitioner imported advanced computers from their parent company in U.S.A. by miss-declaring the value and that one such consignment was pending for clearance at Air Cargo Complex, Mumbai. The investigation was commenced and it transpired during the course of investigation inter alia that there was misdeclaration and under valuation of the goods imported. Upon conclusion of the investigation, a show-cause notice was issued to the petitioner on 1st November, 2004. The case of the petitioner that the said show-cause notice dated 1st November, 2004 was never received by them and it was only when they received the letter dated 14th October, 2005 that they came to know about the show cause notice dated 1st November, 2004. In para 3.3 of the writ petition, the following averment has been made:

3.3 On 14-10-05, the Petitioner was surprised to receive letter No. CIU/ VIG-18/2002 ACC, from the Assistant Commissioner of Customs, Air Cargo Complex, Mumbai, intimating it that a Show Cause Notice, dated 1-11-04, had been issued to it, and that, as no reply had been submitted by it thereto, it was requested to submit the same within 15 days. The Petitioner had, for its part, never received, prior to this date, any Show Cause Notice dated 1-11-04.

7. In reply-affidavit, there is no specific denial to the aforesaid averment. The senior counsel for the Revenue submitted that the show-cause notice dated 1st November, 2004 was sent to the petitioner by Speed Post. There is nothing on record to substantiate it. In the circumstances, it has to be assumed that the show-cause notice dated 1st November, 2004 was not received by the petitioner and it was only when the petitioner received the letter dated 14th October, 2005 that they came to know about the show-cause notice dated 1st November, 2004.

8. Upon receipt of the letter dated 14th October, 2005, immediately thereafter vide letter dated 19th October, 2005, the petitioner informed the respondent No. 2 that they have not received the show-cause notice dated 1st November, 2004. The petitioner requested that the copy of the show-cause notice be issued to them. The respondent No. 2 then sent a copy of the show-cause notice dated 1st November, 2005 to the petitioner under a covering letter dated 27th October, 2005 intimating the petitioner that the matter is fixed for hearing on 11th November, 2005.

9. The petitioner, though received the copy of the show-cause notice which was sent along with covering letter dated 27th October, 2005, it is the case of the petitioner that none of the relied upon documents was sent along with the show-cause notice and, therefore, vide letter dated 9th November, 2005, the petitioner asked for supply of the relied upon documents to enable the petitioner to finalise

its reply to the show-cause notice. The petitioner also requested for return of the unreeled documents. The petitioner prayed for three months'' time. However, by the communication dated 14th November, 2005, the petitioner was informed that the personal hearing in the matter was fixed on 28th November, 2005. The petitioner on receipt of the letter dated 14th November, 2005 again vide its letter dated 22nd November, 2 005 sought for relied upon documents to enable the petitioner to reply to the show-cause notice. The petitioner also sent its representative on 23rd November, 2005 who was given copies of the relied upon documents. On 29th November, 2005, the petitioner again requested for return of unreeled documents for their defence to the show-cause notice. The petitioner claims to have reiterated the request for return of unreeled documents vide letters dated 30th November, 2005, 9th December, 2005 and 16th December, 2005. It was only on 16th December, 2005 that the petitioner was informed that the unreeled documents can be collected on any working day with prior appointment. The petitioner was also informed vide letter dated 16th December, 2005 that the personal hearing has been fixed on 26th December, 2005.

10. The petitioner collected the unreeled documents on 21st December, 2005 and on that very day requested for one month''s time for reply to the show-cause notice and also prayed for postponing the personal hearing on 26th December, 2006.

11. The Commissioner passed the order-in-original on 28th December, 2005 which is the subject matter of challenge in this writ petition.

12. The facts noted by us above clearly show that sufficient opportunity was not given to the petitioner for responding the show-cause notice and that its reasonable prayer for postponing the personal hearing fixed on 26th December, 2005 was not acceded to, without justifiable reason.

13. The case has been set up by the petitioner that the show cause notice dated 1st November, 2004 was not received. There is no specific denial in the reply. It was only on 14th October, 2005 that the petitioner came to know about the show cause notice dated 1st November, 2004 and that hearing was fixed before the Commissioner on 27th October, 2005. The request was made by the petitioner to the respondent No. 2 on 19th October, 2005 for supply of copy of the show-cause notice. It is an admitted fact that it was only on 27th October, 2005 that the petitioner was sent copy of the show-cause notice dated 1st November, 2004. It is also an admitted fact that the copy of the show-cause notice that was sent to the petitioner on 27th October, 2005 was not accompanied by the relied upon documents. The relied upon documents were supplied to the petitioner only on 23rd November, 2005. The unreeled documents were not returned to the petitioner despite request number of times. It was only on 16th December, 2005 that the petitioner was informed that the unreeled documents can be collected on any working day with prior appointment and that personal hearing was fixed on 26th December, 2005. The unreeled documents were collected by the petitioner on 21st December, 2005 and sought for one month''s time to reply to

the show cause notice and for postponing the hearing of the matter. However, the matter was decided and order-in-original was passed on 28th December, 2005.

14. Vide circular dated 13th June, 1988 issued by the Department of Revenue, Ministry of Finance, Government of India, directions have been issued to the concerned officers in relation to the seized documents and return thereof, that in order to avoid the complaints, ordinarily, the department itself should take initiative to return the documents which are not considered useful from the angle of any proceedings to be initiated against the concerned parties. unreeled documents in the show-cause notice may not be relevant for the purposes of Revenue but may be of some relevance to the affected party in preparation of the reply to the show cause notice. It cannot be said that the request made by the petitioner for return of the unreeled documents to enable them to prepare their reply to the show-cause notice was frivolous. If on 16th December, 2005, the petitioner is told to collect the unreeled documents on any working day, with prior appointment and the petitioner collects the unreeled documents on 21st December 2005. and seeks one month''s time to reply to the show-cause notice and for postponement of the personal hearing that was fixed on 26th November, 2005, the request of the petitioner cannot be said to be unreasonable. Even if the Commissioner thought that the request of one month was unreasonable, at least a reasonable time could have been given to the petitioner to enable him to file reply to the show-cause notice and then the order-in-original could have been passed.

15. We are, thus, satisfied that in the peculiar facts and circumstances of the case, the petitioner has been able to make out a case for invocation of extraordinary jurisdiction despite the availability of statutory remedy of appeal u/s 129 of the Customs Act, 1962. Incidentally, we may notice here that out of the total demand amounting to Rs. 2,99,91,236/- confirmed by the Commissioner in the impugned order, the petitioner had already deposited a substantial sum of Rs. 1.75 crores way back on 6th July, 2002. This is not a case where entire demand of differential duty is outstanding against the petitioner.

16. The result is that we allow the writ petition and set aside the order-in-original dated 28th December, 2005 passed by the Commissioner of Customs (Import). The petitioner shall now file reply to the show-cause notice within three weeks from today and appear for personal hearing on the date that may be fixed by the Commissioner. The respondent No. 2 shall then hear the petitioner and pass an appropriate order. We clarify that in case no reply is filed by the petitioner within three weeks from today, the impugned shall stand restored.

17. The writ petition is disposed in terms of this order. No costs.

